STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNTIES
OFFICE OF PUBLIC HEARINGS

DEC 19, 2019

Commission on Human Rights and Opportunities, ex rel.
Oscar Acevedo, Complainant

CHRO Case No. 1820270

v.

Brentwood Hospitality, LLC, Respondent

December 19, 2019

Ruling and Order on Commission's Petition for Reconsideration Deemed a Motion to Reconsider

On December 27, 2017, the complainant filed a complaint with the commission alleging a cause of action against the respondent for discrimination because of his national origin (El Salvador), ancestry (Salvadoran), and physical disability (damaged knee ligament) in violation of the Connecticut Fair Employment Practices Act at General Statutes § 46a-60 (b) (1) (formerly § 46a-60 (a) (1)) , and, by virtue of General Statutes § 46a-58 (a), Title VII of the Civil Rights Act of 1094, 42 U.S.C. § 2000e-2 (Tile VII), and the American with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. (ADA). The complaint also alleges that the respondent retaliated against the complainant in violation of General Statutes § 46a-60 (b (4) (formerly § 46a-60 (a) (4)).

On November 13, 2019, the undersigned granted summary judgment in favor of the respondent with respect to the claim of discrimination because of a physical disability. On November 27, 2019, the commission filed a petition for reconsideration of the November 13, 2019, ruling and order granting the respondent's summary judgment motion. On December 11, 2019, the respondent filed an objection to the commission's motion. For the reasons set forth below, the commission's petition for reconsideration is deemed a motion to reconsider and is denied.

In its reconsideration request, the commission does not expressly rely on the mechanism provided in the Uniform Administrative Procedures Act (UAPA), General Statutes § 4-181a (a) (1), for a petitioner to request reconsideration of an agency's final decision. However, during the November 26, 2019, telephonic status conference, commission counsel represented that the commission intended to file a petition for reconsideration pursuant to § 4-181a (a) seeking reconsideration of the ruling and order granting the respondent's motion for summary judgment as to the complainant's physical disability discrimination claim.

Legal Standard

Petitions for consideration under Section 4-181a (a) of the General Statutes may be made only for final decisions in contested cases. Section 4-181a (a) provides in pertinent part: "a party in a contested case may, within fifteen days after the personal delivery or mailing of the *final decision*, file with the agency a petition for reconsideration of the decision on the ground that: (A) An error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown...." (Emphasis added.) General Statutes § 4-166 (5) defines "final decision" to mean, inter alia, "the agency determination in a contested case" and provides further that the term does not include a preliminary or intermediate ruling or order of an agency ...." Under Section 46a-54-95a of the Regulations of Connecticut State Agencies, applicable to these contested case proceedings, "the *final decision and order* of the presiding officer may be reconsidered, reversed or modified in accordance with section 4-181a of the Connecticut General Statutes." (Emphasis added.)

The respondent's summary judgment motion was directed solely to the physical disability discrimination claim, not to other claims of discrimination based on the complainant's national origin, ancestry, and retaliation, all of which remain viable charges of the complaint that was certified by the commission to the office of public hearings as a contested case. "Where the party against whom judgment is rendered is still in court and the case is open, there is not the requisite finality." *Wilson v. State of Connecticut Judicial Branch*, 2010 WL 421359, *1 (OPH/WBR No. 2008-069) (January 6, 2010) (Order re motion to reconsider), quoting *Girard v. Carbones Auto Body, Inc.* 35 Conn. Supp. 625, 627 (1978); see also *Flagg Energy Development Corp. v. General Motors Corp.*, 1995 WL 684780, *1, Superior Court, judicial district of New Haven, Docket No. CV92-0242198S (November 14, 1995) (same); Practice Book § 61-3 ("A judgment disposing of only a part of a complaint ... is a final judgment if that judgment disposes of all causes of action in that complaint ... brought by or against a particular party or parties.").

The ruling and order of November 13, 2019, granting the respondent's summary judgment motion as to only one of the complainant's claims does not terminate the proceedings. The order does not resolve all issues in dispute in the complaint or settle any of the parties' rights with respect to those issues. Other allegations in the certified complaint are still pending in the office of public hearings which retains jurisdiction of the certified complaint and all parties, including the party against whom summary judgment has been rendered, and the standard of law for reconsideration of the final agency decision articulated § 4-181a (a) (1) does not apply to the commission's petition. Accordingly, the petition will be reviewed as a motion to reconsider an intermediate ruling and not a final decision.

The respondent argues that motions requesting a tribunal to review a decision issued in a pending proceeding are considered under a narrower standard than the standard of review for reconsideration of final decisions in § 4-181a (a) (1). I agree. In Superior Court, motions to reargue decisions which are not final judgments for purposes of appeal are based on matters of fact or law which allegedly have been overlooked or misapprehended by the court in determining the motion sought to be reargued, and shall not raise any additional matters which could have been not offered on the prior motion. See Practice Book § 11-12. The terms "motion to reargue" and "motion to reconsider" are used interchangeably, and "[t]he same standard applies for a motion to reargue or motion for reconsideration." *Pizzoni v. Essent Healthcare of Connecticut, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV 166014136 (May 13, 2019) (2019 WL 2439705, *2). "The purpose of a reargument is ... to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts ... It also may be used to address ... claims of law that the [movant] claimed were not addressed by the court ...." (Citation omitted, internal quotation marks omitted.) Id, *1. " [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *Opoku v. Grant*, 63 Conn. App. 686, 692-93 (2001). The commission does not meet this standard, nor could it meet the standard under § 4-181a (a) (1).

