UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN T. ADAMS, 00-CV-0808E(Sr)

Plaintiff,

-vs-

MEMORANDUM

MASTER CARVERS OF JAMESTOWN, LTD., WALLIE HAINES and THOMAS M. TERWILLIGER, and

ORDER[1]

Defendants.

Adams brought this action asserting claims for defendant's alleged violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.,* and the New York Human Rights Law ("HRL"), N.Y. Exec. Law §290 *et seq*. Defendants seek summary judgment of dismissal. Such motion will be granted.

On April 26, 1999 Adams was hired as Human Resources Coordinator by Master Carvers. Adams' direct supervisor was Master Carvers' CFO and Vice

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[1]This decision may be cited in whole or in any part.

President, defendant Terwilliger, who in turn reported to Master Carvers' CEO and President, defendant Haines. Adams suffers from heart disease[2] and diverticulitis — a gastrointestinal disorder.

Adams was hospitalized in late July relating to his diverticulitis.[3] Adams was hospitalized again August 24, 1999 after having been diagnosed with an abscessed colon related to his diverticulitis. Adams underwent surgery to remove part of his colon. Consequently, Adams missed work while he convalesced until September 27, 1999. During his convalescence, Terwilliger allegedly asked Adams when he would be able to return to work and stated in substance that, "when you get back we have to sit down and discuss if you can physically do the job." Am. Compl., at ¶29. Terwilliger also allegedly told Adams that "[w]e're

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[2]Adams underwent open-heart by-pass surgery in March 1997. Terwilliger was aware of Adams' heart condition when Adams was being interviewed for the job and Terwilliger allegedly told Adams not to mention his heart condition to Haines. In June 1999, however, Haines learned of Adams' heart condition when he observed a scar on plaintiff's chest during a business trip. Haines is alleged to have subsequently commented to Master Carvers' employee, David Eckstrom, that he was concerned about Adams's health.

[3]After Adams' July hospitalization, Adams and Haines traveled together on business during which time Haines allegedly observed that Adams was in "obvious pain" and the two men discussed Adams' condition.

behind in [Human Resources] and not where we want to be. There's a lot of work to do." *Ibid.* Moreover, a Master Carvers employee and former employee Andrew Johnson both allege that Terwilliger made statements to the effect that he wanted to terminate Adams because he was ill and missing work. *See e.g.,* Johnson Dep., at 11-22;[4] Glenn Roberts Aff., at ¶7.[5]

After Adams had been hospitalized in August and during his subsequent recuperation, Master Carvers hired Diane West on September 7, 1999. West assumed Adams' responsibilities and occupied his office. Adams was terminated when he returned to work on September 28, 1999. Terwilliger told Adams that the termination was made for economic reasons and that, with West, Master Carvers had two people performing the same functions.

Rule 56(c) of the Federal Rules of Civil Procedure ("FRCvP") states that summary judgment may be granted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to

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[4]Johnson was Adams' predecessor at Master Carvers.

[5]Roberts was Master Carvers' then Manufacturing Manager.

judgment as a matter of law." In other words, after discovery and upon a motion, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is thus appropriate where there is "no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[6]

With respect to the first prong of *Anderson*, a genuine issue of material fact exists if the evidence in the record "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, at 248.[7] Stated another way, there is "no genuine issue as to any material fact" where there is a "complete

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[6]Of course, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Goenaga* v. *March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party makes such a showing, the non-moving party must then come forward with evidence of specific facts sufficient to support a jury verdict in order to survive the summary judgment motion. *Ibid.*; FRCvP 56(e).

[7]*See also Anderson*, at 252 ("The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant].")

failure of proof concerning an essential element of the nonmoving party's case." *Celotex*, at 323. Under the second prong of *Anderson*, the disputed fact must be material, which is to say that it "might affect the outcome of the suit under the governing law ***." *Anderson*, at 248.

Furthermore, "[i]n assessing the record to determine whether there is a genuine issue as to any material fact, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *St. Pierre* v. *Dyer*, 208 F.3d 394, 404 (2d Cir. 2000) (citing *Anderson*, at 255).[8] Nonetheless, mere conclusions, conjecture, unsubstantiated allegations or surmise on the part of the non-moving party are insufficient to defeat a well-grounded motion for summary judgment. *Goenaga*, at 18.[9] Indeed, in order to survive a motion for summary judgment, plaintiffs in discrimination cases must offer more than "purely conclusory allegations of

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[8]In employment discrimination cases, district courts must be "especially chary in handing out summary judgment *** because in such cases the employer's intent is ordinarily at issue." *Chertkova* v. *Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996).

[9]*See* footnote 6.

discrimination, absent any concrete particulars ***." *Meiri* v. *Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985). Summary judgment is nonetheless appropriate in discrimination cases. *Holtz* v. *Rockefeller*, 258 F.3d 62, 69 (2d Cir. 2001).

Turning to the governing law, the ADA states in pertinent part that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to *** [the] discharge of employees ***." 42 U.S.C. §12112(a). The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds ***." 42 U.S.C. §12111(8).

ADA claims are reviewed under the framework promulgated by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and its progeny. *Regional Economic Cmty. Action Prog., Inc.*, 294 F.3d 35, 48-49 (2d Cir. 2002) (holding that the *McDonnell Douglas* test is applicable when analyzing ADA claims). The tripartite *McDonnell Douglas* test first requires that plaintiff establish a *prima*

facie case of discrimination; if plaintiff meets this burden, the burden of production then shifts to defendant to articulate a legitimate nondiscriminatory reason for its actions and, if defendant meets this burden, the "McDonnell Douglas framework *** disappear[s] and the sole remaining issue *** [is] discrimination *vel non*." *Holtz* v. *Rockefeller & Co.*, 258 F.3d 62, 77 (2d Cir. 2001) (quoting *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-143 (2000)); *McDonnell Douglas*, at 802-804. Indeed, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

In order to establish a *prima facie* case of disability discrimination under the ADA, Adams must show that (1) Master Carvers is subject to the ADA, (2) he suffers from a disability within the meaning of the ADA, (3) he could perform the essential functions of his job with or without reasonable accommodation and (4) he was fired because of his disability. *Reeves* v. *Johnson Controls World Servs., Inc.*, 140 F.3d 144, 149-150 (2d Cir. 1998). Adams, however, fails to

establish a *prima facie* case of discrimination under the ADA because he fails to make the requisite showing under elements two and three.[10]

With respect to the second element, Adams must show that he suffers from a disability within the meaning of the ADA. *Johnson Controls*, at 149.[11] The ADA defines "disability" 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 an impairment." 42 U.S.C. §12101(2).

Adams alleges only that the defendants regarded him as suffering from a disability that substantially limited his ability to work in a broad class of jobs. *See* Am. Compl., at ¶45. Consequently, only subsection (C) is implicated here.

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[10]The first element of a *prima facie* case under the ADA is that the employer is subject to the ADA. *Johnson Controls*, at 149. An employer is subject to the ADA if it is "engaged in an industry affecting commerce" and has "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year ***." 42 U.S.C. §§12111(2) and (5)(A). Master Carvers does not contend that it is not subject to the ADA and this Court therefore assumes that it is. This Court does not address the fourth element.

[11]*See Bragdon* v. *Abbott*, 524 U.S. 624, 630-640 (1998) (discussing definition of disability under the ADA).

The Second Circuit Court of Appeals discussed subsection (C) where it stated that,

> "whether an individual is 'regarded as' having a disability 'turns on the employer's perception of the employee' and is therefore 'a question of intent, not whether the employee has a disability.' It is not enough, however, that the employer regarded the individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled *within the meaning of the ADA*." *Colwell* v. *Suffolk Cty. Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998) (citation omitted) (quoting *Francis* v. *City of Meriden*, 129 F.3d 281 (2d Cir. 1997)), *cert. denied*, 526 U.S. 1018 (1999).

Accordingly, whether Adams is in fact disabled is irrelevant. Rather, Adams must show that he was "'*regarded* as' having an impairment that substantially limits one or more major life activities." *Ibid.* In other words, Adams must show that defendants *perceived* him to be disabled within the meaning of the ADA. *See Giordano* v. *City of New York*, 274 F.3d 740, 747 (2d Cir. 2001).[12]

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[12]In *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471, 489 (1999), the Supreme Court outlined two ways in which an employee may be "regarded as" disabled, the second of which applies where "a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Ibid.*

First, Adams' heart condition and diverticulitis are both physical impairments within the meaning of the ADA. *See Murray* v. *Rick Bokman, Inc.*, No. 99-CV-0015E(Sc), 2001 WL 603698, at *5 (W.D.N.Y. May 24, 2001). Nonetheless, as the Supreme Court has recognized, "[m]erely having an impairment does not make one disabled for purposes of the ADA." *Toyota Motor Mfg.* v. *Williams*, 534 U.S. 184, 122 S. Ct. 681, 690 (2002). Second, the ability to work is a "major life activity" within the meaning of the ADA. *Ryan* v. *Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998). Finally, Adams must show that his physical impairments substantially limited his ability to work. "This inquiry is individualized and fact-specific." *Colwell*, at 643.

With respect to the "substantial limitation" requirement, the Supreme Court has held that,

> "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a

> minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Sutton*, at 491;[13] *see also Ryan*, at 872 (same).[14]

Adams must show that defendants perceived him to have been significantly restricted in the ability to perform a broad class of jobs — not just restricted from doing *his* particular job. *See ibid.* (finding that employer's alleged statement that plaintiff's *position* was too stressful for her in light of her colitis failed to demonstrate that the employer perceived plaintiff as being substantially limited in her ability to work).[15] Adams, however, fails to make this showing where he alleges only to have suffered a short term limitation of his ability to work, *i.e.*, Adams required several weeks of sick-leave. *See Amendola* v. *Henderson*, 182 F.

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[13]*See* footnote 12.

[14]*See also Toyota*, at 691 (holding "that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives").

[15]*See also Sutton*, at 492 ("To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs."); *Toyota*, at 693 ("When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job").

Supp. 2d 263, 274-276 (E.D.N.Y. 2001) (finding that there was no evidence that employer regarded employee as disabled where evidence showed that employer perceived employee as merely requiring several months of post-operative recuperation). Indeed, the gist of the argument in Adams' brief in opposition to defendants' motion for summary judgment is that the defendants were displeased with Adams' health related absenteeism. *See* Pl.'s Mem. Of Law., at 5-10.[16]

This Court has previously held that the need to recuperate, including post-operative recovery, does not constitute a "substantial limitation" on the major life activity of working within the meaning of the ADA. *See Murray*, at *5.[17] Moreover, the Supreme Court recently held that to constitute a substantial

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[16]For example, Adams contends that Haines considered him a "health risk" (*id.* at 6) and that Haines did not want to pay Adams while he was ill and missing work (*id.* at 8), which was inconvenient for Master Carvers (*id.* at 9).

[17]*Murray* appears fatal to this action. Indeed, Adams' failure to discuss *Murray* — other than Adams' citation of *Murray* for the proposition that diverticulitis is an impairment under the ADA (Pl.'s Mem. Of Law, at 4) — is telling of Adams' inability to distinguish such case from the present action. Although *Murray* did not involve an allegation that plaintiff was "regarded as" disabled within the meaning of the ADA, such is irrelevant because being disabled under the "regarded as" prong requires that the employer perceive the employee to be disabled within the meaning of the ADA — and thus merely adds the "perception" requirement of the third prong of the ADA's definition of disability onto the requirements of the first prong. *See* 42 U.S.C. §12101(2)(A), (C); *cf. Colwell*, at 646.

limitation, the "impairment's *impact* must be permanent or long term." *Toyota*, at 691 (emphasis added). Although Adams is physically impaired — and assuming that his impairments are permanent — the impact of his impairments — *i.e.,* his need for sick leave — "is of too short a duration" to be considered substantially limiting for purposes of the ADA. *Colwell*, at 646 (inability to work during seven-month recuperation period not substantially limiting); *Adams* v. *Citizens Advice Bureau*, 187 F.3d 315, 316-317 (2d Cir 1999) (three and one-half month inability to work due to injury not "substantially limiting" under ADA).[18] Indeed, "[c]ourts within this circuit, and the vast majority of courts elsewhere which have considered the question, have held that temporary disabilities do not trigger the protections of the ADA because individuals with temporary disabilities are not disabled persons within the meaning of the act." *Graaf* v. *North Shore Univ. Hosp.*, 1 F. Supp. 2d 318, 321 (S.D.N.Y. 1998). Therefore, to apply the ADA's protections "to circumstances such as those

[18]*See also Murray*, at *5 (citing cases); *Amendola*, at 274-276 (finding that three months of post-operative recovery did not substantially limit employee's ability to work under the Rehabilitation Act, which is interpreted the same as is the ADA).

presented here would be a massive expansion of the [ADA] and far beyond what Congress intended." *McDonald* v. *Com. of PA Dept. of Public Welfare*, 62 F.3d 92, 96 (3d Cir. 1995). Accordingly, Adams has failed to establish that he is disabled for purposes of the ADA because his temporary need for medical leave does not substantially limit the major life activity of working. *Murray*, at *5.[19]

To satisfy the third element of a *prima facie* case of disability discrimination under the ADA, Adams must show that he could perform the essential functions of his job with or without reasonable accommodation. *Johnson Controls*, at 149. As this Court previously held in *Murray*,

> "[p]erhaps the most essential function of any job is simply coming to one's place of employment when scheduled to perform one's functions. An employee who cannot perform the essential functions of his job even with a reasonable accommodation has no claim under the ADA because he is not a qualified individual, and 'it is irrelevant that the lack of qualification is due entirely to a disability.'" *Murray*, at *6 (citations omitted).

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[19]Furthermore and aside from the need for time-off to recuperate from his surgery, Adams does not allege that the defendants believed that his heart condition and/or diverticulitis prevented him from doing his job. Indeed, Adams completely fails to allege *how* his physical impairments affect his major life activities.

Likewise here. Adams was unable to perform his job functions while he was recuperating for several weeks. Accordingly, Adams was not a "qualified individual with a disability" within the meaning of the ADA. *Ibid.* (finding that employee who needed several months to recuperate from surgery related to his diverticulitis could not perform "the essential functions of his job if and while he was absent therefrom for three months recuperating"); *Thorner-Green* v. *New York City Dep't of Corrections*, 207 F. Supp. 2d 11, 15 (E.D.N.Y. 2002) (plaintiff's absence for three out of nine months prior to her termination showed that plaintiff could not perform the essential functions of her job because "'regularly attending work is an essential function of virtually every job' and the 'ADA does not require an employer to accommodate an employee who cannot get to work.'") (citation omitted).[20]

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[20]Inasmuch as Adams was not covered by the ADA while he was on sick leave, there is no reason to think that the ADA would prohibit Master Carvers from terminating Adams upon his return from sick leave. *Charles* v. *D&F Mason, Inc.*, No. 00-7101, 2000 WL 1425137, at *1 (2d Cir. Sept. 27, 2000) (affirming award of summary judgment to employer that terminated employee upon his return to work after five weeks of convalescence); *Parker* v. *Columbia Pictures Indus.*, 204 F.3d 326, 338 (2000) (the ADA does not require employers to keep an ill employee's job open indefinitely). Indeed, it would
(continued...)

Inasmuch as Adams is not a "qualified individual with a disability" within the meaning of the ADA, his HRL claims will also be dismissed. *See Altman* v. *New York City Health & Hosp. Corp.*, 100 F.3d 1054, 1061 (2d Cir. 1996) (affirming dismissal of employee's HRL claim where employee's ADA claim was dismissed because he was not a "qualified individual with a disability" within the meaning of the ADA); *Friedman* v. *Consolidated Edison Co. of N.Y.*, No. 97 Civ. 2735(DLC), 1999 WL 511962, at *10 (S.D.N.Y. July 20, 1999) (noting that the ADA and the HRL are governed by the same standards granting employer's motion for summary judgment with respect to HRL claims because employee was not a "qualified individual with a disability" within the meaning of the ADA).[21]

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[20](...continued)
appear that defendants showed Adams a courtesy by deferring his termination until he was healthy enough to return to work. Such deferral avoided kicking Adams when he was down and may have maintained Adams' insurance coverage until after his hospitalization. In any event, Adams was not covered by the ADA and thus his termination was not prohibited.

[21]Inasmuch as the HRL has a broader definition of "disability" than does the ADA, this Court does not address whether Adams' HRL claims should be dismissed on the basis that he is not disabled within the meaning of the HRL. *See e.g., Johnson Controls*, at 154-157 (noting that the ADA and the HRL differ in that the latter has a broader definition of "disability" and contains no "substantially limited major life activity" requirement).

Accordingly, it is hereby ***ORDERED*** that defendants' motion for summary judgment of dismissal is granted, that plaintiff's motion to strike is denied as moot, and that the Clerk of this Court shall close this action.

DATED: Buffalo, N.Y.

September 12, 2002

JOHN T. ELFVIN
S.U.S.D.J.