

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

3 PEGGY A. PELLOTT,

4 Plaintiff,

5 v.

CIVIL NO. 08-1297 (RLA)

6 UNITED STATES OF AMERICA,
7 et al.,

8 Defendants.

9
10 **ORDER DENYING MOTION TO DISMISS**
11 **AND SETTING DEADLINE FOR DEFENDANTS TO ANSWER THE COMPLAINT**

12 Defendants have moved the court to dismiss the instant complaint
13 under Rules 12(b)(1) and 12(b)(6) Fed. R. Civ. P. alleging that it
14 fails to properly adduce our subject matter jurisdiction and that it
15 also fails to state a colorable claim.

16 Plaintiff instituted this action pursuant to the provisions of
17 the Rehabilitation Act of 1973, 29 U.S.C. § 794. Specifically,
18 plaintiff seeks relief based on her supervisor's alleged harassment
19 and failure to accommodate her needs at work due to her diabetic
20 condition.

21 Defendants contend that the complaint fails to indicate that:
22 she had a disability which substantially affected or limited one or
23 more of her major life activities; plaintiff was qualified to perform
24 the essential functions of her position and she suffered an adverse
25 employment decision by reason of her disability.

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3 **II. RULE 12(b)(1) AND RULE 12(b)(6)**

4 As previously noted, movant argues dismissal premised on both
5 lack of subject matter jurisdiction as well as plaintiffs' failure to
6 state a colorable claim.

7 The court's authority to entertain a particular controversy is
8 commonly referred to as subject matter jurisdiction. "In the absence
9 of jurisdiction, a court is powerless to act." Am. Fiber & Finishing,
10 Inc. v. Tyco Healthcare Group, LP, 362 F.3d 136, 138 (1st Cir. 2004).

11 Federal courts are courts of limited jurisdiction and hence,
12 have the duty to examine their own authority to preside over the
13 cases assigned. "It is black-letter law that a federal court has an
14 obligation to inquire sua sponte into its own subject matter
15 jurisdiction." McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004). See
16 also, Bonas v. Town of North Smithfield, 265 F.3d 69, 73 (1st Cir.
17 2001) ("Federal courts, being courts of limited jurisdiction, have an
18 affirmative obligation to examine jurisdictional concerns on their
19 own initiative.")

20 Further, subject matter jurisdiction is not waivable or
21 forfeited. Rather, it involves a court's power to hear a case, it may
22 be raised at any time. Kontrick v. Ryan, 540 U.S. 443, 124 S.Ct. 906,
23 157 L.Ed.2d 867 (2004); United States v. Cotton, 535 U.S. 625, 122
24 S.Ct. 1781, 152 L.Ed.2d 860 (2002). "The objection that a federal
25 court lacks subject-matter jurisdiction... may be raised by a party,
26 or by a court on its own initiative, at any stage in the litigation,

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3 even after trial and the entry of judgment." Arbaugh v. Y&H Corp.,
4 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

5 The proper vehicle for challenging the court's subject matter
6 jurisdiction is Rule 12(b)(1) whereas challenges to the sufficiency
7 of the complaint are examined under the strictures of Rule 12(b)(6).
8 In disposing of motions to dismiss for lack of subject matter
9 jurisdiction the court is not constrained to the allegations in the
10 pleadings as with Rule 12(b)(6) petitions. Rather, the court may
11 review extra-pleading material without transforming the petition into
12 a summary judgment vehicle. Gonzalez v. United States, 284 F.3d 281,
13 288 (1st Cir. 2002); Aversa v. United States, 99 F.3d 1200, 1210 (1st
14 Cir. 1996).

15 In disposing of motions to dismiss pursuant to Rule 12(b)(6)
16 Fed. R. Civ. P. the court will accept all factual allegations as true
17 and will make all reasonable inferences in plaintiff's favor.
18 Frazier v. Fairhaven Sch. Com., 276 F.3d 52, 56 (1st Cir. 2002);
19 Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267
20 F.3d 30, 33 (1st Cir. 2001); Berezin v. Regency Sav. Bank, 234 F.3d
21 68, 70 (1st Cir. 2000); Tompkins v. United Healthcare of New England,
22 Inc., 203 F.3d 90, 92 (1st Cir. 2000).

