

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

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4 LIZZETE T. MARQUEZ,

5 Plaintiff,

6 v.

CIVIL NO. 06-1581 (RLA)

7 ANTHONY PRINCIPI,
8 DEPARTMENT OF VETERANS AFFAIRS,

9 Defendant.

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11 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

12 Defendant has moved the court to enter summary judgment in this
13 case dismissing plaintiff's complaint. The court having reviewed the
14 arguments presented by the parties as well as the documents submitted
15 in support thereof finds that defendant's arguments are valid and
16 that dismissal is warranted.

17 **BACKGROUND**

18 Plaintiff instituted these proceedings under the Rehabilitation
19 Act of 1973, 29 U.S.C. § 794, claiming failure to accommodate and
20 harassment in her employment allegedly due to her mental and physical
21 disabilities. In the complaint plaintiff also cites unauthorized
22 disclosure of private medical information protected by the Health
23 Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. §§
24 1320d-1320d-8.

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3 **SUMMARY JUDGMENT**

4 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
5 ruling on summary judgment motions, in pertinent part provides that
6 they shall be granted "if the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the
8 affidavits, if any, show that there is no genuine issue as to any
9 material fact and that the moving party is entitled to a judgment as
10 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
11 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
12 1999). The party seeking summary judgment must first demonstrate the
13 absence of a genuine issue of material fact in the record.
14 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
15 issue exists if there is sufficient evidence supporting the claimed
16 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
17 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
18 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), *cert. denied*, 511 U.S.
19 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
20 it might affect the outcome of a lawsuit under the governing law.
21 Morrissey v. Boston Five Cents Sav. Bank, 54 F. 3d 27, 31 (1st Cir.
22 1995).

23 "In ruling on a motion for summary judgment, the court must view
24 'the facts in the light most favorable to the non-moving party,
25 drawing all reasonable inferences in that party's favor.'" Poulis-
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3 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.
4 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995)).

5 Credibility issues fall outside the scope of summary judgment.
6 “Credibility determinations, the weighing of the evidence, and the
7 drawing of legitimate inferences from the facts are jury functions,
8 not those of a judge.” Reeves v. Sanderson Plumbing Prods., Inc.,
9 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
11 91 L.Ed.2d 202 (1986)). See also, Dominquez-Cruz v. Suttle Caribe,
12 Inc., 202 F.3d 424, 432 (1st Cir. 2000) (“court should not engage in
13 credibility assessments.”); Simas v. First Citizens' Fed. Credit
14 Union, 170 F.3d 37, 49 (1st Cir. 1999) (“credibility determinations
15 are for the factfinder at trial, not for the court at summary
16 judgment.”); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
17 Cir. 1998) (credibility issues not proper on summary judgment);
18 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
19 108, 113 (D.P.R. 2002). “There is no room for credibility
20 determinations, no room for the measured weighing of conflicting
21 evidence such as the trial process entails, and no room for the judge
22 to superimpose his own ideas of probability and likelihood. In fact,
23 only if the record, viewed in this manner and without regard to
24 credibility determinations, reveals no genuine issue as to any
25 material fact may the court enter summary judgment.” Cruz-Baez v.

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3 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
4 citations, brackets and quotation marks omitted).

5 In cases where the non-movant party bears the ultimate burden of
6 proof, she must present definite and competent evidence to rebut a
7 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
8 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
9 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
10 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
11 upon "conclusory allegations, improbable inferences, and unsupported
12 speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
13 Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581
14 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
15 5, 8 (1st Cir. 1990).

16 **THE FACTS**

17 Plaintiff commenced working at the San Juan Veterans
18 Administration Medical Center ("SJ-VA") on June 13, 2004 as a Health
19 Systems Specialist at the Utilization Management Section in the
20 Revenue Program under the Business Office.

21 Among her duties as Health Systems Specialist plaintiff had to
22 use clinical judgment in the analysis of medical records in order to
23 determine whether treatment provided to patients at the VA Hospital
24 was consistent with the patient's diagnosis and medical needs. She
25 also had to attend medical rounds and visit the emergency area as
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3 well as examine insurance cases and coverage for non-VA cases
4 whenever necessary.

5 During plaintiff's tenure, Monserrate Leon held the position of
6 Revenue and Marketing Officer under the Business Office at the SJ-VA.

