

**Duckett v New York Presbyt. Hosp.**

2014 NY Slip Op 33685(U)

October 21, 2014

Supreme Court, New York County

Docket Number: 114004/2010

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

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NGINA DUCKETT,

Plaintiff,

Index No.: 114004/2010

-against-

NEW YORK PRESBYTERIAN HOSPITAL,

DECISION and ORDER

Defendant.

-----X

Hon. Shlomo S. Hagler, J.S.C.:

In this employment discrimination case, defendant New York Presbyterian Hospital ("Hospital" or "defendant") moves for an order granting it summary judgment dismissing the complaint by plaintiff Ngina Duckett ("Duckett" or "plaintiff"). Plaintiff opposes defendant's motion.

**FILED**

OCT 23 2014

FACTUAL BACKGROUND

NEW YORK COUNTY CLERK'S OFFICE

In the Fall of 2005, Duckett successfully applied for a position in the Hospital's Quality and Patient Safety Department. Her position required her to coordinate and support board of trustees' quality assurance committee meetings as well as meetings of the Hospital's clinical department chiefs. Duckett was responsible for handling patient information and was informed and aware that maintaining its confidentiality was a requirement of her job.

When she was hired, Duckett was given an employee handbook, which she was responsible for reading. Exhibit "33" to Affirmation of Plaintiff's Counsel H.P. Sean Dweck, Esq., dated April 22, 2013

("Dweck Aff."). It advised her of the availability of the "job protected" Family and Medical Leave Act ("FMLA") which provided unpaid leave of up to twelve weeks for a "serious health condition which makes the employee unable to perform the essential functions of the employee's job." *Id.* It further advised her that if she were to be out of work due to an illness in excess of a workweek, she had to obtain the Hospital's medical clearance. In order to obtain work clearance, she was required to bring in a note from her primary provider or physician, indicating that she was able to return. *Id.*

Duckett performed her job well during her first year of employment and received an award in August 2006 for outstanding service. In the Fall of 2006, Duckett, who had returned to college to fulfill her pre-medical school requirements, had recurrent attendance issues, despite being provided with a flexible work schedule she herself had designed. As of March 2007, she had been unresponsive to prior counseling with respect to this problem. Exhibit "C" to Affidavit of Rachel Negron, dated May 15, 2013 ("Negron Aff."). Duckett was warned that if this continued, she "would be subject to disciplinary action." *Id.* The option of working fewer hours until she finished school was discussed with and offered to her, but Duckett rejected this accommodation because she said she needed the money and benefits. *Id.* Evidently, the problem cleared up and in 2008 Duckett was given a certificate for

completing three years of "dedicated service." Exhibit "30" to Dweck Aff.

Duckett then decided that she was going to sit for the January 2010 MCATs, the test required for medical school admission, but later decided that she would put it off until March, 2010. In the meantime, beside working full-time at the Hospital, and commuting about three hours a day, she spent between 30-40 hours weekly studying for that test. Also, her work began to slip, and her annual 2009 employment review revealed that she was in need of improvement in the areas of decision making and judgment, accountability, and dependability, attention to detail, empathy, innovation, and excellence.

Duckett's deficiencies were discussed with her during various counseling sessions. On March 30, 2010, her supervisor at that time implemented a detailed work improvement plan for her, which she executed. That plan recited that the supervisor would work closely with Duckett over the following 90 days, that there would be weekly or biweekly meetings to discuss Duckett's progress and to render appropriate feedback and support, and that Duckett's continued employment was contingent on her "ability to meet and sustain all performance objectives as outlined." Exhibit "P" to Affirmation of Defendant's counsel Jill Barbarino, dated March 22, 2013 ("Barbarino Aff."). Duckett testified that she agreed with the 2009 performance rating, that nothing in the work improvement

plan was inappropriate or unfair, that she needed to get her "performance back up to par," and that she understood that if she did not do so, she would be fired. Duckett EBT, at 119, 121-122.

In April 2010, Duckett began reporting to a new supervisor, Theresa Vander Vennet ("Vander Vennet"), who met with her on April 6, 2010 to review the work improvement plan and the areas of concern. Duckett understood those concerns and expressed her desire to improve. However, the following day, she was absent from work, and was again absent on April 28th and 29th. Also, because she was confused about the date and time, she missed a scheduled meeting that she was required to attend. Consequently, on May 3, 2010, Vander Vennet counseled Duckett about those deficiencies and that her behavior was not in conformity with the work improvement plan's expectations. On or about May 13, 2010, Duckett was assigned to provide support for a quality assurance committee meeting, which required her to ensure that the meeting was properly set up. Since Duckett failed to do so, the meeting did not go smoothly, leading to another counseling session.

On May 14, 2010, Duckett found a sick cat which was foaming at the mouth and brought it into the office she shared with her pregnant officemate, so that Duckett could take the cat to an animal hospital during her lunch hour. This misstep, coupled with Duckett's other performance issues, raised a concern in Vander Vennet's mind about Duckett's judgment, because bringing a

sick animal could jeopardize the health and safety of Hospital employees. Vander Vennet and Brian Regan ("Regan"), a Hospital vice president for quality and patient safety, conferred and thought that Duckett should be terminated, but human resources believed that Duckett should be suspended, so that she could have more time to work on her improvement plan. On May 18, 2010, Vander Vennet met with Duckett for the purpose of suspending her, but when Vander Vennet started to review Duckett's performance issues, and advised her that her future with the department was tenuous and at risk, Duckett asserted that she was having emotional and physical issues. Instead of suspending plaintiff, Vander Vennet referred Duckett to seek help at the Hospital's Workforce Health and Safety Office ("WHS") and for a potential referral to the Employee Assistance Program ("EAP") if necessary.

That day, Duckett was seen at WHS by Leslie Kondratowicz ("Kondratowicz"), a nurse, and by Dr. Jorge Rivero-Becerra ("Dr. Rivero-Becerra"), an internist, who were there primarily to ensure that Duckett had no glaring non-psychiatric medical problems. Duckett, who denied any suicidal ideation, advised Kondratowicz and/or Dr. Rivero-Becerra that she had been studying very hard for the MCATS, which she ultimately never took, that she was depressed, disorganized, having difficulty concentrating and controlling her behavior, and was fearful of losing her job. Dr. Rivero-Becerra found no physical problem, but believed that

Duckett was depressed. Duckett was referred to EAP for the next day and was taken off duty for an indeterminate period until cleared to return to work.

EAP is a program which provides, among other services, short-term mental health care of up to two months, after which the patients are referred to other medical providers. EAP is an outside entity run by Weill Cornell Medical College and not by the Hospital. The Hospital, which is part of a consortium that belongs to EAP, pays a flat fee to it based on the Hospital's total number of employees, rather than on services rendered. EAP's patients' employers have no access to the records of EAP treatment, unless the patient releases them. In the instant case, Duckett ultimately declined to release the substance of her EAP treatment to the Hospital, but signed a limited release which allowed her EAP social worker to speak with WHS regarding Duckett's EAP attendance and her compliance with its recommendations.

Duckett was first seen at EAP by clinical social worker/therapist, Patricia Anne McDonald ("McDonald"), who referred Duckett to be seen the next day by EAP psychiatrist, Dr. Samantha Boardman ("Dr. Boardman"), to ascertain whether medication was indicated. Duckett's EAP treatment records show that she initially informed her treaters that her work problems only arose within the past several months, and that she was stressed, anxious, and depressed because of her excessive studying

for, and worrying about, the MCATs, and her having promised her parents, both professionals whom she perceived as critical of her career attainments, that she would take the test. Duckett further reported that, as a result, she was not sleeping much, had lost a lot of weight, was not taking care of herself, and was "zoned out" at work. Exhibit "27" to Dweck Aff. Duckett also revealed that her finances were poor, and that she owed her bank \$3,000 in overdraft charges and rent money to her father, who had leased her a house. Duckett was noted to be thin with disheveled hair, and she was found to be guarded and with poor insight and judgment. At Duckett's first session with Dr. Boardman, medication was prescribed to improve Duckett's mood. Dr. Boardman concluded that Duckett was not ready to return to work, and that she should not return until after she had taken the medication and was reassessed in several weeks.

As EAP treatment progressed Duckett advised McDonald that her anxiety was a bit improved, but that she had not noticed much difference after having started the medication. McDonald chart entry of May 26, 2010. Duckett admitted that she had been out of control, and reported that she was now eating twice daily and had caught up on sleep. Duckett asked about returning to work, and McDonald advised that she had to be cleared by WHS, and should contact Kondratowicz. According to Kondratowicz's notes, Duckett

contacted her and expressed that she had improved with medication and was feeling much better, more grounded, and less anxious.

Duckett then saw Dr. Boardman and McDonald on June 2, 2010 at which time Duckett presented "very differently." Boardman and McDonald notes of June 2, 2010. She wore makeup, was neatly attired, and well-groomed, and had sustained eye contact. Her judgment, insight, and mood were observed to be better. She was less guarded and "clearly more organized." *Id.* Further, Duckett herself reported that she felt "much better," had clearer thoughts, and felt more grounded, acknowledged that previously she had not been doing well and had put too much pressure on herself, and advised that she had decided to put off medical school. *Id.* She also recognized the need to see a therapist.

Dr. Boardman recommended that Duckett continue with her medication, therapy, and with consulting a psychopharmacologist (i.e., a psychiatrist who could prescribe medication). Given her improvement, Duckett was cleared to return to work. Dr. Boardman thought that Duckett should start working part-time and then move up to full-time. McDonald gave Duckett the names and phone numbers of several psychiatrists to maintain her medication needs, as well as of therapists, all under her insurance plan.

That day, McDonald informed Kondratowicz that Duckett had been seen by her and Dr. Boardman, who indicated that Duckett could return to work, initially three days a week for about a month, that

Duckett had been given referrals to contact, and that she would no longer be seen at EAP. The next day, Kondratowicz phoned Duckett, who advised that she was ready to return to work full-time, but because Duckett had not yet made an appointment with the referrals, Kondratowicz instructed Duckett to make an appointment with a psychiatrist and let her know her progress in that regard.

Thereafter, Duckett received a June 4, 2010 note from EAP, addressed to whom it may concern, which was signed "Dr. Samantha Boardman," and recited that Duckett "has been evaluated at the EAP and is cleared to return to work. Please feel free to contact me with any further questions." Exhibit "U" to Barbarino Aff. Dr. Boardman testified that she had authorized McDonald to sign her name, that most likely someone had read her note, and that it was "the same letter that we use." Dr. Boardman EBT, at 57. Dr. Boardman further testified, that, although she had indicated in her chart that she had recommended that Duckett initially go back to work on a part-time basis, she believed that Duckett was actually ready to work full-time. Kondratowicz believed that Dr. Boardman's unrestricted medical clearance note superceded the conversation she had had with McDonald about Duckett initially working part-time. Kondratowicz EBT, at 163.

On June 8, 2010, Duckett met with Dr. Joanne Moore ("Dr. Moore") a WHS psychiatrist, presented her with Dr. Boardman's note, and told her that she was feeling well. Dr. Moore testified

that EAP is considered the patient's private doctor for the purposes of providing a recommendation as to whether an employee is ready to return to work. Dr. Moore EBT, at 66. Duckett had a social worker's appointment, but had not yet contacted any psychiatrist. Even then, Dr. Moore found that Duckett appeared able to return to work, but, declined to clear Duckett to work, since Dr. Moore wanted to make sure that Duckett had outpatient treatment appointments in place. Later that day, Duckett called Kondratowicz and advised her of the social worker appointment, and that she had a June 14, 2010 psychiatric appointment.

Meanwhile, after speaking with WHS and determining that Duckett would be out of work in excess of a week, Rachel Negrón ("Negrón") of human services emailed a leave of absence form to Vander Vennet for her to fill out and forward to the leave management unit, so that it could open a leave case for Duckett. Vander Vennet signed the form, which had checked "serious health condition," as the reason for the requested leave (Exhibit "18" to Dweck Aff.), and that Duckett was approved for FMLA leave. Negrón EBT, at 104.

On June 11, 2010, Duckett again met with Dr. Moore and informed her that she felt much better, was organized and focused, was not depressed or anxious, was continuing on her medication, had decided not to study for the MCATS, and wanted to return to work. *Id.*, at 73. Aside from the upcoming social work appointment,

Duckett also advised her that she had contacted several psychiatrists, was waiting to see which one's schedule would fit best with hers, and was arranging an appointment. Consequently, Dr. Moore believed that Duckett was ready to return to work, and had no doubts in that regard, because Duckett had therapy in place and was on medication. Dr. Moore cleared Duckett to return to work on the following Monday, June 14, 2010, and a slip indicating that she was cleared, was signed by Kondratowicz. That slip recited that it had to be promptly returned to the "department head." Vander Vennet was advised that Duckett was cleared to work on June 14th and that Duckett had to present Vander Vennet with the return-to-work slip.

On the morning of June 14, 2010, instead of reporting to work, Duckett, who had agreed to inform McDonald of her progress in securing referrals, went to see McDonald and advised her that she could not secure a psychiatric appointment which fit her schedule. McDonald informed Duckett that she would call her later that day with additional referrals, a promise which she kept. Duckett left for work and reported to Vander Vennet, but did not present her with WHS's return-to-work slip, informing her that she had given it to the building security guard instead.

On June 15, 2010, Vander Vennet sent an email to Negron, Regan, and an administrator in Regan's department, recounting that Duckett had inexplicably given the slip to the security guard and

indicating that this had caused her to question Duckett's thought processes and decision-making ability. She further advised that Duckett had not brought her the slip that day and showed up late on June 14th without having first contacted her. Vander Vennet then stated, "I don't feel comfortable that she is ready for work and cleared - I tried calling WHS with no answer and told Ngina that I need to see her note before discussing any other work related issues. Please let me know if you have any other thoughts." Exhibit "19" to Dweck Aff. According to Vander Vennet, until she saw the slip, she was not sure whether Duckett had in fact been cleared. Vander Vennet EBT, at 265. Regan responded that she should not be at work without clearance.

Later that day, Vander Vennet sent an email to Mark Colman ("Colman"), of human resources, and Negron, with a copy to Regan, advising that she had a work improvement plan update discussion with Duckett that morning, that her assignment for the day was to calendar the meetings for the next six months. When Duckett's work was reviewed, it was discovered that she had failed to calendar two important medical board meetings, and incorrectly calendared the time of another board meeting. The updated improvement plan included Duckett's errors since returning to work, namely her failure to provide the work clearance note to Vander Vennet or inform her that she would be coming to work late on June 14th, and Duckett's failure to properly perform her calendaring assignments.

On June 17, 2010, Duckett was tasked with providing support for a high-level medical board meeting. That morning, shortly before the meeting, Vander Vennet checked with Duckett to see if she was prepared for the meeting. Duckett responded that she had lost the USB drive which contained important information for the meeting. Duckett had also lost such a drive prior to her referral to WHS and EAP. Vander Vennet, who discussed this loss with Duckett, was upset, not only because the drive had been lost, but because Duckett had failed to voluntarily come to her with the problem, even though the meeting was imminent. Furthermore, the drive potentially contained sensitive and confidential materials related to quality assurance issues. Several of the Hospital's administrators, including Regan, were advised of this incident, and after a conference call among Vander Vennet, several Hospital administrators, human resources' personnel, and the Hospital's counsel, a decision was made to terminate Duckett. However, the Hospital has not provided any information as to whether this decision to terminate considered Duckett's previously disclosed psychological and emotional issues, her participation in WHS and EAP, and the similarity between the mistakes Duckett made before she was referred to WHS and EAP and those she continued to make upon her return to work.

Duckett was terminated on June 24, 2010, and was offered a severance package if she waived any and all claims within 21 days

of her termination by signing an agreement ("Severance Agreement"). By letter dated June 26, 2010, Duckett's father, George Duckett, wrote to Colman advising that his daughter, in her current state, did not seem to understand the Agreement, and indicating that it was obvious to him that his daughter was having a behavioral issue. Duckett's father charged the Hospital with prematurely terminating Duckett, asserting that it was aware of her condition from her visits to the Hospital nurse, social worker, and psychiatrist. He advised that his daughter was about to begin long-term treatment covered by her insurance plan, and that when "she was called back to work," he was surprised. Exhibit "23" to Dweck Aff. Duckett's father asked that the termination be rescinded so that Duckett could pursue the medical treatment under her plan. By letter dated July 13, 2010, Duckett's father wrote to the Hospital's human resources department stating that Duckett had been rushed to a hospital on June 28 [sic], and wanting to know whether the 21-day period to sign the Agreement still applied. On July 19, 2010, Duckett's father advised that his daughter was not going to sign the Agreement.

On an unspecified date, Duckett applied for an exemption from temporary assistance work activities. On September 10, 2010, the New York City Department of Social Services determined that Duckett was exempt from work activities as of that date, because of medical evidence showing that she could not work. On November 14, 2010,

Duckett filed a claim for New York State disability benefits, indicating that she had first become disabled on June 24, 2010. The physician portion of the form revealed that Duckett had been hospitalized from June 29 to July 26, 2010, and that Duckett's first treatment for her disability was on June 29, 2010. In response to the item seeking to ascertain when the patient would be able to work, which item instructed the medical provider that, at minimum, an estimated date was required and that the physician should avoid responses such as "undetermined," the doctor inserted July 1, 2011 "estimated." Exhibit "Z" to Barbarino Aff.

On October 25, 2010, Duckett commenced this action, in which she asserts a cause of action under Executive Law §§ 290 *et seq.* (the New York State Human Rights Law ["NYSHRL"]) and another cause of action under the Administrative Code of the City of New York §§ 8-801 *et seq.* (the New York City Human Rights Law ["NYCHRL"]). Duckett alleges that the Hospital knew of her disability and her need to be out of work for treatment, yet terminated her before she had received adequate treatment. During discovery, Duckett admitted that she never told Vander Vennet, Colman, or anyone else from human resources about any of her diagnoses (Duckett EBT, at 156, 216, 219), and Vander Vennet testified that she was unaware of the specific reason why Duckett was placed on leave. Vander Vennet EBT, at 367. Duckett conceded that when she returned to work she never asked for a leave of absence because she wanted to go back to

work and told Dr. Moore and Kondratowicz that she had to get back to work and "can't be refused," but further testified that she was bipolar and could not assess how sick she was. Duckett EBT, at 58, 69.

#### The Instant Motion

The Hospital asserts that Duckett's causes of action are without merit and must be dismissed. It maintains that Duckett's therapist and psychiatrist never disclosed the exact nature of Duckett's emotional condition to it and that those involved in the decision to terminate her only had a vague notion of her emotional issues. The Hospital further argues that it appropriately relied on Dr. Boardman's unrestricted work clearance and the fact that plaintiff insisted on returning to work full-time and advised that she was feeling better. Further, on her return to work, Duckett failed to advise anyone that she could not perform her duties because of a disability. Duckett never requested an accommodation after her May 14, 2010 meeting with Vander Vennet and before her termination. Duckett EBT, at pp. 66-69. In view of the foregoing, the Hospital urges that, on Duckett's return, it had no reason to know of her need for an accommodation. Thus, the Hospital contends that the duty to engage in the interactive process to ascertain what accommodation Duckett required was never triggered.

Additionally, the Hospital asserts that it could not have terminated Duckett for discriminatory reasons because it claims it was unaware on her return that she was still suffering from any emotional disability. Instead, the Hospital claims it terminated Duckett for a legitimate, nonpretextual reason, namely, her poor job performance on her return, including the loss of the USB drive, and her failure to promptly so advise her supervisor in the face of the imminent high-level meeting. The Hospital maintains that Duckett's concessions that her work performance was lacking and that she was never ostracized or criticized about her health (Duckett EBT, at 64-66) support its position that Duckett's claims lack merit, as does the fact that the only accommodation that Duckett ever requested, i.e., for a revised work schedule in the Fall of 2006 which she designed, was promptly granted.

Moreover, the Hospital maintains that plaintiff is judicially estopped from claiming that she could have performed her job duties with a reasonable accommodation, because she filed for temporary assistance and disability benefits, and has failed to demonstrate how her claim that she is disabled from work is consistent with an ability to perform her job functions with a reasonable accommodation. In response, Duckett asserts that the Hospital's motion must be denied because it has failed to demonstrate that there is a lack of evidence which would permit the trier of fact to believe that discrimination played no part in her termination.

Duckett maintains that beginning in the fourth quarter of 2009, she began to manifest the onset of a psychiatric condition, the symptoms of which included a disheveled appearance, a loss of weight, and difficulty in concentrating, and her bringing a sick cat to work, which resulted in Dr. Rivero-Becerra's diagnosis of depression. Duckett notes that several of her supervisors noticed her disheveled appearance and commented on it. Duckett argues that the Hospital should have recognized that her declining performance and appearance were due to a psychiatric condition. Further, Duckett observes that Negrón was aware that Duckett had been taken off duty due to "physical and emotional difficulties," and that Vander Vennet knew from the request for leave form that Duckett had taken a leave of absence for a "serious health condition." Exhibit "18" to Dweck Aff.

Duckett takes the position that the Hospital prematurely cleared her to return to work because she did not have appropriate follow-up treatment in place when she returned. She further faults Dr. Boardman for failing to read or actually sign the work clearance note which bore her signature. Duckett also claims that, when she returned to work, Vander Vennet should have known that she needed an accommodation because Duckett gave the return-to-work slip to the security guard, which should have raised an obvious concern as to Duckett's judgment and whether she was actually ready

to return to work. Duckett contends that one is not required to ask for an accommodation if the need for one is apparent.

As for Duckett's professed desire to return to work in early June 2010, her deposition testimony explains that she wanted to return because she feared that she would lose her job if she did not return. In this regard, Duckett testified that she desired to return to work because Vander Vennet had informed Duckett that her job was in jeopardy, which caused Duckett to become "preoccupied with ... getting back to work as soon as possible and keeping [her] job." Duckett EBT, at 69-70.

Duckett also maintains that the Hospital improperly ignored Duckett's father's request that she be reinstated. Duckett asserts that four days after the termination she attempted suicide, which resulted in a one-month inpatient admission at a psychiatric facility, where she was allegedly diagnosed with depression and a bipolar disorder. Duckett contends that defendant's claim, that Duckett's disability benefits application estops her from asserting a disability discrimination claim, is without merit because, among other reasons, the application was not inconsistent with her claim that she could have performed her job with a reasonable accommodation.

In reply, the Hospital claims that Duckett's assertion that she should not have been allowed to return to work, as she had requested, and when she was cleared by her physician, is without

merit. The Hospital claims that, after an FMLA leave, the law requires an employer to return an employee to work when the employee presents a fitness-for-duty certification. The Hospital challenges Duckett's claim that it should have known that she was bipolar because she performed poorly, brought a sick cat to work, and informed Vander Vennet that she had emotional and physical issues. In this regard, the Hospital notes that Duckett had job performance issues throughout her employment. Also, the Hospital denies that Duckett's failure to properly perform her work duties was sufficient to alert the Hospital that Duckett needed an accommodation or was suffering from a mental condition. The Hospital claims that Duckett's inadequate performance could have been due to any number of reasons, including allowing her personal life to interfere with her job, disinterest, or incompetence. The Hospital adds that it cannot be faulted for accepting a clearance note which appeared to have been signed by Dr. Boardman.

In her supplemental papers, which were authorized during oral argument, plaintiff disputes that the Hospital was bound by the clearance note, and alleges that its handbook and federal regulations permitted the Hospital to inquire of Dr. Boardman so that she could clarify and authenticate her clearance note. Exhibit "33" to Dweck Aff.; 20 CFR § 825.312(b). Duckett claims that if this were done, the Hospital could have discovered whether Duckett needed to return to work part-time and that the Hospital

could have exercised its own judgment as to whether Duckett was ready to return to work. Duckett contends that the Hospital's failure to follow its handbook's procedures demonstrates that her termination for allegedly nondiscriminatory reasons was pretextual. Also, Duckett asserts that if her disability was one under the American with Disabilities Act ("ADA"), the Hospital could have requested medical information and/or, if it had reason to believe that she was unable to perform her duties, required a medical examination. 29 CFR § 825.312(h); Exhibit "2" to Dweck letter of August 5, 2013. In this latter regard, Duckett again notes that she glaringly and improperly gave her return-to-work slip to the security guard, which caused Vander Vennet to question her judgment.

In response, the Hospital asserts that, even where an employer contacts the employee's physician for clarification or authentication, the employee's return to work cannot be delayed while such contact is being made, and that "[n]o second or third opinions on a fitness-for-duty certification may be required." 29 CFR § 825.312(b). The Hospital further claims that case law has rejected the proposition that the ADA permits a fitness-for-duty examination where the employee's physician certified the employee's fitness for duty.

Moreover, the Hospital argues that, contrary to Duckett's contention, it did not violate its handbook's procedures. It

observes that the handbook provides that, where an employee has been referred to EAP, it is the employee's obligation "to follow through with the prescribed treatment." Exhibits "33" and "45" to Dweck Aff. Further, the Hospital points to the handbook provision which simply states that, on returning to work, the employee must provide a clearance note from his/her physician (Exhibit "46" to Dweck Aff.), and that there is no policy requiring the returning employee to have a permanent treatment plan in place.

#### The Applicable Law

On summary judgment, the movant bears the initial burden of *prima facie* establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Id.* Where the moving party makes its required showing, the burden shifts to the opponent to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

In an employment disability discrimination case, the plaintiff is required to "satisfy the minimal burden of making out a *prima facie* case." *Koester v New York Blood Ctr.*, 55 AD3d 447, 448 (1st Dept 2008). Under both NYSHRL and NYCHRL, such a plaintiff must *prima facie* demonstrate that he or she suffered from a disability and that the disability caused the behavior which led to

his or her termination. *Matter of McEniry v Landi*, 84 NY2d 554, 558 (1994); *Jacobsen v New York City Health & Hosps. Corp.*, 97 AD3d 428, 431 (1st Dept 2012); *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 (2d Dept 2006); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1st Dept 2006). See also Executive Law § 296(1)(a); Administrative Code of City of NY § 8-107(1)(a).

Once that showing is met, the burden shifts to the employer to establish that "the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a legitimate nondiscriminatory reason." *Matter of McEniry v Landi*, 84 NY2d at 558. Where the employer meets its burden, the plaintiff must then show that the employer's purported reason for terminating the employee was a pretext and that discrimination was the employer's true motivation. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 (1st Dept 2011). An employee fails to establish pretext simply by showing that he or she has previously received some favorable evaluations. *Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 197 (1st Dept 1998).

Alternatively, the plaintiff can seek to establish that, even though there was a legitimate basis for the termination, there was also a discriminatory basis, i.e., that there were mixed motives for the firing. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 326 (2004); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st

Dept 2012); *cf.*, *Parker v Columbia Pictures Indus.*, 204 F3d 326, 336-338 (2d Cir 2000) (applying mixed-motive analysis in ADA case). At least in NYSHRL cases, once the employee shows that discrimination was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that it would have made the same decision, irrespective of the discriminatory factor. *Sandiford v City of New York Dept. of Educ.*, 23 NY3d 914 (2013); *Raskin v Wyatt Co.*, 125 F3d 55, 60 (2d Cir 1997).

On a summary judgment motion in a discrimination case involving NYSHRL, the defendant must show, as a matter of law, either that the "plaintiff cannot establish the elements of intentional discrimination, or that the plaintiff cannot raise a triable issue of fact as to whether the facially legitimate, nondiscriminatory reasons proffered by the [defendant for its] challenged actions were pretextual." *Ehmann v Good Samaritan Hosp. Med. Ctr.*, 90 AD3d 985, 985-986 (2d Dept 2011) (internal quotation marks and citation omitted); *Considine v Southampton Hosp.*, 83 AD3d 883, 884 (2d Dept 2011); *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997). A defendant seeking summary judgment on a NYCHRL claim must demonstrate that "no jury could find [it] liable under any of the evidentiary routes . . .," including via the mixed-motive and pretextual routes. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d at 41.

NYSHRL "protects from discrimination those individuals with disabilities which, with or without reasonable accommodation, do not prevent the individual from performing the duties of the job in a reasonable manner." 9 NYCRR § 466.11(c)(1). An NYSHRL disability includes mental impairments which "prevent[] the exercise of a normal bodily function or is demonstrable by medically accepted clinical ... diagnostic techniques, [or] a record of such an impairment." 9 NYCRR § 466.11(c)(2)(i), (ii); Executive Law § 292(21). Furthermore, with regard to employment discrimination cases, the term "disability" "is limited to disabilities which, upon the provision of reasonable accommodation do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." 9 NYCRR § 466.11(c)(2)(iii). Since the definition of disability in employment cases is so limited, the employee, as part of his or her prima facie showing, is required to present evidence that, if a reasonable accommodation had been provided, the employee could have performed the essential elements of his or her job. *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 (2013); *Phillips v City of New York*, 66 AD3d 170, 178 (1st Dept 2009); *Evans v City of New York*, 64 AD3d 468, 468 (1st Dept 2009).

A reasonable accommodation, under NYSHRL, pertains to actions which allow an employee "with a disability to perform in a reasonable manner the activities involved in the job ... provided,

however, that such actions do not impose an undue hardship on the business....” 9 NYCRR § 466.11(a)(1). A reasonable accommodation can include “adjustments to work schedule for treatment or recovery.” 9 NYCRR § 466.11(a)(2). However, under NYSHRL, an indefinite leave of absence is not considered a reasonable accommodation. *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 884.

The employer must consider a reasonable accommodation when it is aware of the disability and the need for an accommodation or where a disabled employee informs the employer of the disability and asks for an accommodation. 9 NYCRR § 466.11(e)(1), (2); see also Executive Law § 296(3)(a) (an employer discriminates when it fails to afford reasonable accommodations to “known disabilities”). Generally, an employee has the duty to “make the disability and the need for an accommodation known to the employer.” 9 NYCRR § 466.11(k)(1). The reason an employee is required to request an accommodation is to “ ‘prevent an employee from keeping her disability a secret and suing later for failure to accommodate,’ ” a concern which is irrelevant where the employer has independent knowledge of the disability. *Cf. Brady v Wal-Mart Stores, Inc.*, 531 F3d 127, 135 (2d Cir 2008) (citation omitted) (relating to failure to accommodate under ADA). The request for accommodation may be made by the employee’s representative. 29 CFR § 825.303(a). Where the employee is unable to make a request and the disability

is obvious, i.e., the employer is aware or should have been aware of the disability, the employer has a duty to reasonably accommodate the employee. *Cf. Brady v Wal-Mart Stores, Inc.*, 531 F3d at 134-135.

Under NYCHRL, which to effect its remedial powers is to be construed more liberally and broadly than, and independent from, NYSHRL and comparable federal laws (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 65-69 [1st Dept 2009]), "disability" is defined as "any ... mental or psychological impairment, or a history or record of such impairment." Administrative Code of City of NY § 8-102(16)(a). The NYCHRL's definition of "disability," unlike the NYSHRL's definition, does not incorporate the ability to perform the job in a reasonable manner or with "reasonable accommodation." *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 885. An employer is required, under NYCHRL, to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job ... provided that the disability is known or should have been known by the [employer]." Administrative Code of City of NY, § 8-107(15)(a). The foregoing is subject to the employer's "affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job ...." Administrative Code of City of NY, § 8-107(15)(b). A reasonable accommodation, under NYCHRL, is one "that can be made that shall

not cause undue hardship in the conduct of the covered entity's business." Administrative Code of City of NY § 8-102(18). As contrasted with the NYSHRL, under the NYCHRL, the burden of proving undue hardship is on the employer (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 885; Administrative Code of City of NY § 8-102[18]), and "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation." *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 884 (internal citation and quotation marks omitted).

Under NYSHRL and NYCHRL, an employer faced with a request for an accommodation, or who knows or should have known that the employee requires an accommodation, must engage in an interactive process to assess the employee's needs and the reasonableness of any requested accommodation. *Phillips v City of New York*, 66 AD3d at 175-178; see also *Pimentel v Citibank, N.A.*, 29 AD3d at 149. Nevertheless, the protections afforded disabled employees are "not intended to create a safe haven for individuals who resort to recovery programs as a pretext for avoiding otherwise legitimate disciplinary action." *Matter of McEniry v Landi*, 84 NY2d at 560; *Hazen v Hill Betts & Nash, LLP*, 92 AD3d 162, 171 (1st Dept 2012). Further, in not every case where the employee is purportedly rehabilitated is disciplinary action prohibited, since "[t]he review is individualized." *Matter of McEniry v Landi*, 84 NY2d at

560-561. For example, an employee who has a "propensity to relapse, may be found unable to perform the job in a reasonable manner." *Id.* at 561.

With respect to a disability discrimination claim, an employee who bears the ultimate burden of establishing that he or she could have performed the job with a reasonable accommodation and who has filed for long-term disability benefits, under either a private insurance policy or Social Security Disability Insurance ("SSDI"), can be estopped from asserting that she could have performed the job with a reasonable accommodation, unless she demonstrates that she could have performed the job with a reasonable accommodation so as to explain the apparent inconsistency in the benefits application, *i.e.*, that she was completely disabled, from the claim in the discrimination action that he or she could have performed with a reasonable accommodation. *Cleveland v Policy Mgt. Sys. Corp.*, 526 US 795, 796 (1999) (as applied to an employee asserting an ADA claim, where she had previously filed an SSDI application); *Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d 961, 963 [3d Dept 2005]) (*Cleveland* applicable to claims under NYSHRL); *Parker v Columbia Pictures Indus.*, 204 F3d at 332, n 1, 332-336 (applying *Cleveland* to ADA and NYSHRL claims where employee filed SSDI and private long-term disability insurance claims).

### DISCUSSION

The Hospital's claim that Duckett's application for disability benefits defeats her claim that she is able to perform her job duties is unavailing because, as to Duckett's NYSHRL cause of action, the case law upon which the Hospital relies is inapt because it pertains to applications for long-term disability. Here, Duckett's claims were merely for temporary assistance and for New York State Disability benefits, which afford only short-term relief of up to 26 weeks (Workers' Compensation Law § 205[1]). Furthermore, as to Duckett's NYCHRL cause of action, she does not bear the ultimate burden of establishing that she could have performed the job with a reasonable accommodation.

Duckett did fail to show that she requested any accommodation from the Hospital due to her disability, other than the work schedule accommodation she requested in the Fall of 2006, and which the Hospital granted her. The letters from Duckett's father are unavailing, because they were written post-termination. Moreover, her father's letters, which indicated that Duckett was terminated "prematurely" and requested that the Hospital reinstate her, were based on either a misunderstanding or a falsehood, namely that the Hospital inappropriately summoned her back to work, rather than Duckett insisting upon returning to work full-time. The letters from Duckett's father neither indicated the nature or details of Duckett's disability, nor whether she was able to perform her job

if reinstated. Significantly, even at that point, all that the letters requested were that Duckett be reinstated by the Hospital, without a request for any accommodations.

While Duckett neither requested an accommodation during the time that she was placed on a work improvement plan nor when she was informed that her job security was tenuous and that she was about to be suspended, once Duckett informed her supervisor that she was suffering from emotional and physical problems, this revelation triggered the Hospital's obligation to begin the required interactive process, which it did at that point when she was referred to WHS by her supervisor. While not all of the Hospital's personnel who decided on Duckett's termination had knowledge of her psychological and emotional problems before she took her leave of absence, several of them did know of them. In addition, the Hospital was certainly on notice of Duckett's psychological and emotional disabilities once she was referred to WHS and then to EAP.

Initially, the Hospital was entitled to rely on Dr. Boardman's unrestricted clearance note, irrespective of whether Dr. Boardman read it or whether it was accurate. A return-to-work note "need only be a simple statement of an employee's ability to return to work." *Brumbalough v Camelot Care Ctrs., Inc.*, 427 F3d 996, 1003, 1003-1004 (6th Cir 2005). Even where an employer chooses to request clarification or more information from the employee, the

employer cannot delay in reinstating the employee. *Id.*; see also 29 CFR § 825.312(b). However, once Duckett returned to work and began exhibiting the same problems which led to her being referred to the Hospital's WHS and the EAP, a triable issue of fact exists as to whether the Hospital knew or should have known that Duckett's disability was not alleviated or resolved. To begin with, immediately upon Duckett's return to work at the Hospital, she exhibited several lapses. Specifically, on her first day back on June 14, 2010, Duckett arrived late without informing her supervisor, Vander Venet, in advance of either her delay or the reason for it. In addition, Duckett failed to submit her "return to work" letter to her supervisor as directed but inexplicably left it with the security guard instead. The next day, Duckett improperly calendared meetings. Then on June 17, 2010, the morning of a high-level medical board meeting, Duckett lost the USB drive containing important materials for the meeting but failed to inform her supervisor that she had until Vander Venet questioned her regarding Duckett's preparedness.

Although the Hospital was obligated to accept Duckett's return to work upon her clearance by her doctor's letter, her behavior immediately upon her return was sufficient to question whether she was still disabled. Once Duckett began exhibiting the same or very similar problems as she had when she was referred to WHS and EAP (e.g., failure to properly schedule or notice meetings, loss of a

USB drive, lateness and/or absence, questionable decision-making), that raises a triable issue of fact as to whether the Hospital knew or should have known that Duckett was still disabled and unable to perform her duties without additional reasonable accommodation sufficient to trigger another interactive process on the part of the Hospital, which the Hospital simply failed to do.

**CONCLUSION**

Accordingly, since there are questions of fact as to whether Duckett's behavior upon her return to work should have caused the Hospital to know that she was still disabled, thereby once again triggering the obligation for the Hospital to engage in an interactive process to find a reasonable accommodation for Duckett under both NYSHRL and NYCHRL, it is hereby

ORDERED that the motion for summary judgment by defendant New York Presbyterian Hospital is denied.

The foregoing constitutes the decision and order of this Court.


**FILED**

OCT 23 2014

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER :

Dated: October 21, 2014  
New York, New York

  
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Hon. Shlomo S. Hagler, J.S.C.