Garrett v City of New York
2013 NY Slip Op 32092(U)
September 4, 2013
Sup Ct, New York County
Docket Number: 105375/2010
Judge: Kathryn Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 9/9/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: ______________________________ *Justice*

PART ______

Index Number : 105375/2010
GARRETT, MANUELA
vs
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | **No(s).** ______

Answering Affidavits — Exhibits ______ | **No(s).** ______

Replying Affidavits ______ | **No(s).** ______

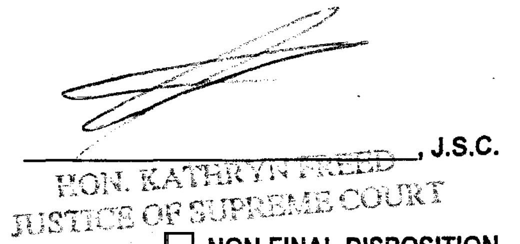
Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP 09 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 9-4-13



______, **J.S.C.**
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

SEP 04 2013

1. **CHECK ONE:** .... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5
--X
MANUELA GARRETT,

Plaintiff,

DECISION/ORDER

-against-

Index No. 105375/2010
Seq. No. 001

THE CITY OF NEW YORK, and NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Defendants.
--X

FILED
SEP 09 2013
NEW YORK COUNTY CLERK'S OFFICE

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..................	1-3 (Ex A-WW)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
ANSWERING AFFIDAVITS...	.........4..........
REPLYING AFFIDAVITS..	....
OTHER..............(Memos of Law)..	.........5-7........

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants City of New York and New York City Human Resources Administration, (collectively, the City) move, pursuant to CPLR§ 3212, for summary judgment dismissing the complaint.

The complaint alleges that plaintiff Manuela Garrett (Garrett) has been employed by HRA since in or about 1986. Since 2006, Garrett has been employed as a Supervisor Level II in the Spousal Certification Unit of the Nursing Home Eligibility Division (the Division), at HRA's office located on West 34th Street in Manhattan. The Division determines the eligibility of individuals requiring medical insurance that are placed in nursing homes. The Division is also responsible for updating their eligibility every year. See deposition of Ralph Torres, Director of Administration for

Nursing Homes, affirmation of Pinar Ozgu, Exh. E at 12. The Spousal Certification Unit handles recertification cases in which one spouse is in the nursing home while the other is living in the community.

Garrett alleges that she suffers from the condition of irritable bowel syndrome ("IBS") and colitis, and is a person with a disability, as defined by the New York State and New York City Human Rights Laws. IBS can cause extreme cramping, diarrhea, and the frequent need to use the bathroom. Garrett alleges that, notwithstanding her medical condition, she has been and is fully capable of performing the essential duties of her job.

According to Garrett, from about April or May 2009 to March 2010, her immediate supervisor was Wendy Berch (Berch), who, in turn, reported to Ralph Torres (Torres). Garrett alleges that, beginning in April or May 2009, Berch began denying her reasonable requests for sick leave, though her requests were made in accordance with HRA policies and procedures. She further alleges that Berch harassed her in connection with her disability by, among other things, yelling at her, telling her that she did not like people who are sick and did not want Garrett working for her, micromanaging her work, giving her unreasonable deadlines, and generally increasing her stress, which excacerbated her illness and caused her extreme emotional and psychological distress.

Garrett asserts three causes of action: 1) violating section 296.1 and 296.3 (a) of the New York State Executive Law (Human Rights Law) by refusing to provide her with a reasonable accommodation for her disability by denying her reasonable requests for sick leave; 2) violating section 8-107 (a) of the Administrative Code of the City of New York (New York City Human Rights Law) by refusing to provide her with a reasonable accommodation for her disability; and 3) negligently failing to properly supervise Berch to effectively prevent her from discriminating against

Garrett. Garrett seeks judgment directing the City to grant her reasonable requests for approved leaves of absence relating to her disability,[1] awarding her damages for lost pay resulting from the denial of requests for approved leaves of absence and for emotional distress, and awarding her costs and attorneys' fees.

In support of its motion for summary judgment, the City submits documents setting out HRA's policy covering employee sick leave as well as voluminous documentation of Garrett's attendance records, including her use of sick leave over a six-year period, from January 1, 2005 through January 30, 2011.

Depending on the employee's civil service title and/or assignment, HRA employees generally work 35, 37½, or 40 hours per week, with twelve paid legal holidays per year, or 248 days work-days per year. Pursuant to HRA policy, most employees accrue one day of paid sick leave for each month that they work. Once they have exhausted their accrued sick days, they may take unpaid sick leave. See HRA's Supervision of Employee Attendance and Punctuality, Procedure No. 03-03 (Procedure No. 03-03) at 1, annexed to Ozgu affirmation, Exh. L.

Pursuant to Procedure No. 03-03, when an employee requests sick leave, the employee may be required to provide a doctor's note to document an illness. Any six instances of sick leave within a "sick leave period" is considered excessive and can place an employee on "Doctor's Note

---

[1] In her deposition, Garrett alleges that she requested a transfer to Queens, where she resides and where her doctors are located, but that her request was denied. In support of its motion for summary judgment, the City submits evidence that the request was in fact granted, but no job was available at the time, and that her request would be reconsidered when a vacancy existed. *See* affirmation of Pinar Ozgu, Exh. GGG. As the City points out in its memorandum in support of its motion, the claim regarding a transfer is not mentioned by Garrett in her affidavit in opposition to the City's motion or in her counsel's memorandum of law, thus, the court concludes that it has been abandoned.

Restriction." Id. at 4.[2] "Medical documentation is mandatory when sick leave exceeds three (3) consecutive days and for anyone on Doctor's Note Restriction." *Id.* at 6. The employee has five days in which to obtain the doctor's note, however the employee is required to enter the request for leave in Autotime on the day of return to work. *Id.*

When an absence is unplanned (e.g. the employee becomes ill at home), the employee is required to contact his or her supervisor (or other designee) within 60 minutes after he or she is required to report to work. "All requests for approval of such unplanned leave must be entered into Autotime on the day the employee returns to his/her assigned location with an explanation for Lateness or unplanned Absence ... detailing the situation." *Id.* at 7. Finally, Procedure No. 03-03 states that "[f]ailure to comply with the above requirements results in unauthorized absence." *Id.*

Garrett's attendance records indicate that during 2006, she took sick leave on 97 days; during 2007, 88 days; during 2008, 64 days; in 2009, 133 days; 2010, 166 days (including 87 days when she was on Family Medical Leave Act [FMLA] leave for a pulmonary embolism); January 2011 through August 2011, 53.9 sick days and 52.7 unscheduled leave without pay days. Thus, over a 5½-year period, Garrett was out of work for all or a portion of at least 654.6 days.[3]

Even before Garrett was transferred to HRA's Spousal Certification Unit and well before Berch became her supervisor, she exhibited problems with the use of time and leave. According to records submitted by the City, during the six-month period between July 21, 2005 and December 30, 2005, there were 26 instances in which her request for sick leave were disapproved because of her

---

[2] The calendar is divided into two "sick leave periods" - from January 1 to June 30 and from July 1 to December 31.

[3] On some of the days when Garrett took sick leave she may have worked at least part of the day.

failure to notify her supervisor or her lack of documentation, and six instances where her requests for annual leave were similarly disapproved. See Ozgu affirmation, Exh. J.

Even in 2008, when she took the fewest number of sick days, and was not yet supervised by Berch, Garrett missed 64 days of her 248-day work-year, or approximately one quarter of the work-year. From January 2011 through August 2011, long after Berch was no longer her supervisor, Garret took 53.9 sick days and 52.7 unscheduled leave without pay days, missing approximately 106 days, or approximately two-thirds of her work-days (not counting holidays).

Because Garrett was absent for more than six days in any sick leave period, pursuant to the HRA Procedure, her supervisor could require her to bring a doctor's note when she requested sick leave. In a meeting held on June 12, 2009 attended by Garret, Berch, Torres, union personnel and labor relations personnel, however, it was agreed that Garret could use her semi-annual blanket doctor's note to cover her use of sick leave for IBS, and that she need not obtain a specific doctor's note for every individual absence, as required by the HRA policy.

During the period between July 2, 2009 and February 12, 2010, however, there were at least 15 instances when Garrett failed to notify her supervisor or other comparable personnel when she had unplanned absences, as required by HRA sick leave policy. See Ozgu aff, Exh. Z. Furthermore, as Torres indicated to her in his memo of February 18, 2010, in the period between the week ending January 9, 2010 and February 18, 2010 (33 working days) Garrett was out sick 14 full days (42.42%) and 4.5 half-days (13.64%) or a total of 16.5 days or 50% of the time. Torres indicated that as a result of her poor attendance, she would no longer be able to use her "blanket doctor's note" and would once again be asked to submit medical documentation of her illnesses. See Ozgu aff, Exh. UU; see also memo from Torres to Joanne Nelson-Williams, MICSA Personnel Director, dated May

13, 2010. Ozgu affirmation, Exh. NNN (noting that Garrett continues to be absent from work and that her absence is affecting the morale and work efficiency of her unit).

On February 24, 2010, Garrett filed a discrimination complaint with HRA's Office of Equal Employment Opportunity (EEO office), based upon disability against Berch and Torres, alleging that Berch stated that she hated her because of her medical condition. According to the complaint, Torres was present when the statement was made, but did nothing to stop Berch, who continued to make disparaging remarks. The complaint also alleged that Berch had continued to disapprove her sick leave requests even when accompanied by medical documentation. The corrective action requested by Garrett was to be transferred from Berch's supervision. See Discrimination Complaint, Ozgu affirmation, Exh. VV. On April 9, 2010, after a fact finding investigation, HRA's EEO Office found "no probable cause to determine you were discriminated against based on your disability; nor does it appear that you were subjected to any adverse employment decisions based on your disability." Letter from Stephanie Grant to Manuela Garrett, dated April 9, 2010, Ozgu affirmation, Exh. XX. The court notes, however, that although HRA's EEO office concluded that Garrett's discrimination complaint was unfounded, shortly thereafter, Berch was removed as Garrett's supervisor. In addition to the evidence of her excessive number of absences, the City submitted substantial evidence regarding Garrett's inability to fulfill her job functions even when she was in the office.

As the supervisor in the Spousal Certification Unit Garrett is the first person to receive the recertification application from the nursing home. She prepares the application and assigns it to one of her caseworkers who evaluates the application and determines eligibility of the applicant, and returns the papers to Garrett. She must then review the case and sign off on it. See Torres dep, Ozgu affirmation, Exh. E at 16-19. If a recertification application is not handled in a timely manner, the

individual may lose his or her benefits. *Id.* at 54.

In addition to her responsibility to assign and sign off on recertification applications, Garrett is responsible for preparing a weekly report indicating the number of recertification applications received and processed during the week, and for approving time sheets of her caseworkers. See deposition of Manuela Garrett, Ozgu affirmation, Exh. C at 76 & 96.

The City submitted the deposition testimony of Berch and Torres as well as the many memoranda Berch sent to Garrett and Torres regarding Garrett's disorganized work habits, the fact that case files piled up for weeks, that files of her staff members had not been signed off by her, that she refused to take attendance of the workers in her unit, and both institutional providers and individual clients had complained to the agency that their cases had not been processed and that, as a result, individual clients and nursing homes had lost benefits. See Torres dep, Ozgu affirmation, Exh. E at 53 - 60; deposition of Wendy Berch, Ozgu affirmation, Exh. D at 128; emails from Berch to Garret, cc Torres, dated June 22, 23 and 25, 2009 regarding case count of completed files being off by more than 100, complaint from Palm Garden about a recertification that had been timely submitted but not processed, missing files, and voice mails from providers that had not been answered regarding a case, Ozgu affirmation, Exh. U; memorandum from Berch to Torres, dated 6/29/09 regarding backlog of cases to be signed off, discrepancies in unit reports, months worth of cases remaining to be processed, refusal of Garrett to use a filing system, complaints from institutional providers that they had to submit cases more than once and complaints that Garrett does not return their calls, Ozgu affirmation, Exh. V; memorandum from Berch to Torres dated 7/2/09 regarding five weeks worth of cases accumulated on Garrett's desk that Berch filed, and 28 cases that had been submitted for recertification since 6/29/09 and 34 cases that had been completed by

[* 9]

caseworkers and had been awaiting Garrett's review since 6/30/09, Ozgu aff, Exh. Y; memorandum from Berch to Torres, dated 7/8/09 regarding complaint from Split Rock Rehab and Care Center regarding three cases that had not been processed, confidential complaint by worker in Garrett's unit advising Berch that the three cases had been completed the previous week but had not been signed off by Garrett during the 1½ days that she was in the office, and complaints from HRA employee, Cynthia Kee, that Garrett's monthly reports contained inaccuracies, Ozgu affirmation, Exh. BB; memorandum from Berch to Torres, dated 7/10/09 regarding, among other things, plan to have a "shared" spousal clerk organize and file 106 cases piled up on Garrett's desk and fax from Mark Versella, Aging Homecare Registry concerning a pending Medicaid recertification for a private client that appeared to be misplaced by Garrett, Ozgu affirmation, Exh. CC; memorandum from Berch to Torres dated 2/10/10, regarding complaint by Sands Point Center for Health and Rehab, Ozgu affirmation, Exh. TT. In addition, there were complaints within HRA resulting from the fact that Garrett failed or refused to carry out some of her supervisory duties such as taking attendance. Berch dep, Ozgu affirmation, Exh. D at 28.

As a result of these various problems, over the following approximately six months, Berch attempted to establish specific tasks and work patterns for Garrett to follow, sending her repeated memos and emails. See Ozgu affirmation, Exh. W. Those efforts have consistently been interpreted by Garrett as constituting micromanagement and harassment.

The complaints from nursing home facilities regarding Garrett's handling of recertification cases and failure to return phone calls continued long after her supervision by Berch. See e.g. email from Jane Fisher, Business Officer Manager, The Mountain View SNF, to Torres, dated July 8, 2011 concluding "I have wasted at least 10 hrs of my time on this case due to this unprofessional

caseworker." Ozgu affirmation, Exh. T; see also faxes and emails regarding patients who had not received Medicaid recertification or needed to be reinstated: from Adriana Pollack, Patient Accounts Director, NYCHHC, dated 8/16/11; from Oona Dunbar, dated July 11, 2011; from Laura Miller, Golden Gate HHC, dated 8/3/11; from Jenny Irizarry, Insurance Manager, Regeis Care Center, dated July 5, 2011; from Dona, Sea Crest Health Care Center, dated 7/11/11; from Alicia Bernard, Buena Vista Continuing Care & Rehabilitation Center, dated 7/11/11, and from Lutheran Augustana Center, dated 7/13/11. Id.

More than one year after Berch was removed as Garrett's supervisor, however, Jacqueline John, Deputy Director of NHED/Administration, Personnel & Provider Relations found similar problems with Garrett's work. See memo of Jacqueline John to Torres, dated July 26, 2011 reporting on Garrett's work station on July 19, 2011, as follows:

"1. 200 Renewal cases were uncovered that were immediately removed.

a. 73 cases with expiration dates prior to July, 2011. Note: These cases were submitted timely; have fallen off the Nursing Home Rosters; and, have experienced lapsed coverage.

b. 72 cases with July, 2011 expiration dates. Note: These cases were submitted timely; have fallen off the Nursing Home Rosters; and, there was no attempt to address these cases, per her task and standards.

c. 38 cases with August, 2011 expiration dates.

d. 17 cases with September, 2011 expiration dates.

2. Cases were not prepped according to Ms. Garrett's supervisory function.

3. Renewals were not distributed for eligibility processing."

Ozgu affirmation, Exh. KKK.

