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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELVA RODRIGUEZ,
Plaintiff,
v.
JOHN MUIR MEDICAL CENTER,
Defendant.

No. C 09-0731 CW
ORDER GRANTING
DEFENDANT'S MOTION
TO DISMISS IN PART
(Docket No. 20)

United States District Court
For the Northern District of California

Plaintiff Elva Rodriguez alleges that she faced discrimination and harassment based on her national origin and disability as an employee of Defendant John Muir Health, erroneously sued as John Muir Medical Center. Defendant moves to dismiss Plaintiff's claims based on her disability. Plaintiff opposes the motion. The motion was taken under submission on the papers. Having considered all the papers submitted by the parties, the Court GRANTS Defendant's motion.

BACKGROUND

The following allegations are contained in Plaintiff's First Amended Complaint (FAC).

Plaintiff began working for Defendant in February, 1989. Throughout her employment with Defendant, she was harassed on the basis of her national origin. Beginning around 2000, the harassment became severe and she faced "inappropriate sexual and ethnic comments." FAC ¶ 3. Although she complained to her supervisors, they did not take steps to end the harassment.

1 Because of her national origin and her complaints, Defendant gave
2 her negative performance evaluations, imposed "unique rules
3 regarding workplace conduct," required her to apologize for actions
4 she did not commit and refused her requests to transfer to another
5 unit of the hospital. FAC ¶ 6.

6 Defendant also discriminated against and harassed Plaintiff
7 based on her "disability involving her back which required
8 reasonable accommodation." FAC ¶ 7. Defendant required her to
9 perform tasks that violated her medical restrictions, exacerbating
10 her disability and causing her "to be placed on disability leave."
11 FAC ¶ 9. Defendant then harassed and retaliated against Plaintiff
12 because she "missed work by reason of her disability and/or by
13 reason of the emotional distress caused by" the hostile work
14 environment. FAC ¶ 9.

15 Beginning on March 11, 2008, Plaintiff took a medical leave of
16 absence because of mental stress.

17 On November 14, 2008, Plaintiff filed a charge of
18 discrimination with the federal Equal Employment Opportunity
19 Commission (EEOC) and the California Department of Fair Employment
20 and Housing (DFEH). Her administrative complaint contained
21 allegations similar to those discussed above. In addition, she
22 asserted that Defendant sent her a letter stating that it would
23 terminate her employment if she did not return to work by December
24 10, 2008. Defendant terminated Plaintiff's employment on December
25 10, 2008.

26 On January 12, 2009, Plaintiff filed a second charge with the
27 EEOC and the DFEH, asserting that the termination was based on her
28 disability, national origin and complaints of harassment.

1 Plaintiff received right-to-sue letters based on both of her
2 charges.

3 Plaintiff asserts thirteen causes of action under federal and
4 state law. She claims that Defendant violated Title VII of the
5 Civil Rights Act of 1964 by discriminating, harassing and
6 retaliating against her. She also asserts causes of action under
7 the Americans with Disabilities Act (ADA) for discrimination,
8 harassment, failure to provide a reasonable accommodation and
9 retaliation. Finally, she brings claims under California law for
10 discrimination, harassment, retaliation, failure to provide
11 reasonable accommodations, failure to prevent discrimination and
12 harassment, and termination in violation of public policy.

13 LEGAL STANDARD

14 A complaint must contain a "short and plain statement of the
15 claim showing that the pleader is entitled to relief." Fed. R.
16 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
17 claim is appropriate only when the complaint does not give the
18 defendant fair notice of a legally cognizable claim and the grounds
19 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
20 (2007). In considering whether the complaint is sufficient to
21 state a claim, the court will take all material allegations as true
22 and construe them in the light most favorable to the plaintiff. NL
23 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
24 However, this principle is inapplicable to legal conclusions;
25 "threadbare recitals of the elements of a cause of action,
26 supported by mere conclusory statements," are not taken as true.
27 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
28 (citing Twombly, 550 U.S. at 555).

DISCUSSION

I. ADA Claims

A. Discrimination

Defendant asserts that Plaintiff's discrimination claim under the ADA fails because she does not plead that she has a cognizable disability or that she was a qualified individual who could perform the essential functions of her job.

To recover for discrimination under the ADA, "an employee bears the ultimate burden of proving that he is (1) disabled under the Act, (2) a 'qualified individual with a disability,' and (3) discriminated against 'because of' the disability." Bates v. United Parcel Serv., 511 F.3d 974, 988 (9th Cir. 2007) (quoting Nunes v. Wal-Mart Stores, 164 F.3d 1243, 1246 (9th Cir. 1999)). "A 'disabled' employee under the ADA is one who: (1) has a 'physical or mental impairment that substantially limits one or more of the major life activities of such individual'; (2) has a 'record of such an impairment'; or (3) is 'regarded as having such an impairment.'" Thornton v. McClatchy Newspapers, 261 F.3d 789, 794 (9th Cir. 2001) (quoting 42 U.S.C. § 12102(2)). To determine whether an impairment substantially limits an individual, a court considers "the nature, severity, duration, and impact of the impairment." Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir. 2003) (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii)). "Whether a person is disabled under the ADA is an 'individualized inquiry.'" Thornton, 261 F.3d at 794 (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999)).

Plaintiff pleads that she "had a disability involving her back which required reasonable accommodation" and asserts that it

1 "impacted major life activities such as lifting." FAC ¶ 8.
2 Although lifting is a major life activity recognized under the ADA,
3 42 U.S.C. § 12102(1)(A), Plaintiff has not alleged facts that
4 suggest that she is substantially impaired by her purported
5 disability. Her allegations do not illuminate the nature,
6 severity, duration and impact of her disability. Plaintiff asserts
7 that Defendant required her to perform tasks that violated her
8 medical restrictions, but she does not plead the nature of these
9 limitations. She also states that she took medical leave beginning
10 on March 11, 2008, but she avers that this was "because of mental
11 stress" and "was prolonged because of job-related carpal tunnel
12 syndrome," FAC ¶ 12; these allegations do not address Plaintiff's
13 disability related to her back.

14 Even if Plaintiff plead a cognizable disability, as Defendant
15 correctly argues, she does not allege that she was a qualified
16 individual. A "qualified individual" is "an individual who, with
17 or without reasonable accommodation, can perform the essential
18 functions of the employment position that such individual holds or
19 desires." 42 U.S.C. § 12111(8). Plaintiff did not address this
20 argument in her opposition.

21 Accordingly, the Court dismisses Plaintiff's discrimination
22 claim under the ADA with leave to amend. Plaintiff must allege
23 facts explaining her claim that she had a disability that
24 substantially impaired a major life activity and that she was a
25 qualified individual.

26 B. Harassment

27 Plaintiff's harassment claim under the ADA fails because she
28 has not alleged a cognizable disability. However, even if she had,

1 Defendant argues that she has not alleged facts to support her ADA
2 harassment claim.

3 The Ninth Circuit has not determined whether a plaintiff can
4 maintain a hostile work environment claim under the ADA.¹ See
5 Brown v. City of Tuscon, 336 F.3d 1181, 1190 (9th Cir. 2003)
6 (declining to decide the issue); see also Keller-McIntyre v. S.F.
7 State Univ., 2007 WL 776126, at *13 (N.D. Cal.). However, other
8 circuits have addressed this issue. "To succeed on a claim of
9 disability-based harassment, the plaintiff must prove: (1) that she
10 belongs to a protected group; (2) that she was subjected to
11 unwelcome harassment; (3) that the harassment complained of was
12 based on her disability or disabilities; (4) that the harassment
13 complained of affected a term, condition, or privilege of
14 employment; and (5) that the employer knew or should have known of
15 the harassment and failed to take prompt, remedial action."
16 Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232 (5th
17 Cir. 2001); see also Keller-McIntyre, 2007 WL 776126, at *13
18 (citing Flowers).

19 Even if the Ninth Circuit recognizes harassment claims under
20 the ADA, Plaintiff has not alleged facts to show that Defendant
21 knew of or should have known of the disability-based harassment.²
22 Plaintiff asserts that she complained to her supervisors about
23 discrimination based on her national origin, but she does not

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25 ¹ Defendant interprets Plaintiff to bring a hostile work
environment claim. Plaintiff does not argue otherwise.

26 ² Defendant also argues that Plaintiff has not alleged that
27 the harassment complained of affected her a term, condition or
28 privilege of her employment. However, Plaintiff alleges that she
was "terminated by Defendant because of her disabilities"
FAC ¶ 14.

1 allege the same about her disability. Instead, Plaintiff avers
2 that she "complained of the said harassment and discrimination,"
3 FAC ¶ 10, but, because she does not plead to whom she complained,
4 this allegation does not support her claim that Defendant had
5 knowledge. Plaintiff argues that Defendant knew of the harassment
6 because it required her to violate her purported medical
7 restrictions. However, Plaintiff pleads no facts to show that
8 Defendant knew of the restrictions. And even if Defendant knew,
9 this would not support an inference that it was equally aware of
10 the alleged harassment.

11 Accordingly, the Court dismisses Plaintiff's disability-based
12 harassment claim with leave to amend. In addition to pleading a
13 cognizable disability, Plaintiff must truthfully allege facts to
14 support her claim that Defendant knew of, and failed to prevent,
15 disability-based harassment.

16 C. Reasonable Accommodation

17 Under the ADA, a defendant's "failure to provide reasonable
18 accommodation to 'an otherwise qualified individual with a
19 disability' constitutes discrimination." Kaplan v. City of Las
20 Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (quoting 42 U.S.C.
21 § 12112(b)(5)(A)). A "reasonable accommodation" includes:

22 (A) making existing facilities used by employees readily
23 accessible to and usable by individuals with
disabilities; and

24 (B) job restructuring, part-time or modified work
25 schedules, reassignment to a vacant position, acquisition
26 or modification of equipment or devices, appropriate
27 adjustment or modifications of examinations, training
materials or policies, the provision of qualified readers
or interpreters, and other similar accommodations for
individuals with disabilities.

28 42 U.S.C. § 12111(9).

1 Plaintiff does not state a claim based on Defendant's alleged
2 failure to provide a reasonable accommodation. For the reasons
3 stated above, she has not plead a cognizable disability or that she
4 was a qualified individual. Furthermore, Plaintiff does not allege
5 that she requested and Defendant denied her a reasonable
6 accommodation. Accordingly, her failure-to-accommodate claim under
7 the ADA is dismissed with leave to amend.

8 II. State FEHA Claims

9 A. Discrimination

10 A prima facie claim for disability discrimination under the
11 FEHA requires a plaintiff to show "(1) he suffers from a
12 disability, (2) he is otherwise qualified to do his job, (3) he
13 suffered an adverse employment action, and (4) the employer
14 harbored discriminatory intent." Avila v. Continental Airlines,
15 Inc., 165 Cal. App. 4th 1237, 1246 (2008). "'An adverse employment
16 decision cannot be made 'because of' a disability, when the
17 disability is not known to the employer.'" Id. (quoting Brundage
18 v. Hahn, 57 Cal. App. 4th 228, 236 (1997)).

19 Unlike the ADA, the FEHA does not require that a disability
20 substantially limit a plaintiff's major life activity. See Cal.
21 Gov. Code § 12926.1(c).

22 [T]he Legislature has determined that the definitions of
23 "physical disability" and "mental disability" under the
24 law of this state require a "limitation" upon a major
25 life activity, but do not require, as does the Americans
26 with Disabilities Act of 1990, a "substantial
27 limitation." This distinction is intended to result in
28 broader coverage under the law of this state than under
that federal act.

26 Id.

27 Plaintiff pleads sufficient facts in support of her claim that
28

1 she had a disability involving her back. She states that the
2 disability impacted her ability to lift, which suffices under
3 California's relaxed standard.

4 Nevertheless, Plaintiff's state law discrimination claim fails
5 because she has not alleged that she was a qualified individual or
6 that Defendant knew of her disability. As stated above, Plaintiff
7 does not allege facts to show that Defendant knew of her medical
8 restrictions or the alleged disability-based harassment.

9 Accordingly, Plaintiff's state law discrimination claim based
10 on her disability is dismissed with leave to amend. Plaintiff must
11 allege facts to show that she was a qualified individual and that
12 Defendant knew of her disability and that she was being harassed
13 because of it.

14 B. Reasonable Accommodations

15 Under California law, the "elements of a failure to
16 accommodate claim are (1) the plaintiff has a disability under the
17 FEHA, (2) the plaintiff is qualified to perform the essential
18 functions of the position, and (3) the employer failed to
19 reasonably accommodate the plaintiff's disability." Scotch v. Art
20 Inst. of Cal.-Orange County, Inc., 173 Cal. App. 4th 986, 1009-10
21 (2009). A "reasonable accommodation" includes:

22 (1) Making existing facilities used by employees readily
23 accessible to, and usable by, individuals with
disabilities.

24 (2) Job restructuring, part-time or modified work
25 schedules, reassignment to a vacant position, acquisition
26 or modification of equipment or devices, adjustment or
27 modifications of examinations, training materials or
policies, the provision of qualified readers or
interpreters, and other similar accommodations for
individuals with disabilities.

28 Cal. Gov. Code § 12926(n).

1 For reasons similar to those above, Plaintiff's failure-to-
2 accommodate claim under state law is dismissed with leave to amend.
3 Plaintiff must allege facts to show that she was a qualified
4 individual and that Defendant did not reasonably accommodate her
5 disability.

6 CONCLUSION

7 For the foregoing reasons, the Court GRANTS Defendants' Motion
8 to Dismiss. (Docket No. 20.) Plaintiff's ADA claims for
9 discrimination (claim three), harassment (claim four) and failure
10 to provide a reasonable accommodation (claim five) and her claims
11 under state law for discrimination (claim eight) and failure to
12 provide a reasonable accommodation (claim eleven) are dismissed
13 with leave to amend to cure the deficiencies discussed above.
14 Plaintiff may file an amended complaint within fourteen days from
15 the date of this order. If Plaintiff does so, Defendant may file a
16 motion to dismiss three weeks thereafter, with Plaintiff's
17 opposition due two weeks following and Defendant's reply due one
18 week after that. Defendant's motion, if one is filed, shall be
19 taken under submission on the papers.

20 A further case management conference is scheduled for May 13,
21 2010 at 2:00 p.m.

22 IT IS SO ORDERED.

23
24 Dated: March 18, 2010



25 CLAUDIA WILKEN
26 United States District Judge
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