SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Marivi Wolfe-Santos

INDEX NO. 160963-2016

MOT. DATE

- v -

MOT. SEQ. NO. 008

NYS Gaming Commission et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS Doc. No(s). 224-279
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS Doc. No(s). 281-312
Replying Affidavits	ECFS Doc. No(s). 315

In this action, plaintiff seeks to recover from her former employer, the NYS Gaming Commission (the "Commission"), for unlawful discrimination, retaliation and failure to accommodate in violation of the New York State Human Rights Law, Exec. Law § 290 *et seq.* ("NYCSHRL"), and the New York City Human Rights Law, Admin Code § 8-101 *et seq.* ("NYCHRL"). Plaintiff also sought to recover for personal injuries she sustained when she fell and was injured while visiting a retailer's location in the course of her employment with the Commission. Plaintiff's personal injury claims against the retailer were dismissed for failure to provide discovery (see decision/order dated May 21, 2020).

Defendants are the Commission, Cynthia Wong, Sara Ying, Michelle Castler, Frederick Perrone, and Francisco Collazo (without the Commission, herein referred to as the "individual defendants"). Defendants now move for summary judgment on the grounds that plaintiff's NYCHRL-based claims are barred by the doctrine of sovereign immunity and her NYSHRL-based claims must be dismissed as law of the case or on the merits. Plaintiff opposes the motion, arguing that defendants waived their sovereign immunity to plaintiff's NYCHRL-based claims and that triable issues of fact preclude summary judgment.

At the outset, defendants' motion for summary judgment dismissing plaintiff's NYCHRL-based claims under the doctrine of sovereign immunity is denied. "[N]o sovereign may be sued in its own courts without its consent" (*Nevada v. Hall*, 440 US 410 [1979] *overruled by Franchise Tax Bd. of California v Hyatt*, 139 SCt 1485 [2019]). The State waived its immunity to actions arising from the NYSHRL, but not the NYCHRL (*Ajoku v. New York State Off. of Temporary & Disability Assistance*, 198 AD3d 437 [1st Dept 2021] *citing Jattan v. Queens Coll. of City Univ. of N.Y.*, 64 AD3d 540 [2d Dept 2009]).

Dated: 8/22/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☑ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Plaintiff argues that the defendants waived their sovereign immunity defense because they "litigated this case on the merits" by filing answers to the complaint and amended complaints "without moving to dismiss on the grounds of Sovereign Immunity, or seeking summary judgment on immunity grounds." However, defendants are now moving for summary judgment on immunity grounds. Plaintiff further complains that defendants did not raise an immunity defense in their motion to dismiss, which defense counsel explains by pointing to *Ajoku*, *supra*, which was decided after defendants' motion was decided.

The State may waive its sovereign immunity "by voluntarily invoking a court's jurisdiction or by its litigation conduct in that court" (*Belfand v. Petosa*, 196 AD3d 60 [1st Dept 2021]). In *Belfand*, the First Department held that New Jersey Transit waived the defense by not only failing to raise it in a responsive pleading, but by raising the defense after conceding liability, losing at a first trial on damages, and only raising the defense in connection with a motion to dismiss the second trial on damages several years later. Thus, the *Belfand* Court concluded that New Jersey Transit's litigation conduct was "inescapably a clear declaration to have our courts entertain this action."

In *Fetahu v. New Jersey Transit Corporation* (197 AD3d 1065 [1st Dept 2021]), the First Department again held that New jersey Transit had waived a sovereign immunity defense because it "did not assert the defense until six years after commencement of this action, and had by then defended against the case on the merits."

While *Belfand* is factually distinguishable from the instant case, *Fetahu* is not. This motion was filed approximately six years after this action was commenced and defendants have never raised the defense of sovereign immunity before, either in a responsive pleading or on the prior motion to dismiss (compare *Milord-Francois v. New York State Office of Medicaid Inspector General*, 635 FSupp3d 308 [SDNY 2022] [defendants raised sovereign immunity as a defense in their answer]). To the extent that defendants argue that they could not assert the defense before *Ajoku* was decided, the First Department has squarely rejected such an argument in *Belfand*. Even if defendants did not think a sovereign immunity defense was available to the individual defendants, it has long been available to the Commission vis-à-vis the State (*Belfand*, *supra* at 72 citing *Nevada v. Hall*, *supra*). Accordingly, given the procedural posture of this case, the court finds that the defendants have waived a sovereign immunity defense.

The court now turns to the parties' substantive arguments. The relevant facts are as follows. Plaintiff was hired as a probationary marketing lottery representative ("MLR") with the Commission on January 14, 2016. According to the official MLR job description, plaintiff was to "engage in extensive face-to-face communications by visiting existing retailers (licensed lottery sales agents) in an assigned territory to assist retailers in maximizing sales at their location; telephone retailers and follow-up on actual visits, oversee each retailers instant game inventory . . . remove slow moving inventory/products; visit and recruit potential retailers to market Lottery games; and encourage retailer participation in selling and promoting Lottery products to their customers."

Approximately a week after plaintiff started working for the Commission, she was hospitalized for pneumonia. Plaintiff returned to work on February 1, 2016. On Friday, April 15, 2016, plaintiff fell while on the job during a site visit to a retailer. The following Monday, April 18, plaintiff sent a series of emails to defendant Francisco Collazo, her direct supervisor, documenting the accident, requesting that she be "mark[ed] out sick" and advising that she was going to see a doctor. Later that day, plaintiff submitted a doctor's note noting a "possible head concussion," and advising that she could return to work on April 22. Plaintiff however was not cleared to return to work that day due to headaches and nausea. On April 28, 2016, Dr. Han, Plaintiff's Neurologist, diagnosed her with a "temporary to moderate marked impairment."

On May 12, 2016, Dr. Han faxed a letter to Maria Williams, an employee at the Workers Compensation ("WC") unit at the Commission's Business Services Center ("BSC"), stating that plaintiff had a "neurological condition" and was "not to return to work pending her next appointment on 6/6/16." On June 3, 2016, Plaintiff obtained an "Estimated Physical Capabilities Form" ("EPC") from her doctor, stat-

ing that she "has temporary impairment in the degree of 50% [and c]an return to work with reduced site visits," and could resume "alternate duty" on Monday, June 6, 2016.

Plaintiff claims in her sworn affidavit that Collazo and defendant Cynthia Wong, her manager, requested that plaintiff work from home despite Dr. Han's directions. She further states that when she returned to work, Collazo gave her a performance evaluation covering the period from January through April 2016 which counted Workers' Compensation days of as "days absent" and days she took off for medical follow-ups related to her first physicial disability as "days absent". Plaintiff theorizes that "they were calculating my time off as 'days absent' on purpose to have an excuse for firing me, because they were annoyed that I was taking time off so soon after being hired."

Copies of the performance evaluations have been provided to the court. The first one recommended Termination and the second one recommended Continued Probation. Both of these reports provided in pertinent part as follows:

> Marivi's volume of output and ability to meet the work schedule is way below what is expected. Her job requires her to visit Lottery retailers on a regular cycle to service the retailers and assist the retailers in maximizing sales.
>
> Marivi has the highest number of retailers that have not been visited and the highest number of discontinued Lottery books that needed to be returned. Due to Marivi's excessive absences, I have to assign her work to be completed by other Lottery Marketing Reps and me.
>
> ...
>
> As of 4/29/16, she has been absent 23 full work days from her appointment date of 1/14/16. This does not include in and out charges during her work days.
>
> ...
>
> Marivi's excessive absences have resulted in her not being able to perform her job duties and have been detrimental to our regional operations and an additional burden on the rest of my team.

Plaintiff refused to sign both evaluations. The third evaluation also recommended continued probation but modified the last paragraph quoted above to change 23 full work days to 10 full work days. Plaintiff accepted this evaluation.

Meanwhile, plaintiff claims that on her first day back to work, June 6, 2016, she asked Collazo for a reasonable accommodation. Collazo allegedly told plaintiff that she "would be fired immediately if [she] reduced [her] site visits." Plaintiff further details interactions between her and Collazo which she claims made her believe the Commission was trying to terminate her. For example, plaintiff admits to sending an email indicating that she could work without temporary restrictions, even though it wasn't true, because Collazo made her and she was "terrified of losing [her] job." Plaintiff also claims she heard from other employees that the individual defendants had discussed firing plaintiff.

On June 13, 2016, plaintiff complained to defendant Frederick Perrone, Regional Manager, that she was being discriminated against because she had taken time out on disability. Perrone allegedly told plaintiff that "Defendant Castler authorized the other Defendants to fire [plaintiff] while [plaintiff] was on WC leave" and in May 2016, Perone told "Collazo and Wong to, 'hold off from creating anything else' to be used to justify terminating [plaintiff's] employment."

Also in June 2016, plaintiff complained to her union reps about the Commissions failure to grant her a reasonable accommodation. Lisa Fitzmaurice from the Commission's HR Department sent an email to Jamel Harewood on July 11, 2016 that read as follows:

> Thank you for your inquiry on Marivi Wolfe…
>
> The employee does not have a reasonable accommodation. Rather, the employee has a Worker's Compensation case and was injured on the job. Upon the employee's return to work on 6/6/16 she has a physician's note in relation to the WC she has a light duty temporary restriction until 7/31/16 to the number of visits she can do in a day. The NYC management office is aware of this and it is my understanding that they have been working with her on that.

Despite this confirmation from Fitzmuarice that plaintiff was on "light duty", plaintiff claims that her site visits were not reduced. On July 29, 2016, plaintiff went out on disability leave and never returned to work. Additional emails between plaintiff's union representative and Fitzmaurice have been provided to the court where the latter reiterates that Marivi was on light duty but "did not ask for a reasonable accommodation".

Plaintiff's second amended complaint asserts six remaining causes of action[1]: disability discrimination in violation of the NYSHRL (1st COA) and against the individual defendants, only, in violation of the NYCHRL (4th COA), failure to accommodate in violation of the NYSHRL (3rd COA) and the NYCHRL (6th COA) and unlawful retaliation in violation of the NYSHRL (7th COA) and NYCHRL (8th COA).

Defendants argue that plaintiff's discrimination claims are deficient as law of the case, plaintiff's evaluation was not discriminatory, and her termination was required by law. As for the retaliation claims, defendants argue that plaintiff was terminated "not because of Plaintiff's alleged disability – or for performance reasons – but simply by operation of law because of her extended absence from her Gaming position." Finally, defendants maintain that it was not required to grant plaintiff's request for "a reduction in quantity of work", defendant did not make a reasonable accommodation request and in any event, plaintiff was permitted to cut down on her site visits but "voluntarily resumed greater volumes of work" (emphasis removed from original).

In turn, plaintiff contends that she has made out a prima facie case for disability discrimination because the Commission failed to engage in a good faith interactive process and denied plaintiff's request for a reasonable accommodation in the form of a temporary reduction in site visits. Plaintiff further argues that the Commissions' reasons for termination are mere pretext and that she was retaliated against for complaining about disability discrimination to both her union representatives and Perrone.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

[1] After codefendant M&A Gourmet Deli was dismissed from this case and plaintiff's hostile work environment claims were dismissed (see decision/order dated September 12, 2018).

A *prima facie* case of discrimination requires a showing by the plaintiff that: [1] she is a member of a protected class; [2] she was qualified to hold the position; [3] she was terminated from employment or suffered another adverse employment action; and [4] the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who must prove that the reason being offered is a pretext, and therefore false.

Failure to accommodate is a form of disability discrimination. The NYSHRL forbids employment discrimination on the basis of an employee's disability, and the NYCHRL provides even greater protection against disability-based discrimination (*Jacobsen v. New York City Health and Hospitals Corp.*, 22 NY3d 824 [1st Dept 2014]). Both require the employee to show that they suffer from a statutorily defined disability and the adverse action was taken because of the disability (*id.* citing *Matter of McEniry v. Landi*, 84 NY2d 554 [1994]). Under the NYSHRL, the employee must show that they could perform the essential functions of his or her job if given a reasonable accommodation, whereas under the NYCHRL, the employer bears the burden "to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business" (*id.* citing *Romanello v. Intessa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]).

Contrary to defendants' contention, this court's decision on plaintiff's motion to dismiss is not outcome determinative of plaintiff's remaining claims. The burdens are different, and the court's discussion of plaintiff's allegations at that juncture of the litigation are inapposite to the evidence before the court now.

Here, assuming *arguendo* that defendants met their burden and established that they did not discriminate against plaintiff based upon her disability, that she was not denied a reasonable accommodation or that she could not perform he essential functions of her job, plaintiff has raised a triable issue of fact on each point sufficient to survive summary judgment. At a minimum, defendants have not shown entitlement to summary judgment on plaintiff's NYCHRL-based failure to accommodate claim, since they have not established that a temporary site visit reduction would place an undue hardship on the Commission.

Further, a reasonable fact-finder could weight the parties' credibility and find that plaintiff's version of events, to wit, that she suffered from a disability and required a temporary reduction of work site visits, which she duly requested and was denied, led to adverse actions such as the numerous evaluations with negative performance appraisals and incorrect accrual tallies, that defendants were laying a groundwork which would justify plaintiff's eventual termination. On this final point, to the extent that defendants argue plaintiff's termination was by operation of law, the court disagrees. If defendants had provided plaintiff with the reasonable accommodation she requested, a temporary reduction in site visits, perhaps she never would have gone out on disability leave. On this record, where triable issues of fact abound on the parties' material disputes of whether plaintiff even requested a reasonable accommodation, summary judgment is not warranted. Accordingly, it is hereby **ORDERED** that defendants' motion for summary judgment is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/22/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.