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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5
Justice

Index Number : 114425/2009
SILVER, DIANE
vs.
CITY OF NEW YORK DEPARTMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4, 5

Replying Affidavits _____ | No(s). 6

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP 24 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/20/12
SEP 24 2012

_____, J.S.C.
BARBARA JAFFE
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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DIANE SILVER,

Plaintiff,

-against-

CITY OF NEW YORK DEPARTMENT OF HOMELESS SERVICES,

Defendant.

----------x

Index No. 114425/09

Argued: 5/1/12
Motion Seq. No.: 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant:
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By amended notice of motion dated November 21, 2011, defendant moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. PERTINENT BACKGROUND

On March 17, 1986, plaintiff began her employment with defendant as a provisional Caseworker in its Human Resources Administration department. (Affirmation of James L. Hallman, ACC, dated Nov. 18, 2011 [Hallman Aff.], Exh. I). On or about June 25, 1998, she was appointed by defendant to the position of Supervisor I (Welfare) (*id.*, Exh. J), and on or about December 16, 2002, she was promoted to the title Supervisor II (Welfare) (*Id.*, Exh. K).

By letter dated June 1, 2003 and addressed to Patrick Caveau, defendant's Regional Director, plaintiff opposed the proposed transfer of her base office from the Wakefield Motor Inn/Hotel to a Manhattan location due her chronic health problems of fibromyalgia, osteoporosis,

and interstitial cystitis. She claims a need to be able to sit on the subway and is unable to stand for long periods of time whether on the train or while waiting for a bus. In support, plaintiff provides a letter dated June 18, 2003 from chiropractor Valerie Malkin, and a letter dated June 20, 2003 from Dr. Neil J. Sayegh, a urologist. Both doctors state that due to plaintiff's health, it was necessary for her to be able to sit on the train. (*Id.*, Exhs. M, N).

On or about July 14, 2003, plaintiff submitted a "Request for Reasonable Accommodation Application," seeking to remain at the Wakefield Hotel as her home base. (*Id.*, Exh. O).

By letter dated September 19, 2003, Denise Benson, DHS' Director of Equal Opportunity Affairs (EOA), advised plaintiff that until further notice, she would remain at the Wakefield Hotel as her home base. (*Id.*, Exh. P).

Sometime between September 2003 and 2005, plaintiff's base office was changed to Alan's House located in Manhattan as the Wakefield Hotel had been shut down. Plaintiff's field work remained confined to DHS shelters in Manhattan. (*Id.*, Exh. Q).

On or about August 8, 2005, plaintiff submitted another request for reasonable accommodation related to the proposed change of her fieldwork territory from exclusively Manhattan to including the Bronx, Queens, and Brooklyn. According to plaintiff, her interstitial cystitis condition, required frequent urination which necessitated her ready access to bathroom facilities and a seat on the train. She annexes in support new letters from Drs. Sayegh and Malkin. (*Id.*). Plaintiff's request was granted and she was permitted to continue with her former assignment. (*Id.*).

On or about November 24, 2008, plaintiff filed a third request for reasonable

accommodation, again in response to defendant's proposal to expand her territory beyond Manhattan, and submitted new letters from her doctors. (*Id.*, Exhs. S, T).

By letter dated January 2, 2009, defendant agreed to continue plaintiff's Manhattan-only assignment, but reserved the right to review the request and accommodation as its operational needs changed. (*Id.*, Exh. U).

By letter dated June 8, 2009, defendant's Director of Personnel advised plaintiff that defendant was reassigning employees with the Supervisor II title, and offered her the option of choosing another position within its Family Services Division, with two positions offered in Brooklyn and one each in Manhattan and Queens, and that if plaintiff did not accept one of the positions, defendant would reassign her based on seniority. (*Id.*, Exh. V).

On or about June 15, 2009, plaintiff submitted a fourth reasonable accommodation request, stating that none of the four positions offered her in the June 8 letter were acceptable given her health conditions. She thus requested a Supervisor II position in the Family or Adult Services program located at 33 Beaver Street in Manhattan. (*Id.*, Exh. W).

By letter dated June 22, 2009, defendant notified plaintiff that she was assigned to the vacant position in Brooklyn, for the 9 am to 5 pm shift, effective June 29, 2009. (*Id.*, Exh. X).

By letter dated June 25, 2009, defendant's Chief of Staff/EEO Officer Mark Neal advised plaintiff that its EOA office had received her reasonable accommodation request, and after speaking with her and her supervisors, it was unable to offer her the accommodation she had requested, but was able to offer her an assignment as a Supervisor II at 78 Catherine Street in Manhattan for three months, and would thereafter reevaluate the accommodation. (*Id.*, Exh. Y).

By email dated July 7, 2009, plaintiff told Neal that she could not accept the assignment

at Catherine Street absent bathroom facilities during her commute to that shelter, and again requested an assignment at Beaver Street. (*Id.*, Exh. Z).

By email dated July 9, 2009, Neal told plaintiff that pending her appeal to defendant's commissioner, her assignment to Catherine Street was still in effect and he had no authority to change it during the appeals process. (*Id.*, Exh. AA).

By letter dated July 8, 2009 and addressed to defendant's Commissioner, plaintiff advised of her medical condition and requested an assignment at Beaver Street. (*Id.*, Exh. BB).

Effective July 13, 2009, plaintiff was assigned to the Catherine Street location as a Supervisor II, at the same salary she had previously received. (*Id.*, Exh. CC).

By email dated July 14, 2009, plaintiff advised Neal that she was attempting to deal with her medical issues while traveling to Catherine Street but that it was still a hardship for her, and she was hoping for a position at Beaver Street. (*Id.*, Exh. DD).

By letter dated July 30, 2009, plaintiff's physician opined that the Catherine Street assignment was detrimental to plaintiff's health as she had to wait for a bus after exiting the subway station and could not be away from a bathroom for more than 30 to 35 minutes. He also observed that the floor of the shelter on which plaintiff worked had only one ladies' bathroom which accommodated one person at a time and had to be shared with 10 other women. (*Id.*, Exh. EE).

On July 31, 2009, plaintiff's appeal was heard by defendant's Deputy Commissioner George Nashak; plaintiff attended the hearing with her union attorney and submitted two letters from her physicians. Nashak determined that the Catherine Street assignment reasonably accommodated plaintiff as the subway lines that were closest to it offered stops with accessible

restrooms and the walk from the stop to the shelter took less time than 30 to 35 minutes. (*Id.*, Exh. GG).

By letter dated August 11, 2009, defendant's Commissioner informed plaintiff that after taking into consideration her request and defendant's operational needs, it was unable to offer her an assignment at Beaver Street and believed that the Catherine Street assignment was reasonable. He thus denied her appeal of defendant's decision. (*Id.*, Exh. FF).

By email dated December 30, 2009 and addressed to Neal, plaintiff again requested an assignment at Beaver Street, stating that her commute to Catherine Street was detrimentally affecting her health. (*Id.*, Exh. HH).

By emails dated January 8, 2009, defendant's Director of Labor Relations informed Neal that the only vacant Supervisor II position in Manhattan was located at a shelter on 30th Street. (*Id.*, Exh. II; Affirmation of Mark L. Neal, Esq., dated Mar. 26, 2012 [Neal Aff.]).

A vacancy report dated March 12, 2010 reflects an open Supervisor II position at 33 Beaver Street; however, the position was not posted or scheduled to be filled, and was formally eliminated by March 2012 due to budget cuts. (Neal Aff.).

By letter dated March 15, 2010, Neal informed plaintiff that after meeting with her on February 3, 2010 about her request for an assignment to Beaver Street, he had been told that there were no Supervisor II positions open in Family Services at that location, and while there was one Supervisor II position available in Adult Families, it was not currently posted. (*Id.*, Exh. KK).

Effective on July 1, 2010, plaintiff retired. (*Id.*, Exh. LL).

II. CONTENTIONS

Defendant contends that plaintiff's claim that only a transfer to Beaver Street would

constitute a reasonable accommodation must be rejected, that it was not required to accommodate plaintiff's commute, that she failed to engage in an interactive process to find her a reasonable accommodation, and that there is no connection between plaintiff's disability and the requested accommodation. It also argues that plaintiff has failed to state either a hostile work environment or constructive discharge claim. (Mem. of Law, dated Nov. 18, 2011).

Plaintiff claims that there were two Supervisor II positions at Beaver Street which were occupied by provisional employees, and that as she had seniority and was a permanent employee, DHS should have terminated one of these employees in order to provide her with the position, and that there were other Supervisor II positions open within DHS such as the one at the 30th Street shelter, thus creating an issue of fact as to whether defendant reasonably accommodated her disability. She also asserts that her claim is not just related to her commute to and from work but also the bathroom facilities at Catherine Street. Plaintiff does not address her hostile work environment or constructive discharge claims. (Mem. of Law, dated Mar. 1, 2012).

III. ANALYSIS

A. Discrimination claim under New York State Human Rights Law

The sole issue here is whether defendant offered plaintiff a reasonable accommodation for her disability. Pursuant to the New York State Human Rights Law (NYSHRL), a reasonable accommodation is defined as:

> actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

(Executive Law § 292[21-e]).

Under both the NYSHRL and the New York City Human Rights Law (NYCHRL), a plaintiff who claims that she has been discriminated against because of her disability bears the burden of establishing that she proposed a reasonable accommodation and her employer refused to make such accommodation. (*Pimentel v Citibank, N.A.*, 29 AD3d 141 [1st Dept 2006], *lv denied* 7 NY3d 707).

The majority of plaintiff's claims regarding her disability relate to the accessibility of bathroom facilities along her route to and from work and to whether or not she was able to sit on the subway during her commute. An employer is not required to accommodate an employee's disability related to his or her commute to work. (*Matter of Dinatale v New York State Div. of Human Rights*, 77 AD3d 1341 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011]). In *Dinatale*, the petitioner requested permission to work from home as her drive to and from work aggravated her symptoms. She did not allege that anything in her work environment caused or exacerbated her symptoms. The court dismissed the claim, holding that an employee's commute constitutes activity unrelated to and outside his or her employment, and that as an employer need only provide reasonable accommodations in the workplace, petitioner's employer had not failed to accommodate reasonably her disability. (*See also Raffaele v City of New York*, 2004 WL 1969869 [Dist Ct, ED NY 2004] [difficulties commuting to work need not be accommodated]; *Rodas v The Estee Lauder Cos., Inc.*, 2010 WL 4732724, 2010 NY Slip Op 33199[U] [Sup Ct, New York County] [employer not required to accommodate employee's difficulties in commuting to work; employee claimed she needed to leave work at certain hour in order to avoid crowded subway which aggravated her anxiety]; *Metz v County of Suffolk*, 4 Misc 3d 914 [Sup

Ct, Suffolk County 2004] [denying petitioner's claim that employer had failed to accommodate her by transferring her to office where her commute would have been shorter, which she contended was medically necessary as she could not sit for long periods of time]).

Moreover, an employer is not required to accommodate an employee according to the employee's personal preferences about where he or she desires to work. That defendant did not transfer plaintiff to the Beaver Street location does not, in and of itself, indicate that it failed to accommodate her reasonably. (*See Vinokur v Sovereign Bank*, 701 F Supp 2d 217 [Dist Ct, ED NY 2010] [employer not required to provide employee with particular accommodation employee requests or prefers]; *Raffaele*, 2004 WL 1969869 [employers not required to create new positions or reassign disabled employees if no positions are vacant]).

In any event, plaintiff did not prove that there existed any vacant Supervisor II positions at Beaver Street. That there were two provisional Supervisor II employees does not require that defendant terminate one of them in order to offer plaintiff the position, nor does it mean that the position was "vacant." (*Esposito v Altria Group, Inc.*, 67 AD3d 499 [1st Dept 2009], *lv denied* 15 NY3d 701 [defendant not required to transfer plaintiff to position in other department that was occupied by another employee]; *Pimentel*, 29 AD3d 141 [employer does not have to find another job for employee or create new job or reassign other employees if no position open]; *Norville v Staten Is. Univ. Hosp.*, 196 F3d 89 [2d Cir 1999] [employer need not reassign employee if no vacant position]; *Picinich v United Parcel Svce.*, 321 F Supp 2d 485 [Dist Ct, ND NY 2004] [defendant not required to create new position for employee or move another employee from his or her position in order to accommodate employee]).

Plaintiff's claim that defendant should have offered her the Supervisor II position at the

30th Street shelter is specious as she made it repeatedly clear that the only such position she would accept was at Beaver Street.

Plaintiff's claim related to the women's bathroom facilities at Catherine Street is also insufficient to warrant the requested relief absent any allegation that she was unable to perform the essential functions or duties of her position without a reasonable accommodation. While she may have had to share a bathroom with other women, she has not shown that it affected her ability to perform her job. (*See Rappo v New York State Div. of Human Rights*, 57 AD3d 217 [1st Dept 2008] [employer not required to offer employee transfer as reasonable accommodation as employee failed to prove that she could not perform essential duties of current position]).

Thus, plaintiff has not demonstrated that defendant violated the NYSHRL by failing to offer her a reasonable accommodation for her disability.

B. Discrimination claim under New York City Human Rights Law

The New York City Human Rights Law provides, in pertinent part, that:

> [i]t shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of the actual or perceived gender [or] disability . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(Admin. Code § 8-107[a][1]).

While plaintiff's claim under the NYCHRL is subject to different legal standards than her claim under the NYSHRL (*see Phillips v City of New York*, 66 AD3d 170 [1st Dept 2009] [disability provisions of NYSHRL and NYCHRL not equivalent and require distinct analyses]), the distinctions are not pertinent here. Thus, this claim fails for the same reasons set forth above.

C. Other claims

As plaintiff failed to address defendant's contentions regarding the sufficiency of her hostile work environment and constructive discharge claims, they are dismissed.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: September 20, 2012
New York, New York
SEP 20 2012

FILED
SEP 24 2012
NEW YORK
COUNTY CLERK'S OFFICE