Toth v Beech Hills Shareholders, LLC
2013 NY Slip Op 33769(U)
December 10, 2013
Supreme Court, Queens County
Docket Number: 14560/2011
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA PART 24

ROSLYN TOTH, Plaintiff, x Index Number 14560 /2011

-against- Motion Date September 4, 2013

BEECH HILLS SHAREHOLDERS, LLC, ET AL., Motion Seq. No. 1

Defendants. x

The following papers numbered 1 to 10 read on this motion by defendants for an order granting summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion- Affirmation-Exhibits.....	1- 4
Opposing Affirmation-Affidavit- Exhibits.....	5-8
Reply Affirmation.....	9-10
Memorandum of Law.....	

Upon the foregoing papers the motion is determined as follows:

In this employment discrimination action, plaintiff Roslyn Toth Dane alleges that she was constructively terminated from her employment as a bookkeeper as a result of defendants' failure to accommodate her medical condition and in retaliation for her complaints of discriminatory treatment. Defendants Beech Hills Shareholders LLC, First Beech Hills Corporation, Second Beech Hills Corporation and Third Beech Hills Corporation (Beech Hills) are alleged to be domestic business corporations engaged in the business of a self-managed cooperative, with its principal offices located at 57-28 246th Crescent, Douglaston, New York. The Beech Hills corporations are residential cooperatives.

Plaintiff commenced this action on June 17, 2011, and alleges that she was employed by the defendants from February 1991 to September 2010, when she was constructively terminated, at age 68. Ms. Toth alleges in her complaint that she suffers from irritable bowel syndrome (IBS), anxiety/panic disorder, and agoraphobia, and that

her supervisor Barbara Leeb, and her prior supervisors were aware of her medical conditions. Ms. Toth alleges that due to her IBS, she has frequent bowel movements in the morning prior to leaving her home to commute to work, and as a result she often arrived at work 9:00 a.m. Although her normal working hours were 9:00 a.m. to 5:00 p.m., with an hour lunch break, she alleges that she was permitted to arrive at 9:30 a.m., with a half-hour lunch break. Plaintiff alleges that her two prior supervisors had approved her adjusted work schedule and that numerous board members were aware of this accommodation due to her medical condition, IBS.

Plaintiff alleges that Ms. Leeb, who was approximately 52 years old, became her manager on February 22, 2010, and that approximately a week later she told plaintiff to come to work at 9:00 a.m. and to take a full one hour lunch break; that she informed Ms. Leeb of her medical condition and that she had been accommodated for the past 19 years and that Ms. Leeb refused to accommodate her. Ms. Toth alleges that she attempted to adjust her schedule, but that due to her IBS, she was often unable to arrive at work at 9:00 a.m. Plaintiff alleges that two weeks after the first conversation, Ms. Leeb told her that she noticed that she was coming in late. Plaintiff alleges that she became upset and anxious; and that Ms. Leeb would not consent to her meeting with the Board to discuss her problems. She further alleges that Ms. Leeb began to encourage her to retire; that she asked her when she was going to retire, and stated "Wouldn't it be nice for you to spend time with your grandchildren and relax after all these years"? .

Plaintiff alleges that Ms. Leeb announced that a new software program was being looked at which would replace the program plaintiff had used for many years, and would change the way she performed her work. It is alleged that several days later, plaintiff was instructed to start training another employee, Alice Buesker, as a back up for payroll; that the payroll program was immediately moved to Ms. Buesker's desk; and that although Ms. Buesker was having difficulty learning the program Ms. Leeb would not permit plaintiff to switch desks with Buesker. Plaintiff alleges that on April 29, 2010, while plaintiff was training Buesker, Ms. Leeb complained about how she handled the payroll. She alleges that as a result of Ms. Leeb's treatment of her, she began to have an anxiety attack, severe diarrhea, and a nose bleed, and that she emailed her resignation letter to the Board that evening. The following day Ms. Toth meet with four board members, and informed them that she was having a difficult time working with Ms. Leeb because she was not willing to accommodate her medical conditions, and that it was causing her stress which worsened her medical condition. Plaintiff alleges that the board members all asked her to continue with her employment and that her resignation was rejected by the Board at a special meeting. Although Ms. Toth returned to work, no adjustments were made to her work schedule.

Over the next several months her relationship with Ms. Leeb did not improve. Plaintiff alleges that Ms. Leeb repeatedly criticized her; "insulted her hairstyle", and suggested that she get a haircut, that "it would make you look more youthful"; and publically humiliated her by yelling at her in front of the office staff. On August 23, 2010, Ms. Buesker was fired, and plaintiff and a co-worker were instructed to take over Ms. Buesker's work load. She alleges that they were told that this would be their top priority, in addition to their own work.

Plaintiff went on vacation from September 13 through September 17, 2010. She alleges that Ms. Leeb had previously approved her vacation time and that when she returned to work on September 20, 2010, Ms. Leeb criticized her for not finishing her work before going on vacation. Plaintiff alleges that she attempted to explain that she could not finish every single task before she left for vacation, as she was not permitted to work overtime. Plaintiff alleges that Ms. Leeb informed her that she would have to take over Ms. Buesker's accounts receivables in the mornings and perform her own work in the afternoons. Ms. Toth alleges that after Ms. Buesker was terminated her own physical condition deteriorated; that she suffered more frequent nose bleeds; and that she was constructively terminated on September 21, 2010, when she emailed her resignation to the Board.

Plaintiff, in her first cause of action, alleges that she was constructively terminated due to her perceived disability and/or her medical condition, in violation of the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of New York § 8-107.1[1]). The second cause of action alleges that the defendants failed to reasonably accommodate her medical condition, in violation of the Administrative Code of the City of New York § 8-107.1(1). The third cause of action alleges that due to plaintiff's actual or perceived age, she was discriminated against in terms of compensation, terms, conditions or privileges of employment, in violation of the City Human Rights Law. Plaintiff in her fourth cause of action alleges that after she made complaints to certain Board members about Ms. Leeb's misconduct, the defendants retaliated and/or discriminated against her, in violation of the City Human Rights Law. Plaintiff seeks to recover compensatory and punitive damages as to each cause of action.

Defendants have served an answer and interposed 24 affirmative defenses. Defendants state in their answer that Beech Hills Shareholders LLC is a self-managed cooperative community which was formed to manage co-defendants First Beech Hills Corporation, Second Beech Hills Corporation and Third Beech Hills Corporation.

Under the NYCHRL, it is an unlawful discriminatory practice for "an employer or an employee or agent thereof, because of the actual or perceived age....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." (Administrative Code of the City of New York, § 8-107 [l][a]).

To establish a case of disability discrimination, a plaintiff must show that he or she suffers from a disability, and the disability caused the behavior for which he or she was terminated. (*Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; *see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 146 [1st Dept 2009]). The NYCHRL defines "disability" purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8-102 [16] [a]). These include: "an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system" (Administrative Code § 8-102 [16] [b] [1]); *see also Phillips v City of New York*, 66 AD3d 170, 181 [1st Dept 2009]).

To establish a prima facie case for an employer's failure to reasonably accommodate, the plaintiff must show: (1) her disability is within the meaning of the statutes; (2) that the employer has notice of the disability; and 3) that the employer refused to fulfill the obligation to provide objectively reasonable accommodations (*see* Administrative Code of the City of New York, § 8-107[1][a]; *Pimentel v Citibank, N.A.*, 29 AD3d 141 [1st Dept 2006]).

An employer's refusal to reasonably accommodate an employee's known disability also constitutes discrimination under the NYCHRL (*see* Administrative Code § 8-107 [15][a]; see *generally Phillips v City of New York*, 66 AD3d 170, supra). The NYCHRL defines "reasonable accommodation" as "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." (Administrative Code § 8-102 (18); *see also* Administrative Code § 8-107 (15) (b) [employer may assert, and must prove, affirmative defense that disabled employee "could not, with reasonable accommodation, satisfy the essential requisites of the job"]; *Harris & Assocs. v deLeon*, 84 NY2d 698, 706 [1994], [statute explicitly puts burden on employer to prove inability to make reasonable accommodation]). Thus, " there are no accommodations that may be 'unreasonable' if they do not cause undue hardship" (*Phillips,* 66 AD3d at 182), and "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation." (*Id; see also Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449 [1st Dept 2012], *affirmed as modified* 22 NY3d 881 [2013] .).

The NYCHRL further requires that, as a first step in providing a reasonable accommodation, an employer must "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." (*Phillips*, 66 AD3d at 176; see Jacobsen v New York City Health and Hosps. Corp., 97 AD3d 428, 431-432 [1st Dept 2012], *Miloscia v B.R. Guest Holdings, LLC,* 94 AD3d 563, 564[1st Dept 2012]). Engagement in an individualized interactive process is itself an accommodation, and, generally, the failure to so engage is a violation of the city statute (*see generally, Miloscia*, 94 AD3d at 564; *Phillips,* 66 AD3d at 176). The NYCHRL affirmatively requires that, even in the absence of a specific request, an employer "shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job ... provided that the disability is known or should have been known by the [employer]." (Administrative Code of the City of New York § 8-107 [15][a]; *see Phillips*, 66 AD3d at 189).

