

**Lowe v New York City Health & Hosps. Corp.**

2008 NY Slip Op 30121(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 0112068/2005

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

TAWANA LOWE,

Plaintiff,

Index No.: 112068/05

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 3

MOTION CAL. NO. \_\_\_\_\_

NEW YORK CITY HEALTH AND HOSPITALS  
CORP., NORTH BROOKLYN HEALTH NETWORK,  
WOODHULL MEDICAL AND MENTAL HEALTH  
CENTER, BEVERLY HALL-HAWKER, ALLEN C.  
CHAMBERLIN, M.D. and CARNEGIE HILL  
ORTHOPEDIC SERVICES, P.C.,

Defendants.

**FILED**  
JAN 16 2008  
CLERK'S OFFICE  
NEW YORK

The following papers, 1-33, were read on this defendants New York City Health and Hospital Corporation, North Brooklyn Health Network, Woodhull Medical and Mental Health Center and Beverly Hall-Hawker's motion for summary judgment dismissing the complaint as asserted against them.

Notice of Motion - Affidavits - Exhibits - Memo of Law  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Papers Numbered  
1-23  
24-32  
33

Cross-Motion:  Yes  No

On January 2, 2001, plaintiff, Tawana Lowe, slipped and fell while entering the Greenpoint Community Health Center, where she was employed as a Clerical Associate Level IV.<sup>1</sup> According to plaintiff's deposition testimony, she was knocked unconscious, sustained a gash over her left eye and suffered injuries to various parts of her body, including her left knee, right elbow, neck and

<sup>1</sup> Greenpoint Community Health Center is an off-site clinic of Woodhull Hospital, a facility owned and operated by New York City Health and Hospital Corporation and a part of the North Brooklyn Health Network. Plaintiff's duties as a Clerical Associate Level IV at the Greenpoint Community Health Center included, but was not limited to, greeting patients, scheduling appointments, registering and processing patients, calling and corresponding with patients.

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back. Plaintiff sought emergency medical treatment immediately following her fall, but returned to work the following day, January 3, 2001 and continued to work until January 10, 2001. Plaintiff treated with her primary physician, Dr. Zelter, on January 6, 2001 and January 9, 2001.

On January 11, 2001, plaintiff "called in" to work and advised her supervisor Beverly Hall-Hawker that her injuries had become more severe. According to plaintiff, her knee injury was so severe that she couldn't walk and the injuries sustained to her right elbow and back were worsening. Plaintiff informed her supervisor that Dr. Zelter advised her to see a Workers' Compensation doctor. Plaintiff was provided with information relating to Workers' Compensation doctors and, ultimately, made an appointment to see Dr. Peter Carrer the following day, January 12, 2001. Plaintiff was under the care of Dr. Carrer from January 12, 2001 through August of 2001, during which time she did not return to work. In August of 2001, plaintiff submitted to an independent medical examination as required by Workers' Compensation, which resulted in a finding that plaintiff did not have any restrictions and was able to return to work. As a result, plaintiff's employer directed her to return to work on September 4, 2001.

Plaintiff returned to work on September 4, 2001 and continued to work through August 26, 2002. During this period, plaintiff treated with Dr. Allen Chamberlain, an orthopedist. According to plaintiff, her injuries continued to worsen and it became more difficult to perform her job duties. As discussed in further detail below, plaintiff testified that she made various complaints to her supervisor, defendant Hall-Hawker, with respect to her inability to perform certain functions of her job. On August 27, 2002, plaintiff was in "unbearable" pain, and called defendant Hall-Hawker to inform her that she was unable to come to work, and that she had an appointment to see Dr. Chamberlain on September 3, 2002. It is defendant's policy that "[a]n employee who is absent more than three consecutive days due to illness must submit a doctor's certification indicating the diagnosis (nature of illness), dates of treatments, prognosis (medical status), and probable date of return to work." Plaintiff testified at her deposition that she was aware of this policy. Notwithstanding plaintiff's continued absence from work, she did not provide her employer with the required medical documentation. According to plaintiff, her physician, Dr. Chamberlain, refused to provide her with the necessary medical documentation.

