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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

LUIS CABRERA, Plaintiff, v. SEARS ROEBUCK DE PUERTO RICO, INC., et al., Defendants.	Civil No. 08-1325 (JAF)

OPINION AND ORDER

Plaintiff Luis Cabrera brings this action against Defendants Sears Roebuck de Puerto Rico Inc. ("Sears") and Sears Holding Group alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and Act No. 44, of July 2, 1985, 1 L.P.R.A. § 501-511b (2008) ("Law 44"); Act No. 115, of December 20, 1991, 29 L.P.R.A. § 194-194b (2001) ("Law 115"); and Act No. 80, of May 30, 1976, 29 L.P.R.A. § 185a-185m (2001 & Supp. 2007) ("Law 80"), under Puerto Rico law. (Docket No. 12.) Defendants move for summary judgment. (Docket No. 29.) Plaintiff opposes (Docket No. 40), Defendants reply (Docket No. 50), and Plaintiff surreplies (Docket No. 54).

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I.

Factual and Procedural Synopsis

We derive the following facts from the parties' motions, statements of uncontested facts, and exhibits. (Docket Nos. 29, 30, 35, 38, 40, 49, 50, 53, 54, 60.)

Plaintiff began working at Sears on December 14, 1999, as a materials handler in the Sears Retail and Distribution Center ("RDC") in Cupey, Puerto Rico. From 2003 to 2006, Plaintiff operated a cherry picker machine in a RDC warehouse picking and retrieving stocked merchandise. This required Plaintiff to lift himself up to fifteen-and-a-half feet in the air with the machine to take merchandise off the warehouse shelves.

During Plaintiff's employment, Sears had a code of business conduct and a workplace policy prohibiting violence and threats. Sears issued notices to Plaintiff several times during his employment for alleged violations of the policy.

On October 23, 2001, Plaintiff received an Ethics/Policy Violation Notice from a supervisor regarding an incident on August 29, 2001, with a co-worker, Iván Molina. The notice provides no details of the incident. Sears later terminated Molina's employment.

On April 11, 2006, RDC Operations Manager Gregory Rivera and District Logistics Manager Abner Román met with Plaintiff and a co-worker to discuss an incident that had occurred between them on February 9, 2006. The nature of the incident is not documented and is disputed by the parties.

In February 2006, Dr. Evelio Bravo Fernández ("Bravo") diagnosed Plaintiff with Hepatitis C. On May 4, 2006, Plaintiff verbally requested reassignment to another position due to anticipated physical and emotional changes resulting from a medical treatment he was about to begin. On May 9, 2006, Bravo submitted a Health Care Provider Certification ("HCPC") to Sears stating that Plaintiff was limited in his ability to perform manual tasks, specifically heavy lifting, exposure to heights, and use of stairs. Bravo indicated that the expected duration of the treatment would be forty-eight to fifty weeks, and that Plaintiff would require reassignment to another position and a modified work schedule. Bravo also checked "yes" in response to the question, "Do you believe your patient poses an imminent and substantial degree of risk to [his] health or safety or to the health and safety of others if [he] worked in the described position?" (hereinafter the "risk assessment question"). Bravo explained that Plaintiff "[m]ay fall or get accident prone."

(Docket No. 29-20.) Prior to beginning treatment, Plaintiff was asymptomatic and able to perform the essential functions of his job without limitation.

Plaintiff began treatment on May 26, 2006; he took a leave of absence around this time for three to four weeks. As a result of the treatment, Plaintiff suffered muscular pain, cerebrovascular problems, diarrhea, stomach problems, dizziness, depression, hair loss, weight loss, irritability, fatigue, anemia, insomnia, memory loss, difficulty with coordination of movement, and weakness. Upon his return to work, Sears assigned Plaintiff to stock merchandise using a Hyster machine, which did not expose Plaintiff to heights or heavy lifting and allowed him to remain seated.

On August 29, 2006, Sears issued a Documentation of Performance Issues ("DPI"), which described an incident in June 2006 between Plaintiff and his supervisor Miguel Paca, during which Plaintiff allegedly threatened Paca and used obscene language. The document advised Plaintiff that it was not the first time he had been involved in an argument or altercation at work. Plaintiff denies that the incident occurred.

