SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
HYACINTH SEIVRIGHT,

Plaintiff,

Index No. 21466/14E

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

MONTEFIORE MEDICAL CENTER,

Defendant.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1-3
Answering Affidavit and Exhibits	4-5
Replying Affidavit and Exhibits	6-7
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint, is granted.

Plaintiff commenced this personal injury action, alleging, *inter alia*, wrongful termination. Plaintiff claims that she was discriminated against on the basis of her disability and age when, on October 21, 2010, after having worked for defendant for more than 32 years, she was terminated at the age of 67 due to defendant's failure to offer her a reasonable accommodation. Plaintiff testified that defendant terminated her on October 21, 2010 because she had not identified and secured a new position in the time period provided by the Collective Bargaining Agreement (CBA) between the New York State Nursing Association (NYSNA) and Montefiore Hospital. Defendant argues that plaintiff's action should be dismissed as the federal court dismissed plaintiff's

discrimination claims, and that she was terminated only after she rejected defendant's attempts to reasonably accommodate her disability.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])" (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

Plaintiff was in a sedentary position at defendant's hospital, where she remained until January 16, 2008, when she suffered an on-the-job injury. Upon her return to work in June of 2009, plaintiff worked in a position that required her to perform physical tasks. Plaintiff remained in that position until her car accident on September 24, 2009. As a result, she was out on medical leave until March 24, 2010. Janet Hunter, defendant's training and placement manager, met with plaintiff weekly to review current vacancies. Plaintiff acknowledged that sedentary positions which otherwise fit her skillset became available, but she did not express any interest in applying because they did not meet her additional criteria. She testified that she " would not have accepted a non-NYSNA position . . . that was going to have [her] take a pay cut." Since no satisfactory positions were found, defendant terminated plaintiff's employment on October 21, 2010, noting that the maximum nine-month period permitted for personal illness leave under the CBA had expired more than three months ago.

It is well settled that when a precise issue has been determined in a prior action

or proceeding, during which a party had a full and fair opportunity to litigate said issue, that party, or those with whom it is in privity, will be collaterally estopped from raising the issue again in a subsequent proceeding (*see generally Singleton Mgt. v Compere*, 243 AD2d 213, 215-216 [1st Dept 1998]). The District Court made clear in its decision and order that it was granting summary judgment in favor of defendant on plaintiff's claims for age discrimination arising under the federal Age Discrimination in Employment Act (ADEA), as well as the New York State Human Rights Law (State HRL) and the New York City Human Rights Law (City HRL), noting that plaintiff had failed to offer any responsive arguments on the points in her brief submitted in opposition to defendants' motion. Since plaintiff had a full and fair opportunity to oppose dismissal of those claims, their adjudication by the U.S. District Court has collateral estoppel effect. The court therefore grants the branch of the motion to dismiss plaintiff's age discrimination claims based on the State HRL and City HRL.

Defendant also moves for summary judgment dismissing plaintiff's disability discrimination claims arising under the State HRL and City HRL, on the ground that the evidence shows that she was terminated only after she rejected defendant's attempts to reasonably accommodate her disability over a period of several months. "[T]he State HRL forbids employment discrimination on the basis of an employee's disability, and the City HRL provides even greater protection against disability-based discrimination" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833-834 [2014]), and each statute provides broader protection than their federal counterparts (*see Phillips v City of NY*, 66 AD3d 170, 176 [1st Dept 2009] ["The State HRL provides protections broader than the ADA; and the City HRL is broader still."]). An employee "states a prima facie

case of discrimination under both the State HRL and City HRL if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee was terminated" (*Jacobsen*, 22 NY3d at 834). Moreover,

> Under the State HRL, if an employee has a physical impairment that prevents the employee from performing the core duties of his or her job even with a reasonable accommodation, the employee does not have a disability covered by the statute, and consequently, the employer is free to take adverse employment action against the employee based on that impairment. On the other hand, if a reasonable accommodation would permit the employee to perform the essential functions of the employee's position, the employee has a 'disability' within the meaning of the statute, and the employer cannot disadvantage the employee based on that disability. A reasonable accommodation for an employee's impairment is one which permits an employee with a disability to perform in a reasonable manner the activities involved in the job and does not impose an undue hardship on the employer's business (*Jacobsen*, 22 NY3d at 834 [cleaned up] [citations and quotations omitted]).

"Although the State HRL and City HRL maintain separate burdens of proof at trial regarding the existence of a reasonable accommodation, under both statutes an employee's request for an accommodation is relevant to the determination of whether a reasonable accommodation can be made" (*id* at 835). The State HRL "defin[es] a 'reasonable accommodation' in terms of an employee's request for accommodation and the employer's ability to conduct its operations within the limits of the employee's proposed arrangement," and hence, "any ensuing dialogue about the impact of the proposed accommodation on the employer's business inform the determination of whether a reasonable accommodation exists" (*id*). The statute imposes "an 'individualized standard' for determining whether an employee could perform the essential functions of his or her job with a reasonable accommodation" (835-836). An

employer therefore cannot, under the State HRL, "disadvantage a disabled employee based on a generalized sense that disabilities of the kind suffered by the employee can rarely be accommodated and that the employee is unlikely to be able to satisfy his or her employment responsibilities" (*id* at 836). Rather, the statute "require[s] that, where the employee seeks a specific accommodation for his or her disability, the employer must give individualized consideration to that request and may not arbitrarily reject the employee's proposal without further inquiry."

"Consequently, to prevail on a summary judgment motion with respect to a State HRL claim, the employer must show that it 'engaged in a good faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested'" (*Jacobsen*, 22 NY3d at 837 [cleaned up], *quoting Phillips*, 66 AD3d at 176). This interactive process contemplates that the parties "speak[] openly about an employee's impairment and the employer's ability to adjust its practices to meet the employee's needs" (*id*). Showing proof that it engaged in such a process, permits the employer seeking summary judgment on a State HRL claim to present a record "demonstrating that there is no triable issue of fact as to whether the employer duly considered the requested accommodation" (*id*).

Unlike the State HRL, "the City HRL's definition of 'disability' does not include 'reasonable accommodation' or the ability to perform a job in a reasonable manner, but rather defines 'disability' solely in terms of impairments" (*Jacobsen*, 22 NY3d at 834 - 835 [citations and quotations omitted]). The City HRL's "definition of 'reasonable accommodation' is itself unique: 'such accommodation that can be made that shall not

cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship'" (*Watson v Emblem Health Servs.*, 158 AD3d 179, 181-182 [1st Dept 2018], *quoting* NYC Administrative Code 8-102 [18]). The statute therefore "places squarely on the shoulders of a defendant the burden of persuasion to prove, as an affirmative defense, that even with reasonable accommodation, a plaintiff could not perform the essential requisites of a job." (*Phillips*, 66 AD3d at 184; *see also Jacobsen*, 22 NY3d at 835).

Defendant argues that under the CBA with plaintiff's union it was required to permit her to return to the same CMC job title and function which she enjoyed pre-leave, but since that position did not satisfy her medical restrictions, defendant's provision of an accommodation was satisfied by fulfilling its alternative obligation under the CBA of permitting her to apply to other open positions. The evidence shows that defendant not only permitted this, but aided in plaintiff's search by meeting with her weekly for five months to identify suitable positions. The court finds that under these circumstances, these efforts constituted a good faith interactive process of attempting to accommodate plaintiff's disability based on her individualized circumstances, *to wit*, the specific medical restrictions which required that she be assigned only to a sedentary position.

Plaintiff argues that the five-month process of attempting to locate an available sedentary position does not constitute a good faith interactive process because this occurred only after defendant had already unilaterally declared that it would not offer any other accommodation, as shown by its letters of March 11, 2010 and June 3, 2010.

This is belied, however, by both the record evidence and plaintiff's pleadings. As to the latter, it is noted that plaintiff's complaint specifically alleges that defendant's refusal to accommodate her disability commenced in May of 2010 when it did not assign her to a sedentary RN position. The March 11, 2010 letter cannot serve as evidence of an alleged failure to accommodate that did not start until two months later.

In any event, the March 11, 2010 letter did not indicate a refusal to accommodate, since it merely reiterated that plaintiff had to resume work by March 24th in order to guarantee that she could return to her same position, and at that time defendant did not know of plaintiff's new disabilities, since it is undisputed that she first notified defendant of this when she appeared on March 24th and submitted Dr. Palmieri's evaluation of the same date. That Occupational Health Services (OHS) refused to permit plaintiff to resume work on that date is not evidence of a failure to accommodate, since it is undisputed that plaintiff required a sedentary position, the position to which she would have returned was not sedentary, and there is no evidence that defendant could have spontaneously provided her with a sedentary position. Defendant waiting to obtain clarification from Dr. Palmieri before clearing plaintiff to return to work, demonstrates an attempt to ascertain the nature and extent of the medical restrictions so as to make an informed individualized assessment, as contemplated by the State HRL and City HRL.

Plaintiff's contention that the March 11, 2010 and June 3, 2010 letters advised her of only one option, thus proving that defendant had no intention of providing a reasonable accommodation ignores that plaintiff has already acknowledged that her specific medical restrictions rendered her incapable of performing the duties in her

position. She confirmed as much in the complaint when she specifically alleged that the accommodation she sought was a sedentary RN position. In contrast, as noted above, the job description provides that the job's physical requirements involve exertion of forces greater than that for sedentary work, and the detailed explanation provided by plaintiff's former direct supervisor indicated that the position required standing, walking, or pulling of equipment for 5½ hours out of the 7½ hour work day.

Plaintiff argues in her papers opposing this motion that what she really wanted was a position in defendant's office that she could physically perform, like what she had. The title that plaintiff held from 2004 through January 2008 was a sedentary job, but defendant established that no such positions became available during 2010 and 2011. Although plaintiff now argues that defendant should have kept open the job she worked in before her most recent medical leave, that was the position that she has always maintained she could no longer perform due to the medical restrictions identified by Dr. Palmieri. Moreover, plaintiff's present argument that the submission of Dr. Palmieri's March 24, 2010 note should have started the interactive process to determine additional reasonable accommodations with respect to her position, contradicts the theory of liability that she had, up until the instant motion practice, consistently maintained since the inception of this action, which is that it was defendant's refusal to assign her to a sedentary RN position which constituted the failure to provide a reasonable accommodation. It is noted that plaintiff has stated in her opposing papers that the parties in this case were proceeding on the factual record developed in the federal action which resulted in the grant of a motion for summary judgment back in 2014. In any event, on the same date it received the March 24th note,

defendant requested additional information from plaintiff's doctor and asked its nursing recruiter to look out for sedentary positions. This shows that defendant immediately started the interactive process.

As the Court of Appeals has instructed, "under both [the State HRL and City HRL] an employee's request for an accommodation is relevant to the determination of whether a reasonable accommodation can be made" (*Jacobsen*, 22 NY3d at 835). Here, the specific accommodation identified was an assignment to a sedentary position as per the restrictions imposed by Dr. Palmieri, and plaintiff expressly requested this when she submitted his evaluations. Plaintiff, however, also desired a union RN position at the same salary, but the evidence does not show that any positions meeting all of these criteria were available. To the contrary, defendant showed that sedentary positions satisfying plaintiff's medical restrictions were available, but plaintiff expressed no interest in applying to them because they did not meet her desired non-disability related prerequisites, despite the unrebutted evidence that defendant's policy was to attempt to approximate a reassigned employee's salary. On these facts, meeting with plaintiff every week for five months in an attempt to find a position that satisfied her medical restrictions sufficiently establishes that defendant engaged in the good faith interactive process contemplated by both anti-discrimination statutes. In so doing, "[d]efendant[] w[as] not required to provide plaintiff with the specific accommodation she preferred" (*Porter v City of NY*, 128 AD3d 448, 449 [1st Dept 2015]).

Plaintiff additionally argues that defendant failed to show that it could not have provided other forms of reasonable accommodations that would have allowed her to perform in the position and not have constituted an undue hardship to defendant,

suggesting that defendant could have "provid[ed] proper seating and a motorized cart to transport her equipment or otherwise accommodate [her] in her journey to the patient floor." An employee's purported inability to perform the essential job functions even with a reasonable accommodation is an affirmative defense that must be pleaded and proved under the City HRL (*see Phillips*, 66 AD3d at 184), but as with any defense, it need not be raised if it is inapplicable to the facts of the case. Rather, an employer may obtain summary judgment upon a showing that the employee rejected reasonable accommodations offered as a result of the good faith interactive process (*see DeFrancesco v Metro-North R.R.*, 112 AD3d 445, 446 [1st Dept 2013] [summary judgment properly awarded because employer "engaged in a good faith interactive process and offered plaintiff a choice of positions that did not require use of the (purportedly anxiety-inducing device), which she rejected"]). Notwithstanding that the record shows that defendant engaged in an interactive process with plaintiff regarding the specific accommodation that she requested at the time, it must be noted that plaintiff raised a similar argument before the U.S. District Court, which found that

> "the record establishe[d] that this [CMC] position required her to work on different floors and in different buildings on a day-to-day basis, to retrieve patient charts from various locations, and move other heavy objects such as a computer and reference books, such that a fixed seating location or motorized cart would not necessarily have eliminated the substantial physical effort that the position required."

The Court also found that the *post hoc* request was inconsistent with the record, noting that plaintiff did not demonstrate any desire to return to the position, noting that

she did not request to apply to those which became available during the five-month period from May through October of 2010 (*see id*, p. 17).

Plaintiff also alleges bad faith, citing e-mails showing that some human resources personnel complained about having to hold her position open due to staffing deficits, and the lack of evidence corroborating defendant's claim to have been unable to secure a temporary replacement after plaintiff's eighth week of leave in the fall of 2009 so as to guarantee that she could return to her same position in accordance with the CBA. In order to show a nexus between the discriminatory remarks and the adverse decision, the remarks must be probative of an intent to discriminate, and must have been made by the decision maker close in time to the adverse decision or in relation to the decision (*see Mete v NY State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 [1st Dept 2005] [granting summary judgment to employers on age discrimination claim under the State HRL]). Moreover, "even a decision maker's stray remark, without more, does not constitute evidence of discrimination" (*id*; *see also Wecker v City of NY*, 134 AD3d 474, 475-476 [1st Dept 2015] ["stray derogatory remarks, without more, do not constitute evidence of discrimination;" granting summary judgment to defendant on housing discrimination claim under the City HRL]). The remarks complained of in the e-mails are not facially indicative of animus towards plaintiff's perceived disability or other trait, nor were they authored by Narissa Chin, the person identified by the District Court as having made the decision to terminate plaintiff.

The court declines to consider the arguments raised in plaintiff's opposing papers concerning a purported claim for retaliation under the State HRL and City HRL.

The complaint does not raise any such causes of action, nor does it even allege the factual predicate for same. The plaintiff does not allege nor is there any indication that plaintiff filed an amended complaint or a bill of particulars asserting such a claim. The court therefore finds that there is no retaliatory action claim in this case.

Accordingly, the Clerk is directed to dismiss the instant action.

The foregoing shall constitute the decision and order of this court.

Dated: DEC 15 2020

J.S.C.

☒ Motion is granted
☒ Action is dismissed