In a letter, dated September 23, 2002, from Woodhull known as a "Five Day Letter" plaintiff was advised that she had been absent from work without authorization since September 3, 2002 and that she must submit a doctor's note to her supervisor, along with other required paperwork, within five (5) days of the date of the letter. In a letter, dated September 27, 2002, plaintiff advised Ms. Hall-Hawker that she was requesting a medical leave of absence, stemming from the injuries that resulted from the January 2, 2001 fall. Plaintiff, however, did not submit the required doctor's note. Thereafter, a "Ten Day Letter," dated January 23, 2003, was sent to plaintiff stating that she failed to properly respond to the "Five Day Letter" and, again, advising her that she had been absent from work without authorization since September 3, 2002. Plaintiff was instructed to respond to the letters within ten (10) days. Plaintiff did not respond to the "Ten Day Letter."

By letter, dated February 4, 2003, plaintiff was notified that she was brought up on disciplinary charges (1) for failing to report to duty on 109 scheduled work days between September 4, 2002 through February 3, 2003; (2) for failing to report her absence from duty on 23 occurrences for the period between September 4, 2002 through February 3, 2003; (3) remaining on unauthorized leave for the period between September 4, 2002 through February 3, 2003; and (4) for failing to properly respond to the Five and Ten Day Letters. A Step 1(a)

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Conference was conducted with respect to the charges brought against plaintiff on March 3, 2003. The plaintiff, through Union Grievance Representative, Sheila Lewis, plead guilty to the charges, with the explanation that her treating doctor, Dr. Chamberlain, had not provided her with documentation substantiating his finding that plaintiff was unable to return to work. Based upon the testimony at the conference and documentation provided, the Disciplinary Conference Officer found, in a written decision dated March 27, 2003, that despite plaintiff's allegations that she was caused to suffer a disability as a result of her on-the-job injury sustained on January 2, 2001, she failed to provide the necessary documentation. The Conference Officer further found that plaintiff, as a Provisional Clerical Associate Level IV, was not entitled to a medical leave of absence. The Conference Officer also found that plaintiff's absence had placed an undue hardship on the department in which she was employed. As a result, the Conference Officer determined that plaintiff was to be separated from service at the North Brooklyn Health Network.

Thereafter, on September 9, 2003, a hearing was conducted before a Hearing Officer. Plaintiff was represented by counsel at this hearing and was permitted to testify, call witnesses and offer documentary evidence to support her position. Notwithstanding, the Hearing Officer found that the Corporation had adequately established the four misconduct charges brought against her relating to her unauthorized absences. With respect to plaintiff's inability to obtain a doctor's note from Dr. Chamberlain, the Hearing Officer found that there was a significant delay before plaintiff made efforts to get Dr. Chamberlain's cooperation or locate an alternative source for the required medical documentation. The hearing Officer ultimately found the plaintiff guilty and set forth "that the penalty of termination, while harsh, [was] not unreasonable or inappropriate under the circumstances," and upheld the penalty imposed at the Step 1(a) hearing. Plaintiff appealed the decision of the Hearing Officer to the Personnel Review Board, which in a decision, dated February 12, 2004, adopted the Hearing Officer's report and recommendation of termination. Ultimately, plaintiff was terminated from her employment.

Plaintiff commenced the instant action on or about August 26, 2005 against New York City Health and Hospital Corporation, North Brooklyn Health Network, Woodhull Medical and Mental Health Center, Beverly Hall-Hawker (hereinafter, collectively referred to as the "City defendants"), Allen C. Chamberlain, M.D. and Carnegie Hill Orthopedic Services, P.C. The crux of the plaintiff's complaint, as asserted against the City defendants, is that these defendants failed to accommodate her disability and discriminated against her based upon that disability. The crux of the plaintiff's complaint, as asserted against Allen C. Chamberlain, M.D. and Carnegie Hill Orthopedic Services, P.C., was that they were negligent in failing to provide her with a note stating that she had been treated by Dr. Chamberlain at the Carnegie Hill Orthopedic Services, P.C. facility, resulting in her termination from her employment. By decision, dated May 25, 2006, this Court granted Dr. Chamberlain and Carnegie Hill Orthopedic Services, P.C.'s motion to dismiss, holding that a physician and/or medical treatment facility does not have a legal duty to provide a "doctor's note." The action, as asserted against Dr. Chamberlain at the Carnegie Hill Orthopedic Services, P.C., was dismissed. As discovery has been completed in this action, the remaining defendants presently seek summary judgment dismissing the complaint as asserted against them.

