

<b>Pringle v Devos, Ltd.</b>
2007 NY Slip Op 34005(U)
December 6, 2007
Supreme Court, Suffolk County
Docket Number: 0000306/2004
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 6-29-07  
ADJ. DATE 8-31-07  
Mot. Seq. # 003 - MG; CASEDISP

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ORETTA ANN PRINGLE,	:	SCOTT MICHAEL MISHKIN, P.C.	
	:	Attorneys for Plaintiff	
Plaintiff,	:	One Suffolk Square, Suite 240	
	:	Islandia, New York 11749	
- against -	:		
	:	CERTILMAN BALIN ADLER & HYMAN, LLP	
DEVOS, Ltd. d/b/a GUARANTEED RETURNS,	:	Attorneys for Defendant	
	:	90 Merrick Avenue, 9 <sup>th</sup> Floor	
Defendants.	:	East Meadow, New York 11554	
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -10; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 11 - 16; Replying Affidavits and supporting papers 17 - 20; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant for summary judgment is granted and the complaint is dismissed.

Plaintiff commenced this action seeking damages for alleged violations of the New York State Human Rights Law ("NYSHRL"). Plaintiff is a former employee of defendant, a company which does business in the pharmaceutical industry accepting and providing credit to pharmacies for recalled, expired, damaged, or otherwise unusable prescription and over-the-counter drugs. Plaintiff was employed by defendant from May 25, 1999 until September 15, 1999 when she claims she was forced to resign as a result of the discriminatory practices of her supervisors in violation of Executive Law § 290, et seq. Specifically, plaintiff alleges that defendant failed to honor her repeated requests for the reasonable accommodation of a high-back chair for her known disability.

Plaintiff alleges that she has been disabled due to a low back injury and leg pain suffered in 1997 while performing patient care as a home health aide. On May 11, 1999, plaintiff completed a job placement referral application with United Cerebral Palsy Association of Greater Suffolk ("UCP"), an organization which provides job placement services for disabled individuals. On May 21, 1999, a job placement coordinator at UCP submitted plaintiff's resume for a data entry position and visited defendant's facility to ensure that plaintiff's disability could be accommodated as she needed the use of a chair.

Plaintiff was hired on May 25, 1999 for the data entry position. Plaintiff contends that although she was not properly instructed and her trainers were not patient, she satisfactorily performed her duties. Defendant, on the other hand, alleges it became apparent plaintiff was not qualified for the position as she had difficulty reading and counting the pills, and was not familiar with using a computer which resulted in numerous mistakes entering data and disposing of the controlled substances. Defendant alleges that instead of terminating plaintiff, she was afforded a reasonable accommodation of a job change, and as on June 16, 1999 was transferred to the position of miscellaneous sorter.

Defendant denies that it had knowledge of plaintiff's alleged disability since neither her job application nor resume specify her need for a chair. Indeed, defendant points out, plaintiff indicated on her UCP application that she could not sit for too long and that she had a limitation of sitting for more than 45 minutes. Additionally, it is pointed out that the separate job application plaintiff completed for defendant, does not mention the need for an accommodation. According to defendant, the only complaint it received from plaintiff regarding the lack of a chair was on August 20, 1999. Defendant maintains that plaintiff was sleeping in the chair, an allegation plaintiff denies, and the chair was moved, not taken away. Thereafter, a conference was held on August 24, 1999, wherein plaintiff and her job coach from UCP were informed that as an accommodation to plaintiff, upon advising her supervisor, plaintiff could take a break and sit whenever she needed. Nevertheless, after August 27, 1999, plaintiff did not return to work. While at work on August 27, 1999, a metal rack fell on plaintiff's back and, although her supervisor wanted her to continue working, plaintiff left the facility and went to the emergency room. Thereafter, by letter dated September 15, 1999, plaintiff tendered her resignation. In the letter, plaintiff claims she is a person with a disability of which defendant was aware, and that she was not "fully granted" the accommodation of a chair that she needed to do her job.

Plaintiff initially commenced an action in the United States District Court for the Eastern District of New York alleging causes of action for violations of the Americans with Disability Act (the "ADA") and the NYSHRL, and for retaliation. Defendant moved for and was granted summary judgment dismissing the claims for discrimination under the ADA and the claims of retaliation. The Judge in the Federal Court action held that plaintiff failed to establish that she was disabled under the ADA and failed to establish a causal connection to support her claims of retaliation. The Federal Court, however, found that plaintiff's failure to establish a disability within the meaning of the ADA did not necessarily preclude her claim under the broad definition of disability set forth in the NYSHRL. In light of the dismissal of all the federal claims, the Federal Court Judge declined to exercise supplemental jurisdiction with regard to the disability claims under the NYSHRL, prompting plaintiff to commence the instant action.

Defendant now moves for summary judgment dismissing the complaint arguing, *inter alia*, that plaintiff is not disabled under the NYSHRL, she was never terminated and thus suffered no adverse employment action, that plaintiff was provided with reasonable accommodations and that even with such accommodations was not qualified for the positions. Additionally, defendant argues, the analysis for the retaliation claim is the same under both the ADA and the NYSHRL. Defendant maintains that since the Federal Court summarily dismissed plaintiff's retaliation claim after plaintiff was given a full and fair opportunity to be heard, the second and third causes of action alleging retaliation herein, should be dismissed on the grounds of res judicata and collateral estoppel.

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On a claim of discrimination, plaintiff has the initial burden of establishing a prima facie case of discrimination (*Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]). To state a prima facie case of employment discrimination due to a disability under the NYSHRL, plaintiff must demonstrate that she suffered from a disability and that because she is disabled, was subjected to an adverse employment action (*Matter of Eniry v Landi*, 84 NY2d 554, 620 NYS2d 328 [1994]; *State Univ. of N.Y. Ctr. at Brooklyn*, 306 AD2d 271, 761 NYS2d 94 [2003], *lv denied* 1 NY3d 507, 776 NYS2d 223 [2004]). Under the NYSHRL the term disability is broadly defined (*State Div. of Human Rights v Xerox Corp.*, 65 NY2d 213, 491 NYS2d 106 [1985]) as:

(a) a physical, mental or medical impairment resulting from anatomical, physiological genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in...dealing with employment, the terms shall be limited to disabilities, which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held

(Executive Law § 292[21]). Hence, “[f]airly read, the statute covers a range of conditions varying in degree from those involving a loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future” (*State Div. of Human Rights v Xerox Corp.*, *supra*, at 218-219). Therefore, it has been held, “an individual can be disabled under the [NYSHRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limited that individual’s normal activities” (*Reeves v Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155-156 [2d Cir. 1998]; *Hazeldine v Beverage Media, Ltd.*, 954 F. Supp. 697, 706 [SDNY 1997]).

Here, plaintiff has been diagnosed by her treating physician, Eric D. Shapiro, M.D, a diplomat of the American Board of Physical Medical and Rehabilitation, with a lumbar strain and pelvic obliquity with a leg length discrepancy which rendered her disabled due to back pain. Additionally, an Administrative Law Judge of the Social Security Administration Office of Hearings and Appeals, found that plaintiff is severely impaired by degenerative disc disease of the lumbar spine. Hence, plaintiff has demonstrated that she suffers from a disability as defined under the NYSHRL (*see*, Executive Law § 292[21]; *Matter of State Div. of Human Rights on Complaint of Granelle*, 70 NY2d 100, 517 NYS2d 715 [1987]). Nevertheless, plaintiff has not demonstrated that because she is disabled she suffered an adverse employment action under circumstances giving rise to an inference of a discriminatory motive.

“An adverse employment action requires a materially adverse change in the terms and conditions of employment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306, 786 NYS2d 382 [2004]). The materially adverse change in working conditions must be “more disruptive than a mere inconvenience or an alteration of job responsibilities [and]...might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation” (*id.* quoting *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000]).

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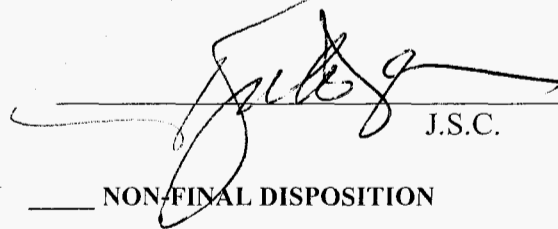
Here, plaintiff has not offered any evidence that her change in job title constituted a demotion or any way materially altered her working conditions. Indeed, defendant alleges, and UCP concedes that plaintiff's transfer to the position of miscellaneous sorter was a reasonable accommodation. Moreover, the alleged mistreatment suffered at the hands of her supervisors (i.e., removing her chair and returning it hours later, requiring her to stand when the "boss" was in the area, etc.) does not rise to the level of an adverse action, nor does the comment uttered by a supervisor that people with disabilities want special treatment, without more, support a claim of discrimination (*see, Forrest v Jewish Guild for the Blind, supra; Almanzar v Collegiate Church Corp.*, 255 AD2d 230 [1998]). In any event, an "employer cannot be held liable under state law for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it" (*Forrest v Jewish Guild for the Blind, supra* at 311 [citations omitted]). Plaintiff has failed to offer any evidence that defendant knew of, let alone condoned or acquiesced in, the aforementioned treatment which she alleges was discriminatory.

There is also no factual support for plaintiff's claim that she was constructively discharged. An employee is "constructively discharge" when her employer, rather than discharging her directly, intentionally created a work atmosphere so intolerable that she is forced to quit involuntarily (*Cox v Quick & Reilly, Inc.*, 401 F. Supp. 2d 203 [2005]; *see, Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 825 NYS2d 697 [2006]). Plaintiff must show either specific intent or that the employer's actions were deliberate and not merely negligent or ineffective, and must objectively demonstrate that working conditions had become intolerable, or so difficult and unpleasant that a reasonable person in plaintiff's shoes would have felt compelled to resign (*see, Cox v Quick & Reilly, Inc., supra; Morris v Schroder Capital Mgt. Intl., supra; Nelson v HSBC Bank USA*, 41 AD3d 445, 837 NYS2d 712 [2007]). There, is no evidence that defendant was, in any respect, trying to force plaintiff to resign by making her working conditions intolerable. Rather, the evidence supports defendant's contention that plaintiff was given opportunities to remain on its payroll and procedures were put in place to accommodate her disability.

Accordingly, plaintiff has failed to satisfy her burden of establishing a claim of disability discrimination. Therefore, defendant is entitled to summary judgment dismissing the first cause of action for discrimination in violation of the NYSHRL.

Plaintiff also bears the initial burden of proving a prima facie case of retaliation, and must show that: (1) she was engaged in a protected activity; (2) that her employer was aware of her participation in such activity; (3) that she suffered an adverse employment action based upon the activity; and (4) there is a causal connection between the protected activity and the adverse action (*see, Forrest v Jewish Guild for the Blind, supra*). As plaintiff cannot establish that an adverse employment action was taken against her, the retaliation claims cannot be sustained. Hence, defendant is also entitled to summary judgment dismissing the second and third causes of action in the complaint for retaliation.

Dated: DEC 06 2007

  
 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION