Thomson v. Dept. of Social Services

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********** KIM THOMSON v. DEPARTMENT OF SOCIAL SERVICES (AC 38851) Sheldon, Beach and Flynn, Js. Syllabus The plaintiff employee commenced an action against her employer, the defendant Department of Social Services, alleging that the defendant had violated the Connecticut Fair Employment Practices Act (§46a-51 etseq.)bydiscriminatingagainsttheplaintiffonthebasisofherdisability as a result of the defendant's failure to provide her with a reasonable accommodation. The plaintiff suffered from a severe chronic disease thatrequiredhertoperiodicallymisswork.InJanuary2013,theplaintiff, who was not eligible for federal family and medical leave, provided G, oneofthedefendant'shumanresourcesrepresentatives,withamedical certificate from her physician that indicated that the plaintiff would have to work on a reduced schedule, but the physician did not indicate adatewhenshecouldreturntoworkfull-time.Approximatelyoneweek later, the plaintiff left a note under G's door indicating that she would be taking a medical leave lasting more than thirty days, depending on her condition. The note listed the plaintiff's cell phone number and home address, and stated that she could be contacted regarding any questions. Thereafter, O, another human resources representative who replaced G, sent a certified letter to the address listed in the plaintiff's note, stating that she was ineligible for family and medical leave, that she had not provided the documents necessary to support a medical leaveofabsence,andthatshewascurrentlyonunauthorizedleave.The letter stated that O had called the plaintiff's cell phone and left a voice- mail message but that she had not received a response. The

letter providedthattheplaintiff'sabsencewould bedeemedaresignationnot in good standing if she did not return to work or provide a medical certificate to support her leave by a certain date. After that date had passed, O sent the plaintiff a letter stating that she had ``been resigned not in good standing'' because she had failed to return to work and failed to provide a completed medical certificate. The trial court there- aftergrantedthedefendant'smotionforsummaryjudgment,concluding thattheplaintifffailedtopresentevidencesufficienttosupportaprima facie case of discrimination because she had not provided evidence demonstrating that she was able to perform her job with or without a reasonable accommodation, or that the defendant did not reasonably accommodate her. From the summary judgment rendered thereon, the plaintiffappealedto thiscourt,claimingthatthetrial courthadimprop- erlyrenderedsummaryjudgmentforthedefendantbecauseherrequest for leave was a reasonable accommodation that would have enabled her to perform the essential functions of her job. Held that the trial court properly determined that the plaintiff could not meet her burden of proving a prima facie case of disability discrimination because her request for leave was not a reasonable accommodation, as the plaintiff informed the defendant that she would be taking a leave of absence but did not provide the defendant with any time frame for her return and did not respond to the defendant's subsequent attempts to contact her regarding her request for leave, and the defendant was not required to wait indefinitely for the plaintiff's medical condition to be corrected; moreover, the defendant was not given an opportunity to engage in the required interactive process with the plaintiff regarding a reasonable accommodation for her disability given that she had failed to follow throughwithherowndirectionstothedefendantastohowcommunica- tions would occur. Argued March 6Đofficially released September 5, 2017 Procedural History Action to recover damages for alleged disability dis- crimination,andforotherrelief,broughttotheSuperior Court in the judicial district of Hartford, where the court,Elgo,J.,grantedthedefendant'smotionforsum- mary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. Affirmed. James V. Sabatini, for the appellant (plaintiff). Matthew F. Larock, assistant attorney general, with whom, on the brief, wereGeorgeJepsen, attorney gen- eral, and Ann E. Lynch, assistant attorney general, for the appellee (defendant). Michael Roberts filed a brief for the Commission on Human Rights and Opportunities as amicus curiae. Opinion BEACH,J.Theplaintiff,KimThomson,appealsfrom the judgment of the trial court granting the motion for summary judgment filed by the defendant, the Depart- ment of Social Services. On appeal, the plaintiff con- tends that the court improperly held that insufficient facts were presented to support a prima facie case for disabilitydiscrimination.Weaffirmthejudgmentofthe trial court. Thefollowingfacts,takenfromthematerialssubmit- ted in connection with the motion for summary judg- ment, are relevant to this appeal. The plaintiff was employed by the defendant as a clerical assistant from 1987 to 2013. She has suffered from severe chronic asthma since birth. Throughout her employment with the defendant, the plaintiff suffered occasional ``flare-ups''ofhercondition.Duringtheseflare-ups,theplain- tiff required rest for recovery and was unable to work. On several occasions the plaintiff arranged with her human resources representative, Kelly Geary, to take medicalleavepursuanttotheFamilyandMedicalLeave Act,29U.S.C.§2601etseq.(2012)(FMLA).ByOctober, 2012, however, the plaintiff was no longer eligible for FMLA leave because she had not worked the number of hours required to maintain eligibility.

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The plaintiff, Geary,andtheplaintiff'ssupervisor,LouisPolzella,met to discuss how they could accommodate the plaintiff without using FMLA leave and determined that the plaintiffcouldusesickleave,personalleave,governor's leave, and unpaid leave when necessary to accommo- date her disability. On January 30, 2013, the plaintiff notified Geary that shewouldneedtotakeintermittentleaveasanaccom-modationforherdisability.TheplaintiffprovidedGeary withamedicalcertificateonwhichtheplaintiff'sphysi- cian indicated that she would need ``to . . . work only intermittently or on a reduced schedule as a result of the condition,'' and would be unable to work for four days per month going forward. The form left space for the plaintiff's physician to indicate when she would be able to return to work full-time, but he drew a line through the space and did not fill in a date. Earlyin2013,Gearybecameresponsibleforsupervis-inganotherunit,andLisaOwensreplacedGearyasthe plaintiff's human resources representative. On January 31 of that year, Geary sent Owens a memo informing herthattheplaintiff``[h]ashadFMLAÐfedintermittent for years'' and that ``last time she submitted,'' she did nothavethehoursrequiredtotakeanyadditionalFMLA leave. Geary also indicated that the plaintiff had men- tioned that she may need to take leave soon and had requested the ability to use leave donated from a coworker, but that Geary ``advised her she could not enactituntilshewasouton`longterm'illnessof[more than thirty] days.'' Approximately one week later, on February 6, 2013, theplaintiffleftanoteunderGeary'sofficedoorindicat-ingthatshewouldbetakingamedicalleaveofabsence beginning the next day, February 7, 2013, and lasting for ``over thirty days depending on my lung condition as Ineed toget welland mylungs better.''The plaintiff noted that she had not spoken with Polzella about tak- ing a leave of absence. The plaintiff also provided her cell phone number and her home address, which she listedinboldtypefont,andaskedGearytocontacther if she had any questions. The plaintiff otherwise did notspeakwithGearyabouttakingthisleaveofabsence. Theplaintiff alsoleftpaperworkwith Gearytomake claims under two short-term disability insurance poli-cies.Thepaperworkleftspaceinseveralplacesforthe plaintiff and her physician to indicate when she would bereturningtowork.Onthepaperworkforonepolicy, theplaintiffindicatedthatshewouldbeunabletowork from February 7, 2013, ``[until] reevaluated.'' On the same form, the plaintiff's physician indicated that she would be unable to work from ``2/7/13'' to ``ongoing,'' and that he expected ``significant improvement in the [plaintiff's] medical condition'' in one to two months. On the paperwork for her other policy, the plaintiff's physician indicated that she would be unable to work from ``2/7/13'' through ``ongoing,'' and would be able to returntowork``whenreevaluated,''butdidnotindicate when that reevaluation would occur. The plaintiff did not provide Geary with a medical certificate sufficient to support this request for leave. On February 7, 2013, Gearysenttheplaintiff'snoteandpaperworktoOwens. OnFebruary13,2013,Owensmailedacertifiedletter to the plaintiff's home address notifying her that she wasineligibleforFMLAleave,thatshehadnotprovided thedocuments necessarytosupporta medicalleaveof absence, that she was not eligible to use leave time donated by a coworker, and that she was currently on unauthorized leave. Owens also notified the plaintiff that she needed to contact her supervisor to request leave on a daily basis, and that, if she did not return to work or provide a

medical certificate to support her leave by February 21, 2013, her absence ``may be deemed a resignation not in good standing.'' (Internal quotation marks omitted.) Owens noted that she had calledtheplaintiff'scellphonenumberandleftavoice- mailmessageonFebruary8,2013,buthadnotreceived a call back. The plaintiff did not respond and did not return to work. On February 22, 2013, Owens sent the plaintiff a second letter via regular mail notifying her that she had ``been resigned not in good standing'' because she had failed to return to work and failed to provide a completed medical certificate on or before February 21, 2013. The plaintiff did not receive either of these letters until February 24, 2013, when she returned home from anapproximatelytwoweekstayatherdaughter'shome in Hartford. The plaintiff had not been retrieving her mail from her home address while she was away. On February25,theplaintiffbegancallingandleavingmes- sagesforGearyandOwens,askingwhetherthedonated leave had been applied, requesting that the disability paperwork be completed, and seeking to ``make sure that everything [is] going in the manner that it should be.'' On February 27, Owens spoke with the plaintiff onthephoneandinformedherthat,pertheletterssent to her home address, she had been deemed resigned not in good standing. On March 15, 2013, the plaintiff mailedareplicaofherJanuary30,2013medicalcertifi- cate toOwens withthe additional notation:``[a]sked to stay off work 2/7/13 [until] improved.'' No action was taken on the basis of that certificate. The plaintiff commenced an action alleging that the defendant had discriminated against her on the basis of her disability and had failed to provide her with a reasonable accommodation in violation of General Statutes§46a-60(a)(1),aprovisionoftheConnecticut FairEmploymentPracticesAct,GeneralStatutes§46a- 51 et seq. The defendant filed a motion for summary judgmentarguingthattheplaintiffhadfailedtopresent evidence sufficient to support a prima facie case of discrimination, and the trial court granted the defen- dant's motion. The court agreed and noted that ``the plaintiffhasnotproducedevidencedemonstratingthat shewasabletoperformherjobwithorwithoutreason- ableaccommodationnorhassheshownthatthedefen- dant did not reasonably accommodate [her].'' This appeal followed. We begin by setting forth the relevant standard of review and applicable legal principles. ``A court shall render summary judgment if the pleadings, affidavits and any other proof submitted show that there is no genuineissueastoanymaterialfactandthatthemoving partyisentitledtojudgmentasamatteroflaw.Practice Book §17-49. In deciding a motion for summary judg- ment,thetrialcourtmustviewtheevidenceinthelight most favorable to the nonmoving party. . . . The party movingforsummaryjudgmenthastheburdenofshow- ing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. . . . Our review of thetrialcourt'sdecisiontograntthedefendant'smotion for summary judgment is plenary.'' (Internal quotation marks omitted.) Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 402±403, 944 A.2d 925 (2008). ``Our Supreme Court has determined that Connecti- cutantidiscriminationstatutesshouldbeinterpretedin accordance with federal antidiscrimination laws. . . . While certain elements of the Fair Employment Prac- tices Act and the [Americans with Disabilities Act, 42 U.S.C. §12101 et seq. (2012) (ADA)] differ, [c]laims for violations of the [Fair Employment Practices Act] are analyzed under the same standards as claims for viola- tions of the

ADA. . . . [D]iscrimination on [the] basis of [a] disability under [the] ADA includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual withadisabilitywhoisanapplicantoremployee,unless suchcoveredentitycandemonstratethattheaccommo- dation would impose an undue hardship on the opera- tion of the business of such covered entity. . . . Under the ADA, a qualified individual with a disability is one who is capable of performing the essential functions ofthedesiredjobwithorwithoutreasonableaccommo- dation.'' (Citations omitted; footnote omitted; internal quotation marks omitted.) Langello v. West Haven Board of Education, 142 Conn. App. 248, 259±60, 65 A.3d 1 (2013). ``In order to survive a motion for summary judgment on a reasonable accommodation claim, the plaintiff must [first establish a prima facie case of disability discrimination by] produc[ing] enough evidence for a reasonable jury to find that (1) [s]he is disabled within the meaning of the [statute], (2) [s]he was able to per- form the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonablyaccommodateit.''(Internalquotationmarks omitted.) Curry v. Allan S. Goodman, Inc., supra, 286 Conn.415;seeMcBridev.BICConsumerProductsMfg. Co.,585 F.3d92, 96±97(2dCir. 2009).``Once adisabled individual has suggested to his [or her] employer a reasonable accommodation . . . the employer and the employee engage in an informal, interactive process with the qualified individual with a disability in need of the accommodation . . . [to] identify the precise limitations resulting from the disability and potential reasonableaccommodationsthatcouldovercomethose limitations. . . . In this effort, the employee must come forward with some suggestion of accommoda- tion, and the employer must make a good faith effort to participate in that discussion.'' (Citation omitted; internal quotation marks omitted.) Id., 416. ``The plaintiff bears the burdens of both production andpersuasionastotheexistenceofsomeaccommoda- tionthatwouldallowhertoperformtheessentialfunc- tions of her employment . . . .'' McBride v. BIC Consumer Products Mfg. Co., supra, 583 F.3d 97. ``To satisfy this burden, [the] [p]laintiff must establish both that[her]requestedaccommodationwouldenable[her] to perform the essential functions of [her] job and that it would allow [her] to do so at or around the time at whichitissought.''(Internalquotationmarksomitted.) Nandori v. Bridgeport, United States District Court, Docket No. 3:12CV673 (JBA), 2014 WL 186430, *5 (D. Conn. January 16, 2014); see alsoMcBride v.BICCon- sumer Products Mfg. Co., supra, 97±98 (plaintiff requestingreassignmentasaccommodationrequiredto ``demonstratetheexistence,atoraroundthetimewhen accommodationwassought,ofanexistingvacantposi- tion to which she could have been reassigned''). Tosatisfythesecondelementofherprimafaciecase, theplaintiffmustshowthattherequestedaccommoda- tion was reasonable and enabled her to function in the workplace.SeeCurryv.AllanS.Goodman,Inc.,supra, 286Conn.419(``[i]nordertosurvivesummaryjudgment onareasonableaccommodationclaim,theplaintiffhas the burden of showing that an accommodation would enable him [or her] to perform the functions of the job and that, `at least on the face of things,' it is feasible for the employer to provide the accommodation''); see also Graves v. Finch Pruyn & Co.,

457 F.3d 181, 185 (2d Cir. 2006); Nandori v. Bridgeport, supra, 2014 WL 186430, *5±6. The plaintiff argues that her request for leavewasareasonableaccommodationandwouldhave enabled her to perform the essential functions of her job. The defendant contends that the plaintiff's request for leave was not reasonable, and, therefore, that she failedtoprovethatshewasabletoperformtheessential functionsofherjobwithareasonableaccommodation. We agree with the defendant. We first note that a medical leave of absence is a recognizedformofaccommodation.SeeGreenv.Cellco Partnership, 218 F. Supp. 3d 157, 164±65 (D. Conn. 2016);Hutchinsonv.Ecolab,Inc.,UnitedStatesDistrict Court,DocketNo.3:09CV1848(JBA),2011WL4542957, *9 (D. Conn. September 28, 2011). Federal courts have held, however, that ``[t]he duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover, nordoesitforceanemployertoinvestigateeveryaspect of an employee's condition before terminating him [or her] based on [an] inability to work.''Parker v.Colum- biaPicturesIndustries,204F.3d326,338(2dCir.2000); seealsoMitchellv.WashingtonvilleCentralSchoolDis- trict, 190 F.3d 1, 9 (2d Cir. 1999) (``[n]or, especially in lightofthe . . . theabsenceofanyindicationfrom[the plaintiff] . . . [that] he expected to be able to return [to work], was the [defendant] required to grant [the plaintiff] an indefinite leave of absence''); Nandori v. Bridgeport, supra, 2014 WL 186430, *8 (``[p]laintiff's onlyidentifiedaccommodationwasarequestforindefi- nite injury leave, which, as a matter of law, does not constitute a reasonable accommodation''). Although not bound by it, ``we review federal prece- dent concerning employment discrimination for guid- anceinenforcingourownantidiscriminationstatutes.'' Curryv.AllanS.Goodman,Inc.,supra,286Conn.415. We find persuasive the reasoning of the United States Court of Appeals for the Fourth Circuit in Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995), that ``reasonable accommodationisbyitstermsmostlogicallyconstrued as that which presently, or in the immediate future, enablestheemployeetoperformtheessentialfunctions of the job in question. . . . [R]easonable accommoda- tion does not require[an employer] to wait indefinitely for[theemployee's]medicalconditionstobecorrected . . . .'' See also Mitchell v. Washingtonville Central SchoolDistrict, supra, 190 F.3d 9, citingMyers;Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759±60 (5th Cir. 1996) (finding no merit in argument that indefinite leave was reasonable accommodation). The plaintiff argues that she had requested a reason- ableaccommodation,therebysatisfyingthesecondele- mentofherprimafaciecase.Wedisagree.Theplaintiff, prior to her departure,informed Geary that she would be taking leave for ``over thirty days depending on my lung condition . . . .'' (Emphasis added.) At a subse- quent deposition, the plaintiff was asked, with respect to her request for leave, that ``you didn't know how long you were going to be out, correct?'' The plaintiff responded, ``[c]orrect.'' One of the forms the plaintiff submittedonFebruary6,2013,indicatedthatherphysi- cian expected ``improvement'' within ``one to two months,'' and additionally stated, in at least three places,thattheplaintiffwouldbeabsent``[until]reeval- uated.'' The forms did not indicate when the plaintiff was expected to be reevaluated. Neither the plaintiff's note to Geary nor her short-term disability paperwork indicated whenÐor even whetherÐthe plaintiff would be returning to work. Whenthedefendantattemptedtoobtainfurtherinfor-

mationbycontactingtheplaintiffbycertifiedandregu- lar mail,the plaintiffdid not respond.As the trialcourt noted, ``the defendant's efforts to communicate with the plaintiff were stymied by the plaintiff's failure to followthroughwithherowndirectionstothedefendant as to how communications would occur.'' The plaintiff did not attempt to contact the defendant until she had been absent from work for more than two weeks, despite the fact that her request for leave had never been approved. The defendant, then, was not given an opportunity to engage in the required interactive pro- cesswiththeplaintiffregardingareasonableaccommo- dation for her disability. 1 The plaintiff informed the defendant that she would betakingaleaveofabsence,didnotprovidethedefen- dant with any time frame for her return, and did not respondtothedefendant'ssubsequentattemptstocon- tact her regarding her request for leave. The plaintiff effectively asked the defendant ``to hold [her] position open indefinitely while [she] attempt[ed] to recover . . . .'' Parker v. Columbia Pictures Industries, supra, 204 F.3d 338. On the basis of the record before us, the plaintiff has failed to demonstrate that she requested a reasonableaccommodationthatenabledhertoperform the essential functions of her job, and, therefore, the court properly determined that as a matter of law the plaintiff could not meet her burden of proving a prima facie case of disability discrimination. 2 The judgment is affirmed. In this opinion the other judges concurred. 1 The plaintiff argues that ``[b]efore an employer should be able to rely on the `indefiniteness' of a leave request as a justification for avoiding the accommodation, the interactive process should compel the employer to explain its particular difficulty surrounding the lack of a return date, and to invite the employee to seek an approximate return to work [time frame] from a health care provider.'' We do not disagree. The defendant, however, did attempt to engage in the necessary interactive process, and the plaintiff did not respond for more than two weeks. 2 In making a claim for disability discrimination, the plaintiff has the burden to prove all three elements of the prima facie case. See Curry v. Allan S. Goodman, Inc., supra, 286 Conn. 415. Because she has failed to establish the second element, we need not address the plaintiff's remaining claims.