UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARGRETTA FATCHERIC, Plaintiff, -against- THE BARTECH GROUP, INC., and DAWNETTE COOKE, in her individual capacity, Defendants.	:	15cv9702 OPINION & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff Margretta Fatcheric brings this employment discrimination action against her former employer The Bartech Group, Inc. ("Bartech") and former supervisor Dawnette Cooke (collectively, "Defendants"), alleging unlawful termination based on her disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., the New York State Human Rights Law ("NYSHRL"), New York Executive Law § 296 et seq., and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8–107 et seq. Defendants move for summary judgment dismissing this action. For the reasons that follow, Defendants' motion is denied.

BACKGROUND

Fatcheric worked as a Program Director at Bartech from March 2014 to January 2015. Bartech provides staffing to clients for functions, such as procurement, finance, and human resources. (Defendants' Statement of Material Facts ("DSMOF"), ECF No. 56 at ¶ 1.) Bartech's Program Directors manage client relationships and oversee service-delivery consultants. (DSOMF ¶¶ 2–3.) The Program Director job description does not indicate that

working on-site is a requirement of the position, but allows that Program Directors should build "subject matter expertise within . . . the client's environment." (March 6, 2017 Declaration of Joanne ("Seltzer Decl."), ECF No. 57, Ex. R.) On-site expectations for Program Directors depend on client needs—some work on-site every day, others work on-site two or three times per week. (DSMOF ¶ 3.)

In March 2014, Fatcheric applied to be the Program Director for Citicorp North America, Inc. ("Citi"). (DSMOF ¶ 2.) The position became available because her predecessor abandoned his post. (April 7, 2017 Declaration of Russell Wheeler ("Wheeler Decl."), ECF No. 59, Ex. 2 at 36.) Fatcheric interviewed for the position with Cooke, who would be her supervisor, and discussed a weekly schedule for the position. (DSMOF ¶ 7.) Initially, Cooke proposed a schedule in which Fatcheric would work three days per week on-site at Citi and two days per week remotely. (DSMOF ¶ 7; Seltzer Decl., Ex. D, at 1.) However, Fatcheric testified that Cooke also discussed the possibility that the on-site requirement could be reduced or eliminated. (Wheeler Decl., Ex. 4, at 36.) Cooke's notes, indicating that they discussed "adjust[ing]" the "on-site demand" and about working "remote 5 days a week," appear to corroborate Fatcheric's testimony. (Seltzer Decl., Ex. D, at 2, 4.) Internal, post-interview emails also confirm those discussions, indicating that Fatcheric would be on-site "3 days per week and maybe not always even that." (Wheeler Decl., Ex. 3, at 5.)

When Fatcheric commenced her employment, she commuted to Citi's office in Manhattan three days per week. (DSMOF ¶ 8.) Her primary contacts at Citi were Robb Walton and Janine Battaglia. (DSMOF ¶ 8.)

In April 2014, Fatcheric fell on her way to work, injuring her foot and knee. (DSMOF ¶¶ 10–11.) As a result, she was unable to commute to work and eventually required

surgery. (DSMOF ¶ 11.) Initially, Fatcheric refrained from telling Walton about her injury out of fear that he would be "very upset" with her inability to work on-site. (DSMOF ¶ 11.) This concern may have been premised on the fact that Walton wanted Fatcheric to be on-site until her remote access was available. (DSMOF ¶ 10.) In fact, shortly after the injury, Cooke emailed her supervisor, Brian Salkowski, explaining that Walton and Battaglia wanted Fatcheric replaced if she was out "much beyond this week." (DSMOF ¶ 12.) Cooke opined that Citi's low tolerance was due to the events surrounding the termination of Fatcheric's predecessor. (Seltzer Decl., Ex. I.) Once Fatcheric's remote access was configured, she worked exclusively off-site until June 2014, when she returned to her original schedule. (DSMOF ¶ 13; Fatcheric Decl., ¶ 18.)

In August 2014, Fatcheric injured her other knee, which prohibited her from working on-site until November 2014. (DSMOF ¶¶ 14–15.) During that period, the relationship between Bartech and Citi was strained. (DSMOF ¶ 16.) As Fatcheric acknowledged, she was not "100% . . . effective." (DSMOF ¶ 16.) Citi characterized her work as "sloppy" and Fatcheric responded with a "multi page diatribe" to the client that her Bartech supervisors regarded as unprofessional. (DSMOF ¶ 16.) Then in November, Fatcheric had to "scramble" to prepare a client presentation and was reminded by Cooke that she needed to prepare her presentations in advance. (DSMOF ¶ 19.)

In December 2014, Fatcheric sustained a third injury on her way to work. (DSMOF ¶ 20.) On December 9, Fatcheric informed Bartech and Citi that she would be out for the remainder of the week and possibly the following week due to her injury. (DSMOF ¶ 23.) When Battaglia learned of this absence, she told Cooke, "I think we do need to make a change. I haven't spoken to [Walton] yet….. but let's chat on Friday." (Plaintiff's Statement of Material Facts ("PSOMF"), ECF No. 58, ¶ 39.) That same day, Cooke recommended to Salkowski that

Fatcheric be terminated. (DSOMF ¶ 24; PSOMF ¶ 40.) Salkowski authorized Fatcheric's termination that day, but the decision was not communicated to Fatcheric for several weeks. (PSOMF ¶ 40.)

In the interim, Fatcheric provided Bartech with updates on her condition. (PSOMF ¶ 47; e.g., Wheeler Decl., Ex. 18.) Cooke encouraged Fatcheric to use the time to recover and not force an early return to work. (PSOMF ¶ 44 ("I have you off all week – so, use that time!").) On December 29, 2014, Fatcheric informed Cooke that she intended to return to work on January 5, 2015. (DSOMF ¶ 21; Wheeler Decl. Ex. 5.) She made this decision despite her doctors' recommendation that she should not commute. (DSOMF ¶¶ 21, 22.) According to Fatcheric, she intended to build her on-site presence back up to three days per week. (PSOMF ¶ 51.)

On January 5, 2015, Cooke terminated Fatcheric. (DSOMF ¶ 25.) After Fatcheric's termination, Bartech assigned an employee working at its Michigan headquarters as a short-term replacement Program Director. (DSOMF ¶ 25.) Bartech required that employee to commute from Michigan to New York and Florida as part of her Program Director responsibilities at Citi. (DSOMF ¶ 30.)

Shortly after her termination, Fatcheric contacted her short-term disability benefits provider to inform them that she was not ready to return to work. (DSOMF ¶ 28.) She remained incapable of commuting or performing on-site work until at least April 2015. (DSOMF ¶ 29.)

STANDARD

Summary judgment is appropriate only where all of the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making that determination, the Court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party asserts facts showing that the non-movant's claims cannot be sustained, the opposing party must "set out specific facts showing a genuine issue for trial," and cannot "rely merely on allegations or denials" contained in the pleadings. Fed. R. Civ. P. 56(e); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir.2010) (citations omitted). In addition, self-serving, conclusory affidavits, standing alone, are insufficient to create a triable issue of fact and defeat a motion for summary judgment. See BellSouth Telecommunications, Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996).

DISCUSSION

I. ADA and NYSHRL Claims

Employment discrimination claims under the ADA and the NYSHRL are subject to the McDonnell Douglas burden-shifting standard. See McMillan v. City of N.Y., 711 F.3d 120, 125 (2d Cir. 2013) (ADA); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (NYSHRL).

Under this framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. Delaney v. Bank of Am. Corp., 766 F.3d 163, 168 (2d Cir. 2014). To establish a prima facie case, a plaintiff must show by a preponderance of the evidence that: (1) her employer is subject to the ADA/NYSHRL; (2) she was disabled within the meaning of the applicable statute; (3) she was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) she either suffered adverse employment action because of her disability (wrongful termination theory), or her employer refused to make reasonable accommodations(failure to accommodate theory). Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000) ("[F]ailure to make reasonable accommodation, when the employee has satisfied the first three elements of his claim, amounts to discharge 'because of' [her] disability."); McMillan, 711 F.3d at 125; Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 118 (2d Cir. 2004); Spiegel v. Schulmann, 604 F.3d 72, 80 (2d Cir. 2010).[1]

If a plaintiff makes that initial showing, the burden shifts to the employer to demonstrate undue hardship in making a reasonable accommodation, Stone v. City of Mount Vernon, 118 F.3d 92, 97 (2d Cir. 1997) (failure to accommodate claims), or evidence of a legitimate non-discriminatory reason for the discharge, McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) (wrongful termination claims). "The defendant's burden also is light. The employer need not persuade the court that it was motivated by the reason it provides; rather, it must simply articulate an explanation that, if true, would connote lawful behavior." Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998).

[1] Although the ADA, NYSHRL, and NYCHRL define disability differently, see Giordano v. City of N.Y., 274 F.3d 740, 754 (2d Cir. 2001), they employ the same burden-shifting analysis.

If a defendant makes that demonstration, "the plaintiff must then produce evidence and carry the burden of persuasion that the proffered reason is a pretext." McBride, 583 F.3d at 96.

a. Prima Facie Case

The crux of this action is whether working on-site was an essential function of the Program Director position. Essential functions are "'fundamental' duties to be performed in the position in question, but not functions that are merely 'marginal.'" Stone, 118 F.3d at 97 (quoting 29 C.F.R. § 1630.2(n)(1) (1996)). "Although a court will give considerable deference to an employer's determination as to what functions are essential, there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions." McMillan, 711 F.3d at 126. Factors to consider include: "(i) [t]he employer's judgment as to which functions are essential; (ii) [w]ritten job descriptions . . . ; (iii) [t]he amount of time spent on the job performing the function; (iv) [t]he consequences of not requiring the incumbent to perform the function; (v) [t]he terms of a collective bargaining agreement; (vi) [t]he work experience of past incumbents in the job; and/or (vii) [t]he current work experience of incumbents in similar jobs." Stone, 118 F.3d at 97 (citing 29 C.F.R. § 1630.2(n)). In the end, "[c]ourts must conduct a 'fact-specific inquiry' to determine whether job duties are essential in nature." Daley v. Cablevision Sys. Corp., No. 12-CV-6316, 2016 WL 880203, at *5 (S.D.N.Y. Mar. 7, 2016), aff'd, No. 16-991, 2017 WL 506977 (2d Cir. Feb. 6, 2017).

Construing the record in the light most favorable to Fatcheric, the question of whether working on-site was an essential function of the Program Director position is in dispute. For instance, although the Program Director job description states that a Program Director should build "subject matter expertise within . . . the client's environment," it does not indicate that

being physically present on-site is a requirement. (Seltzer Decl., Ex. R.) And Bartech had different on-site expectations for its Program Directors depending on the client. (Seltzer Decl., Ex. A at 61–62.) Moreover, it appears that during her interview for the position Cooke may have told Fatcheric that the on-site demand could be adjusted or eliminated, and her interview notes reflect at least some discussion about Fatcheric working "remote 5 days a week." (Seltzer Decl., Ex. D, at 2, 4; Wheeler Decl., Ex. 4, at 36.)

The facts surrounding Fatcheric's predecessor or successor provide little clarity on the issue. Her predecessor's termination appears to have been precipitated by his abandonment of his duties as a Program Director, not simply a failure to appear on-site. As Cooke testified, he simply "stopped showing up for work . . . no-call, no-show." (Wheeler Decl., Ex. 2 at 36.) And an internal email indicated that Fatcheric's replacement was only able to be on-site "a few days monthly." (Wheeler Decl., Ex. 12.) These are material disputed facts that preclude a determination by this Court of whether working on-site is an essential function of the Program Director position.

b. Defendants' Burden

Defendants argue that regardless of whether Fatcheric can state a prima facie case, they meet their burden of either demonstrating an undue hardship in making a reasonable accommodation, Stone, 118 F.3d at 97 (failure to accommodate claims), or offering evidence of a legitimate non-discriminatory reason for the discharge, McBride, 583 F.3d at 96 (wrongful termination claims).

First, Defendants contend that they were under no obligation to continue allowing Fatcheric to work exclusively from home because "an employer is not required to accommodate an individual with a disability by eliminating essential functions from the job." Borkowski v.

Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995). However, as discussed, it is not clear that working on-site was an essential function of the Program Director position.

Defendants also contend that terminating Fatcheric was legitimate and non-discriminatory because her continued inability to be on-site was impairing its relationship with Citi. However, there are material facts in dispute surrounding Fatcheric's termination. For instance, on December 9, 2014, Bartech decided to terminate Fatcheric even though Battaglia wanted to speak to Walton before finalizing Citi's decision that a change needed to be made. (See PSOMF ¶ 39.) Yet there are no subsequent communications from Citi concerning Walton's views in the record. In addition, on that same day in an internal email to Cooke, a Human Resources Director opined that "the Customer is at the point that there have been too many gaps in service delivery." (Seltzer Decl., Ex. O.) But it was Cooke who recommended Fatcheric's termination, and a single email referencing Fatcheric's absences is insufficient, particularly where Fatcheric's third injury was unlike the prior two. For her third injury, as opposed to her first two injuries, Fatcheric indicated only that she would be out for a week and a half. (DSMOF ¶ 23.) And Citi may have been more willing to accommodate a short absence. Indeed, Fatcheric provided multiple updates on her condition and was hopeful she could return to work a week after Bartech made the decision to terminate her. (PSOMF ¶¶ 44, 47; see, e.g., Wheeler Decl., Ex. 18.) It appears that Fatcheric also indicated that she intended to return on-site by January 5, 2015, albeit on a more limited basis as she built back up to three days per week. (PSOMF ¶ 51.) Ultimately, too many material facts are in dispute to warrant summary judgment.

II. NYCHRL Claim

"[C]ourts must analyze NYCHRL claims separately and independently from any federal and state law claims." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102,

109 (2d Cir. 2013). That is because, unlike the ADA or NYSHRL, "[u]nder the NYCHRL, in order to survive summary judgment, a plaintiff need only adduce evidence 'that she has been treated less well than other employees because of her protected status.'" Rogers v. Bank of N.Y. Mellon, No. 09-CV-8551, 2016 WL 4362204, at *8 (S.D.N.Y. Aug. 15, 2016). Nevertheless, "[t]he NYS and NYC Human Rights Laws have very similar requirements with respect to the ADA's 'essential functions' test." Davis v. City of N.Y. Health & Hosps. Corp., No. 08-CV-0435, 2011 WL 4526135, at *6 (S.D.N.Y. Sept. 29, 2011); Kinneary v. City of N.Y., 601 F.3d 151, 158 (2d Cir. 2010). Because Defendants failed to establish their entitlement to summary judgment under the ADA and NYSHRL, they are not entitled to summary judgment under the more expansive NYCHRL. Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 843 n.3 (2d Cir. 2013).

III. Individual Claims

Fatcheric alleges Cooke is individually liable under the NYSHRL and NYCHRL as an aider and abettor. An individual who "actually participates" in the discrimination is liable as an aider and abettor. See Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995). Although Cooke acted as the messenger by informing Fatcheric of her termination, she was also the one who recommended that Fatcheric be terminated. (PSOMF ¶ 41.) Accordingly, because Cooke may have actually participated in Fatcheric's termination, summary judgment is inappropriate. See Chapkines v. N.Y. Univ., No. 02-CV-6355, 2004 U.S. Dist. LEXIS 2990, at *15 (S.D.N.Y. Feb. 25, 2004) (finding, for aiding and abetting purposes, that one defendant "participated in [plaintiff's termination] by recommending that plaintiff not be reappointed"); Malena v. Victoria's Secret Direct, LLC, 886 F. Supp. 2d 349, 367 (S.D.N.Y. 2012) ("By

supplying the intent and the complaints that may have led to Plaintiff's termination, [defendant] may have 'actually participated in the conduct giving rise to the plaintiff's claims.").

CONCLUSION

Defendants' motion for summary judgment dismissing this action is denied. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 54 and 62.

Dated: July 19, 2017
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.