First, plaintiff alleges in her complaint that the moving defendants failed to accommodate her disability, in violation of the New York Human Rights Law (NYHRL)(Executive Law §296 (3)(a)). Under the NYHRL, an employer has a statutory duty to "provide reasonable accommodation to the known disabilities of an employee." Executive Law § 296 (3)(a)*see also Pimentel v. Citibank*, 29 AD3d 141 [1st Dept. 2006]; *Pembroke v. New York State Office of Court Administration*, 306 AD2d 185 [1st Dept. 2003]. The proponent of such a claim has the burden of establishing *inter*

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*alla*, that a reasonable accommodation was proposed to an employer, and the employer refused to make such an accommodation. See *Pimentel v. Citibank, supra*; *Pembroke v. New York State Office of Court Administration, supra*. It is the view of the Court that plaintiff in the instant action has not met this burden.

Plaintiff testified at her deposition that when she returned to work in September of 2001 she had voiced some complaints to defendant Hall-Hawker regarding clerical issues and problems she had pertaining to co-workers and the operation of the facility. Plaintiff testified that in or about October or November of 2001 she made verbal complaints to defendant Hall-Hawker about her inability to perform certain functions of her job because of her physical condition. According to plaintiff, in July of 2002, she again complained to defendant Hall-Hawker about her physical limitations. Plaintiff testified that on August 14, 2002 she made another verbal complaint and requested some assistance at work. At that time plaintiff reduced to writing a list of her work duties and provided same to defendants. Admittedly, plaintiff did not tell defendants what type of assistance she needed at work. It is noted that defendant Hall-Hawker testified at her deposition that plaintiff never complained about not being able to perform her job.

Further, although plaintiff testified that she would have been able to continue working if defendants would have provided her with an accommodation for her disability, when questioned repeatedly with respect to what defendants could have done to enable her to continue working, plaintiff was unable to articulate what type of reasonable accommodation could have been provided. Plaintiff answered the many questions relating to what, if any, accommodations could have been provided by setting forth that defendants could have "assist[ed her] with help", "guid[ed her] in the right direction", "give[n her] some kind of help or lighter duty" and other similar statements.

Such evidence is not sufficient to establish that plaintiff proposed a reasonable accommodation to defendants. There exists no evidence to indicate that plaintiff specified the accommodations sought from defendants. It appears that, at most, plaintiff made generalized complaints about her physical condition and her inability to perform her job. Moreover, the Court notes that even if plaintiff's complaints could have been interpreted by defendant Hall-Hawker as a proposal for an accommodation, such an accommodation could only have been construed as a reduction of plaintiff's workload, which would have required the reassignment of much of the work to her coworkers, and, thus, would be unreasonable. See *Pembroke v. New York State Office of Court Administration, supra*.

Additionally, as any alleged failure to accommodate plaintiff's disability on the part of defendants occurred outside the three-year statute of limitations period (see CPLR 214 [2]), her claim relating to such failure to accommodate is time barred. See *Alimo v. Off Track Betting Corp.*, 258 AD2d 306 [1st Dept. 1999]. Plaintiff commenced the instant action on August 26, 2005, therefore, claims relating to any discriminatory conduct occurring prior to August 26, 2002 are time-barred. According to plaintiff's own testimony, she made complaints to defendant Hall-Hawker with respect to her physical limitations in October or November of 2001, in July of 2002, and on August 14, 2002. As a result, even if the Court viewed such complaints as proposals for a reasonable accommodation, all such proposals were made outside the limitations period.