7 Monserrate Leon's duties as Revenue and Marketing Officer
8 included the supervision of the Utilization Revenue Program where
9 plaintiff was assigned. She also signed plaintiff's evaluations.

10 Carmen Nereida Garcia Robles was plaintiff's team leader. As
11 such, she assigned plaintiff's work and prepared plaintiff's
12 evaluations for Ms. Leon's signature.

13 On or about February 16, 2005 plaintiff was hospitalized at
14 Hospital Panamericano due to a mental condition.

15 Plaintiff was approved to return back to work by her physician
16 effective March 21, 2005.

17 On or about June 10, 2005 plaintiff's request for accommodation
18 in her duties to avoid contact with patients due to her low immune
19 system was denied.

20 On June 14, 2005 plaintiff applied for Immediate Retirement from
21 Federal Service.

22 On June 15, 2005 plaintiff's request for participation in the
23 Donated Voluntary Leave Transfer Program was approved.

24 Plaintiff's last day at work was June 16, 2005.

25 Plaintiff had an initial EEO contact on August 24, 2005.

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3 Plaintiff retired from Federal Service due to disability
4 effective November 25, 2005.

5 **REHABILITATION ACT**

6 Disability discrimination in federal employment is specifically
7 covered by the provisions of the Rehabilitation Act and not by the
8 American with Disabilities Act ("ADA"), 42 U.S.C. 12101-12213. See,
9 Enica v. Principi, 544 F.3d 328, 338 n.11 (1st Cir. 2008) ("[a]s a
10 federal employee, [plaintiff] is covered under the Rehabilitation Act
11 and not the ADA.")

12 "The ADA and Rehabilitation Act prohibit discrimination against
13 an otherwise qualified individual based on his or her disability. The
14 Rehabilitation Act, the precursor of the ADA, applies to federal
15 agencies, contractors and recipients of federal financial assistance,
16 while the ADA applies to private employers with over 15 employees and
17 state and local governments." Calero-Cerezo v. U.S. Dep't of Justice,
18 355 F.3d 6, 19 (1st Cir. 2004).

19 The Rehabilitation Act protects employees from disability-based
20 harassment in the workplace if it is severe enough to constitute a
21 hostile work environment. "To establish a hostile work environment,
22 [plaintiff] ha[s] to show that [her] workplace was permeated with
23 discriminatory intimidation, ridicule, and insult that was
24 sufficiently severe or pervasive to alter the conditions of [her]
25 employment and create an abusive working environment." Quiles-Quiles
26 v. Henderson, 439 F.3d 1, 7 (1st Cir. 2006) (citations and internal

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3 quotation marks and brackets omitted). See also, Rios v. Principi,
4 520 F.3d 31, 43 (1st Cir. 2008). "Among the factors relevant to this
5 inquiry are the severity of the conduct, its frequency, and whether
6 it unreasonably interfered with the victim's work performance."
7 Quiles-Quiles, 439 F.3d at 7; Rios v. Principi, 520 F.3d at 43.

8 Employees with a disability are also entitled to a reasonable
9 accommodation in their place of work. "In addition to prohibiting
10 disparate treatment of individuals with disabilities, the
11 Rehabilitation Act and American with Disabilities Act ('ADA') impose
12 an affirmative duty on employers to offer a reasonable accommodation
13 to a disabled employee." Enica v. Principi, 544 F.3d at 338
14 (internal citation and quotation marks omitted). "The federal
15 statutes barring discrimination based on disability do more than
16 merely prohibit disparate treatment; they also impose an affirmative
17 duty to employers to offer a 'reasonable accommodation' to a disabled
18 employee." Calero-Cerezo, 355 F.3d at 19-20.

19 Prior to recurring to the courts for relief, employees claiming
20 violation of the Rehabilitation Act must allow the government an
21 opportunity to review their claims within specific time limitations.

22 "An employee suing the federal government under the
23 Rehabilitation Act must exhaust certain administrative remedies
24 before initiating a lawsuit in federal court. The first step is to
25 initiate contact with an EEO Counselor within 45 days of the date of
26 the matter alleged to be discriminatory." Bruce v. U.S. Dep't of

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3 Justice, 314 F.3d 71, 74 (2nd Cir. 2002) (citations, internal
4 quotation marks and brackets omitted). "Under Title VII and the
5 Rehabilitation Act, federal employees are required to initiate
6 administrative review of any alleged discriminatory or retaliatory
7 conduct with the appropriate agency within 45 days of the alleged
8 discriminatory act." Shiver v. Chertoff, 549 F.3d 1342, 1344 (11th
9 Cir. 2008).

10 Failure to comply with the pre-complaint processing requirements
11 of 29 C.F.R. § 1614.105(a)(1) - which mandate contact with an EEO
12 counselor within 45 days of the allegedly discriminatory event - will
13 result in the dismissal of any such claims under the Rehabilitation
14 Act. See *i.e.*, *id.* ("[g]enerally, when the claimant does not initiate
15 contact within the 45-day charging period, the claim is barred for
16 failure to exhaust administrative remedies"); Henrickson v. Potter,
17 327 F.3d 444, 446 (5th Cir. 2003) ("no viable claims under the
18 Rehabilitation Act because [plaintiff] failed to contact the EEO
19 counselor within 45 days of the alleged discriminatory act");
20 Velazquez Rivera v. Danzig, 234 F.3d 790, 794 (1st Cir. 2000)
21 ("administrative remedies had not been exhausted since there had been
22 no contract with an Equal Employment Opportunity Commission (EEOC)
23 counselor within 45 days as required by 29 C.F.R. § 1614.105(a)(1)");
24 Roman-Martinez v. Runyon, 100 F.3d 213, 216-18 (1st Cir. 1996)
25 (failure to timely contact counselor entails waiver of court review).
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3 In cases of harassment, events occurring outside the 45-day
4 period may be taken into consideration in ascertaining whether or not
5 a violation of the statute has taken place. "Because acts of
6 harassment may not all occur within the filing period, the Supreme
7 Court has held provided that an act contributing to the claim occurs
8 within the filing period, the entire time period of the hostile
9 environment may be considered by a court for the purposes of
10 determining liability." Greer v. Paulson, 505 F.3d 1306, 1313 (D.C.
11 Cir. 2007) (citations, internal quotation marks and brackets
12 omitted).

13 **Accommodation**

14 It is evident that plaintiff's claims for alleged failure to
15 accommodate her disability-based needs at work are untimely.

16 In her August 24, 2005 initial contact with an EEO counselor
17 plaintiff indicated that she had been denied reasonable accommodation
18 for a second time on June 10, 2005 when her petition not to make
19 hospital rounds was denied. According to plaintiff, the first time
20 her accommodation request had been rejected was when she was
21 initially hired on June 13, 2004, when she had informed Ms. Leon of
22 her need for an assessment in her work area to adapt it to her
23 physical disabilities. According to the Initial Contact and Interview
24 Sheet, not only did Ms. Leon not provide her with any assistance in
25 this regard but was angry when plaintiff was able to procure a
26 special chair and a keyboard on her own.

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3 It is clear that both the June 2004 denial of accommodation in
4 plaintiff's work area as well as the June 13, 2005 denial of
5 plaintiff's request not to come in contact with patients fall outside
6 the 45 day limit set by the applicable regulations.

7 Because plaintiff failed to bring these two matters to the
8 attention of the Office of Resolution Management within the required
9 45 day term plaintiff is precluded from raising them at this time.

10 Accordingly, plaintiff's failure to accommodate claims are
11 hereby **DISMISSED**.

12 **Harassment**

13 Plaintiff also complains that she was harassed at work due to
14 her disability in that Ms. Leon was constantly inquiring as to her
15 whereabouts and also denied her request for leave for her service-
16 connected appointments.

17 Even though plaintiff's June 14, 2005 application for disability
18 retirement was approved effective November 25, 2005, as plaintiff
19 herself concedes, she "ceased to actively report to work" on June 17,
20 2005.¹

21 Absent evidence to the contrary, it is axiomatic that once
22 plaintiff ceased to attend work at the SJ-VA she was no longer

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24 ¹ Plaintiff's Opposition to Motion for Summary Judgment (docket
25 No. 29) p. 6. See also, Initial Contact and Interview Sheet dated
26 August 24, 2005 (docket No. 24-9) p. 1 which states that plaintiff
"hasn't been to work since June 17, 2005 because of stress." Also, in
her Application for Immediate Retirement plaintiff indicated that she
was "[i]n (sic) leave without pay status." (Docket No. 24-13) p. 13.

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3 subject to the alleged discriminatory harassment underlying her
4 Rehabilitation Act complaint. Hence, the 45-day term for the EEO
5 initial contact regarding her alleged discriminatory harassment
6 commenced to run on June 17, 2005 and it elapsed prior to plaintiff's
7 August 24, 2005 initial EEO contact.

8 Based on the foregoing, plaintiff's claim based on a hostile
9 environment is hereby **DISMISSED**.

10 **HIPAA**

11 In the complaint plaintiff also mentions that Ms. Leon allegedly
12 accessed and/or received medical information regarding plaintiff's
13 health conditions and treatment without her authorization on at least
14 three separate occasions.

15 HIPAA was enacted to ensure the confidentiality of health
16 information particularly given the developments in electronic
17 communications. In order to ensure compliance, the statute includes
18 both civil and criminal penalties for improper disclosure of
19 protected information. Further, HIPAA specifically delegates
20 enforcement to the Secretary of Health and Human Services.

21 All courts which have addressed the issue have consistently held
22 that HIPAA does not provide for a private cause of action to
23 individuals protected by the statute. Acara v. Banks, 470 F.3d 560,
24 571 (5th Cir. 2006); Butler v. Illinois Dep't of Transp., 533
25 F.Supp.2d 821, 827 (N.D.Ill. 2008); Buchanan v. Gay, 491 F.Supp.2d
26 483, 497 (D.Del. 2007); Agee v. United States, 72 Fed. Cl. 284, 289

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3 (Fed.Cl. 2006); Johnson v. Quander, 370 F.Supp.2d 79, 100 (D.D.C.
4 2005); Valentin Muñoz v. Island Fin. Corp., 364 F.Supp.2d 131, 136
5 (D.P.R. 2005).

6 Rather, relief is limited to enforcement of the statute by the
7 Secretary of Health and Human Services as specifically provided for
8 in the statute. Acara, 470 F.3d at 571; Agee, 72 Fed. Cl. at 289;
9 Johnson, 370 F.Supp.2d at 100; Valentin Muñoz, 364 F.Supp.2d at 136.

10 Accordingly, plaintiff is precluded from asserting breach of the
11 HIPAA privacy provisions in this case for we lack subject matter
12 jurisdiction to entertain any such individual claims. See Acara, 470
13 F.3d at 572 (“[w]e hold there is no private cause of action under
14 HIPAA and therefore no federal subject matter jurisdiction over
15 [plaintiff’s] asserted claims”); Johnson, 370 F.Supp.2d at 100
16 (“because no private right of action exists under the HIPAA, this
17 Court does not have subject matter jurisdiction over this claim”).
18 See also, Valentin Muñoz, 364 F.Supp.2d at 136.

19 In her memorandum plaintiff argues that the alleged HIPAA
20 violations were “raised in the complaint as evidence of the
21 harassment”² she was allegedly subjected to at the SJ-VA. If this were
22 the case these allegations have become moot inasmuch as plaintiff’s
23 harassment claim has been dismissed for failure to timely contact an
24 EEO counselor.

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26 ² Plaintiff’s Opposition (docket No. 29) p.2.

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3 **CONCLUSION**

4 Based on the foregoing, Defendant's Motion for Summary Judgment
5 (docket No. 23)³ is **GRANTED**.

6 Accordingly, plaintiff's claims for alleged failure to
7 accommodate and for harassment under the Rehabilitation Act are
8 **DISMISSED** for failure to timely approach an EEO counselor.

9 It is further ORDERED that plaintiff's claim under HIPAA is
10 **DISMISSED** for lack of subject matter jurisdiction.

11 Judgment shall be entered accordingly.

12 IT IS SO ORDERED.

13 San Juan, Puerto Rico, this 18th day of February, 2009.

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15 S/Raymond L. Acosta
16 RAYMOND L. ACOSTA
17 United States District Judge

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25 ³ See Defendant's Memorandum of Law (docket No. 25); Plaintiff's
26 Opposition (docket No. 29); Defendant's Reply (docket No. 32) and
Plaintiff's Counter Reply (docket No. 36).