In December 2006, Plaintiff filed a complaint with Puerto Rico's Occupational Safety and Health Administration ("PROSHA")

to report safety concerns at Sears. On December 14, 2006, PROSHA sent Sears a letter regarding the situation; the letter did not identify the complainant. PROSHA later notified Plaintiff that Sears had resolved the safety concerns.

On January 4, 2007, Plaintiff received a DPI notifying him that on November 30, 2006, he had violated the workplace violence policy by engaging in a verbal altercation with a co-worker in front of other co-workers. Plaintiff noted on the form that he had reported the incident on November 30, 2006. Plaintiff's earlier report stated that the co-worker had instigated the incident and threatened Plaintiff.

In April or May 2007, Bravo informed Plaintiff that the treatment had not been successful and would need to continue. On May 8, 2007, Plaintiff submitted another HCPC from Bravo requesting accommodations. The form reported limitations in Plaintiff's ability to perform manual tasks, specifically heavy lifting, exposure to heights, and using stairs. Bravo indicated that he expected the condition to last forty-eight weeks, and that Plaintiff required reassignment to another position and a modified work schedule that did not require work on Saturdays. Bravo again checked "yes" in response to the risk assessment question and noted that Plaintiff "[m]ay fall or get accident

prone. Emotional liability [second] to his treatment." (Docket No. 29-28.)

Associate Relations Manager Sunny González contacted Sears' Accommodation Help Desk in Chicago on May 25, 2007, for assistance in handling Plaintiff's request for accommodation. On March 31, 2007, Román and Human Resources Specialist Jennifer Vega spoke with Jean Barlett, Sears' fair employment and accommodation consultant, who directed them to ask Plaintiff's doctor whether Plaintiff could continue working with the accommodations he had already been given. If the information was unclear, Sears would hire an independent doctor, and would put Plaintiff on leave for the duration of his treatment if he could not work in any available position. On June 28, 2007, González requested that Plaintiff submit additional medical information in order to evaluate his request for reasonable accommodation. The same day, González sent an email with a Performance Plan for Improvement to Román to discuss with Plaintiff, and stated that "we understand that this is not the time to fire him." (Docket No. 53-11.) González asked Román to explain to Plaintiff that this would be his last chance.

On June 15, 2007, PROSHA again notified Sears that it had received a notice of an alleged health and safety risk,

specifically that the batteries of their lifts were defective and released acid and smells that affected employees; the notice did not identify the complainant. On June 27, 2007, Plaintiff complained to Vega that the Hyster machine's battery was leaking acid and emitting a strong odor. Vega and others later visited the machine but discovered no odor.

On July 3, 2007, PROSHA wrote to Plaintiff acknowledging a complaint he had filed about safety concerns at Sears. The same day, PROSHA wrote to Román informing him of a complaint of stagnant water and defective ramps at Sears; the letter did not identify the complainant.

On July 4, 2007, Plaintiff received another DPI listing seven occasions on which he had been disrespectful or threatening toward supervisors or coworkers, including a June 27, 2007, incident in which Plaintiff allegedly yelled at Vega and other supervisors in front of coworkers.

Plaintiff submitted a third HCPC from Bravo on July 10, 2007. Bravo stated that Plaintiff had been diagnosed with depression and anemia, was limited in several major life activities, and suffered from insomnia, loss of memory, muscle pain, irritability, and lack of stamina and strength. He wrote that he expected the condition to last seventy-two weeks and that

Plaintiff could not perform heavy lifting or be exposed to heights. Bravo clarified in response to the risk assessment question that Plaintiff was at risk for "trauma due to falls and could get hurt or have accident[s] due to his weakness. He is not a risk to the health of others." (Docket No. 29-34.)

González, Vega, and Román met with Plaintiff on July 24, 2007. At the meeting, Plaintiff executed a medical release so Sears could speak directly with his doctors regarding his limitations and required accommodations. The supervisors also informed Plaintiff that he would be suspended from work pending clarification of the information in the HCPC. During the suspension, Plaintiff received short-term disability payments of seventy percent of his salary.

On July 30, 2007, González spoke by telephone with Bravo, who confirmed that Plaintiff could do his job with the provided accommodations, that he would simply have to work more slowly and carefully due to his weakness and lack of agility, that his irritability and aggressiveness were a result of the treatment but that it was not likely to rise to the level of violence, and that the treatment would last at most five to six months more. Bravo also stated that he had referred Plaintiff to a psychiatrist to deal with his changes in mood.

At González' request, Plaintiff executed a medical release form for her to speak with his psychiatrist, Dr. Brignoni ("Brignoni"), on August 2, 2007. On August 6, 2007, Plaintiff brought González a letter from Brignoni certifying that Plaintiff's emotional condition was stable and did not prevent or interfere with his work, but she did not accept the letter. Later that day, González spoke by telephone with Brignoni, who stated that he would not comment until González put Sears' specific concerns in writing. On August 9, 2007, González sent Brignoni a five-page letter detailing Plaintiff's alleged problems at work.

On August 14, 2007, Sears received notice that Plaintiff had filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 25, 2007.

On August 15, 2007, Brignoni sent Sears a medical certificate stating that Plaintiff could return to work and "resume his full-time tasks." (Docket No. 29-44.) The same day, Sears informed Plaintiff that he could return to work. Plaintiff returned to work on August 16, 2007, and continued working with the Hyster machine accommodation. That day, González asked Ricardo Miranda, Plaintiff's supervisor, to assist her in

ensuring that Plaintiff satisfactorily performed his work without creating problems for coworkers or supervisors.

On October 5, 2007, an anonymous caller contacted a Sears ethics hotline to report that Plaintiff frequently disrespected coworkers and supervisors, instigated arguments, and created tension and anxiety in the workplace. The caller could not provide specific examples of such behavior.

On October 10, 2007, Plaintiff drafted a statement detailing an interview he had had with police agents who were investigating thefts at RDC. Plaintiff implicated certain Sears supervisors and managers as responsible for the thefts. Plaintiff alleges that he informed Vega of these facts and allegations on November 8, 2007.

On November 8, 2007, Paca called the ethics hotline and reported that Plaintiff had disrespected him that day and on three prior occasions; Paca claimed to have made prior reports without effect. The same day, Paca wrote a report detailing the incident and the verbal exchange with Plaintiff. Plaintiff denies Paca's account.

Sears terminated Plaintiff on November 9, 2007. Plaintiff filed a second charge of discrimination with the EEOC on November 13, 2007.

Plaintiff filed the present action in federal district court on March 14, 2008. (Docket Nos. 1, 12.) Defendant moved for summary judgment on April 24, 2009. (Docket No. 29.) Plaintiff opposed on May 18, 2009 (Docket No. 40), Defendant replied on May 29, 2009 (Docket No. 49), and Plaintiff surreplied on June 9, 2009 (Docket No. 54).

II.

Summary Judgment Standard Under Rule 56(c)

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004). The moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 331 (1986). The burden has two components:

(1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. Id. at 331.

In evaluating a motion for summary judgment, we must view the record in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). However, the non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

III.

Analysis

A. ADA Claims

1. Disability Discrimination

Defendants argue, inter alia, that Plaintiff is not a qualified individual with a disability under the ADA because he was unable to perform the essential functions of his job, picking and retrieving stocked merchandise. (Docket No. 30.) The parties dispute whether "picking and retrieving" merchandise was an essential function of Plaintiff's job. (See Docket Nos. 30, 40.)

The ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to . . . discharge . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To establish a claim for an adverse employment action under the ADA, a plaintiff must prove that he was (1) disabled under the ADA, but (2) "able to perform, with or without reasonable accommodation, the essential functions of her job," and (3) "discharged or adversely affected, in whole or in part, because of her disability." Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105, 111 (1st Cir. 2006).

A qualified individual under the ADA is one "able to perform the essential functions of the position with or without reasonable accommodation." Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 33 (1st Cir. 2000). An "essential function" is a "fundamental job dut[y] of the employment position the individual with the disability holds or desires." 29 C.F.R. § 1630.2(n)(1). To determine whether a particular job requirement is an essential function, a court must conduct a fact-intensive inquiry and consider numerous factors, including (1) the employer's view of job requirements; (2) written job descriptions prepared prior to hiring; (3) the length of time spent performing

this function; (4) the consequences of not requiring the function; (5) work experience of past incumbents in the job; and (6) work experience of current incumbents in similar positions. See C.F.R. § 1630.2(n)(3); see also Ward, 209 F.3d at 34-35. The employer, who is better positioned to produce the relevant evidence, bears the burden of demonstrating that a given job function is essential. See Ward, 209 F.3d at 35 (citations omitted). "[E]vidence that accommodations were made so that an employee could avoid a particular task 'merely shows the job could be restructured, not that [the function] was non-essential.'" Phelps v. Optima Health, Inc., 251 F.3d 21, 26 (1st Cir. 2001) (quoting Basith v. Cook County, 241 F.3d 919, 930 (7th Cir. 2001)).