The NYCHRL prohibits retaliation or discrimination against individuals who have exercised their rights under the NYCHRL (*see* Administrative Code of City of NY § 8-107[7]). Under the provisions of the NYCHRL, as amended by the Restoration Act (*see* 2005 NY City Legis Ann, at 528-535), a plaintiff need not establish that the alleged retaliation or discrimination "result[ed] in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment" so long as "the retaliatory or discriminatory act . . . [was] reasonably likely to deter a person from engaging in protected activity" (Administrative Code of City of NY § 8-107[7]; *see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 739-742 [2d Dept 2013]; *Williams v New York City Hous. Auth*., 61 AD3d 62, 70-71 [1s Dept 2009]).

To prevail on a motion for summary judgment, the movant must, by submitting evidentiary proof in admissible form, establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id*. at 853). Once such showing has been made, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562.). The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc*., 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]).

Defendants, in support of the within motion for summary judgment, have submitted, among other things, copies of the deposition testimony of plaintiff Roslyn Toth, non-party witness Barbara Leeb, and JoAnn Schlesinger, the president of the Board of Beech Hills Shareholders LLC and president of Second Beech Hills Corporation, as well as a copy of an affidavit from Ms. Leeb that was submitted in response to a complaint made to the New York State Division of Human Rights. Plaintiff, in opposition to said motion, has submitted an affidavit, as well as an affidavit from Fred Danziger, her former supervisor.

The evidence presented here establishes that the plaintiff suffers from a disability within the meaning of the NYCHRL and that her prior supervisors were aware of her disability, and provided an accommodation from 1999 until February 2010, when Ms. Leeb became her supervisor. Defendants assert that plaintiff did not inform Ms. Leeb or certain Board members of the severity of her condition, and also assert that her lateness was noted on a 2000 evaluation by Fred Danziger, her supervisor between 2000 and 2009. Mr. Danziger, however, states in his affidavit that when he presented the evaluation to Ms. Toth she informed him of her IBS, and her difficulties in arriving at work at 9:00 a.m., and that her prior supervisor was also aware of her condition, and had provided an accommodation by adjusting her work schedule, and that he continued to accommodate her by adjusting her work schedule. He further states that Ms. Toth made up her time by taking a shorter lunch break or working later at the end of the work day; that this did not affect the overall efficacy of the administrative duties and responsibilities he managed; and that he later learned that the cooperative's board of directors was aware of Ms. Toth's medical condition and did not object to the accommodation.

Defendants also assert that they engaged in good faith in the interactive process and that plaintiff caused the process to break down by resigning. Plaintiff, however, asserts that she made an effort to substantiate her claim with medical documentation, that she made requests for a reasonable accommodation to Ms. Leeb and to the Board and suggested a possible accommodation, which was flatly refused.

The resolution of the issues of whether an accommodation would be "effective" and whether it would cause undue hardship for an employer is "singularly case-specific, further illustrating the need for an individualized, interactive fact-specific process" (*Phillips*, 66 AD3d at 180). Thus, "[t]he issue of whether an accommodation is reasonable is normally a question of fact, unsuited for a determination on summary judgment"(*Scalera v Electrograph Sys., Inc*., 848 F Supp 2d 352, 367 [ED NY 2012], *quoting Canales-Jacobs v. New York State Ofc. of Ct. Admin*., 640 F Supp 2d 482, 500 [SD NY 2009]). Therefore, based on the conflicting evidence presented here, the court finds that triable issues of fact exist as to whether defendant discriminated against plaintiff based on her disability and whether they engaged in the good faith interactive process required by the NYCHRL. Those branches of

the motion which seek to dismiss the first and second causes of action, are denied.

Plaintiff's third cause of action for age discrimination is based on two statements allegedly made by her supervisor, Barbara Leeb concerning her hairstyle, and whether she would want to retire and spend more time with her grandchildren. Plaintiff does not state when these conversations took place. However, at her deposition, she stated that she and her co-workers had discussed the possibility of retirement, albeit in general terms. Stray remarks, like these, without more, however, are insufficient to establish a claim based upon age discrimination (*see Melman v Montefiore Medical Center*, 98 AD3d 107, 125-126 [1st Dept 2012]; *Rollins v Fencers Club, Inc*., 40 Misc 3d 1233 [A][Supreme Court, New York County 2013]). Therefore, that branch of the defendants' motion which seeks to dismiss plaintiff's third cause of action, is granted.

Plaintiff, in her fourth cause of action, alleges that the defendants retaliated against her by not providing a reasonable accommodation after she complained to certain Board members about Ms. Leeb's management style and her failure to provide a reasonable accommodation. Under the NYCHRL, a request for reasonable accommodation is not a protected activity for purposes of a retaliation claim (*see Witchard v Montefiore Med. Ctr.*, 103 AD3d 596 [1st Dept 2013]; *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677-678 [2d Dept 2006]). Therefore, that branch of defendants' motion which seeks to dismiss the fourth cause of action for retaliation, is granted.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted solely to the extent that the third and fourth causes of action are dismissed.

Dated: December 10, 2013

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AUGUSTUS C. AGATE., J.S.C.