SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

INDEX NO. 103560/08

SHARON RODAS,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

-against-

MOTION CAL. NO.

THE ESTEE LAUDER COMPANIES, INC.
and ELC BEAUTY LLC,

Defendants.

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: This is an action based upon disability discrimination. The plaintiff began employment with defendants Estee Lauder Companies, Inc. and ELC Beauty LLC in September, 2002 when she was hired to manage their Creme De la Mer product line of skin care products and assigned to the company's sales counter at Bergdorf Goodman, a luxury department store located on Fifth Avenue in Manhattan. The plaintiff's duties included brand promotion, training sales staff and managers, and developing and implementing strategies to increase product sales.

When the plaintiff began working for Estee Lauder at Bergdorf's, she lived in Newark, New Jersey, which entailed an approximately 45 minute commute to work. In October, 2004, the plaintiff married and moved to Middletown, New Jersey, which is located over two hours from New York City. The plaintiff alleges that in December, 2004, she began to suffer from severe anxiety and panic attacks, depression and claustrophobia. After seeking medical treatment, the plaintiff notified the defendants of her condition and went on disability leave. During her disability leave, the plaintiff sought treatment with Dr. Eric London, a psychiatrist, and Ellen Burkowsky, a therapist. Although the plaintiff's therapist suggested that she work closer to home, the plaintiff indicated her desire to remain in Manhattan and return to work at Bergdorf.

The plaintiff returned to work at Bergdorf at the end of February, 2005, at which time her psychiatrist wrote a letter to Estee Lauder requesting that it make an accommodation for the plaintiff's disability and reduce her work week from five days to four. The letter suggested that the plaintiff could be re-evaluated in one to two months for a possible return to full-time duty. The plaintiff claims that she was then notified by one of her supervisors, Tara Taylor, that the defendants would accommodate her disability not by reducing the number of days she worked, but by allowing her to leave work every day at 5:00 p.m. instead of 6:00 p.m and expressed her commitment to helping the plaintiff successfully return to work. The plaintiff readily agreed to this accommodation. Although the letter from plaintiff's psychiatrist suggested that her need for an alternative work schedule would be temporary, the accommodation continued for the next 1½ years without incident. The plaintiff claims that during this period, she was given annual salary increases, bonuses and positive evaluations and that the issue of her work hours was never raised.

In 2006, Estee Lauder's operations at Bergdorf underwent a re-organization. A new supervisor, Irene Waxman, took over the department and, according to the plaintiff, pressured Ms. Taylor to remove the plaintiff's accommodation. The plaintiff alleges that in December, 2006, she was told by Ms. Taylor that it was no longer possible to allow her to leave early because, as a counter manager, the plaintiff needed to be present during the store's later hours and to cover special evening events. Taylor suggested that the plaintiff consider accepting a position in New Jersey. The plaintiff rejected this offer on the grounds that

the salary at that location would be much lower than in New York and would not allow her to pay off her mortgage, and that she did not wish to leave the prestigious Bergdorf counter. The plaintiff thereafter provided notes from her doctors which indicated that she could not work more than seven hours a day. They did not, however, specify the time she should leave. In response, Estee Lauder indicated to the plaintiff that while it would honor her doctors' request that she be restricted to a seven-hour work day, it could no longer permit her to leave work at 5:00 p.m. Instead, it advised the plaintiff that she should come in at 11:00 a.m. and leave at 6:00 p.m., her original departure time. In a contemporaneous letter dated March 10, 2007, the plaintiff wrote to MaryClaire Pedone, one of her supervisors, that she was attempting to sell her New Jersey house and needed to leave work earlier than 6 p.m. in order to have more time at home to do so. Despite her objections, the plaintiff began working pursuant to the 11-6 schedule. She claims that she was thereafter subjected to unfavorable treatment, including loss of privileges and not being notified of important meetings that she had always previously been asked to attend. The plaintiff also complained that she was being micro-managed and humiliated in front of other employees.

On May 11, 2007, the plaintiff wrote a letter to Taylor indicating that she had retained a lawyer and that she felt that she had been unfairly discriminated against because of her disability and because she had requested that the previous accommodation be allowed to continue. In that letter, the plaintiff indicated she needed to leave by 5:00 p.m. in order to ensure she could get home earlier. According to the plaintiff, leaving at 6:00 p.m. would mean that "with the two-hour plus commute I would get home approximately 8:15 to 8:30. Having almost no home life and preexisting medical condition, my anxiety would worsen." The plaintiff's lawyer sent a similar letter to Waxman on or around June 8, 2007.

On July 9, 2007, the defendants terminated the plaintiff's employment. The plaintiff claims that she was notified by Irene Waxman that she was being terminated for three reasons: (1) that defendants had received a complaint from an important customer that the plaintiff had been rude to her; (2) that the plaintiff had improperly sent out samples of skin products to personal associates; and (3) that plaintiff had improperly obtained information about Estee Lauder's competitors. Alleging that all of these reasons were pretextual and that she was actually fired because of her disability and her complaints about the company, as well as her retention of legal counsel, the plaintiff then commenced this employment discrimination action.

The complaint asserts three causes of action. The first two causes of action are brought under section 8-107(1)(a) of the New York City Administrative Code ("City Human Rights Law"). They allege that the plaintiff was discriminated against because of her disability and ultimately terminated because of and in retaliation to her complaints of discrimination. The third cause of action asserts a claim of tortious interference with business relations. The defendants now move for summary judgment dismissing the complaint.

Discussion

A. Plaintiff's Claims of Discrimination Under the City Human Rights Law -- The complaint alleges that the defendants violated plaintiff's rights under the City Human Rights Law by refusing to reasonably accommodate her disability and subjecting her to adverse treatment because of this disability. Although, in the past, New York courts have analyzed claims brought under the State and City Human Rights Laws interchangeably with federal law, the plaintiff's claims of discrimination under the City Human Rights Law must now be analyzed differently in light of the Local Civil Rights Restoration Act of 2005. *See* Local Law No. 85 [2005] of City of New York § 1 [Local Civil Rights Restoration Act of 2005]; *Williams v. New York City Housing Authority*, 61 AD3d 62 (1st Dept. 2009). This act requires state courts to interpret the City Human Rights Law in a manner that is more liberal than, and independent of, the corresponding state and federal civil rights laws. *See Williams v. New York City Housing Authority*, 61 AD3d at 67-68; *Jordan v. Bates Adv. Holdings*, 11 Misc 3d 764, 770-771 (Sup Ct NY Co 2006).

In moving for summary judgment, the defendants argue that (1) the plaintiff was not actually "disabled" within the statutory meaning, (2) even if she were disabled, the plaintiff's desire to leave work at 5:00 p.m. was unrelated to her disability and was merely a "personal preference" and (3) the alternative accommodation the defendants provided was reasonable and fair in that it allowed the plaintiff to perform the essential functions of her job.

In analyzing a motion for summary judgment in a discrimination case, a three-step framework is required. First, the plaintiff must establish a prima facie case of disability discrimination. The plaintiff must prove that (1) she was a member of the class protected by the statute, (2) she was actively or constructively discharged or suffered adverse employment action, (3) she was qualified to hold the position from which she was terminated and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. *See Ferrante v. American Lung Association*, 90 NY2d 623, 629 (1997); *Balsamo v. Savin Corporation*, 61 AD3d 622, 623 (2nd Dept. 2009); *Nelson v. HSBC Bank*, 41 AD3d 445, 446 (2nd Dept. 2007). Once the plaintiff has established a prima facie case of discrimination, the defendants must set forth, through rebuttal evidence, "legitimate, independent, and nondiscriminatory reasons to support their challenged employment decision." *Matter of Miller Brewing Co. v. State Div. of Human Rights*, 66 NY2d 937, 938 (1985). *See also Ferrante v. American Lung Association*, 90 NY2d at 629. Upon the submission of such evidence, the plaintiff must then prove, by a preponderance of the evidence, that defendants' stated reasons for their actions are only a pretext. *See Ferrante v. American Lung Association*, 90 NY2d at 630. To survive summary judgment at that juncture, the plaintiff must establish the existence of a material issue of fact as to whether 1) the employer's asserted reason for the challenged action is false or unworthy of belief and (2) more likely than not the employee's disability was the real reason. *See Id.* at 930.

Here, the plaintiff has satisfied the first three elements for establishing a prima facie case of disability discrimination. First, her claimed disability is one which is clearly protected under the City Human Rights Law. The City Human Rights Law defines disability as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." *See* Admin Code of the City of New York § 8-102(16)(a). The defendants do not dispute that the plaintiff had a psychological condition which was documented by her therapist. This condition, involving depression and anxiety, qualify as impairments even under the stricter federal laws. *See Hatzakos v. Acme A. Refrig., Inc.*, 2007 WL 202182 at *5 (E.D.N.Y. 2007). Although the defendants cite to case law in support of their argument that the plaintiff was not disabled, these cases involved plaintiffs who had suffered stress and anxiety because of the actions of their employers, not because of an independent medical condition. *See, e.g., Harrison v. New York City Hous. Auth.*, 2001 WL 1658243 at *2 (SDNY); *Lenhoff v. Getty*, 2000 WL 1230252 at *7 (SDNY). Second, the plaintiff was discharged from her position. Third, the defendants do not dispute that the plaintiff was otherwise qualified to hold her position.

However, as to the fourth element, the defendants argue that the plaintiff cannot establish that she was subjected to adverse treatment under circumstances giving rise to an inference of discrimination. They dispute that the change in her schedule constituted adverse treatment or a taking away of an accommodation and argue that the plaintiff's other complaints concerning increased supervision and micro-managing do not constitute adverse employment action. The court agrees.

Under the City Human Rights Law, an employer is obligated to make "reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job..." *See* NYC Admin Code § 8-107(15)(a). The record shows that at all times, Estee Lauder accommodated the plaintiff's restrictions caused by her disability, as set forth by her medical providers and by the plaintiff herself. Prior to the commencement of this litigation, none of the plaintiff's medical providers ever advised the defendants that

it was necessary for the plaintiff to leave work by 5:00 p.m. in order to perform the essential functions of her job. Rather, her doctors approved the plaintiff's return to work on a temporarily reduced schedule of four days and agreed to re-evaluate her condition within one to two months. The 5:00 p.m. departure time was an alternative accommodation suggested by Ms. Taylor and readily agreed to by the plaintiff. It was never even mentioned, much less suggested, by any of the plaintiff's medical providers. The fact that Estee Lauder allowed the plaintiff to leave early for a year and a half does not turn what was a temporary benefit to the plaintiff into a permanent obligation on the part of her employer. *See Lucas v. W.W. Grainger, Inc.*, 257 F3d 1249, 1257 n.3 (11th Cir. 2001); *Terrell v. USAir*, 132 F3d 621, 626-27 (11th Cir. 1998). Although the plaintiff claims that Taylor had suggested to her that the schedule change allowing her to leave at 5 p.m. would be permanent, she does not point to any specific statements by Taylor to that effect and, in any event, such statements would not be legally binding on the employer. In any event, the record shows that at all times, Estee Lauder continued to accommodate her doctor's restrictions on her work hours. After her providers suggested that the plaintiff be restricted to seven hours a day, the defendants informed the plaintiff that she could come in at 11:00 a.m. and work until 6.

In her opposition papers, the plaintiff charges that Estee Lauder "set her up to fail" and acted in an unlawful and discriminatory manner by unilaterally modifying her schedule without demonstrating that the previously agreed-upon schedule constituted an undue hardship to their business. These claims are inaccurate and misplaced. Under the City Human Rights Law, an employer is obligated to make "reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job..." *See* NYC Admin Code § 8-107(15)(a). The problem again for the plaintiff is that neither she nor any of her medical providers ever suggested to the defendants that being allowed to leave at 5:00 p.m. was necessary in order for the plaintiff to perform the essential requisites of her job in spite of her disability. In the two letters she and her lawyer wrote to the defendant prior to the commencement of this litigation, the only reasons plaintiff gave for having to leave early were that she could thereby have more of a "home life," see her husband and be able to sell her home. These reasons were notably unrelated to the plaintiff's ability to perform her job.

At her deposition and in her opposition papers, the plaintiff now claims that her real reason for needing to leave work at 5 p.m. was to avoid the subway rush hour which would otherwise greatly exacerbate her anxiety. She suggests that the subway is somehow significantly less crowded at 5:00 p.m., the peak of rush hour, than at 6:00 p.m. and that she so advised the defendants. This claim, however, is undercut by the absence of any documentation to this effect, as well as by the letters she and her attorney wrote to the defendants in which only other reasons were offered. Similarly, although the plaintiff's therapist, Ellen Burkowsky, now states in an affidavit prepared this litigation for that the plaintiff's panic attacks could be aggravated by having to travel in a crowded subway car, she does not explain why the note she wrote that the plaintiff submitted to Estee Lauder in April, 2007 made no mention of a medical need for an early departure time. In any event, none of the plaintiff's medical providers ever indicated to the defendant, prior to the commencement of this litigation, that the plaintiff needed to leave early or that her disability was aggravated by traveling in crowded subway cars which took her from 59th Street to Penn Station, where she then switched to a train to New Jersey.

An employer is not obligated to provide a disabled employee with the specific accommodation that the employee requests or prefers. *See Pimental v. Citibank*, 29 AD3d 141, 148 (1st Dept. 2006). Moreover, the obligation of reasonable accommodation is obviously limited by the employer's knowledge of the disability that needs to be accommodated. *Id.* If the plaintiff failed to document or explain the extent and limits of her restrictions, Estee Lauder cannot be held liable for failing to provide the plaintiff with a specific accommodation. *Id.* The plaintiff has not cited to any case or statute which requires an employer to assign work schedules based on the length or general difficulty of a disabled employee's commute. On the contrary, the New York state courts, as well as the majority of federal courts, have long held that an

employer is not required to accommodate an employee's difficulties in commuting to and from work since an employee's commute is an activity that is unrelated to and/or outside of the workplace and an employer is only obligated to provide accommodations that eliminate difficulties in the workplace itself. *See, e.g., Dinatale v. New York State Div, of Human Rights*, _ AD3d _, 2010 WL 3817560 * 2 (4th Dept. 2010); *Metz v. County of Suffolk*, 4 Misc3d 914, 916-17 (Sup Ct. Suffolk Co 2004); *LaResca v. American Tel. and Tel.*, 161 F Supp2d 323, 333-34 (D. NJ 2001); *Salmon v. Dade County School Board*, 4 F Supp.2d 1157, 1163 (S.D. Fla 1998). As the defendants point out, if the plaintiff wished to avoid the subway at 6:00 p.m., she could have chosen to exercise other options, such as a bus, taxicab or walking.

For these reasons, the plaintiff cannot establish a prima facie case that she was discriminated against because of her disability and therefore the first cause of action must be dismissed. Although the plaintiff also complains of other discriminatory treatment unrelated to scheduling, such as being unfairly micro-managed and not being invited to important sales meetings, these claims, even if true, are not actionable. It is well settled that an employee must endure a materially adverse change in the terms and conditions of employment in order to demonstrate an adverse employment action and that changes which, as here, amount to mere inconvenience or annoyance do not, in the absence of a change in job title or loss of salary, qualify as adverse employment actions. *See Quarless v. Bronx-Lebanon Hosp. Ctr.*, 228 F Supp2d 377, 386 (SDNY 2002). The court is thus persuaded that the first cause of action must be dismissed.

B. The Plaintiff's Claim of Retaliation - - In the second cause of action, the plaintiff alleges that she was terminated unlawfully in retaliation to her refusal to voluntarily give up her accommodation and to her complaints of discrimination, as well as to her retention of a lawyer. Under the City Human Rights Law, it is unlawful for an employer to retaliate against an employee because the employee has opposed a discriminatory practice. *See* NYC Admin. Code § 8-107(7). To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) he or she was engaged in a protected activity, (2) the employer was aware of that activity, (3) he or she suffered an adverse employment action such as termination and (4) there was a causal connection between the protected activity and the adverse employment action. *See Torge v. New York Society for the Deaf*, 270 AD2d 153 (1st Dept. 2000); *Distasio v. Perkin Elmer Corporation*, 157 F3d 55, 66 (2nd Cir 1998). Here, the plaintiff was clearly engaged in a protected activity and the defendants were aware of this activity. As to any causal connection, the plaintiff was fired on July 9, 2007, one month after her attorney had written to the defendants complaining about their discriminatory conduct. The plaintiff argues that such a temporal proximity creates a question of fact as to whether her termination was causally connected to her protected activity. She also argues that the defendants' stated reasons for the termination were pretextual since none of the alleged infractions she may have committed was anything more than minor in nature and should not have otherwise led to her termination but for her prior disability claim.

As already discussed, the plaintiff was given three reasons for her termination: a complaint from an important customer that the plaintiff had been rude to her, a claim that the plaintiff had improperly sent out large samples of the defendants' skin products to personal associates and a claim that plaintiff had improperly shared information with the defendants about their competitors.

On their summary judgment motion, the defendants note that Bergdorf was unhappy with the plaintiff over this conduct and that this dissatisfaction provided a valid reason for terminating her employment. In support, they point to the deposition testimony of Eileen Leddy, a floor manager employed by Bergdorf. At her deposition, Leddy testified that Bergdorf was unhappy with the plaintiff because, at Bergdorf's expense, she had improperly sent out skin product samples as mere "thank you" gifts to individuals, such as her mortgage broker, who had helped her on various personal matters but who were unlikely to ever become customers of Bergdorf or Estee Lauder. Leddy was also troubled by the plaintiff's apparent accessing of Bergdorf's computer system in order to share information about competitors with

Estee Lauder and by the alleged incident with the customer. Although Leddy stopped short in her deposition of claiming that Bergdorf demanded the plaintiff be fired, she clearly indicated that Bergdorf was unhappy with the plaintiff. Indeed, at one point, she suggested that the plaintiff was no longer welcome at the store. Given the important commercial relationship between Bergdorf and the defendants, Bergdorf's unhappiness with the plaintiff's actions constitutes a valid, nondiscriminatory ground for terminating her employment.

Significantly, the plaintiff does not challenge the substance of Leddy's assertion that Bergdorf was unhappy with her over her alleged misconduct. Rather, the plaintiff simply asserts that there is an issue of fact as to whether this unhappiness was the real reason for her termination or merely a pretext. The problem with this argument is that the plaintiff has failed provide any evidence of pretext and her claim of retaliation is based entirely on the temporal proximity between her retention of a lawyer and her termination. However, in the absence of any other evidence of retaliatory animus and given the commission of independent, intervening acts of misconduct by the plaintiff between the time she engaged in protected activity and her discharge, this temporal connection alone is insufficient to defeat summary judgment. *See, e.g.*, *Baldwin v. Cablevision Systems Corp.*, 65 AD3d 961, 967 (1st Dept. 2009); *Koester v. New York Blood Center*, 55 AD3d 447, 449 (1st Dept. 2008); *Farrugia v. North Shore University Hospital*, 13 Misc3d 740, 753 (Sup Ct NY Co 2006); *Galimore v. City University of New York Bronx Community College*, 641 F Supp2d 269, 289 (S.D.N.Y. 2009); *Chojar v. Levitt*, 773 F Supp 645, 655 (S.D.N.Y. 1991). The plaintiff's second cause of action must therefore also be dismissed.

C. Tortious Interference - - Finally, in her third cause of action, plaintiff alleges that the defendants engaged in tortious interference with business relations by blacklisting her and/or "badmouthing her" in the cosmetics industry, thereby making it impossible for her to find new employment. The defendants argue that this claim should be dismissed because it is unsupported by any probative evidence. The court agrees. The claim is based on plaintiff's deposition testimony that she interviewed for several jobs after her termination and that each opportunity "dried up" after the potential employer contacted Bergdorf Goodman to ask for a reference. She speculates that the defendants, by unlawfully firing her and unfairly criticizing her performance, poisoned her relationship with Bergdorf which, in turn, affected her relationships within the industry as a whole. Not only is this claim entirely speculative but, as the defendants point out, the plaintiff has obtained several jobs in the industry subsequent to her termination. including one job with Neiman-Marcus, the parent company of Bergdorf Goodman. Under the circumstances, the third cause of action must be dismissed.

Accordingly, the defendants' motion for summary judgment is granted and the complaint is hereby dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 10-12-10

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION