

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PATRICIA HARRIS LEE,

Plaintiff,

-against-

07 Civ. 6733 (CM)

SONY BMG MUSIC ENTERTAINMENT, INC.,  
and BARBARA WARNOCK-MORGAN,  
Individual,

Defendants.  
\_\_\_\_\_x

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART  
THE MOTION FOR LEAVE TO DISMISS THE SECOND AMENDED COMPLAINT

McMahon, J.:

Familiarity with the court's prior decision in this matter is presumed.

In that decision, this court denied defendant's motion to dismiss plaintiff's claims of hostile work environment and race discrimination, granted the motion to dismiss plaintiff's claim of national origin discrimination and intentional infliction of emotional distress with prejudice, and granted the motion to dismiss her claims of discrimination on the basis of disability and retaliation without prejudice. Plaintiff was granted leave to replead the claims that were dismissed without prejudice and was told that the failure to be much more specific in her pleading would result in dismissal without leave to further replead (this being plaintiff's third complaint).

I have before me the Second Amended Complaint and a motion for dismissal or summary judgment.

To the extent that defendants again seek to dismiss the claims that were satisfactorily pleaded in the first amended complaint (i.e., plaintiff's claims for race discrimination and hostile work environment), the motion is denied. It is simply a motion to reconsider the court's earlier ruling, made out of time and lacking in more merit.

The motion to dismiss the claims for discrimination based on disability is denied. Plaintiff's "amended" pleading suffers from exactly the same defect as her prior pleadings, as her brief in opposition to the instant motion makes clear. Plaintiff takes a hostile work environment claim and tries to turn it into a disability discrimination claim. Her so-called "disability" consists of nothing more than the ailments that plaintiff claims to have suffered after she was attacked by her supervisor, including her psychological reaction to having to work for the supervisor whose

actions form the basis for her sexual harassment claim. The fact that her requested “accommodation” for her “disability” was a transfer to a different supervisor further underscores that plaintiff is trying to shoehorn what is essentially a hostile work environment claim (particularly the damages she allegedly suffered as a result of the harassment) into a disability shoe. There is no need for the court to repeat its previous analysis of why these allegations do not give rise to any cause of action under the Americans with Disabilities Act.

To the extent that Plaintiff is contending that the denial of her claims for short-and-long term disability benefits somehow violated the ADA – or is alleging that the denial of disability benefits constitutes an adverse employment action – she is again barking up the wrong tree. The denial of disability benefits is governed by ERISA and does not state a claim under the ADA. Plaintiff has not pleaded a claim under ERISA, and cannot do so until she has exhausted the insurer’s appeal process. The Second Amended Complaint alleges that plaintiff is “in the process of exhausting” her appeals (§ 49).

Because plaintiff has still not successfully pleaded a claim of disability discrimination, her claim for retaliation under the disability discrimination laws must also be dismissed.

The motion for summary judgment on the hostile work environment and race discrimination claims is denied as premature.

Defendants have ten days to file an answer to the Second Amended Complaint. The parties will have until March 27 to complete all discovery and until April 24 to file their final pretrial order. Any motion for summary judgment must be filed on or prior to April 24, but the filing of such a motion does not suspend the obligation to file the pretrial order and all accompanying documents. If the parties have any discovery disputes, they are to notify chambers, and I will refer them to the assigned Magistrate Judge.

This constitutes the decision and order of the Court.

Dated: October 30, 2008

  
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U.S.D.J.

BY ECF TO ALL PARTIES

Plaintiff was also given leave to replead her retaliation claim. She pleads that she made complaints about harassment and discrimination that she experienced while on the job.