Defendants have produced a written job description for the warehouse material handler position, which includes "stock[ing] and pick[ing] merchandise" on a list of essential job functions. (Docket No. 29-5.) Vega testified that Sears provided the job description to all new employees upon hiring, and later if requested. (Docket No. 35-2.) She further explained that the job description does not change unless the position is changed. (Id.) González testified that while at any given time a warehouse material handler might not be required to perform all of the

listed functions, he or she could be called upon at any time to perform those functions depending on Sears's needs. (Docket Nos. 35-5, 35-6.) Accordingly, Sears required that employees in that position be capable of performing all of the described functions. (See id.)

Plaintiff testified that, prior to his treatment and since he began working in the warehouse in 2003, his job consisted of picking and retrieving merchandise using a cherry picker and manually loading pallets. (Docket No. 35-4.) In May 2006, Plaintiff submitted a form completed by Bravo requesting a reasonable accommodation involving a reassignment to another position that did not require him to lift heavy objects or be exposed to heights. (Docket No. 29-20.) Plaintiff does not dispute that he was unable to perform the task of picking and retrieving merchandise once he began treatment. Instead, Sears allowed him to stock merchandise using a Hyster machine which lifts pallets up and places them on the upper shelves of the warehouse while the operator remains seated. (Docket No. 35-4.)

Plaintiff does not suggest what he believes are the essential functions of his position, offer any evidence to rebut Sears' evidence demonstrating that picking is an essential function, or argue that he was capable, with or without

accommodation, of picking and retrieving merchandise. Plaintiff's arguments that Defendant's evidence is contradictory are unavailing. (See Docket No. 40.) Beyond these assertions, Plaintiff claims only that, because Sears allowed him to stock merchandise rather than pick and retrieve merchandise during his treatment, his job could be restructured. (See id.) However, the First Circuit rejected this argument in Phelps. See 251 F.3d at 26. The fact that Sears restructured Plaintiff's job to accommodate his treatment does not prove that picking and retrieving merchandise was not an essential function. Cf. id. Without any other evidence, Plaintiff has failed to show a triable issue of fact regarding his essential job functions. Accordingly, Plaintiff is not a qualified individual under the ADA, see Ward, 209 F.3d at 33, and we must grant summary judgment for Defendants on Plaintiff's ADA disability discrimination claims. As we grant summary judgment for Defendants on this ground, we need not address their other arguments regarding disability discrimination.

2. Failure to Accommodate

Defendants argue that they are entitled to summary judgment on Plaintiff's failure to accommodate claim because Sears in fact provided Plaintiff with the accommodation he requested. (Docket

No. 30.) Plaintiff does not dispute Defendants' motion for summary judgment on this issue and, in fact, concedes that he received a reasonable accommodation during his treatment. (See Docket No. 40.) We, therefore, grant summary judgment in favor of Defendants on Plaintiff's failure to accommodate claim.

3. Retaliation

The ADA prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a). "An ADA plaintiff may assert a claim for retaliation even if [he] fails to succeed on a disability claim." Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 106 (1st Cir. 2007). In the absence of direct evidence, as here, a plaintiff must make a prima facie showing of retaliation by showing that (1) he engaged in protected conduct, (2) he suffered an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse employment action. See Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003). In some circumstances, "the causation element may be established by evidence that there was a temporal proximity between" the protected conduct and the

employment action. Quiles-Quiles v. Henderson, 439 F.3d 1, 8 (1st Cir. 2007).

Once a plaintiff establishes the prima-facie case, "the burden shifts to the employer 'to articulate a legitimate, nondiscriminatory reason for its employment decision.'" Wright, 352 F.3d at 478 (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991)). If the employer does so, the burden shifts back to the plaintiff to show that the proffered reason is mere pretext for retaliation. Id. "[W]here a plaintiff . . . makes out a prima facie case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be particularly cautious about granting the employer's motion for summary judgment." Billings v. Town of Grafton, 515 F.3d 39, 55-56 (1st Cir. 2008) (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998)).

