SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JILL GALLO-DRASSER,

Plaintiff,

SUBMISSION DATE: 3/10/08
INDEX No.: 15768/03

-against-

COUNTY OF NASSAU and NASSAU COUNTY POLICE DEPARTMENT,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..... X
Answering Papers..... X
Reply..... X

Motion by defendants, County of Nassau and Nassau County Police Department, for an Order, pursuant to CPLR 3212, granting them summary judgment and dismissing the complaint of the plaintiff, Jill Gallo-Drasser, is granted.

In this action, the plaintiff, Jill Gallo-Drasser, alleges that the defendants, County of Nassau ("County") and the Nassau County Police Department ("Department"), unlawfully terminated her employment because of her disability in violation of Article 15 of New York State Executive Law. Plaintiff alleges that the defendants discriminated against her by refusing to transfer her back to the Emergency Ambulance Bureau ("EAB"), or by refusing to assign her to the Hot Line in the Communication Bureau, Fire/Police Academy ("the Academy") or Medical Control (*Motion*, Ex. G, ¶¶25, 29]). Plaintiff claims that defendants' failure to reasonably accommodate her disability resulted in an aggravation of symptoms of her physical condition which ultimately forced her to resign from her employment with the County. Plaintiff alleges that in this manner defendants violated Executive Law §296(3)(a).

In July 1987, plaintiff commenced employment at the Nassau County Police Department as an Advanced Emergency Medical Technician III (AEMT) in the Emergency Ambulance Bureau (*Gallo*

Drasser Aff, ¶4). As an AEMT, plaintiff responded to 911 calls for assistance, carried patients in and out of houses where they were sick or from a vehicle in a motor vehicle accident. She also placed patients on stretchers or other apparatus and then carried patients to an ambulance (*Id.*, ¶14) In July 1992, she suffered an on-the-job injury which resulted in her initially having to take 15 days of sick leave. Subsequent to this period of leave, plaintiff was intermittently absent from work for a total of 32 days (between August 31, 1992 to April 21, 1993) with complaints of back, neck, and/or shoulder pain all relating to her July 1992 injury. On or about July 9, 1993, as a result of "patient care issues", plaintiff was transferred out of the EAB to the Record Bureau where she remained until August 1998, at which time she was reassigned back to the EAB as an AEMT. Plaintiff's next extended sick leave of 65 days occurred between January 2, 1994 and April 5, 1994 (while she was at the Records Bureau) for knee surgery, and she was again absent for approximately 113 days between September 12, 1994 to February 24., 1995 because of alleged back and neck pain.

John Fitzwilliam, an Inspector with the Department, states in his affidavit, and furnishes supporting documentation, that between September 17, 2000 and December 29, 2001 (prior to her 2002 injury and following her 5 year transfer to the Records Bureau), plaintiff as an AEMT, was disciplined on nine separate occasions for such offenses as failing to report to work, acting out of protocol with respect to an emergency patient care decision, failing to operate a department vehicle in a careful and prudent manner, improperly documenting a patient's information, neglecting to ascertain a zip code for a call location, presenting false and misleading information and insubordination to a supervisor (*see Motion*, Ex. K [Fitzwilliam Aff. and attached Notices of Personnel Actions] dated 9/17/00 through 12/29/01]).

On January 5, 2002, plaintiff suffered another on-the-job injury as a result of which she was on sick leave for 42 work days. It is this January 5, 2002 injury that forms the basis of the instant action for employment discrimination. Plaintiff claims that, while working full duty, she was injured when a patient to whom she was administering an IV and drawing blood, began to thrash around in the ambulance with the needle in her arm. As a result of this incident, she felt pain from her neck to her feet (*Gallo Drasser Aff*, ¶14). Pursuant to General Municipal Law § 207-c, the County apparently paid for all of plaintiff's medical expenses relating to her January 5, 2002 on-the-job injury and paid to plaintiff her full amount of salary for this extended absence due to injury[1]. These payments were made over and above the amounts paid by Workers' Compensation for injuries sustained during the

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[1]Defendants fail to provide evidentiary proof of the GML §207-c payments.

performance of one's job duties (*Affirmation in Support of Motion*, ¶9).

On March 14, 2002, plaintiff, upon being examined by a police surgeon who deemed her to be capable of resuming employment on a restricted assignment basis, returned to work, on restricted assignment and was assigned to the Academy which was a part of the EAB (*Gallo Drasser Aff.* ¶¶24-25). While at the Academy, plaintiff's duties were strictly clerical. She was involved in the grading of tests and doing primary care review reports (*Id.*, ¶26). Thereafter, in July 2002, plaintiff was "loaned" to the Chief Surgeon's Office ("CSO") "on a duty assignment basis" in a support clerical role (*Id.*, ¶31).

John J. Asheld, M.D., the Chief Police Surgeon of the Department, who served as the Commanding Officer of the CSO during plaintiff's employment in the CSO from July 2002 to April 2003, confirms in his affidavit that plaintiff was "loaned" to the CSO and assumed responsibilities in a support clerical role in July 2002 (*see Motion*, Ex. L [Asheld Aff]., ¶4). He further states that plaintiff "was never officially assigned to the CSO and remained an employee of the [EAB] ... [and] was therefore never working out of her job title and her time and leave issues continued to be handled by the EAB" (*Id*). He further confirms that "the CSO was experiencing a severe shortage of support staff in 2002" and thus plaintiff was "welcomed...with open arms" (*Id.*, ¶6). It is undisputed that plaintiff's employment in the CSO was contemplated to be only temporary (*Id; see also Gallo Drasser Aff.*, ¶¶30-31, 57).

During her assignment to the CSO, plaintiff was accepted into a pilot program called the "Work Hardening Program." The premise of the program was to have restricted assignment employees who were recovering from illness or injury "work reduced hours with the idea of gradually increasing their tolerance at their normal duties and increasing the duration of their work allowing them to return to a full-time status." As a benefit of this program, plaintiff "was permitted to go home after one half day of work and not be charged sick leave for the rest of the day" (*Asheld Aff.*, ¶9). She was, however, charged sick leave time if she failed altogether to report for duty on any given workday. Dr. Asheld states in his affidavit that because "[t]he Department determined that the 'Work Hardening Program' was ...not achieving its goal of restoring restricted assignment employees to full-duty status," the program was discontinued only after a few months (*Id.*, ¶10). After the program was discontinued, plaintiff and other employees taking part in the program, reverted to regular County time and leave procedures which required the use and charging of sick time when out on sick leave (as opposed to absence for a line of duty injury) (*Asheld Tr.*, p. 89).

On July 10, 2002, plaintiff applied for Article 15 Disability Retirement.

A short while after the discontinuation of the Work Hardening Program, plaintiff informed a supervisor in the Medical Administration Office ("MAO") of her intent to resign from the Department for "personal reasons." Bruce Duryee, a supervisor in the MAO, states in his affidavit that in 2002, plaintiff asked him:

> for a favor concerning her time and leave use and also informed [him] of her intent to resign from the Department. She stated ...that she was getting married and was tired of working for the Department. She further stated that she was planning on resigning and moving out of state after she got married. She requested that she be permitted to use up her remaining personal time before she left because she alleged that she was running out of sick time. As a favor to [plaintiff] and in light of her impending resignation plans, I consulted with the Commanding Officer of the MAO, and Plaintiff's request to utilize her personal leave time was approved (*Duryee Aff.*, ¶3).

Plaintiff, in response to Defendants' First Set of Interrogatories, claims that "the time came when [she] could no longer perform the tasks required of her in the [CSO]" (*Motion*, Ex. G ¶46). She explains that she "requested a [GML 207-c] hearing in order to determine if she was fit for duty. On February 14, 2003, defendant placed [her] on sick leave pending a 207-c hearing, which she never received" (*Id*). Notably, defendants do not deny that a GML 207-c hearing was not held. Rather, counsel for the defendants, without any evidentiary support for the claim, asserts that:

> since plaintiff was already being accommodated by being placed on restricted assignment status and since she failed to provide the Department with a physician's letter or other medical documentation attesting to her medical need to work only part-time, no purpose would have been served by holding a hearing. More importantly, the Department was not contractually obligated to hold a hearing for [plaintiff]... [Plaintiff] never challenged the Department's decision not to hold a hearing, presumably because there was no contractual basis for such a challenge. (*Affirmation in Support of Motion*, ¶17).

On April 2, 2003, plaintiff submitted a resignation letter and turned in her equipment to the EAB. She was subsequently removed

from the Department payroll. On December 11, 2003, plaintiff's application for Article 15 Disability Retirement was disapproved on the grounds that "the applicant is not permanently incapacitated for the performance of duties" (*Motion*, Ex. R).

In bringing this employment discrimination action, plaintiff claims that her resignation was involuntary and that it was directly related to defendants' failure to reasonably accommodate her in a fashion which was compatible with her medical condition. She states that she would not have resigned had she been reasonably accommodated. More specifically, plaintiff asserts that she requested that she be reassigned back to the EAB or be assigned to the Hot Line in the Communications Bureau, the Academy or Medical Control (*Motion*, Ex. G, ¶29). She states that when in July 2002 she was assigned to the CSO's office, she was compelled to perform tasks that aggravated her medical condition to the point where she was required to go on a half-day arrangement (*Complaint*, ¶12). In her complaint, plaintiff alleges that the defendants violated Article 15 of the Executive Law of the State of New York by unlawfully discriminating against her based upon her disability by failing to provide reasonable accommodations in the workplace.

It is well-established that the statutory duty of a New York employer under Article 15 of New York's Executive Law is to "provide reasonable accommodations to the known disabilities of an employee . . . in connection with a job or occupation sought or held" (Executive Law § 296[3][a]). Further, "reasonable accommodation" is defined as actions taken by employer which "permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . . provided, however that such actions do not impose an undue hardship on the business" (Executive Law § 292[21-e]).

Under Article 15 of the Executive Law, an employee must show that she requested and was refused reasonable accommodations (*Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185 [1st Dept. 2003]). In this case, the plaintiff alleges that the reasonable accommodation she requested, and which the defendants refused, was a transfer back to the EAB or a transfer to the Hot Line in the Communications Bureau, Academy or Medical Control. Plaintiff maintains that the defendant had an obligation to transfer her to such position as a reasonable accommodation of her disability.

It is true that an obligation to reassign or transfer a disabled employee to another position may exist pursuant to Executive Law § 292 (21-e) pursuant to which "reasonable accommodations" include, but are not limited to, "provision of an accessible worksite, acquisition or modification of equipment,

support services for persons with impaired hearing or vision, job restructuring and modified work schedules" (Executive Law §292[21-e]). "Reasonable accommodations" also include "reassignment to an available position" (9 NYCRR 466.11[a][1], [2]) which, analogous to the language of the Americans with Disabilities Act, means "reassignment to a vacant position" (42 USC § 12111[9][B]). Thus, the Division of Human Rights contemplates that "reasonable accommodations" means employers are required to transfer disabled employees, unable to perform in their current jobs because of disability, to other vacant positions in which they are capable of performing (*Jackan v New York State Dept. of Labor*, 205 F3d 562, 565-566 [2nd Cir. 2000], *cert denied* 531 US 931 [2000]; *Smith v Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F3d 1154, 1161-1163 [10th Cir. 1999]).

The law on "reasonable accommodations" has been stated by the Appellate Division First Department in *Pimentel v. Citibank, N.A.*, 29 AD3d 141:

> [A] plaintiff seeking to hold a New York employer liable for a failure to make a transfer as a reasonable accommodation, has the burden of demonstrating that a vacant funded position exists and that plaintiff was qualified to fill that position" * * * The provision does not require an employer to find another job for the employee or to create the job, or to reassign if no position is open * * * Nor are employers required to retrain and assign disabled employees to entirely different positions * * * Specifically, an employer is not obligated to provide the disabled employee with accommodation that the employee "requests or prefers" * * * In any event, it is clear that a proponent of a NYHRL claim has the burden of establishing that she proposed a reasonable accommodation and that the defendant refused to make such accommodation * * * The obligation of reasonable accommodation is also limited to the employer's knowledge of the disability that needs to be accommodated * * * (*Pimentel v. Citibank, N.A.*, 29 AD3d 141, 147-148 [1st Dept. 2006] [citations omitted].

In this case, defendants have submitted ample admissible evidence that plaintiff failed to request that she be reasonably accommodated; that they fulfilled their duty to reasonably accommodate her given that she was not qualified for her requested accommodation and that there was no vacancy at the time in the department where she sought to be transferred; that even if they had fulfilled her request to be accommodated on her terms, she could not have performed her job duties in a reasonable manner; and that they were otherwise not legally required to provide reasonable accommodations to her. Defendants have demonstrated that they

cannot be held liable for failing to provide the plaintiff with an accommodation since she failed to adequately request the accommodations sought or explain the extent and limits of her restrictions. Defendants have also shown that plaintiff failed to request a change of assignment or for any other form of reasonable accommodation in the workplace.

An employer does not have a duty to provide reasonable accommodations to an employee unless the employee engages in "interactive communication" with the employer about the need to be accommodated. The burden to communicate this concern is solely on the employee, and the interactive process should involve the employee specifying to the employer the nature and extent of his/her limitations and the type of accommodations sought (*Pimentel v. Citibank, N.A.*, supra at 148-149). Defendants have sufficiently and adequately demonstrated that no interactive communication took place between plaintiff and the defendants, either orally or in writing, concerning plaintiff's need to be accommodated. Vague passing complaints about symptom aggravation do not qualify as interactive communication.

In support of their motion, defendants annex a copy of plaintiff's handwritten and undated letter that was apparently uncovered during discovery which purports to request a change of assignment. Both Commanding Officers, Fitzgerald and Asheld, state in their respective affidavits that they never received the alleged letter (*Fitzwilliam Aff.*, ¶9; *Asheld Aff.*, ¶13). Nevertheless, based upon a plain and simple reading of this letter, however, it is clear that this letter [addressed to the Commanding Officers of the EAB (John Fitzwilliam) and of the CSO (John Asheld, MD)] does not set forth a request for an accommodation; plaintiff merely cites in the letter the dates of her two on-the-job injuries and briefly describes her restricted assignment positions following these injuries. She also states that she is currently working out-of-title at the CSO and is being excluded from such job perks as overtime. Nowhere in the letter does plaintiff set forth a request for a change of assignment or for any other form of reasonable accommodation in the workplace. Defendants claim that they never received this letter during plaintiff's period of employment with the County. However, even if they had, this Court finds that it does not constitute a request to be reasonably accommodated. Thus, based upon the evidence submitted, this Court finds that plaintiff failed to show that she specified the accommodations sought.

Moreover, defendants have also demonstrated that assigning her to the Academy upon her return to the office on March 14, 2002, on a restricted assignment basis, where her duties were strictly clerical, and then temporarily transferring her to the CSO to fulfill a vacant "support clerical role" in July 2002, more than 4 months after her return to the office from her January 2, 2002

injury constituted a reasonable accommodation given that she was not qualified for any other position and that there were no other vacancies at the time.

Dr. Asheld in his affidavit states that plaintiff's assignment at the CSO was one of the least physically demanding placements within the Department (*Asheld Aff.*, ¶8) and it had a vacant restricted assignment position available in July 2002 (*Id.*, ¶6).Given the disciplinary action taken against her as an AMET on several occasions for a variety of Department violations and given her chronic history of excessive sick leave absences and restricted duty status, it was not unreasonable for defendants to preclude the plaintiff from assuming any position requiring direct patient contact.

Plaintiff testified at her deposition, and claims herein in this litigation, that she would have preferred to be placed in the Medical Control Unit, Academy or Communications Bureau Hotline. However, defendants have sufficiently shown that not only was she not eligible for these positions because she had proven in the past to have serious deficiencies in patient care knowledge and skills while she was an AMET and also during her short employment in the Academy in 2002 but that there were also no vacancies existent at the time. Plaintiff was the subject of disciplinary actions on nine separate occasions between September 17, 2000 and December 29, 2001. The record confirms that she also had a very poor attendance record. Inspector Fitzwilliam states in his affidavit that "[i]ndividuals employed in Medical Control must have strong patient assessment skills, a solid knowledge of patient care, and written protocols" (*Fitzwilliam Aff.*, ¶11). Plaintiff testified at her deposition that Medical Control serves as a "go-between the ambulances on the street and the doctors" (*Plaintiff Tr.*, p. 46). Fitzwilliam states in his affidavit that the AMETs in this unit "must interact effectively with EAB supervisors, police officers, fire rescue personnel, hospital staff, and the Medical Examiner's Office" (*Fitzwilliam Aff.*, ¶11). Their duties also include providing " 'pre-arrival' medical assistance via telephone to the public. Callers of the general public are linked from 911 to Medical Control and are often hysterical or highly stressed" (*Id*). The AMETs "must be skilled at calming these individuals and given them clear and accurate instructions [and while] Plaintiff filled in occasionally as an operator in Medical Control, she was never a candidate for permanent assignment in the unit" (*Id.* ¶¶11-12).

Moreover, defendants have also demonstrated that they could not have reassigned her to a position as a Medical Control operator because no vacancies existed at the time. Plaintiff has the burden of proving that a "vacant funded position exists and that plaintiff was qualified to fill that position" (*Pimentel v. Citibank, N.A.*, supra at 147). Defendants via the affidavit of Inspector

Fitzwilliam have submitted proof that there was no vacancy in Medical Control as an operator in 2002.

In light of defendants' showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiff submits her affidavit, the job description of a Nassau County EMT and her unsworn and unaffirmed medical records. Plaintiff's sole argument in opposition is that defendants failed to reasonably accommodate her. Citing to Federal authority, plaintiff, however, offers nothing more than conclusory and unsupported allegations of discrimination. Plaintiff fails to demonstrate that she sought a transfer of her position; that a vacant funded position existed; or, that she was even qualified to fulfill such a position (*Jackan v. New York State Dept. Of Labor*, supra at 567).

In fact, counsel for plaintiff states in his affirmation that "[t]he determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations" (*Aff. In Opp.*, ¶12). However, counsel fails to demonstrate how this "process" was engaged in this case. Plaintiff's self-serving statements that she was at all times during her employment qualified for her position as an AEMT is contradicted by her disciplinary and attendance records and performance evaluations. Plaintiff's bare conclusory statements that she was qualified to fill the Medical Control position and that such a vacant position existed are not sufficient to meet her burden of making a prima facie case of discrimination against the defendants nor is it sufficient to raise a material triable issue of fact.

Accordingly, defendants' motion for summary judgment is granted and plaintiff's complaint is herewith dismissed.

Settle Judgment on Notice.

This decision constitutes the order of the court.

Dated: MAY 02 2008

KENNETH A. DAVIS J.S.C.