

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

|                              |   |              |
|------------------------------|---|--------------|
| PATRICIA S. CONROY,          | : | CIVIL ACTION |
| Plaintiff,                   | : |              |
|                              | : | NO. 00-3528  |
| v.                           | : |              |
|                              | : |              |
| TOWNSHIP OF LOWER MERION and | : |              |
| LOWER MERION TOWNSHIP        | : |              |
| WORKERS ASSOCIATION,         | : |              |
| Defendants.                  | : |              |

**MEMORANDUM AND ORDER**

BUCKWALTER, J.

November 30, 2001

Plaintiff has filed a seven-count Amended Complaint.

Count I alleges that the Township of Lower Merion (Township) violated the Americans with Disabilities Act (ADA) by failing to accommodate her disability.

Count II charges the Township with retaliation under ADA because of plaintiff's filing a complaint with the Pennsylvania Human Relations Commission.

Counts III and IV charge the Township with violations of the Pennsylvania Human Relations Act for discrimination (Count III) and retaliation (Count IV).

Count V charges the Township under 42 U.S.C. § 1983 and § 1988, alleging denial of due process and violations of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Count VI alleges the Township violated the Family and Medical Leave Act (FMLA).

Count VII charges the Lower Merion Township Workers Association (Union) with breach of duty of fair representation.

Township filed a motion for summary judgment as to Counts I, II, III, IV and V, and has asked the court to reconsider its ruling on Count VI and grant summary judgment on it as well.

## **I. FACTS**

Plaintiff has been employed as a clerk in the Finance Department of the Township for almost 23 years, all of which have been in the Township Municipal Building, 75 E. Lancaster Avenue, Ardmore, Pennsylvania. Sometime in 1984, she sustained an injury to her back in a non-work related incident. As a result, she developed neuropathy and sensitivity to moving air currents (*See Amended Complaint*). The Township has, according to plaintiff, over the course of 15 years, accommodated this sensitivity (*See pages 1 and 2 of plaintiff's Amended Complaint*). Later at page 4 of her Amended Complaint, plaintiff contradicts this by saying since November of 1997, the Township has failed to accommodate her condition.

The above contradiction may be based upon a series of events leading up to November of 1997. It appears that in September of 1996, plaintiff presented the Township with a note from William W. Lander, M.D., dated September 12, 1996, stating

that plaintiff “is under my care for chronic back pain which is aggravated by certain weather conditions.” *See* September 12, 1996 note by Dr. Lander, Exhibit “E” of Township’s brief. In response to this note by Lander, on February 21, 1997, Roseann Siso (Siso), the Township’s Director of Personnel, sent a letter to Lander requesting medical evidence concerning plaintiff’s diagnosis, prognosis and what, if any, restrictions and/or accommodations she needs due to her medical situation. *See* February 21, 1997 letter from Siso, Exhibit “F” of Township’s brief. On or about July 7, 1997, Lander responded to Siso and indicated that plaintiff has had a “disabling neuropathy” since injuring her back in 1985 and, as a result, experiences “severe, intermittent pain” that is aggravated by “several environmental and physical changes” including “exposure to air currents blowing from open windows.” *See* July 7, 1997 letter from Lander, Exhibit “G” of Township’s brief. Because her condition could be aggravated by air currents, Lander recommended that Conroy work in an area where “she will not be exposed to drafts from open windows.” Lander did not, however, indicate that plaintiff could not work in a space where a window would not expose her to a draft. Nor did Lander provide a diagnosis or prognosis, or state specific job duties that Conroy could not perform.

After receiving Lander’s July 7, 1997 letter, the Township attempted to ascertain the scope and extent of plaintiff’s condition, as well as the steps needed to “accommodate” this condition. Because Lander had not provided a diagnosis or specified the exact nature of the “environmental and physical changes” that aggravated plaintiff’s

back, the Township eventually decided to send plaintiff for an independent medical examination (“IME”). *See* July 25, 1997 memorandum from Siso to plaintiff, Exhibit “H” of Township’s brief.