23 Our scope of review under this provision is a narrow one.
24 Dismissal will only be granted if after having taken all well-pleaded
25 allegations in the complaint as true, the court finds that plaintiff
26 is not entitled to relief under any theory. Brown v. Hot, Sexy and

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3 Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) *cert. denied* 116
4 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700
5 (1st Cir. 1994). Further, our role is to examine the complaint to
6 determine whether plaintiff has adduced sufficient facts to state a
7 cognizable cause of action. Alternative Energy, 267 F.3d at 36. The
8 complaint will be dismissed if the court finds that under the facts
9 as pleaded plaintiff may not prevail on any possible theory.
10 Berezin, 234 F.3d at 70; Tompkins, 203 F.3d at 93.

11 It appearing that defendants' challenges under our consideration
12 are directed at the sufficiency of the claims as plead in the
13 complaint, we shall examine plaintiff's allegations by applying the
14 Rule 12(b)(6) criteria.

15 Except in cases where either a statute or rule specifically
16 imposes a heightened pleading standard, "courts faced with the task
17 of adjudicating motions to dismiss under Rule 12(b)(6) must apply the
18 notice pleading requirements of Rule 8(a)(2). Under that rule, a
19 complaint need only include a short and plain statement of the claim
20 showing that the pleader is entitled to relief. This statement must
21 give the defendant fair notice of what the plaintiff's claim is and
22 the grounds upon which it rests... In... cases for which no statute
23 or Federal Rule of Civil Procedure provides for different treatment,
24 a court confronted with a Rule 12(b)(6) motion may dismiss the
25 complaint only if it is clear that no relief could be granted under
26 any set of facts that could be proved consistent with the

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3 allegations." Educadores Puertorriqueños en Acción v. Rey-Hernández,
4 367 F.3d 61, 66 (1st Cir. 2004) (internal citations and quotation
5 marks omitted). "[U]nder Fed. R. Civ. P. 8 it is not necessary that
6 a legal theory be pleaded in the complaint if plaintiff sets forth
7 sufficient factual allegations to state a claim showing that he is
8 entitled to relief under *some* viable legal theory." Fitzgerald v.
9 Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989) (internal citations and
10 quotation marks omitted, italics in original).

11 REHABILITATION ACT

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

18 However, "the case law construing the ADA generally pertains
19 equally to claims under the Rehabilitation Act." Calero-Cerezo v.
20 U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004). See also,
21 Enica, 544 F.3d at 338 n.11 ("since the same standards apply to both
22 the Rehabilitation Act and ADA, we rely on precedent construing both
23 statutes"); Rios-Jimenez v. Principi, 520 F.3d 31, 41 n.6 (1st Cir.
24 2008) ("same standard of proof applies to claims under the ADA and
25 the Rehabilitation Act"); Freadman v. Metro. Prop. and Cas. Ins. Co.,
26 484 F.3d 91, 103 (1st Cir. 2007) ("[c]laims under Title I of the ADA

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3 and § 504 of the Rehabilitation Act are analyzed under the same
4 standards"); Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d
5 23, 25 (1st Cir. 2000) ("[a]n employment discrimination claim under
6 section 794 of the Rehabilitation Act is analyzed under the same
7 standards applicable to Title I of the ADA.")

8 "The ADA and Rehabilitation Act prohibit discrimination against
9 an otherwise qualified individual based on his or her disability. The
10 Rehabilitation Act, the precursor of the ADA, applies to federal
11 agencies, contractors and recipients of federal financial assistance,
12 while the ADA applies to private employers with over 15 employees and
13 state and local governments." Calero-Cerezo, 355 F.3d at 19.

14 The Rehabilitation Act protects employees from disability-based
15 harassment in the workplace if it is severe enough to constitute a
16 hostile work environment. "To establish a hostile work environment,
17 [plaintiff] ha[s] to show that [her] workplace was permeated with
18 discriminatory intimidation, ridicule, and insult that was
19 sufficiently severe or pervasive to alter the conditions of [her]
20 employment and create an abusive working environment." Quiles-Quiles
21 v. Henderson, 439 F.3d 1, 7 (1st Cir. 2006) (citations and internal
22 quotation marks and brackets omitted). See also, Rios-Jimenez, 520
23 F.3d at 43. "Among the factors relevant to this inquiry are the
24 severity of the conduct, its frequency, and whether it unreasonably
25 interfered with the victim's work performance." Quiles-Quiles, 439
26 F.3d at 7; Rios-Jimenez, 520 F.3d at 43.

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

14 In order to establish a claim for discrimination under the
15 Rehabilitation Act plaintiff "must prove by a preponderance of the
16 evidence that: 1) she was disabled within the meaning of the statute;
17 2) she was qualified to perform the essential functions of the job,
18 either with or without a reasonable accommodation; and 3) the
19 employer took adverse action against her because of the disability."
20 Rios-Jimenez, 520 F.3d at 41.

21 "In order to assert a claim for failure to accommodate under the
22 Rehabilitation Act, [plaintiff] must establish that she (1) suffers
23 from a 'disability' within the meaning of the statute, (2) is a
24 qualified individual inasmuch as she is able to perform the essential
25 functions of her job, with or without reasonable accommodation, and
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3 (3) that, despite its knowledge of her disability, the [defendant]
4 did not offer a reasonable accommodation." Enica, 544 F.3d at 338.

5 Specifically, defendants contend that "plaintiff must allege at
6 her complaint sufficient pleadings setting forth a disability under
7 the ADA or the Rehabilitation Act of 1973, by showing that she (1)
8 has a disability; (2) was qualified to perform the essential
9 functions of employment with or without reasonable accommodation; and
10 (3) suffered an adverse employment decision due to disability."
11 Defendants' Memorandum of Law (docket No. 11) p. 4.

12 We find that defendant's first challenge is untenable. In the
13 complaint¹ plaintiff indicates that she was diagnosed with diabetes
14 which she controls with Metformin and which requires that she eat at
15 regular intervals to avoid low sugar levels.

16 Diabetes has specifically been found to constitute an impairment
17 within the meaning of the statute. "We have little difficulty in
18 concluding that diabetes is a 'physical impairment' under the ADA...
19 Diabetes is a physical impairment under the ADA because it is a
20 physical condition affecting the digestive, hemic, and endocrine
21 systems... Also, EEOC regulations specifically include diabetes in
22 the definition of a physical impairment." Fraser v. Goodale, 342 F.3d
23 1032, 1038 (9th Cir. 2003).

24 Next, defendant posits that plaintiff has failed to indicate
25 that she was qualified to perform the essential functions of her

26 ¹ Complaint ¶ 8.

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3 position with or without accommodation. This argument is totally
4 without merit. At ¶¶ 7, 8 and 9, the pleading specifically states
5 that plaintiff had been employed with AAFES for 13 years and for
6 about 5 years held the position of Food Activity Foreman at Popeye's
7 in Fort Buchanan, Puerto Rico. It is also evident from the complaint
8 that but for defendants' discrimination she would still be working at
9 her job.

10 In her complaint² plaintiff further described the type of
11 accommodation warranted by her diabetic condition, *i.e.*, need for
12 regular break schedules, as well as defendant's refusal to grant
13 plaintiff's request for accommodation despite her repeated requests.

14 Additionally, there are abundant allegations regarding the
15 constant harassment plaintiff was subjected to by MR. LARRY BRYANT,
16 the new Food Court Manager, tantamount to a hostile environment
17 claim.

18 Based on the foregoing, we find that the complaint properly puts
19 defendants on notice of her disability-based claims.

20 **CONCLUSION**

21 Accordingly, defendants' Motion to Dismiss (docket No. **10**) is
22 **DENIED.**

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26 ² Complaint ¶¶ 13 and 16.

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3 Defendants shall answer the complaint or otherwise plead **on or**
4 **before February 27, 2009.**

5 IT IS SO ORDERED.

6 San Juan, Puerto Rico, this 2nd day of February, 2009.

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8 S/Raymond L. Acosta
9 RAYMOND L. ACOSTA
United States District Judge

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