With respect to plaintiff's claim that she was terminated from employment because of her disability, plaintiff has the initial burden to prove by a preponderance of the evidence a *prima facie* case of discrimination, which requires a plaintiff to demonstrate: (1) membership in a protected

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class; (2) that plaintiff was qualified to hold the position; (3) termination from employment or other adverse employment action; and (4) that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *See Forrest v. Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept. 2003], citing *Ferrante v. American Lung Assn.*, 90 NY2d 623 [1997]. Thereafter, the burden shifts to the employer to rebut a presumption of discrimination by producing evidence establishing a legitimate, independent and non-discriminatory reasons to support the challenged employment decision. *See Forrest v. Jewish Guild for the Blind, supra*. "If the defendant's evidence successfully rebuts plaintiff's initial presumption of discrimination, plaintiff may prove that the purportedly legitimate reasons proffered by defendant were merely a pretext for discrimination, by demonstrating that (1) the articulated reasons are false, and (2) discrimination was the real reason." *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]; *Ferrante v. American Lung Assn., supra*. With respect to a defendant's summary judgment motion in connection with a discrimination claim brought pursuant to the NYHRL, the First Department, in *Forrest v. Jewish Guild for the Blind (supra)*, has stated that "the defendant can establish a right to summary judgment if it demonstrates that plaintiff lacks evidence establishing each element of the claim or establishes, without proof to the contrary, that the complained of conduct, to the extent it is supported by evidence, was prompted by legitimate, nondiscriminatory motives." *See also Scardace v. Mid Island Hospital Inc.*, 21 AD3d 363 [2d Dept. 2005][defendant in an action for employment discrimination based upon a disability in violation of the NYHRL met its *prima facie* burden by establishing that its actions were non-discriminatory].

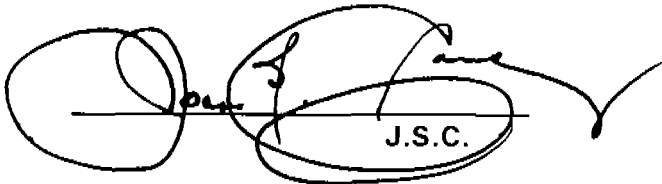
The evidence as set forth by the defendants in support of the instant motion establishes that they had a legitimate, independent and non-discriminatory reason to support plaintiff's termination. The evidence demonstrates that plaintiff violated defendants' policy and procedures with respect to authorized sick leave by (1) failing to report to duty on 109 scheduled work days between September 4, 2002 through February 3, 2003; (2) failing to report her absence from duty on 23 occurrences for the period between September 4, 2002 through February 3, 2003; (3) remaining on unauthorized leave for the period between September 4, 2002 through February 3, 2003; and (4) failing to properly respond to the Five and Ten Day Letters. As defendants made *prima facie* showing that there existed a legitimate, independent and non-discriminatory reason for plaintiff's discharge, plaintiff has the burden to raise a triable issue of fact as to whether such reason was merely a pretext for discrimination, by demonstrating that (1) the articulated reasons are false, and (2) discrimination was the real reason. Plaintiff has made no such showing. Despite plaintiff's arguments relating to defendants awareness of plaintiff's physical condition and plaintiff's inability to obtain medical documentation from her physician, no evidence was provided demonstrating that the stated reasons for plaintiff's termination by defendants, which, again, was her violation of the defendants' policy and procedures relating to absenteeism, was merely a pretext for discrimination. As the defendant herein can establish that the complained of conduct, *i.e.*, her termination from employment, was prompted by legitimate, nondiscriminatory motives, summary judgment is appropriate.

Based on the foregoing, it is hereby

ORDERED that the motion of defendants New York City Health and Hospital Corporation, North Brooklyn Health Network, Woodhull Medical and Mental Health Center and Beverly Hall-Hawker for summary judgment dismissing the complaint as asserted against them is granted; and it is further,

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ORDERED that the clerk of the court is directed to enter judgment in favor of defendants New York City Health and Hospital Corporation, North Brooklyn Health Network, Woodhull Medical and Mental Health Center and Beverly Hall-Hawker dismissing the complaint.

Dated: 1/3/2008



J.S.C.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

**FILED**  
JAN 16 2008  
COUNTY CLERK'S OFFICE  
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