The Township contracted with Susan Blydenburgh, M.D., M.P.H. (Blydenburgh), the Medical Director at the Crozer Keystone Health System Centers for Occupational Health, to conduct the IME on plaintiff. *See* October 10, 1997 letter from Siso to Blydenburgh, Exhibit “I” of Township’s brief. Siso explained to Blydenburgh that the Township wanted “medical evidence . . . stating Conroy’s diagnosis, prognosis and what, if any, restrictions and/or accommodations she may need due to her medical situation.” Of particular interest, Siso explained, was how indoor air movements affected plaintiff as opposed to normal air movement outdoors.

Blydenburgh eventually conducted an IME on plaintiff and reported the results back to the Township by letter dated October 30, 1997. *See* October 30, 1997 letter from Blydenburgh to Siso, Exhibit “J” of Township’s brief. Based on her review of plaintiff’s medical history, as well as a physical evaluation, Blydenburgh concluded that plaintiff’s back pain was aggravated by cold temperatures and air movement and that plaintiff should “avoid cool temperatures and the issue of air movement – which could come from a window or an air conditioning vent.”

At the Township’s request, Blydenburgh issued a follow-up letter clarifying several of the points she had made in her October 30 letter. *See* November 4, 1997 letter

from Blydenburgh to Siso, Exhibit “K” of Township’s brief. With respect to the issue of avoidance of drafts, Blydenburgh clarified that his means “an actual, perceptible draft that could be objectively documented by an industrial hygienist or HVAC specialist.”

Blydenburgh further stated that “[i]f the window 35 feet away from . . . Conroy’s cubicle does not give rise to any air currents at her desk or cause an adverse change in temperature, then I am not supporting medically that the window be closed simply because she says to close it.” Blydenburgh further indicated that it may be necessary to “objectively characteriz[e] indoor air conditions” in order to determine whether these aggravating conditions exist at Conroy’s work station.

Following the Township’s receipt of Blydenburgh’s November 4 letter, plaintiff complained to the Finance Director, Mark Spector (Spector), that she has had to leave work on several occasions recently due to air currents emanating from Spector’s and Bradley’s offices. *See* January 23, 1998 memorandum from Conroy to Spector, Exhibit “L” of Township’s brief. Nevertheless, in her own brief, plaintiff again states, “The Township has, over the course of 15 years, accommodated this disability. However, since 1999, the Township, despite knowing of plaintiff’s disability, and without explanation, has refused to continue to accommodate her condition, all of which is in violation of the ADA and PHRC.” (*See* Plaintiff’s brief in answer to Lower Merion Township’s Cross Motion for Summary Judgment, p. 2). It appears then that up until

sometime in 1999, plaintiff herself acknowledges that Township has accommodated her disability.

It bears noting, however, that in response to plaintiff's memorandum dated January 23, 1998, Exhibit "L" of Township's brief, the Township followed Blydenburgh's suggestion and had ECS Risk Control, Inc. (ECS) perform a ventilation survey of the finance department, including plaintiff's work area.

ECS performed its ventilation survey on February 24, 1998, a cloudy and rainy day, with winds of approximately 35 miles an hour blowing into the side of the building where Spector's and Bradley's offices were located. *See* March 23, 1998 letter from Tim Horn to Siso, Exhibit "M" of Township's brief. ECS observed that under a variety of scenarios, with Spector's and Bradley's windows and doors opened and closed, the service window opened and closed, the main door into the department opened and closed, and the ventilation system both off and on, no moving air currents occurred at plaintiff's work station. While air currents did move throughout the department under these scenarios, they dissipated before they reached plaintiff's cubicle. Under each scenario, ECS observed that smoke rose undisturbed to the ceiling and that no measurable airflow was detected by a velometer. Even though ECS did not observe any moving air currents at plaintiff's work station, it recommended that the Township install weather stripping at the bottom of the office doors and relief air vents between the hallway and office area.

The Township reported ECS's findings to plaintiff on April 28, 1998. *See* May 8, 1998 memorandum from Siso to plaintiff, Exhibit "N" of Township's brief. The Township further informed plaintiff that as a show of good faith, staff in the finance department would "endeavor to keep the windows closed" and, if the Director's or Assistant Director's windows were opened, every attempt would be made to keep their doors closed. The Township subsequently followed ECS's recommendations and installed an air vent above the entrance door to the department and rubber door sweeps on all doors within the department. *See* June 4, 1999 memorandum from Mike Beck (Beck), Supervisor of Facilities Maintenance, to Siso, Exhibit "O" of Township's brief.

Despite the efforts of the Township, plaintiff feels that since 1999, the Township has not accommodated her problem. In an April 27, 1999 memorandum, Exhibit "P" of Township's brief, she wrote, "Not feeling well. Rich's window open."

As she points out in her brief at p. 2, on March 8, 2000, plaintiff went out of work and by letter dated March 9, 2000, Exhibit "Q" of Township's brief, Dr. Lander stated:

On this date, I have reexamined and treated my patient, Patricia Conroy, for recurrent low back pain. Her last visit to me was February 28, 2000 for a similar condition. However, her pain today is much more severe. Treatment today, as it was on her last visit, was injections of corticosteroids mixed with a local anesthetic. Today, three separate low back areas were injected.

Mrs. Conroy related that the pain became much more intense following the activation of the building air conditioner with air streaming onto her body. This occurred on March 6, 2000. In spite

of the pain, Mrs. Conroy returned to work on March 7, 2000. However, when Mrs. Conroy's immediate supervisor opened the office window and then left the room, leaving the door open, the pain became much more severe. She left work and has not worked on March 8<sup>th</sup> and 9<sup>th</sup>. I refer you to a letter I wrote to Lower Merion Township dated July 7, 1997.

It has been my pleasure to have been Mrs. Conroy's physician for almost thirty-four years. During this time, I have treated her for migraine headaches and since her motor vehicle accident in 1985, I have been one of her physicians treating her low back pain. It is my professional opinion that stressful working conditions and drafts in the work area are the cause of the exacerbations of pain in her back, a disabling neuropathy. At this time, for medical reasons, I suggest Mrs. Conroy be placed on sick leave for an extended time until her condition and the conditions at work have improved.

The Township notified plaintiff by letter dated March 16, 2000, Exhibit "R" of Township's brief, that her "request for Family and Medical Leave Act (FMLA) is approved for your 'low-back pain.'"

In pertinent part, the letter stated:

In addition, you have asked for "written instructions" while you are out. As outlined in the enclosed FMLA Policy and Sick Leave Program and Policy and in accordance with Article 7.3b of the Collective Bargaining Agreement between the Worker's Association and Lower Merion Township, you will not be required to call in each work day as long as you continue on your approved and consecutive/extended sick leave of FMLA for "low-back pain."

Plaintiff was a member of the Union and her employment was governed by the Collective Bargaining Agreement (CBA).

On or about May 3, 2000, Dr. Lander drafted a letter to the Township indicating that plaintiff may return to work, but "should avoid drafts and stressful

working conditions,” since these exacerbate her “low back pain and migraine headaches.” *See* May 3, 2000 letter from Lander to the Township, Exhibit “S” of Township’s brief. Lander subsequently provided the Township with a completed “Medical Documentation for Non-Work Related Absence” form, which stated that plaintiff could “return to unrestricted duty” effective May 15, 2000. *See* May 18, 2000 Medical Documentation for Non-Work Related Absence, Exhibit “T” of Township’s brief. Despite indicating that plaintiff could “return to unrestricted duty,” Dr. Lander further stated that the Township should refer to a November 4, 1997 letter by Susan Blydenburgh, M.D., concerning plaintiff’s need to avoid cold and drafts. In her November 4, 1997 letter, Dr. Blydenburgh suggested that plaintiff avoid cool indoor air temperature and drafts. Thus, in his May 18 certification, Dr. Lander stated both that Conroy could return to “unrestricted duty” and that Conroy still needed to avoid cold and drafts.

Following the receipt of Lander’s May 3 letter and what is considered internally inconsistent May 18 certification, the Township expressed confusion about the conditions under which Conroy could return to work. As a result, the Township requested Conroy to participate in an IME pursuant to the terms of the CBA. *See* May 26, 2000 letter from Jacqueline Z. Shulman to C. Scott Shields, Exhibit “U” of Township’s brief. Plaintiff refused to consent to get an IME as requested by the Township. As the Township has argued in a prior motion, plaintiff is required by the past practices between the Township and the Union under the CBA to submit to an IME.

Plaintiff has not been allowed to return to work from her family and medical leave of absence. Plaintiff's employment with the Township ended on September 9, 2000 when her leave of absence surpassed 180 days. Under Article 7, Section 7.5 of the CBA, an employee may remain on leave from the Township for 180 days, after which time they lose their status as a Township employee under Article 13, Section 13.7. *See*, 1999-2002 Agreement between the Township and the Union, Articles 7 and 13, Exhibit "X" of Township's brief.

It is still not clear that the past practices of the Township required employees to undergo IME's when the employee's medical documentation was unclear, inconsistent or confusing. Both the uncontradicted Affidavit of Roseann Siso, Director of Human Resources for the Township, Exhibit "A" of Township's Supplemental Memorandum of Law (Docket No. 42), and the Declaration of Thomas G. Strang, Secretary of the Union, attached to its brief (Docket No. 33), a portion of which is quoted from page 3 of his Declaration as follows:

After receiving the attorneys' letter, I gave copies of it to the members of the Executive Board. We met to discuss Ms. Conroy's grievance and the attorneys' evaluation of it. The members of the Board recognized the Township's argument that there were some potential inconsistencies in the doctor's notes provided by Ms. Conroy. It troubled us that Ms. Conroy was resisting the offer to be examined by a doctor who would be chosen by her and the Township. This aspect of the Township's Family Medical Leave Policy which had been agreed to by the union, actually predated the Policy, and had never been a problem for other employees before. We thought that the Township's actions with regard to Ms. Conroy were not unreasonable and were consistent with our past practice;

are evidence that there was indeed such a policy. But the written Township FMLA policy seems to be somewhat inconsistent with this. In any event, the material facts necessary to establish the policy are not clear enough from the present record to summarily find in favor of the Township.

## **II. LAW**

The plaintiff's § 1983 claim fails to the extent that plaintiff purports to argue a denial of due process, substantive as well as procedural. As to the former, there is no fundamental property interest in public employment for purposes of substantive due process. As to the latter, procedural due process is satisfied inasmuch as the CBA provided plaintiff with the process she was due. Summary judgment will be granted as to Count V.

With regard to Counts I and III, alleging discrimination on the basis of her alleged disability, the initial hurdle for plaintiff is proving that her disability "chronic back pain" comes under the ADA definition of disability. There is really some doubt on this record that plaintiff has met the first hurdle.

However, assuming she can pass the prima facie hurdle under the McDonnell-Douglas burden shifting analysis applicable to ADA claims, Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000), the Township has articulated a legitimate, non-discriminatory reason for not returning plaintiff to work; namely, that she would not submit to an IME. Because plaintiff refused to do so, the Township did not allow

plaintiff to return to work. Her subsequent termination was mandated under the CBA when her leave of absence exceeded 180 days. See Article 7, Section 7.5

Plaintiff has not been able to point to direct or circumstantial evidence from which a fact finder would reasonably disbelieve the Township's articulated legitimate reasons; or believe that an invidious discriminatory reason was more likely than not the determinative cause of its actions. Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994), Sheridan v. E.I.Dupont deNemours and Co., 100 F.3d 1061 (3d Cir. 1996). Indeed, by her own admission, the Township accommodated her back pain for 15 years until sometime in 1999. Thereafter, there is simply nothing plaintiff can point to that meets the Fuentes-Sheridan burden placed upon her.

As to Counts II and IV regarding retaliation, it is clear that plaintiff can point to no causal connection between her protected activity of filing a claim with the PHRA and the Township's request that she have an IME before returning to work.

As to Count VII, the Union did not breach its duty of fair representation toward the plaintiff, based upon the uncontradicted facts of this case and the uncontradicted reason given by the Union with respect to plaintiff's case.

Accordingly, it is hereby **ORDERED** that:

(1) Judgment is entered in favor of defendant, Township of Lower Merion (Docket No. 34) and against plaintiff Patricia S. Conroy, on all counts except Count VI.

(2) Judgment is entered in favor of Lower Merion Township Workers Association (Docket No. 33) and against plaintiff Patricia S. Conroy on Count VII.

(3) Further proceedings in this case are STAYED until January 3, 2002. Thereafter, discovery may continue until February 4, 2002, limited to essentially the latest Affidavit of Roseann Siso, Exhibit "A" of Township's Supplemental Memorandum of Law.

(4) Except as set forth above, plaintiff's motion to exclude evidence produced after the close of discovery, etc. (Docket No. 44) is DENIED.

A status conference is scheduled for Wednesday, February 6, 2002 at 4:00 p.m. in the chambers of the undersigned.

BY THE COURT:

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RONALD L. BUCKWALTER, J.