Discussion and Conclusion

In granting summary judgment with respect to the claim of discrimination based on the complainant's physical disability, the tribunal determined that "there is not a factual dispute that the complainant's knee ligament injury was not a 'chronic physical handicap, infirmity or impairment,' as that term is defined in General Statutes § 46a-51 (15) marked by 'long duration' or 'threatening a long continuance.'" (Ruling and order on respondent's motion for summary judgment, November 13, 2019). Significantly, in seeking a review of the ruling and order granting summary judgment in favor of the respondent on the disability discrimination claim, the commission makes no substantive argument that the complainant was or is actually disabled.

Instead, the commission argues that the undersigned failed to consider unauthenticated excerpts of certain text messages offered by the commission as "evidence" that the respondent *perceived* the complainant to be disabled, and that whether the respondent perceived the complainant to be disabled is a material fact in dispute. The commission's argument is unpersuasive. The complaint in this case does not allege a cause of action based on perceived disability discrimination. In order "to state a claim under the 'regarded as' disabled prong of the ADA ..., a plaintiff must allege that his employer regarded him as having an 'impairment' within the mearing of the statute [ ]." *Francis v. City of Meriden*, 129 F. 3d 281, 285 (2nd Cir. 1997); *Rivera v. Pfizer Pharmaceuticals, LLC*, 521 F. 3d 76, 84-85 (1st Cir. 2008) (affirming summary judgment dismissal of "regarded as disabled" claim, inter alia, because plaintiff had not pleaded claim with adequate specificity under *Twonbley* Rule 12 (b) (6) standard). Similarly, to state a claim of discrimination because the employer perceived the complainant as having a physical disability under the Connecticut Fair Employment Practices Act, a complainant must set forth in the complaint that the employer perceived her as having a disability. In *Derosiers v. Diageo North America, Inc.*, 314 Conn. 773 (2014), the complainant alleged separate claims of discrimination based on actual disability and perceived disability. The court held that coverage under Connecticut Fair Employment Practices Act protects those who were merely perceived as physical disabled; that an allegation in the third court of complaint that complainant's employer "perceived [her] medical condition to be worse that it was" pled a cause of action for discrimination based on perceived disability, and the pleadings and affidavits in the case were sufficient to a establish question of material fact as to the perceived disability discrimination claim. Id. 773, 778, 794-96., see also, e.g., *Commission on Human Rights & Opportunities ex rel. Chilly v. Milford Automatics, Inc.*, 2000 WL 35575652, * 1, 10-14 (CHRO No. 9830459) (October 3, 2000); *Commission on Human Rights & Opportunities ex rel. Walsh v. Soundview*, 2000 WL 36092823, *6-7 (CHRO No. 9430024) (January 28, 2000).

In the present case, the respondent made an evidentiary showing that there is no genuine issue of material fact whether the complainant was physically disabled. In support of its motion for summary judgment, the respondent submitted three evidentiary exhibits consisting of certain medical records that the complainant had produced in compliance with the respondent's production request. As documents disclosed by the opposing party in response to discovery, these evidentiary exhibits meet the test of authentication under Practice Book § 17–45 (a) ("A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, *disclosures*, written admissions and other supporting documents.") (Emphasis added). See also, Colin C. Tait & Hon. Eliot D. Prescott, Tait's Handbook of Connecticut Evidence, § 9-2 (4th ed., 2008) (A document may be authenticated directly in a number of ways, including by an admission of its existence by an opposing party in responses to discovery.)

While the party seeking summary judgment has the burden of showing the absence of any genuine issue of material fact, "[t]he opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue.... *The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Pion v. Southern New England Telephone Co.*, 44 Conn. App. 657, 663 (1997). The commission as the opposing party failed to present concrete evidence that demonstrates the existence of some disputed factual issue with respect to the complainant's physical disability discrimination claim, which was the sole subject of the respondent's summary judgment motion. "[I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.... The presence ... of an alleged adverse claim is not sufficient to defeat a motion for summary judgment...." (Brackets in original; citations omitted; internal quotation marks omitted.) *Episcopal Church v. Gauss*, 302 Conn. 408, 421-22 (2011); see also, e.g., *Vollemans v. Wallingford*, 103 Conn. App. 188, 293 (2007); *Gianetti v. Health Net of Connecticut, Inc.*, 116 Conn. App. 459, 464-465 (2009); *Commission on Human Rights & Opportunities ex rel. Carretero v. Hartford Public Schools,* 2005 WL 5746419,*7 (CHRO No.

0310481) (November 28, 2005) (Ruling on motion for summary disposition). "[The] rules would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment." *United Services Automobile Assn. v. Marburg,* 46 Conn. App. 99, 107–108 (1997).

As a final argument, the commission contends that the undersigned should have scheduled oral argument on the respondent's summary judgment motion despite the fact that none of the parties, including the commission and the complainant, requested oral argument. The commission's argument is not a valid argument. Section 46a-54-87a (c) of the Regulations of Connecticut State Agencies governing these proceedings explicitly provides, "The presiding officer *may decide all motions without oral argument.* If the presiding officer, on his or her own or upon motion by a party, orders oral argument, the presiding officer shall notify the parties of the time and place for such argument....." (Emphasis added.) The commission did not file a motion requesting oral argument, and cites no commission or other administrative regulations requiring oral argument on the respondent's summary judgment motion. Having failed to make a motion for oral argument, the commission waived its right under the applicable regulation to do so.

In conclusion, after careful consideration of the commission's petition, deemed a motion to reconsider the ruling and order granting summary judgment for the respondent on the physical disability discrimination claim, having found no matters of fact or law that were overlooked or misapprehended by the tribunal, and no claims of law that were not addressed in determining the respondent's summary judgment motion, the commission's motion for reconsideration is hereby **DENIED**.

It is so ordered this 19th day of December 2019.

Elissa T. Wright
Presiding Human Rights Referee

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