Requesting an accommodation constitutes protected conduct under the ADA's retaliation provision. Freadman, 484 F.3d at 106. It is undisputed that Sears suspended and later discharged Plaintiff, and that these constituted adverse employment actions. We consider the suspension and the termination in turn.

a. Suspension

Defendants argue that Plaintiff has failed to show a causal connection between his protected conduct and the suspension. (Docket No. 30.) Plaintiff submitted HCPCs requesting reasonable accommodations on May 8, 2007, and July 10, 2007. Sears suspended Plaintiff shortly thereafter on July 24, 2007. Moreover, it is undisputed that Plaintiff's supervisors informed him that he was being suspended so that they could clarify information in his reasonable accommodation request. We find that the temporal proximity between Plaintiff's requests, coupled with this admission by his supervisors, is sufficient evidence for a reasonable jury to find a causal connection between the requests and the suspension.

Defendants do not articulate a justification for Plaintiff's suspension in response to his claim for retaliation. (See Docket Nos. 30, 50.) Nonetheless, we consider the reason articulated by Defendants in response to Plaintiff's disability discrimination claims. (See Docket No. 30.) Defendants state that they suspended Plaintiff in order to evaluate whether his emotional condition made him a threat to others due to the irritability and "emotional liability" Bravo noted on the May 2007 HCPC, and

because of Bravo's affirmative notations on the HCPCs related to the risk assessment question. (Docket No. 30; see Docket Nos. 29-20, 29-28.)

Drawing all inferences in Plaintiff's favor, however, we believe a jury could find this assertion to be pretext. First, the HCPC form links the risk assessment question to an attached description of the patient's present position. (See id.) In other words, the form appears to ask only whether the individual poses a risk in his current position, and Bravo's notations suggest that Plaintiff would not pose the potential risk with the accommodations requested. For example, Plaintiff would not be at risk for falling if he was not exposed to heights.

Second, as Plaintiff notes, Defendants did not suspend him after he submitted the May 2006 form containing Bravo's affirmative response to the risk assessment question (Docket No. 29-20), nor did Defendants choose to suspend him after Bravo wrote that he could be a risk due to "emotional liability" on the May 2007 form (Docket No. 29-28). It was not until after Bravo clarified that Plaintiff was not a risk to others on the July 2007 form (Docket No. 29-32) that Defendants suspended Plaintiff to allegedly investigate the risk posed by his emotional state. We agree with Plaintiff that these discrepancies raise a triable

issue of fact as to whether his suspension was motivated by retaliation. See Billings, 515 F.3d at 55-56 ("One way to show pretext is through 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . . .'" (quoting Hodgens, 144 F.3d at 168)).

b. Discharge

Defendants argue that Plaintiff has failed to point to any evidence suggesting a causal connection between his EEOC charge and his discharge. (Docket No. 30.)

Defendants became aware that Plaintiff had filed the EEOC charge on August 15, 2007, but the discharge did not occur until nearly four months later, on November 8, 2007. Plaintiff, thus, cannot rely on temporal proximity to create an inference of causation, see Calero-Cerezo, 355 F.3d at 25, and he has suggested no other theories supporting such an inference.

Plaintiff seems to assert that the fact that most of the reprimands he received took place after his first request for reasonable accommodation shows that the reprimands and the ultimate discharge were all motivated by retaliatory animus. (See

Docket No. 40.) While it is true that "[e]vidence of discriminatory or disparate treatment in the time period between the protected activity and the adverse employment action can . . . show a causal connection," Chungchi Che v. Mass. Bay Trans. Auth., 342 F.3d 31, 38 (1st Cir. 2003), Plaintiff fails to point to any evidence that the reprimands reflect some discriminatory animus or disparate treatment. Without more, we cannot find that there was a causal nexus between Plaintiff's requests for accommodation or EEOC charge and his discharge.

B. Law 44

Because Law 44 is coterminous with the ADA's discrimination and reasonable accommodation provisions, our reasoning above applies to Plaintiff's claims for disability discrimination under Law 44, and we grant summary judgment for Defendants on these claims. See Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 87 (1st Cir. 2008).

C. Law 115

Law 115 provides that an employer may not discriminate against an employee for offering or attempting to offer "any testimony, expression or information before a legislative, administrative or judicial forum." 29 L.P.R.A. § 194a. Law 115

does not prohibit retaliation in response to internal complaints, only offerings to a judicial forum. Id.; Hoyos v. Telecorp Commc'ns., 405 F. Supp. 2d 199, 207 (D.P.R. 2005). To prove liability under Law 115, an employee must first establish a prima-facie case by showing that she participated in a protected activity and was subsequently discharged. 29 L.P.R.A. § 194a(c). Next, the employer must offer a legitimate, non-discriminatory reason for the discharge. Id. Finally, the plaintiff may prevail by demonstrating that the alleged reason is a "mere pretext for the discharge." Id.

Defendants do not dispute that filing a charge with the EEOC, filing a complaint with PROSHA, and offering testimony to the police in a criminal investigation constitute protected activity. It is further undisputed that Defendants discharged Plaintiff. These facts establish Plaintiff's prima-facie case. See 29 L.P.R.A. § 194a(c).

Defendants have stated that Plaintiff's discharge was a result of repeated reprimands he received for acts of insubordination and threats towards his supervisors and coworkers. To show pretext, Plaintiff has introduced evidence challenging the truth of the reprimands and the factual scenarios involved in the alleged incidents.

Plaintiff has failed to show that the reprimands constituted pretext for retaliation on the basis of his PROSHA complaints because the evidence he has introduced does not demonstrate causation. (See Docket Nos. 38, 40.) Plaintiff apparently filed two complaints with PROSHA regarding safety concerns at Sears, but the letters from PROSHA to Sears and to Plaintiff show that Plaintiff's identity as a complainant was kept confidential. Plaintiff, therefore, cannot show that Defendants knew he had filed the complaints.

Plaintiff has also failed to show causation arising from his EEOC charge. Defendants became aware Plaintiff had filed the charge on August 14, 2007, but he was not discharged until nearly four months later. Plaintiff has not pointed to any evidence suggesting a causal connection between these events, or that the discharge was motivated by his filing of the charge.

On the other hand, Plaintiff has introduced evidence that he provided testimony to the police in a criminal investigation less than one month before his termination, and that he informed Vega of his allegations the day before Defendants discharged him. We find that, if proven at trial, a reasonable jury could determine that this very close proximity, combined with Plaintiff's

challenges to Defendant's proffered reason for the discharge, demonstrate pretext for retaliation.

D. Law 80

Law 80, Puerto Rico's wrongful termination statute, entitles an employee discharged from employment without just cause to severance pay from his former employer. 29 L.P.R.A. § 185a. Under Law 80, an employee bears the initial burden of alleging unjustified dismissal and proving actual dismissal. Álvarez Fonseca v. Pepsi Cola of P.R., 152 F.3d 17, 28 (1st Cir. 1998). Once the employee does so, the burden shifts to the employer to prove that it discharged the employee for just cause. Id.

It is undisputed that Defendants terminated Plaintiff from his employment with Sears. Defendants submit evidence of multiple examples of occasions where Plaintiff received reprimands for insubordination and inappropriate conduct in the workplace. Plaintiff, in response, proffers testimony and evidence challenging most of these reprimands as unwarranted or falsified, including the final incident that allegedly precipitated his termination. There remain triable issues of material fact regarding Plaintiff's Law 80 claims; accordingly, summary judgment on this claim is unwarranted.

IV.

Conclusion

For the reasons stated herein, we hereby **GRANT** Defendant's motion for summary judgment **IN PART** and **DENY** it **IN PART** (Docket No. 29). We **DISMISS** Plaintiff's claims for disability discrimination, failure to accommodate, and retaliatory discharge under the ADA, his Law 44 claims, and his Law 115 claims relating to his EEOC charge and PROSHA complaints. Remaining are Plaintiff's claims for retaliatory suspension under the ADA, retaliatory discharge under Law 115 arising from his testimony to the Puerto Rico police, and wrongful termination under Law 80. The parties are strongly encouraged to exhaust all settlement possibilities before proceeding to trial.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 10th day of August, 2009.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge