

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

JILL WATERS : CIVIL ACTION
: :
: :
v. : :
: : NO. 03-CV-2909
: :
GENESIS HEALTH VENTURES, :
INC. :

SURRICK, J.

DECEMBER 21, 2004

MEMORANDUM & ORDER

Presently before the Court is Defendant Genesis Health Ventures, Inc.'s Motion for Summary Judgment. (Doc. No. 56.) For the following reasons, Defendant's Motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff, a Caucasian female, was employed by Defendant for ten years until her employment was terminated on September 23, 2002. (Doc. No. 6 at 2, 5.) On or about May 2, 2003, Plaintiff filed a Complaint against Defendant alleging discrimination on the basis of "age (59) and/or disability (chronic fatigue syndrome)" in violation of the Age Discrimination in Employment Act ("ADEA"), Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"), and retaliation. (Doc. No. 1 at 1.)¹ The Complaint contained

¹Plaintiff filed charges of discrimination with the Philadelphia office of the Equal Employment Opportunity Commission ("EEOC") on August 19, 2002, and on October 16, 2002, on the basis of age and disability. (Doc. No. 1 at 3.) Those filings did not include a charge of discrimination on the basis of race.

no claim of discrimination based upon race.² In the Joint Case Report filed on or about August 29, 2003, Plaintiff reiterated that her Complaint was based on age and disability discrimination. (Doc. No. 6 at 1.) On March 8, 2004, almost a year after filing her Complaint, Plaintiff filed her First Amended Civil Action Complaint (“Amended Complaint”). (Doc. No. 18.) The Amended Complaint was the same as the original Complaint, but added a fifth count alleging reverse discrimination based upon race in violation of 42 U.S.C. § 1981.³ Thereafter, Plaintiff advised Defendant that she would not pursue the age discrimination claim in Count One. On October 11, 2004, in her Memorandum of Law in Opposition to Defendant’s Motion For Summary Judgment, Plaintiff, for the first time, stated that the basis of her disability claim is Charcot’s foot syndrome and diabetic neuropathy, and not chronic fatigue syndrome, as indicated in her Complaint. (Doc. No. 66 at 12.)

Plaintiff alleges that in June, 2002, Defendant hired Marvin Kirkland, an African-American male, as director of nursing. (Doc. No. 27 ¶ 13.) Kirkland supervised Plaintiff and other employees. The factors motivating Plaintiff’s termination are in dispute. Plaintiff alleges that her termination was due to Kirkland’s discriminatory animus. (*Id.* ¶¶ 16, 30.) Specifically, Plaintiff alleges reverse discrimination based upon race in violation of 42 U.S.C. § 1981 and the PHRA, and disability discrimination in violation of the ADA and the PHRA. (Doc. No. 66 at 2.)

Defendant claims Plaintiff was dismissed for performance-related reasons. Plaintiff

²The Complaint in the instant case contains four counts: (1) the claim under the ADEA; (2) the ADA claim; (3) the claim under 42 U.S.C. §1981 alleging age discrimination; and (4) the claims under the PHRA. (Doc. No. 1.)

³The claimed disability in the Amended Complaint continued to be “chronic fatigue syndrome.” (Doc. No. 18 ¶ 1.)

responds that she had received positive reviews throughout her tenure until Defendant hired Kirkland in 2002. In 1998, Plaintiff was promoted to staff development coordinator. (*Id.* Ex. A at 29.) In 2001, Carol McQuillan, Defendant’s administrator, offered Plaintiff another promotion. (*Id.* Ex. A at 64, Ex. D at 144.)

II. LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, “a court does not resolve factual disputes or make credibility determinations, and must view facts and inferences in the light most favorable to the party opposing the motion.” *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). The moving party bears the burden of proving that no genuine issue of material fact is in dispute. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has carried its initial burden, to prevent summary judgment the non-moving party “may not rest upon the mere allegation or denials of his pleading, but his response . . . must set forth specific facts showing there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

III. DISCUSSION

A. Plaintiff’s Disability Claim

In her Amended Complaint, Plaintiff specifically states that her disability was chronic fatigue syndrome. (Doc. No. 18 at 7.) In her Memorandum in Opposition to Summary Judgment, Plaintiff changed her disability to Charcot’s foot syndrome and diabetic neuropathy as

a result of suffering from Type II Diabetes. (Doc. No. 66 at 12.) Defendant argues that Plaintiff should not be permitted to change the nature of her disability at this late stage of the proceedings. (Doc. No. 73 at 4.) Plaintiff argues that the requirements of notice pleading are broad and she was not required to plead all the facts underlying her claim. (Doc. No. 66 at 61.)⁴

While Plaintiff is correct that plaintiffs are not required to plead all the facts underlying a claim, a plaintiff asserting disability discrimination under the ADA is required to identify the disability which forms the basis for her claim. *See, e.g., Pierce v. United Parcel Serv.*, No. 01 C 5690, 2002 WL 992624, at *3 (N.D. Ill. May 9, 2002); *McCann v. Catholic Health Initiative*, No. Civ. A. 98-1919, 1998 WL 575259, at *2 (E.D. Pa. Sept. 8, 1998); *Super v. Price Waterhouse*, No. 94-7466, 1995 WL 498773, at *2 (S.D.N.Y. Aug. 22, 1995). Title I of the ADA prohibits discrimination by certain private employers against qualified individuals. 42 U.S.C. § 12112 (2000). Under the Act, a “disability” is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment. *Id.* § 12102. As noted above, the case law is clear that, in order to state an ADA claim, Plaintiff must allege in her Complaint that she is a qualified individual suffering from a specific disability and was discriminated against because of such disability. The complaint serves to “provide the defendant with fair notice of the claim.” *Pierce*, 2002 WL 992624, at *13 (quoting *Scott v. City of*

⁴Interestingly, in its Motion for Summary Judgment, Defendant focuses entirely on chronic fatigue syndrome as Plaintiff’s disability. In her Memorandum of Law in Opposition to Motion for Summary Judgment, Plaintiff indicates that “Defendant has been on notice for an extended period of time that the disability Plaintiff claims is Charcot’s foot syndrome and diabetic neuropathy.” (Doc. No. 66 at 61 n.31.) However, Plaintiff does not indicate how Defendant was put on notice. Moreover, the Court was not put on notice.

Chicago, 195 F.3d 950, 951 (7th Cir. 1999)). As the court stated in *Pierce*, “[t]he critical defect here is *Pierce*’s failure to identify the disability he alleges motivated the defendants. Without this information, UPS does not have sufficient notice of the claim against it.” *Id.* at *16 (citing *Johnson v. Lehigh County*, No. 00-1670, 2000 U.S. Dist. LEXIS 9871, at *4-5 (E.D. Pa. July 12, 2000) (dismissing ADA claim for failure to specify disability)). The case law establishes that ADA lawsuits failing to point to a specific disability must be dismissed. The nature of the disability is an essential element of an ADA claim. Defendants need such information because, for example, they may dispute that the specific disability qualifies as a disability under the ADA.

In the instant case, Plaintiff specifically stated that her disability was chronic fatigue syndrome. (Doc. No. 18 at 7.) While Plaintiff’s medical reports may have revealed a host of medical issues, and her deposition may have revealed that these medical problems include problems with her foot and diabetes, Defendant was on notice that Plaintiff was claiming discrimination based upon chronic fatigue syndrome. If Plaintiff intended to argue that she was discriminated against on the basis of Charcot’s foot syndrome and diabetic neuropathy, she could have amended her Complaint or supplemented her pleading to reflect this change far earlier in these proceedings. For some reason, Plaintiff chose not to specifically designate the real basis for her disability claims until after the Motion for Summary Judgment was filed.

The case of *Scott v. IBM Corp.*, 196 F.R.D. 233 (D.N.J. 2000), is instructive. In *Scott*, the plaintiff similarly alleged a different disability during the course of the litigation. *Scott*, 196 F.R.D. at 243 n.6. The district court rejected the plaintiff’s attempt to change the focus of his claim, stating: “Plaintiff never made mention of any disability related to walking in his administrative claim or in his complaint in this case. Accordingly, this [c]ourt will not entertain

this apparent attempt to amend plaintiff's claims at this stage of the litigation" *Id.* In the instant lawsuit, Plaintiff similarly changed the nature of the alleged disability too late in the proceedings. Plaintiff commenced this lawsuit in May, 2003. Discovery has been extended numerous times. (Doc. Nos. 8, 9, 21, 52.) Plaintiff clearly alleged that she believed she was discriminated against because of her chronic fatigue syndrome, which affected her ability to work.⁵ In her Memorandum in Opposition to the Motion for Summary Judgment, the focus of her disability changed to Charcot's foot syndrome and diabetic neuropathy, which affected her ability to walk. This apparent attempt to amend her claim in October, 2004, will not be permitted.

Accordingly, we will not entertain Plaintiff's disability claim based on Charcot's foot syndrome and diabetic neuropathy. Because Plaintiff concedes that her claim for disability discrimination is not based on chronic fatigue syndrome as alleged, we will grant summary judgment on Plaintiff's claims under the ADA and PHRA.

B. Plaintiff's Race Claim

Plaintiff alleges race discrimination in violation of 42 U.S.C. § 1981 and the PHRA. We examine claims of disparate treatment under section 1981 under the test developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Third Circuit Court of Appeals has stated:

[T]he McDonnell Douglas analysis proceeds in three stages. First, the plaintiff must establish a prima facie case of discrimination. If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's termination. Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate

⁵We note that in our Memorandum dated June 23, 2004, we made reference to the fact that Plaintiff's disability was alleged to be chronic fatigue syndrome.

reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999) (citing *McDonnell Douglas*, 411 U.S. at 802) (quotation omitted). The Third Circuit has held that in cases of reverse discrimination, “all that should be required to establish a prima facie case is . . . for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.” *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999).

Once the plaintiff establishes a prima facie case, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *McDonnell Douglas*, 411 U.S. at 802. If the employer offers some evidence of a legitimate, nondiscriminatory reason, then plaintiff is “afforded a fair opportunity to show that [employer’s] stated reason for [plaintiff’s] rejection was in fact pretext.” *Id.* at 804. “The substance of the burden-shifting analysis applies with equal force to claims of ‘reverse discrimination.’” *Iadimarco*, 190 F.3d at 158.

In the instant case, Plaintiff has set forth specific facts showing that there is a genuine issue of material fact on the issue of whether she was subjected to reverse discrimination. Plaintiff has presented sufficient evidence to allow a reasonable fact finder to conclude, given the totality of the circumstances, that Defendant treated Plaintiff less favorably than others because of her race. Thus, she has established a prima facie case. Moreover, while Defendant has asserted a legitimate, nondiscriminatory reason for Plaintiff’s termination, *i.e.*, performance, Plaintiff has, in turn, demonstrated a genuine issue of material fact as to whether Defendant’s

reason is, in fact, pretext. While Defendant alleges that Plaintiff was terminated for performance-related reasons, Plaintiff points out that she was only disciplined twice in her ten years working for Defendant. This discipline occurred during her last three months of employment and only one month after Kirkland began working for Defendant. (Doc. No. 66, Ex. C at 4.) Plaintiff was terminated in September, 2002. She had been offered a promotion by Carol McQuillan, Defendant's administrator, just one year earlier. (*Id.* Ex. A at 64, Ex. D at 144.) Prior to Kirkland's arrival, Plaintiff was sometimes asked to fill in for the position for which Kirkland was hired, director of nursing. (*Id.* Ex. A at 65.) The prior administrator and Plaintiff's former supervisor, Cynthia Burke, testified that Plaintiff was knowledgeable and fulfilled her job functions. In Burke's seven or more years working for Defendant, she never found any problem with Plaintiff's performance. (*Id.* Ex. Q at 10.) The director of nursing preceding Kirkland, Susan Wagner, testified that she also was Plaintiff's supervisor. She was not critical of Plaintiff's performance, and indicated that Plaintiff performed all assigned tasks. (*Id.* Ex. S at 75-77.) Kirkland replaced Plaintiff with an African-American woman who, according to other employees, was not qualified for the position. (*Id.* Ex. L at 108-09.) Moreover, Plaintiff's African-American replacement was allowed certain privileges, such as the use of Plaintiff's former office, that Kirkland withdrew from Plaintiff. (*Id.* at 151.)

Defendant contends that Kirkland had no authority to terminate Plaintiff's employment without approval from two higher authorities. (*Id.* Ex. DD ¶ 33; Doc. No. 56 Paul McGuire Aff. ¶ 35.) However, Cynthia Berke and Susan Wagner, former directors of nursing, testified that Susan Wagner, as the director of nursing, had the authority to hire and terminate employees. (Doc. No. 66, Ex. Q at 107, Ex. S at 100.) Kirkland also testified that he had sole authority to

hire and terminate employees. (*Id.* Ex. V at 210-12.)

In addition, Defendant provided a computerized summary of evaluations of Plaintiff from January through March of 2002. (*Id.* Ex. H.) Clinical education coordinator Ellen Loughrey performed these regular evaluations of Plaintiff. During Loughrey's deposition, she was provided with a copy of the handwritten evaluation for January, 2002, that she acknowledged writing. (*Id.* Ex. R.) The handwritten evaluation conflicts with the computerized evaluation. The handwritten evaluation provides a far more positive review of Plaintiff. Significantly, when Loughrey was shown both evaluations during her deposition, she stated that she was "surprised" and added, "[m]y handwritten document is different from this, so, because this is my handwriting, I just don't know about this report." (*Id.* Ex. Z at 52-53, 96.) Loughrey explained that she never altered any of the evaluations she had handwritten and could not recall ever finding a problem with Plaintiff's record keeping, especially for three consecutive months, as the computerized summary reports. (*Id.*) Loughrey also testified that she could not have performed an evaluation in February because she was in Saratoga, New York. (*Id.*) Plaintiff contends that the computerized summary is fabricated. (Doc. No. 66 at 84.)

These combined facts lead us to conclude that genuine issues of material fact exist which preclude the granting of summary judgment on Plaintiff's section 1981 claim.

C. Plaintiff's PHRA Claim

Plaintiff alleges that Defendant's actions violate the PHRA, 43 Pa. Const. Stat. § 951 *et seq.* "To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. If a plaintiff fails to file a timely complaint with the PHRC, then he or she is precluded from pursuing judicial remedies.

The Pennsylvania courts have strictly interpreted this requirement.” *Richards v. Foulke Assocs., Inc.*, 151 F. Supp. 2d 610, 613 (E.D. Pa., 2001) (citing Pa. Cons. Stat. §§ 959(a), 962); *see also Vincent v. Fuller*, 616 A.2d 969, 974 (Pa. 1992). Because Plaintiff never filed an administrative complaint with the PHRC alleging discrimination based on race, we dismiss Plaintiff’s PHRA claim for failure to exhaust administrative remedies. Unlike claims under the PHRA, however, section 1981 does not require filing an administrative complaint prior to commencing suit. Accordingly, her section 1981 claim survives.

D. The Retaliation Claim

Plaintiff claims that Defendant retaliated against her by terminating her employment for making complaints of discrimination. To advance a prima facie case of retaliation, a plaintiff must show that: (1) the employee engaged in a protected activity; (2) the employer took an adverse employment action after or contemporaneous with the employee’s protected activity; and (3) a causal link exists between the employee’s protected activity and the employer’s adverse action. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000) (citing *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1977)); *see also Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). To determine whether prima facie evidence of causation has been produced to support a retaliation claim, the Third Circuit focuses on two areas: (1) timing; or (2) evidence of ongoing antagonism. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920-21 (3d Cir. 1997); *Kachmar*, 109 F.3d at 177. Temporal proximity between the action and protected activity may permit an inference of causation where the relatively short interval between the two is “unusually suggestive” of retaliation. *See Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997).

In this case, Plaintiff engaged in protected activity when, on July 14, 2002, she made a written complaint of discrimination to Defendant. (Doc. No. 66, Ex. KK.) Plaintiff was disciplined on July 22, 2002, only three business days later. (Doc. No. 66, Ex. JJ.) On August 31, 2002, Kirkland recommended termination of Plaintiff to McQuillan. (*Id.* Ex. LL.) Plaintiff experienced an adverse employment action when she was terminated in September, 2002. (Doc. No. 18 at 6.) Under the circumstances, we conclude that there are genuine issues of material fact concerning the claim of retaliation and summary judgment is therefore not appropriate.

An appropriate Order follows.

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

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| JILL WATERS | : | CIVIL ACTION |
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| v. | : | |
| | : | NO. 03-CV-2909 |
| | : | |
| GENESIS HEALTH VENTURES, | : | |
| INC. | : | |

ORDER

AND NOW, this 21st day of December, 2004, upon consideration of Defendant Genesis Health Ventures, Inc.'s Motion for Summary Judgment (Doc. No. 56, No. 03-CV-2909), and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motion for Summary Judgment is GRANTED as to Plaintiff's ADA claim and Plaintiff's PHRA claim. Summary judgment is DENIED as to Plaintiff's claim under 42 U.S.C. § 1981 and the claim for retaliation.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge