Jochelman v New York State Banking Dept.
2010 NY Slip Op 32750(U)
September 30, 2010
Sup Ct, NY County
Docket Number: 103533/07
Judge: Alice Schlesinger
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SCANNED ON 10/5/2010

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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 103533/2007

JOCHELMAN, IRVING

vs

STATE BANKING DEPARTMENT

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED OCT 05 2010 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by defendants for summary judgment is granted in part and denied in part in accordance with the accompanying memorandum decision. The case is referred to Mediation and then Part 40 for trial.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SEP 30 2010

Dated: September 30, 2010

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
IRVING JOCHELMAN ,

Plaintiff,

-against-

Index No. 103533/07
Motion Seq. No. 005

THE NEW YORK STATE BANKING DEPARTMENT and DIANA TAYLOR, Superintendent of Banks and the NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Defendants.
--X

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

SCHLESINGER, J.:

This is an action brought by plaintiff Irving Jochelman, a long-term employee of the NYS Banking Department, against the Banking Department for its alleged failure to provide him with reasonable accommodations at his work place. Before the Court now is a motion for summary judgment by the State defendants. The thrust of the motion is that the State acted reasonably in denying part of Mr. Jochelman's request because the disability that he was asserting was not obvious, and the need for his particular accommodation was not evident or observable nor established by other facts.

Mr. Jochelman was born with a congenital condition, neurofibromatosis. Due to this condition, Mr. Jochelman took a medical leave in 2005 and had a series of four major surgeries during the year. This condition leads to the development of tumors in various places in an individual's body, and in Mr. Jochelman's case, the surgery involved removal of these tumors as well as inserting and replacing a shunt in his head to reduce fluids.

Mr. Jochelman was cleared to return to work some time in October 2005. However, he was still suffering the residual effects of the surgeries and the illness. He often had to

use a crutch to walk. On February 10, 2006, Mr. Jochelman was informed by a supervisor Regina Stone that because of restructuring in the department where he worked, his workstation would be moved closer to an individual, Michael Linyard, whom he was going to be supervising. Mr. Linyard was a disabled person confined to a wheelchair. While Mr. Jochelman was on leave in August 2005, Mr. Linyard was moved to a different cubicle from where he had been, and this cubicle was modified to accommodate his needs.

On or about February 10, 2006, after learning that he would be moved to a different workstation to be closer to Mr. Linyard, Mr. Jochelman went to speak to Ms. Stone about this move. According to Ms. Stone in her affidavit filed in support of the Department's motion, when Mr. Jochelman began to tell her that he did not want to move to the new cubicle for medical and/or health reasons, she ended the conversation because she said she did not want to discuss confidential medical information with him, and she suggested that he file an "ADA" request with the Human Resources Department. On February 14, 2006, the plaintiff did exactly that. He submitted a request to the Department on the designated form entitled "Request for Reasonable Accommodation" (Exh B to moving papers) . This document was received by the Director of Human Resources, Ellen Sherman, who also filed an affidavit in support of this motion.

In Section A of this form, Mr. Jochelman requested to "remain in my current cubicle to which I was assigned to until 2/10/06. This would be the situation as it existed until 2/10/06." He then gave the following explanation as the reason why he was making this request.

> I am disabled and use a crutch as support. I was first told of this move on Friday, February 10, 2006. The cubicle to which I was assigned

> [A], was safer and more convenient than the one [B], to which I have been moved to. The old cubicle "A" was more convenient and closer to the general toilet facilities. Since it has a number of stalls, there is always an open stall to use. The other toilet although now closer to my new cubicle [B] is many times occupied. When I would have encountered that, it would mean that I would have to rush or run to the other toilet. I am unable to do either since I have difficulty walking and use a crutch as support. Having to move fast would mean that I will fall and injure myself. I do not need additional damage to my legs. Nor do I want an accident and resulting embarrassment. In addition I have difficulty bending down. I asked that the Sales finance files be moved to the 12 empty file drawers next to my old cubicle [A]. This will allow me to wheel my chair over and remove files from the two lower drawers. With the new cubicle [B] I have to walk over to the file cabinet and can only use the top drawer safely. The old cubicle [A] also places me closer to the copier. This is important as the printer is next to the copier, so when additional copies are needed, I do not have to walk over to the copier. The sales finance licensees have been assigned to me under the Supervision Unit. As such, I am the examiner who would have the most extensive use for them. Placing the files in the empty drawers next to me would be most convenient for me.

Three months later, in a memorandum dated May 15, 2006 (Exh C), after what Ms. Sherman characterizes in her affidavit (at ¶10) as her "investigation and consideration" of plaintiff's request for a reasonable accommodation, Ms. Sherman made the following recommendation as to Mr. Jochelman's request: "The request to be moved to his previous workstation should be denied." With regard to Mr. Jochelman's request that the files be moved and that he have better access to the printer and the copier, some accommodation

[* 5]

was recommended, although it was not specifically what Mr. Jochelman had proposed as a reasonable solution to his problem. What is more, according to Mr. Jochelman's affidavit in opposition to the motion (at ¶25), the Department failed to follow through and "never provided" him with the accommodation that had been granted relating to access to files, the printer and the copier.

In her May 15 memo, Ms. Sherman gave a lengthy explanation of her reasons for recommending denial of Mr. Jochelman's main request. Significantly, she began by acknowledging that "The applicant's disability relative to difficulty walking is evident and observable." (Exh C).That "evident" disability justified an accommodation with respect to files, the copier and the printer. In contrast, she stated, the professed "disability regarding urgency is not obvious." She went on to explain that Mr. Jochelman had not submitted documentation in support of this need. Therefore, she concluded that neither the applicant nor the evidence established an urgency requiring that he be given a cubicle with access to the multiuser restroom.

Ms. Sherman states in her affidavit that during her three month's consideration of plaintiff's request, she had asked Mr. Jochelman to provide medical documentation but he had declined, stating that he believed his disability was evident and obvious. Clearly by her recommended denial she found that it was not. As part of her further explanation or justification for the denial, she states that in her conversation with Mr. Jochelman, she learned that he was able to commute to work every day using public transportation and that on occasion he would attend meetings with other staff members on other floors in the Department. She attempts to explain her recommendation further, pointing out that the new workstation was actually closer to a bathroom. However, she says nothing about Mr.

[* 6]

Jochelman's assertion that the bathroom, although designated as one for disabled people, was often occupied by non-disabled individuals and was thus unavailable for his use.

Ms. Sherman's recommendation was promptly accepted by the Banking Department. Mr. Jochelman was given a copy of that decision, which was dated May 17, 2006, a date only two days after Ms. Sherman's memo had been drafted. Ms. Sherman states that plaintiff then gave her, on the day following, a photocopy of a handwritten note on a prescription form from his doctor, Dr. Chandranath Sen. The note, which was dated May 2, 2006, stated in its entirety that "Due to his neurological problems, it is requested that he may have an office closer to the bathroom. Thank you." (Exh F to moving papers). After receiving this note and delivering the decision to Mr. Jochelman, Ms. Sherman informed him that he could reapply and attach this note and it would be considered.

The next thing that happened of significance here was a letter dated June 22, 2006 by Chief Administrative Officer Ms. Diana S. Rulon (Exh O). She had consulted with Ms. Sherman with regard to the latter's recommendations. She wrote to Mr. Jochelman that they had not as of yet received his second request and if he was interested in pursuing a second request he should use the Request for Reasonable Accommodation form and provide medical documentation in support of his request. She went on to say that the note he had provided from Dr. Sen was not sufficient to establish a need for an accommodation, explaining that:

> The medical information would need to establish that you are restricted in the distance that you can travel to reach a rest room. It must clarify why this is a requirement for the location of your workstation, but not a restriction on your commute or other daily activities, as it relates to a major life function. If you have any questions on these requirements, please let me know.

Nine months later, in February 2007, Mr. Jochelman did submit a second request for the same accommodation he had asked for earlier, using the same May 2006 note from Dr. Sen (Exh P). Referring to the physician's note, Mr. Jochelman stated in his request that "I believe this is specific and exact as it defines my needs for an accommodation." Not surprisingly, this request was denied a second time by letter from Diana Rulon dated March 12, 2007, stating that the physician's note was insufficient to establish the need for the requested accommodation (Exh T).

In a lengthy affidavit submitted by the plaintiff as part of his opposition to this motion, he explains that in the month of February 2007 when he submitted his second request, he had suffered twelve urinary accidents and two bowel-related accidents at work. In that second request (Exh 7 to Opp), Mr. Jochelman emphasized the severity of his problem and reiterated that his prior workstation, which had been suitable, was still vacant and not being used by the Department for any purpose whatsoever. Specifically, Mr. Jochelman explained as follows:

> The primary reason for my resubmission is that the current accommodations are placing me in very painful position. I am requesting that I be relocated to my previous cubicle in order to be closer to the main men's toilet. I need to be as close as possible to the toilet. I do not need a disabled person's toilet. My problem is that when I need to go to the toilet there has to be an empty stall available. This is only possible at the normal toilet which has 3 urinals and 4 stalls. It is always possible to find an empty spot. In my current location I am further from the toilet than I used to be. In my physical condition, this additional distance is significant. It means the difference between making it in time or having an embarrassing accident. I have submitted a specific note from my doctor dated May 2, 2006.

[* 8]

> It refers to neurological problems and requests that I be placed "closer to the bathroom". I believe this is specific and exact as it defines my needs for an accommodation. My commute to work is not relevant. This request is based on my daily time in the NYSBD office.

Mr. Jochelman then concluded his second request by reiterating his points about his serious need for a workstation close to a multi-user bathroom, such as his previous workstation which was still vacant:

> I need to be closer to the main toilet in order to be able to get to it quickly. The additional distance which I need to walk to the main toilet places a painful physical burden on me. It can mean with high certainty that I will have an accident and not make it in time to the toilet. This happened on two occasions in the past after this relocation. A cubicle for which I am asking to return is empty. It has remained empty since the day I was moved.

In addition to the three affidavits already referred to from Sherman, Stone and Rulon, Ms. Connell, counsel for defendants, also submitted an affirmation and a memorandum of law. In the course of her argument, she refers to a deposition taken of Dr. Sen after this action was commenced. Dr. Sen explained there that he could not be any more specific than he had been in his May 2006 note because his records did not contain sufficient information to allow him to detail the neurological basis for the urgency or incontinence that supported Mr. Jochelman's request. This deposition was taken on December 28, 2009, years after the action was commenced. While defendants claim it supports their position that Mr. Jochelman was not disabled and therefore not deserving of the accommodations he sought, the ultimate determination as to whether the denial was reasonable must be based on the circumstances that existed and were known to the

[* 9]

Department at the time it made its decisions of denial. What is more, Dr. Sen's deposition cannot be viewed as a retraction of his note, but rather as an explanation as to why he was unable to provide more details.

In Ms. Connell's memorandum of law she also argues that the ADA does not apply here and that there should be no personal action against the named defendant Diana Taylor, who at the time was Superintendent of Banks. As there is really no meaningful opposition by plaintiff to these arguments, defendants motion is granted as those causes of action under the ADA and against Ms. Taylor, and those claims are dismissed.

However, plaintiff strenuously opposes those arguments proffered by defendants based on the factual basis for the Department's denials; i.e., that Mr. Jochelman unreasonably rejected the Department's efforts to obtain more information and failed to take part in their "interactive process" of coming to an accommodation. Further, that strenuous opposition convinces the Court that there are legitimate issues as to which of these parties failed to engage in an interactive process and who failed to act reasonably.

Both sides agree that an individual making a request for an accommodation must act reasonably and that the parties involved in such request must engage in a true interactive process. Both sides also agree that such a request must be treated on an individualized basis. However, there are sharp disagreements here as to whether the Department truly did engage in an interactive process, as well as whether the Department was reasonable in balancing Mr. Jochelman's express individualized needs with its reasons for denying him accommodations to meet those professed needs.

For example, in a case cited by the defendants, *Economou v. Caldera, Secretary of the United States of the Army*, 2000 WL 1844773 (SDNY), decided by Magistrate Peck

on December 18, 2000, the plaintiff was denied the specific accommodation he had requested for his carpal tunnel condition. However, Magistrate Peck found that the plaintiff had nevertheless been immediately offered a reasonable accommodation which was quite extensive in nature, explaining (at p 2) that:

> The undisputed evidence shows that within two hours of Economou's initial Application for Sick Leave on September 8, 1997 with a period September 2 through October 8, 1997, Economou was informed that the Army Corps would accommodate him by: (1) making a secretary available to him to type or write, (2) purchasing work recognition software which would enable him to "speak" to his computer which would write for him, or (3) providing him with a tape recorder on which he could record notes that would then be transcribed by his secretary.

In sharp contrast here, after three months of deliberation, the Department rejected Mr. Jochelman's request to be moved back to his more suitable, and still vacant, original workstation so he could reach the bathroom in time to avoid painful and embarrassing situations.

Mr. Jochelman, in his sworn affidavit, insists that there was no meaningful attempt by the Department to engage in an interactive process. He states that when he spoke to Ms. Sherman, she spoke to him for a short time only, perhaps five minutes, wherein she primarily asked for a doctor's note. Further, neither she nor anyone else from the Department ever asked any follow-up questions after that initial brief meeting. He also explains that his commute to the office was 20 minutes on a bus and that he would accommodate his personal needs by using the facilities right before he left his apartment. He goes on to explain that the recuperation process from the multiple surgeries he

underwent in 2005 took longer than he had hoped and that he in fact did continue to suffer from both frequency and urgency of urination.

In *Phillips v. City of New York*, 66 AD3d 170 (1st Dep't July 2009), Justice Rolando Acosta, in a lengthy well-reasoned decision, he explained that the lower court was required to examine the "reasonable accommodations" provisions in both the State and the City Human Rights Laws. In *Phillips* the plaintiff had requested extended medical leave for breast cancer treatment. Her request was denied and she instead was terminated.

In reversing the lower court's dismissal of plaintiff's claims, the Appellate Division emphasized that there are broader protections afforded by the State and City Human Rights Laws than under the Federal ADA, adding (at p 176) that: "The intended purpose of the State HRL cannot be achieved without requiring that employers, in every case, *consider* the requested accommodations by engaging in an individualized, interactive process." (Emphasis in original). A failure to consider such an accommodation would be a violation of Executive Law §296(3)(a). The Court also stated that the employer must engage in the interactive process in good faith and assess the needs of the disabled individual and the reasonableness of the requested accommodation. Further, the process must continue until, "if possible", an accommodation is reached. *Id.* Finally, the Court reversed the lower court's dismissal and reinstated the plaintiff's complaint, indicating that summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith.

Here, there is a genuine dispute as to precisely that. On the one hand the defendants argue that they did so engage in the interactive process and that it was

Mr. Jochelman who was unreasonable and not obviously disabled and therefore undeserving of the accommodation he requested. In contrast, Mr. Jochelman insists that he was obviously disabled, that he did all that he reasonably could to establish that fact, that he tried to engage in an interactive process to no avail, and that the Department adamantly refused to accommodate his very reasonable request to be returned to his still vacant previous workstation which was closer to suitable restroom facilities. Thus, that part of the defendants' motion to dismiss the causes of action sounding in a violation of the Executive Law and the State Human Rights Law is denied, as those claims must be decided by a jury.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing those of plaintiff's claims that relate to the ADA and those naming defendant Diana Taylor individually; and it is further

ORDERED that defendants' motion for summary judgment is denied insofar as it seeks the dismissal of claims sounding in a violation of the Executive Law and the State Human Rights Law; and it is further

ORDERED that this case shall promptly proceed to court-sponsored Mediation and then Part 40 for trial. The plaintiff shall contact the Clerk in Trial Support (Room 158) to make the necessary arrangements.

Dated: September 30, 2010
SEP 30 2010

FILED
OCT 05 2010
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J.S.C.
ALICE SCHLESINGER