In her memo John concluded,

> "Please be advised that Ms. Garrett's negligence had a rippling affect throughout NHED and caused delays in case reviews, data entry and processing. There was also an additional cost to the Agency in having to approve overtime to address any further processing delays. It is concerning that after speaking with Ms. Garrett, she continued to show disregard toward her assignments, the consumers we serve and her colleagues." *Id.*

Because of Garrett's continuing absences and the many problems with the functioning of her unit resulting at least in part from her absences, Torres repeatedly contacted the HRA personnel director requesting a medical evaluation of Garrett in connection with her excessive absences, her disregard of duties, and her impact on morale and work efficiency to determine whether she could perform her job. See memos from Torres requesting medical evaluation dated July 6, 2009 (Ozgu affirmation, Exh. LLL); August 3, 2009 (Ozgu affirmation, Exh. MMM); May 13, 2010 (Ozgu affirmation, Exh. NNN); March 3, 2011 (Ozgu affirmation, Exh. 000); May 31, 2011 (Ozgu affirmation, Exh. PPP); August 16, 2011 memo requesting medical evaluation and disciplinary action (Ozgu affirmation, Exh. QQQ); October 6, 2011 memo requesting medical evaluation (Ozgu affirmation, Exh. RRR).

Finally, Torres's request was granted, and on October 10, 2011, Dr. George Brief conducted a medical evaluation pursuant to section 72 of the Civil Service Law in which he concluded:

> "This patient suffers from a severe form of inflammatory bowel disease.
> This condition is activated by many factors including psychosocial dysfunction.
> The psychosocial aspects of her condition should be evaluated by an expert in the field of psychiatry.
> As far as her fitness for duty is concerned, it is my professional opinion that at the present time she cannot fulfill her professional duties. I base this opinion on the very unusual number of sick days that kept her away from work."

Letter from George Brief, M.D., F.A.C.C. to Mr. SooHoo, dated October 10, 2011, Ozgu

affirmation, Exh. SSS at 3.

Garrett then received a psychiatric evaluation which concluded that "it is obvious from the patient's record and from her physical and emotional condition that, at this time Ms. Manuela Garrett is not able to continue and perform her duties with the City of New York." Letter from Azariah Eshkenazi, MD., F.A.P.A. to Patrick Soohoo, dated December 13, 2011, Ozgu affirmation, Exh. UUU. Eshkanazi stated that Garrett said that she did not go to work because her supervisor harasses her badly which causes her to be anxious and exacerbates her IBS symptoms. Eshkenazi also stated that when he discussed her absenteeism from work with her "[s]he, indeed, appeared quite insincere by stating, 'I was only out a couple of days her [sic] and a couple of days there, and the only time I was out was when I had the lung embolism.' Indeed, one got a strong impression of insincerity." *Id.* at 3.

On October 26, 2011, Garrett was notified that a case conference was scheduled pursuant to section 72 of the Civil Service Law resulting from her poor absence and inability to perform her full-time duties as a supervisor II. According to that notice, for the 20-month period from January 2010 through August 2011 Garret was absent from work 73.5% of the time (307.5 of 418 possible work days, 69% of which were attributed to sick leave). Ozgu affirmation, Exh. TTT. On March 6, 2012, Garret and the City entered into a stipulation of settlement of the disciplinary proceeding in which she agreed to take a voluntary medical leave of absence beginning on March 12, 2012, for a period of four months. Ozgu, Exh. VVV.

The City has submitted voluminous documentation of Garrett's work history, including, her excessive use of sick leave before, during and after the time she was supervised by Wendy Berch; internal agency memos complaining not merely about her excessive absences, but her failure to carry

out her work, including failing to supervise the staff in her unit, when she was at work; complaints received from institutional clients concerning her work; a finding of no probable cause by HRA's EEO unit on her discrimination complaint against her supervisors, Berch and Torres; documentation of disciplinary action taken against her for her use of sick time for which she made no contact with the agency; and the results of the medical and psychiatric evaluations finding her unfit for work. In response to the documentation submitted by the City, Garrett merely submits her own affidavit contending that Berch and Torres repeatedly denied her requests for sick leave because she did not have a doctor's note, as required by HRA procedures. According to Garrett, she needed to use the blanket note so that she would not have to take off additional time from work merely to obtain doctors' notes when her condition did not require medical treatment, but rather being at home in bed or near the bathroom.

Referring to the June 12, 2009 meeting with her supervisors, and representatives of the union and the agency's central labor relations office at which it was agreed that she could use a blanket doctor's note to cover her absences as an accommodation to her condition, Garrett contends that the system "worked well" for a while but complains that HRA's central labor office, nonetheless, permitted Torres to discontinue the procedure at a certain point.[4] However, she does not address the

---

[4] Garrett also claims that she was never notified that permission to use the blanket note was being withdrawn, but she fails to address the February 18, 2010 memo to her from Ralph Torres regarding time and leave which notified her that the special accommodation was being discontinued because her excessive use of sick leave had not improved. The memo specifically states that

> "[s]ince the week ending 1/9/10 to date (33 working days) you have been out sick 14 full days (42.2%) and the equivalent of 2.5 days (4.5 half days) (13.64%). This means that out of 33 working days, you were absent 16.5 days or 50% of the time. This is not acceptable."
> (Memo from Torres to Garrett, 2/18/10, Ozgu affirmation, Exh. UU).

[* 14]

numerous requests for leave that were denied because she failed to call in to her supervisor as required by HRA procedures (see Ozgu affirmation, Exh. Z), or the request for charges and specifications filed against her pertaining to unauthorized leave taken by her during that same period which resulted in a penalty of a ten day pay fine. See Ozgu affirmation, Exhs. ZZ and AAA.

Similarly, Garrett fails to address the many documents regarding specific complaints regarding her work, including the complaints of institutional providers regarding her failure to return phone calls, loss of documents, and loss of funding for clients, merely contending that Berch micromanaged her work, and that the backlog in work was caused by the large number of cases and inadequate staffing.[5] Garrett affidavit, ¶ 14. Nor does she address the specific complaints concerning her work and "the impact her continual negligence has on the consumer workflow of the Spousal unit" and the "rippling affect throughout NHED" of that negligence, made not by Berch or Torres, who she contends were hostile to her because of her medical condition, but by Jacqueline John, Deputy Director, Nursing Home Eligibility Division/Administration, Personnel & Provider Relations. See Memo from John to Torres, dated July 26, 2011, Ozgu affirmation, Exh. KKK.

Garrett's first and second causes of action allege disability discrimination based upon the failure of Berch and Torres to provide her with a "reasonable accommodation" for disability (IBS), i.e. an refusal to permit her to use a blanket doctor's note to cover her many absences from work, and their denial of her "reasonable requests" for leaves of absence for her condition.

---

[5] The court notes that at her deposition, Garrett testified that from February 2011 to August 2011 she only had one case worker and that prior to that time she had two or three case workers. Garrett dep at 73. Therefore, during the time in which Berch complained of Garrett's lack of productivity and at least some of the provider complaints were lodged concerning her work, Garrett was not understaffed.

[* 15]

CONCLUSIONS OF LAW:

SUMMARY JUDGEMENT STANDARD:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*,49 N.Y.2d 557 [1989]; *People v. ex rel Spitzer v. Grasso*, 50 A.D. 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

REASONABLE ACCOMMODATION:

"A complaint states a prima facie case of disability discrimination under the Executive Law if the individual suffers from a disability and the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment. The term 'disability' is limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job held." (*Staskowski v. Nassau Community Coll.*, 53 A.D.3d 611, 611 (2d Dept. 2008)(citations omitted). "A reasonable accommodation is defined in relevant part as an action that

permits an employee with a disability to perform his or her job activities in a reasonable manner." (*Matter of DiNatale v. New York State Div. of Human Rights*), 77 A.D.3d 1341, 1342 (4th Dept. 2010)(internal quotation marks and citation omitted). It may not, however, impose undue hardship on the employer. *Id.*

Numerous cases cited by the City establish that showing up for work on a regular basis is an essential part of performing one's job in a reasonable manner. See e.g. *Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir 1999) (employee that missed work or was late 40 times during a 20 month period was not a qualified worker as a matter of law because of erratic and unexplained absences); *Daddazio v. Katherine Gibbs School, Inc.*, 1999 WL 228344, *5, 1999 US Dist LEXIS 5408, *14 (SD NY, Apr 20, 1999, 98 Civ 6861 [DC]), affd 205 F3d 1322 (2d Cir 2000)("'[R]egularly attending work' is an essential function of virtually every job."); *Davis v. Pitney Bowes*, 1997 WL 655935, *16, 1997 US Dist LEXIS 16258, *50 (SDNY, Oct. 20, 1997, No 95 Civ 4765 [LAP]), citing *Jackson v. Veterans Administration*, 22 F.3d 277, 279 (11th Cir.) (because employee was absent numerous times, employee "could not fulfill this essential function of his employment, that of being present on the job, and was not otherwise qualified").

It is clear from the massive amount of evidence presented by the City, and not countered by Garrett, that for a large percent of the work years from 2006 through 2011, Garrett was not present at the job. Moreover, even with the accommodation of using a blanket doctor's note, she was not able to perform her job activities in a reasonable manner. During the period when she was permitted to use the blanket note, her absences were excessive and she repeatedly failed to call in to her supervisor as required by Procedure No. 03-03. Furthermore, during that period, there were repeated complaints about her work and the impact it was having on the Spousal Certification Unit made not

only by her supervisors, but also by the institutional providers. As noted above, a special accommodation is not required where it will impose an undue hardship on the employer.

Although it is unclear to the Court why Torres's repeated requests to personnel for a medical evaluation of Garrett went unheeded until October 2011, when that evaluation was ultimately conducted, it was determined that Garrett was unfit to perform her duties, and ultimately, Garrett entered into a stipulation of settlement with the City agreeing to a voluntary medical leave of at least four months.

Based on the voluminous documentation submitted by the City, the Court concludes that the decision of Garrett's supervisors to discontinue permission for her to use a blanket doctor's note does not constitute disability discrimination.

DISCRIMINATORY TREATMENT:

Based solely on her own affidavit, Garrett contends that her former supervisor Wendy Berch frequently denied her requests for approved sick leave and repeatedly made negative comments to her about her illness, including telling Garrett that she doubted that she had IBS, said that she preferred not to have Garrett work for her on numerous occasions when there were no witnesses present, and on least one occasion when three co-workers were present, Berch "screamed" at her when she was at her desk on her phone. Garrett does not provide the statements of any of those co-workers to confirm her allegations. Garrett also complains that Berch "micromanaged" her work. Garrett's unsupported allegations are effectively that Berch's treatment of her created a hostile workplace.

Berch denies having made the statements attributed to her, states that she never screamed at Garrett, and that if she spoke loudly to Garrett, it was because she, Berch, was hard of hearing.

Berch dep, Ozgu affirmation, Exh. D at 22-23, 27, 28. Torres states that he never heard Berch yelling at Garrett, though he remembered that Garrett complained of being yelled at. He further states that had Berch "screamed" at Garrett, he would have heard her. He confirmed that Berch wore a hearing aid. Torres dep, Ozgu affirmation, Exh. F, at 39-40.

With respect to her claim that Berch frequently denied her sick leave requests, as discussed further above, there is substantial documentation submitted by the City indicating that on numerous occasions Garrett's sick leave requests were indeed denied because she failed to comply with HRA requirements that she call in to her supervisor. Regarding her complaint that Berch micromanaged her work, given the complaints from providers regarding the real and substantial impacts on both individual clients and institutional providers resulting from the inefficiency of Garrett's unit and her interaction with the providers, it was certainly necessary for Berch to at least try to remedy the problems in the unit. The numerous emails from Berch to Garrett and memos from Berch to Torres indicate that Berch was trying to assist Garrett in becoming more organized and to eliminate the substantial backlogs in Garrett's unit. Even if Berch's many emails and directives seeking to remedy the inefficiencies of the unit caused Garrett to suffer stress, those efforts do not, under the circumstances, constitute adverse employment actions or a hostile work environment based upon disability discrimination. That leaves Garrett with merely Berch's alleged statements on which to base her claim of hostile work environment or discriminatory treatment.

Berch's alleged behavior toward Garrett formed the basis of her in-house EEO discrimination complaint which was determined to be unfounded. The Close Out Report of the EEO investigation indicated that two of Garrett's witnesses had been contacted. One witness, Juana Paredes-Cabral, Supervisor II, sent an e-mailed statement to the EEO office stating, among other things:

> "Ms. Garrett has two chronic illnesses which require her to stay home a lot, therefore, her work accumulates and either has to be reviewed and signed off by the Directors or reassigned to either Ms. Sharon Haynes (Provisional Sup. II) or to me (Senior Sup. II). I believe that is the main reason why there is so much friction between Ms. Garrett and management." *** "I have not witnessed any confrontation between Ms. Garrett and management because most of their conversations take place in the Director's office."

Ozgu affirmation, Exh. WW at 2-3. A second witness, Robin Whyte, caseworker, stated in a telephone interview "Ms. Garrett has been having a lot of challenges with Ms. Berch since she got here. They have had written exchanges and that is all I have observed." *Id.* at 3.

Garrett contends that nonetheless, the allegations were true, and that no corrective action was taken. In fact, however, at about the same time that the EEO division concluded that Garrett's complaint was unfounded, for whatever reasons, Berch was removed as Garrett's supervisor. Thus, Garrett actually obtained the relief that she sought in her EEO complaint.

As the City has pointed out, the causes of action for discriminatory treatment or hostile workplace trigger different standards of review under the New York State and New York City human rights laws. "State law prohibits discrimination in the form of a hostile work environment where 'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" (*Artis v. Random House, Inc.*, 34 Misc. 3d 858, 865 (Sup Ct, NY County 2011), quoting *Forrest v. Jewish Guild for the Blind*, 3 N.3.d 295, 310 (2004). Under the State Human Rights Law, the claims must be dismissed if they do not meet the "severe and pervasive" standard. That standard is "intended to forge 'a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.'" Hernandez v. *Kaisman*, 103 A.D.3d 106, 113 (1st Dept. 2012)(citation omitted). Even assuming Garrett's

allegations concerning Berch's statements were true, that conduct certainly does not meet the "severe and pervasive" standard.

Under the City Human Rights Law, "'questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability.'" *Id.* at 113-114, quoting *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 76 (1st Dept. 2009). Nonetheless, as the court pointed out, the City Human Rights Law "is not a general civility code, such that an employer can be held liable for petty slights and trivial inconveniences." *Id.* at 114 (internal quotation marks and citation omitted). In a claim of hostile work environment, "[t]he objective hostility of a work environment depends on the totality of the circumstances." *Id.* at 112 (internal quotation marks and citation omitted).

The Court notes that neither Garrett's attendance record, nor her job performance appeared to improve after Berch was no longer her supervisor. Moreover, Garrett ultimately agreed to take a medical leave of absence after her medical evaluation resulted in findings that she was medically unfit to fulfill her duties based on the number of sick days she had taken. The Court further notes that Garrett's claims regarding statements allegedly made by Berch to her have been denied both by Berch and contested by Torres. Indeed, no statements of witnesses have been produced by Garrett to support her contentions. However, even assuming the truth of Garrett's allegations regarding statements allegedly made by Berch, based on the totality of the circumstances, the Court concludes that those allegations are not sufficient to sustain a claim of hostile environment pursuant to the New York City Human Rights Law.

THIRD CAUSE OF ACTION:

Garrett's third cause of action for negligence alleges that the city failed to properly supervise

Berch to prevent her from discriminating against Garrett based upon her disability. As the City argues, a plaintiff seeking to recover from the City based upon the negligence of its employees must file a notice of claim within 90 days of the alleged tort, pursuant to General Municipal Law § 50-e. Furthermore, "[p]laintiff must not only plead in his complaint that he has served a notice of claim, but must also allege that the notice was served at least 30 days prior to commencement of the action and that in that time defendants neglected to or refused to adjust or to satisfy the claim." (*Davidson* v *Bronx Mun. Hosp.*, 64 N.Y.2d 59, 61-62 (1984). This Garrett has failed to do.

The Court further notes that Garrett has failed to respond to the City's motion with respect to her third cause of action. Therefore, the Court concludes that her third cause of action has been abandoned, and it is dismissed.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment of defendants City of New York and New York City Human Resources is granted and the complaint is dismissed and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: September 4, 2013

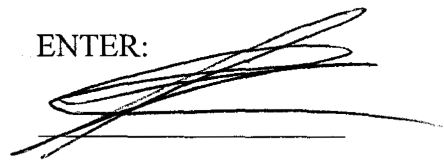
SEP 04 2013

FILED

SEP 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT