

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

COMPLAINT AND
JURY TRIAL DEMAND

CAROLYN PISANI,

Civil Action No.: CV 03 4860

Plaintiff-Intervenor,

v.

THE HOME DEPOT USA, INC.,

Defendant.

-----X

PRELIMINARY STATEMENT

Plaintiff-Intervenor's causes of action seeks declaratory, injunctive and equitable relief, compensatory and liquidated and punitive damages, litigation costs and attorneys' fees for, inter alia, disability discrimination suffered by Plaintiff-Intervenor during her employment in violation of and pursuant to 42 U.S.C. §§12101, *et seq.*, the Americans with Disabilities Act ("ADA"), Title I of the Civil Rights Act of 1991, and §§290, *et seq.* of the New York Executive Law ("New York State Human Rights Law" or "NYSHRL").

PARTIES

1. Plaintiff-Intervenor is a twenty-nine (29) year old female, who is developmentally disabled in that she suffers from mental retardation resulting in learning disabilities. Plaintiff's resides at in Harrisburg, PA 17111. At all relevant times Plaintiff-Intervenor resided at, 7 Embassy Road, Selden, County of Suffolk, New York 11784.

2. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation, and enforcement of Title I of the ADA and is expressly authorized to bring this action by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(I).

3. Upon information and belief, Defendant Home Depot USA, Inc. (hereinafter "Home Depot") is a domestic corporation organized and doing business under and by virtue of the laws of the State of New York and the United States.

4. Upon information and belief, Home Depot maintains its corporate headquarters at 2455 Paces Ferry Road, NW, Atlanta, Georgia 30339-4024.

5. At all relevant times, the discriminatory acts alleged herein took place at the Home Depot store located at 255 Pond Path, South Setauket, County of Suffolk, New York 11720 (hereinafter "South Setauket Store"), where Plaintiff-Intervenor was employed.

6. Upon information and belief, the District Office in charge of Home Depot's personnel or Human Resources matters is located at Home Depot's Northeast Store Support, 3096 Hamilton Boulevard, South Plainfield, New Jersey 07080.

7. At all relevant times, Defendant Home Depot and its South Setauket Store are employers within the meaning of "employer" under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(a) and (h) of Title VII, 42 U.S.C. §§ 2000-e(g) and (h), and §§290, *et seq.*, of the New York Executive Law since it employs over fifteen (15) employees and engages in a business which affects interstate commerce.

8. At all relevant times, Defendant Home Depot has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. §12111(2).

JURISDICTION

9. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12117(a), which incorporates by reference §§706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-5(f)(1) and (3); and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981a. This Court has pendant jurisdiction over Plaintiff-Intervenor's state causes of action under the New York State Human Rights Law ("NYSHRL") since all of Plaintiff-Intervenor's claims arise from the same nucleus of operative facts. See, 28 U.S.C. §1367.

10. On or about July 12, 2000, Ms. Pisani timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") which was duly filed with the New York State Division of Human Rights ("Division of Human Rights"). Annexed hereto as Exhibit "A" is a true and accurate copy of Plaintiff-Intervenor's Charge of Discrimination.

11. On or about December 14, 2002, the EEOC determined that there was probable cause to believe that Defendant Home Depot had engaged in unlawful employment practices. Annexed hereto as Exhibit "B" is a copy of the EEOC's probable Cause Determination.

12. The EEOC attempted to eliminate such practices by informal methods of conference, conciliation and persuasion pursuant to 42 U.S.C. §§12101, *et seq.*, but was unable to secure a conciliation agreement.

13. On or about September 25, 2003, the EEOC filed a suit on behalf of Ms. Pisani. Annexed hereto as Exhibit "C" is a true and accurate copy of Complaint filed by the EEOC.

14. On or about February 12, 2004, Ms. Pisani moved to intervene as of right in the action initiated against Home Depot. On or about, July 29, 2004, the Court permitted Ms. Pisani to intervene as of right. Annexed hereto as Exhibit "D" is a true and accurate copy of the Order, dated July 29, 2004.

15. Plaintiff-Intervenor seeks declaratory, injunctive and equitable relief pursuant to 42 U.S.C. §§12101, *et seq.*, 42 U.S.C. 1981(a), §504 of the Rehabilitation Act, 29 U.S.C. §§794, *et seq.*, and §§290, *et seq.* of the New York Executive Law and Rule 54 of the Federal Rules of Civil Procedure.

16. Plaintiff-Intervenor seeks compensatory damages pursuant to 42 U.S.C. §§12101, *et seq.*, 42 U.S.C. 1981(a), 29 U.S.C. §§794, *et seq.*, and §§290, *et seq.* of the New York Executive Law including, but not limited to, damages for loss of back pay and front pay, humiliation, pain, loss of dignity, suffering and emotional stress.

17. Plaintiff-Intervenor also seeks full punitive and/or liquidated damages under 42 U.S.C. §§12101, *et seq.*, 42 U.S.C. 1981(a).

18. Plaintiff-Intervenor seeks reasonable attorneys' fees pursuant to 42 U.S.C. §12101, *et seq.*

VENUE

19. Plaintiff-Intervenor's causes of action properly lie in the Eastern District of New York, United States District Court, District of New York pursuant to 20 U.S.C. §1391(b)

because Plaintiff-Intervenor's claims arose in this judicial district and pursuant to 42 U.S.C. §§12101, *et seq.*, and 42 U.S.C. 1981(a), because the unlawful employment practices were committed in this judicial district.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

20. Plaintiff-Intervenor repeats, reiterates and realleges each and every allegation contained in paragraph "1" through "19" of this Complaint with the same force and effect as if more fully set forth at length herein.

21. Ms. Pisani is developmentally disabled in that she suffers from mental retardation resulting in learning disabilities. Ms. Pisani's learning disabilities substantially limit the major life activity of learning.

22. Ms. Pisani is a qualified individual with a disability in that she is able to perform her job with a reasonable accommodation. Ms. Pisani's reasonable accommodation is the use of a job coach to assist her to understand the job and to make site visits to ensure her progress and to address any workplace difficulties with her.

23. Ms. Pisani was employed as a Sales Associate for Home Depot from June through October 1999.

24. Ms. Pisani's job coach made numerous site visits to Ms. Pisani's workplace and communicated regularly with Ms. Pisani and her managers during her employment with Defendant. Managers of Home Depot were aware of Ms. Pisani's job coach and her role and that they should contact the job coach regarding any disciplinary action.

25. Ms. Pisani's performance was satisfactory at all times of her employment with Defendant.

26. Ms. Pisani obtained her job with Home Depot through VESID, the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities. Her job coach while employed by Home Depot was Jodi LaMar ("LaMar") at ACLD (Adults and Children with Learning and Developmental Disabilities Inc.).

27. Pursuant to a work schedule posted at the South Setauket Store, Ms. Pisani was scheduled to work the weekend of the September 25th and 26th.

28. On or about September 24, 1999, Ms. Pisani was informed, by telephone, that Home Depot did not want her to work the weekend of the September 25th and 26th.

29. On Monday, September 27, 1999, Ms. Pisani went to work as scheduled. Ms. Pisani's manager asked her why she did not work the previous weekend. Ms. Pisani advised her manager that she was advised not to work the weekend. Ms. Pisani was permitted to resume working, no disciplinary action was taken at that time.

30. On or about October 1, 1999, Ms. Pisani received a telephone call from a Home Depot employee, with real or apparent managerial authority, who told Ms. Pisani not to work the weekend of October 2nd and 3rd, although Ms. Pisani was scheduled to work those days.

31. Ms. Pisani returned to work on the following Monday or Tuesday and no mention was made of her not working on October 2nd and 3rd.

32. The following week the Ms. Pisani received another call from a Home Depot employee, with real or apparent managerial authority, who told Ms. Pisani not to work the weekend of October 9th and 10th.

33. On October 11, 1999, Ms. Pisani reported to work. On that day Didi Perkel, South Setauket Store Manager, and Kathy Elkins, Assistant Store Manager called Ms. Pisani into

a meeting. During the meeting Ms. Pisani's managers placed three documents in front of her and required her to sign each one.

a. The first was an Associate Performance Notice for a violation of company policy or procedures, i.e. failure of Ms. Pisani to report to work on October 9, 1999. Mr. Robert Beckhusen ("Beckhusen"), Manager and Ms. Elkins allegedly signed the document on October 9, 1999.

b. The second was an Associate Performance Notice for a violation of company policy or procedures, i.e. failure of Ms. Pisani to report to work on October 10, 1999. Ms Elkins allegedly signed the document on October 10, 1999.

c. The third was an Associate Action Notice terminating Ms. Pisani because of alleged attendance/punctuality problems. This document was signed by the Ms. Perkel on October 11, 1999.

34. It was not until after signing each Notice that Ms. Pisani was informed of her termination.

35. Ms. Pisani's job coach was never notified that Ms. Pisani had allegedly failed to report to work on September 25th, September 26th, October 2nd, October 3rd, October 9th and October 10th, or that Ms. Pisani had violated company policy by failing to appear on those dates.

36. Ms. Pisani's job coach was never notified that Ms. Pisani was being disciplined and/or terminated for violations of the company's policies.

37. Home Depot did not involve Ms. Pisani's job coach regarding its discipline or termination of Ms. Pisani and thus failed to accommodate and terminated Ms. Pisani because of her disability.

**AS AND FOR A FIRST CLAIM FOR
RELIEF AGAINST DEFENDANT HOME DEPOT**

38. Plaintiff-Intervenor repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "37" of this Complaint with the same force and effect as if more fully set forth at length herein.

39. Home Depot is an employer within the meaning of 42 U.S.C. §§12101, *et seq.*, the Americans with Disabilities Act ("ADA"). At all relevant times, Home Depot had or has stores within this judicial district including the South Setauket Store at issue.

40. At all relevant times, Ms. Pisani performed her duties in a competent and satisfactory manner and was qualified for a position of Sales Associate.

41. Home Depot, through its agents, has maliciously, intentionally and/or recklessly violated the 42 U.S.C. §§12101, *et seq.*, the Americans with Disabilities Act ("ADA"), by maliciously, intentionally and/or recklessly constructively terminating Ms. Pisani's employment on the basis of her disability, mental retardation.

**AS AND FOR A SECOND CLAIM FOR
RELIEF AGAINST DEFENDANT HOME DEPOT**

42. Plaintiff-Intervenor repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "41" of this Complaint with the same force and effect as if more fully set forth at length herein.

43. Home Depot is an employer within the meaning of 42 U.S.C. §§12101, *et seq.*, the Americans with Disabilities Act ("ADA"). At all relevant times, Home Depot had or has stores within this judicial district including the South Setauket Store at issue.

44. At all relevant times, Ms. Pisani performed her duties in a competent and satisfactory manner and was qualified for a position of Sales Associate.

45. Home Depot, through its agents, has maliciously, intentionally and/or recklessly violated the 42 U.S.C. §§12101, *et seq.*, the Americans with Disabilities Act ("ADA"), by failing to accommodate Ms. Pisani in that Defendants did not involve her job coach prior to the simultaneous discipline and termination.

**AS AND FOR A THIRD CLAIM FOR
RELIEF AGAINST HOME DEPOT**

46. Plaintiff-Intervenor repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "45" of this Complaint with the same force and effect as is more fully set forth herein.

47. Home Depot is an employer within the meaning of "employer" under §§290, *et seq.* of the New York Executive law. At all relevant times, Home Depot employed or employees more than four (4) employees and has business locations, including the South Setauket location at issue, within this judicial district.

48. Upon information and belief, Defendants Perkel, Beckhusen, Elkins and Zmuda participated in the decision to approve, condoned, aided and/or abetted and/or ratified Home Depot's termination of Ms. Pisani on the basis of her disability, mental retardation.

49. Defendant violated §§290, *et seq.* of the New York Executive Law by maliciously, intentionally and/or recklessly constructively terminating Ms. Pisani's employment on the basis of her disability, mental retardation.

AS AND FOR A FOURTH CLAIM FOR

RELIEF AGAINST HOME DEPOT

50. Plaintiff-Intervenor repeats, reiterates and realleges each and every allegation contained in paragraphs “1” through “49” of this Complaint with the same force and effect as if more fully set forth at length herein.

51. Home Depot is an employer within the meaning of “employer” under §§290, *et seq.* of the New York Executive law. At all relevant times, Home Depot employed or employees more than four (4) employees and has business locations, including the South Setauket location at issue, within this judicial district.

52. Upon information and belief, Defendants Perkel, Beckhusen, Elkins and Zmuda participated in the decision to approve, condoned, aided and/or abetted and/or ratified Home Depot’s decision to deny Ms. Pisani a reasonable accommodation.

53. Defendant violated §§290, *et seq.* of the New York Executive Law by maliciously, intentionally and/or recklessly failing to accommodate Ms. Pisani in that Defendants did not involve her job coach prior to the simultaneous discipline and termination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Intervenor prays that this Court:

- (a) empanel a jury of Plaintiff-Intervenor’s peers;
- (b) declare the conduct engaged by all Defendants to be in violation of Plaintiff-Intervenor’s civil rights;
- (c) enjoin all Defendants from engaging in such conduct;
- (d) award Plaintiff-Intervenor equitable relief of back pay, salary and fringe benefits for the period remaining until normal retirement;

- (e) award Plaintiff-Intervenor full compensatory damages under the 42 U.S.C. §§12101, *et seq.*, 42 U.S.C. §1981(a), and §§290, *et seq.* of the New York Executive Law;
- (f) award full liquidated and/or punitive damages as allowed under 42 U.S.C. §§12101, *et seq.*, and 42 U.S.C. §1981(a) ;
- (g) award Plaintiff-Intervenor the costs of prosecuting her cause of action and for reasonable attorneys' fees under the aforementioned statutes and 42 U.S.C. §1988; and
- (h) an award to such other and further relief as this Court may deem appropriate.

Respectfully submitted,
SLAVIN, ANGIULO & HOROWITZ, LLP

L. Susan Scelzo Slavin

By: L. Susan Scelzo Slavin (LSS 1916)
Attorneys for Carolyn Pisani
350 Jericho Turnpike (Suite 101)
Jericho, New York 11753
(516) 942-9300

To: Sunu Chandy, Esq.
U.S. Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004-3620
(212) 336-3620

Donald R. Livingston
Akin Gump Strauss Hauer & Feld, LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C 20036
(202) 887-4000

EXHIBIT “A”

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See Privacy Act Statement before completing this form.

AGENCY

CHARGE NUMBER

☐ FEPA
☒ EEOC

160-A0-2445

NEW YORK STATE DIVISION OF HUMAN RIGHTS

and EEOC

NAME (Indicate Mr., Ms., Mrs.)

Ms. Carolyn Pisani

HOME TELEPHONE (Include Area Code)

631-451-2442

STREET ADDRESS

CITY, STATE AND ZIP CODE

7 Embassy Road, Selden, New York 11784

DATE OF BIRTH

5/24/73

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME

NUMBER OF EMPLOYEES, MEMBERS

TELEPHONE (Include Area Code)

The Home Depot

more than 20

631-580-7849

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

225 Pond Path, South Setauket, New York 11720

Suffolk

NAME

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

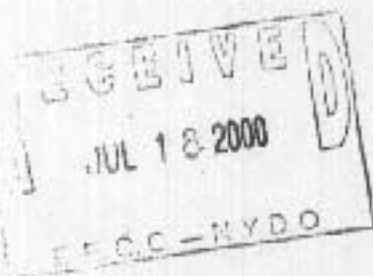
 DATE DISCRIMINATION TOOK PLACE
 EARLIEST (ADEVEPA) LATEST (ALL)
 10/11/99

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ AGE
☐ RETALIATION ☐ NATIONAL ORIGIN ☒ DISABILITY ☐ OTHER (Specify)

☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s))

See attached Rider to Charge of Discrimination



I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary for State and Local Requirements)

I declare under penalty of perjury that the foregoing is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

Carolyn Pisani

Carolyn Pisani

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (day, month, and year)

Date 7-10-2000 Charging Party (Signature)

7-10-2000

EEOC FORM 5 (Test 10/94)

Michele Gapski

 MICHELE GAPSKI
 NOTARY PUBLIC, State of New York
 No. 4964235
 (Qualified in Suffolk County)
 Commission Expires July 15, 19-2001

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK REGIONAL OFFICE

-----X
CAROLYN PISANI,

Complainant,

-against-

**RIDER TO CHARGE
OF DISCRIMINATION**

THE HOME DEPOT,

Respondents.
-----X

I, CAROLYN PISANI, hereby states and deposes under the pains and penalties of perjury:

1. I am the Complainant in the above referenced case and bring this Charge of Discrimination to seek redress for Respondent's violations of my Civil Rights under the Americans With Disabilities Act ("ADA").

2. I am a twenty six (26) year old female who resides at 7 Embassy Road, Selden, New York 11784. My telephone number is (631) 451-2442.

3. Respondent The Home Depot ("Home Depot") is a private corporation and/or company which engages in industry affecting commerce and, at all relevant times, employed and continues to employ more than twenty (20) employees.

4. Upon information and belief, Home Depot's principle place of business or headquarters is located at Atlanta, Georgia. The acts of discrimination alleged herein all occurred at Home Depot's store located at 255 Pond Path, South Setauket, County of Suffolk, New York 11720, where I was employed.

5. I have a learning disability.

6. In or about June of 1999 Home Depot hired me to serve as a Sales Associate in the electrical department.

7. At all relevant times, throughout my employment at Home Depot, I performed all my duties in a satisfactory, competent and professional manner.

8. On October 11, 1999 I was terminated for allegedly not calling in when I was unable to work.

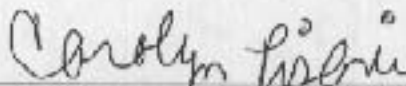
9. On the two days in question, although I was originally scheduled to work, I had received telephone calls informing me that I was not needed and should not report to work.

10. Because of my disability, I have a job coach at ACLD. At no time did Respondent inform my job coach about any alleged problem with my attendance.

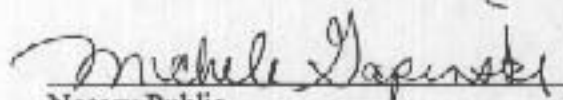
11. Upon information and belief, my absences were engineered to provide a pretext for terminating my employment.

12. For the foregoing reasons, I believe that Respondents' have violated my rights under the Americans With Disabilities Act ("ADA") 42 USC §§12101, et seq., and §§290 et seq of the New York Executive Law.

Through this Charge of Discrimination, I claim my rights under the aforementioned Civil Rights statutes.


CAROLYN PISANI

Sworn to and subscribed before
me this 19 day of June, 2000


Notary Public

MICHELE GAPINSKI
NOTARY PUBLIC, State of New York
No. 4984235
Qualified in Suffolk County
Commission Expires July 15, 2003

EXHIBIT “B”

27-02 03:33pm From:EEOC

T-195 P.032/003 F-555



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

Spencer H. Lewis, Jr.
 District Director
 New York District Office

33 Whitehall Street, 5th Floor
 New York, NY 10004-2112
 Phone: (212) 336-3620
 General Fax: (212) 336-3625
 TTY: (212) 336-3622

DETERMINATION

Charging Party:

Ms. Carolyn Pisani
 7 Embassy Road
 Selden, NY 11784

Respondent:

The Home Depot
 225 Pond Path
 South Setauket, NY 11720

RE: EEOC Charge Number: 160-A0-2445

On behalf of the U.S. Equal Employment Opportunity Commission ("Commission"), I issue the following determination on the merits of the above referenced Charge of Discrimination filed under The Americans with Disabilities Act of 1990 ("ADA"). All requirements for coverage have been met.

Charging Party alleges that Respondent discriminated against her because she has a learning disability by failing to accommodate her and by terminating her. Charging Party states in June 1999 Respondent hired her as a Sales Associate. Charging Party states she had a job coach assigned to her from Adults and Children with Learning and Developmental Disabilities, Inc. ("ACLD") because of her disability. Charging Party states that her job coach was to act as an intermediary between herself and Respondent to help resolve any problems that may arise between the Charging Party and Respondent, thus the job coach was Charging Party's reasonable accommodation.

Charging Party states that on Monday, October 11, 1999, Respondent terminated her for not calling in when she was scheduled to work on Saturday, October 9th and Sunday, October 10th. Charging Party states although she was originally scheduled to work on that Saturday and Sunday, she received a telephone call while working in the store the previous week wherein she was told that she was not needed and should not report to work on those days. This also happened on Oct. 1, 1999, when a woman called Charging Party at work and told her not to come in the following weekend, Oct. 2nd and 3rd. This also took place on Sept. 24, 1999, when Charging Party's father told her that someone called from Respondent and said that she need not work during the weekend of Sept 25th and 26th. Charging Party states that her absences were engineered to provide a pretext for terminating her employment because of her disability.

Charging Party also states that Respondent failed to appropriately seek the job coach's intervention to resolve any alleged on-going attendance problems prior to making the decision to give the Charging Party written job performance warnings and terminating her. Instead, Charging Party states that Respondent, without any documented progressive discipline, unilaterally terminated her and took advantage of her disability by having her sign multiple job performance warnings and a termination notice, all on the same day, even though they were dated with different dates. Charging Party alleges Respondent thus failed to follow the reasonable accommodation by not contacting her job coach prior to issuing her any job performance warnings and prior to Charging Party's termination and by firing her because of her disability.

Letter of Determination
Carolyn Pisani v. The Home Depot
EEOC Charge Number: 160-A0-2445

Respondent alleges Charging Party has failed to establish a *prima facie* case of discrimination based on her purported disability. Respondent alleges Charging Party has not shown that she is a qualified individual with a disability entitled to protection under ADA. Respondent alleges that Charging Party was not subjected to an adverse employment action under circumstances giving rise to an inference of discrimination based on Charging Party's purported disability or any unlawful discriminatory reason.

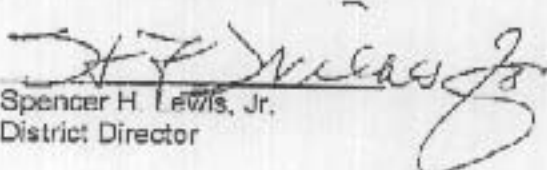
Respondent alleges Charging Party had frequent attendance problems, especially on weekends, which were verbally addressed by her supervisors. Respondent states the store management was compelled to terminate Charging Party's employment for her non-attendance following their regular policies. Respondent states Charging Party was not discriminated against when she was terminated for non-attendance.

Based on our investigation, Charging Party is a qualified individual with a disability entitled to protection under the ADA. There is reasonable cause to believe that Respondent terminated the Charging Party because of her disability in that it informed Charging Party that she was not needed at the job during certain days and then fired her for not coming to work on those days. Respondent also discriminated against Charging Party on the basis of her disability by failing to allow Charging Party the proper use of her accommodation, having the involvement of a job coach for any issues that may arise in her job, throughout her time of employment. Respondent failed to involve the job coach during any discipline of or during the termination of Charging Party, and only contacted the job coach following the termination of the Charging Party.

This determination is final. The ADA requires that if the Commission determines that there is reasonable cause to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the Respondent to join with it in an effort toward a just resolution of this matter. A representative of this office will be in contact with the Respondent to begin the conciliation process.

Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with ADA and the Commission's Procedural Regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's representative is unable to secure a settlement acceptable to the Office Director, the Director shall so inform the Respondent in writing of the court enforcement alternative available to the Commission.

On Behalf of the Commission:


Spencer H. Lewis, Jr.
District Director

12-24-02
Date

EXHIBIT “C”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EV 03 " 4860

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

THE HOME DEPOT

Defendant.

Civil Action No.

COMPLAINT

AND

JURY TRIAL DEMAND

SEYBERT, J.
ORENSTEIN, M.J.

NATURE OF THE ACTION

This is an action under Title I of the Americans with Disabilities Act of 1990 ("ADA") and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices based on disability and to provide relief to Carolyn Pisani ("Pisani"), who was adversely affected by such practices. As alleged with particularity below, Defendant The Home Depot ("Home Depot" or "Defendant") discriminated against Pisani because of her disability. Pisani is developmentally disabled in that she suffers from mental retardation resulting in learning disabilities that substantially limit the major life activity of learning.

Defendant violated the ADA by terminating Pisani because of her disability and by failing to accommodate her. Pisani was directed not to report to work on three separate weekends, and Defendant then terminated her for the resulting absences. Defendant also failed to accommodate Pisani in that it did not involve her job coach prior to the simultaneous discipline and termination.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference §§ 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The unlawful employment practices alleged were committed within the jurisdiction of the United States District Court for the Eastern District of New York.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation, and enforcement of Title I of the ADA and is expressly authorized to bring this action by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1).

4. At all relevant times, Defendant Home Depot has continuously been a private entity doing business in the State of New York and has continuously employed at least fifteen employees.

5. At all relevant times, Defendant Home Depot has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §§ 2000-e(g) and (h).

6. At all relevant times, Defendant Home Depot has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. § 12111(2).

STATEMENT OF CLAIMS

7. More than thirty days prior to the institution of the lawsuit, Carolyn Pisani filed a charge with the Commission alleging violations of Title I of the ADA by Defendant Home Depot. All conditions precedent to the institution of this lawsuit have been fulfilled.

8. Since at least May 15, 1999, Defendant has engaged in unlawful employment practices in violation of Sections 102 and 503 of the ADA, 42 U.S.C. §§ 12112 and 12203, as outlined below:

a. Pisani is developmentally disabled in that she suffers from mental retardation resulting in learning disabilities. Pisani's learning disabilities substantially limit the major life activity of learning.

b. Pisani is a qualified individual with a disability in that she is able to perform her job with a reasonable accommodation. Pisani's reasonable accommodation is the use of a job coach to assist her to understand the job and to make site visits to ensure her progress and to address any workplace difficulties with her.

c. Pisani was employed as a Sales Associate for Home Depot from June through October, 1999.

d. Pisani's job coach made numerous site visits to Pisani's workplace and communicated regularly with Pisani and her managers during her employment with Defendant. Managers of Home Depot were aware of Pisani's job coach and her role and that they should contact the job coach regarding any disciplinary action.

e. Pisani's performance was satisfactory at all times of her employment with Defendant.

f. During three consecutive weeks in September and October, 1999, Pisani was informed that she did not need to work on the following weekends. Home Depot then simultaneously disciplined and terminated Pisani on October 11, 1999 for allegedly not reporting to work during those three previous weekends.

g. Home Depot did not involve Pisani's job coach regarding its discipline or termination of Pisani and thus failed to accommodate Pisani and terminated her because of her disability.

9. The effect of the practices complained of above have been to deprive Pisani of equal employment opportunities and otherwise to affect adversely her status as an employee because of her disability.

10. The effect of the practices complained of above has been to inflict emotional pain, suffering, and inconvenience upon Pisani.

11. The unlawful employment practices complained of above were intentional.

12. The unlawful employment practices complained of above were done with malice and reckless disregard for Pisani's federally protected rights, in violation of 42 U.S.C. § 12101 et seq.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with them, from engaging in any employment practice that discriminates on the basis of disability or perceived disability.

B. Order Defendant to institute and carry out policies, practices, and programs that provide equal employment opportunities for qualified individuals with disabilities and that eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make Carolyn Pisani whole by providing any affirmative relief necessary to eradicate the effects of its unlawful employment practices.

D. Order Defendant to make Carolyn Pisani whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful practices complained of above, including pain and suffering, emotional distress, indignity, inconvenience, loss of enjoyment of life, loss of self-esteem, and humiliation, in an amount to be determined at trial.

E. Order Defendant to pay Carolyn Pisani punitive damages for its malicious and reckless conduct, as described above, in an amount to be determined at trial.

F. Grant such further relief as the Court deems necessary and proper in the public interest.

G. Award the Commission its costs of this action.

JURY TRIAL DEMAND

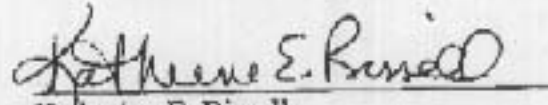
The Commission requests a jury trial on all questions of fact raised by this Complaint.

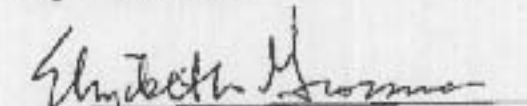
Eric S. Dreiband
General Counsel

James L. Lee
Deputy General Counsel

Gwendolyn Y. Reams
Associate General Counsel

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1801 L Street, N.W.
Washington, D.C. 20507


Katherine E. Bissell
Regional Attorney


Elizabeth Grossman
Supervisory Trial Attorney

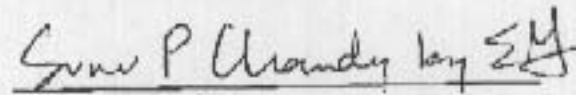

Sunn P. Chandy
Trial Attorney, US EEOC
33 Whitehall Street, 5th Floor
New York, New York 10004
Phone 212-336-3706
Fax 212-336-3623

EXHIBIT “D”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

CAROLYN PISANI,

Plaintiff-Intervenor,

-against-

THE HOME DEPOT, USA, INC., DIDI PERKEL,
KATHY ELKINS, MUFFIN ZMUDA and ROBERT
BECKHUSEN,

Defendant.
-----X

Appearances:

For Plaintiff: Sunu Chandy, Esq.
New York District Office
Equal Employment Opportunity Commission
33 Whitehall Street, 5th Floor
New York, New York 10004-3620

For Intervenor: Susan Scelzo Slavin, Esq.
Slavin, Angiulo & Horowitz, LLP.
350 Jericho Turnpike, Suite 101
Jericho, New York 11753

For Defendant: Michelle A. Burg, Esq.
Akin, Gump, Strauss, Hauer & Feld, LLP.
590 Madison Avenue
New York, New York 10022

Donald R. Livingston, Esq.
Akin, Gump, Strauss, Hauer & Feld, LLP.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

SEYBERT, District Judge:

Pending before this Court is a motion brought by a
third party, Carolyn Pisani ("Plaintiff-Intervenor" or "Pisani")
to intervene in a suit between the Equal Employment Opportunity

Commission ("Plaintiff" or "EEOC") and Defendants, The Home Depot USA, Inc., Didi Ferkell, Kathy Elkins, Muffin Zmuda, and Robert Beckhusen, (collectively "Defendants"). Plaintiff-Intervenor claims a statutory right to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. This Court finds that intervention is improper for the reasons stated below.

Background

Plaintiff-Intervenor suffers from a learning disability and, therefore, has a job coach. In October 1999, she was terminated from Home Depot for allegedly not calling in when she was unable to work. She claims that she was told not to come into work that day and that at no time prior to termination did any of the Defendants contact her job coach. Furthermore, she claims that these actions violated her rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq.

The EEOC brought the original claim on her behalf and she now seeks to intervene and pursue claims under Section 290 of the New York Executive Law ("NYSHRL") and Section 504 of the Rehabilitation Act. Plaintiff-Intervenor also seeks to add additional defendants including the South Setauket Store Manager, Robert Beckhusen, and South Setauket Electrical Department Supervisor, Muffin Zmuda, whom she believes "aided and/or abetted" the alleged acts of discrimination.

Discussion

The existing parties do not oppose intervention to the extent that Plaintiff-Intervenor seeks to assert claims under the ADA and "parallel" NYSHRL claims. However, Defendant opposes intervention for the purpose of adding claims under the Rehabilitation Act and the NYSHRL against the four individuals. This Court must determine whether intervention, is permissible under the circumstances presented.

The ADA specifically incorporates the powers, remedies and procedures, set forth in Title VII of the Civil Rights Act of 1964. Therefore, the Plaintiff-Intervenor points to Section 2000e-5(f)(1), which provides that an "aggrieved employee has a right to intervene in a civil action commenced by the EEOC." Title VII does not, however, grant an unconditional right to assert additional claims. See 42 U.S.C. § 2000e-5(f)(1). The right to intervene "presupposes the presentation of a cognizable claim that the intervenor would have standing to pursue." EEOC v. Victoria's Secret Stores, Inc., No. 02-CV-6715, 2003 WL 21282193 (E.D. Pa. January 13, 2003). Therefore, a motion to intervene should not be granted when the intervenor fails to state cognizable claims such as claims that are barred by the statute of limitations.

To intervene under Rule 24(a)(2), an applicant must show that: (1) the application is timely; (2) he has an interest relating to the property or transaction which is the subject matter of the litigation; (3) the protection of the interest may as a practical matter be impaired by

the disposition of the action; and (4) the interest is not adequately protected by an existing party.

United States v. City of Niagara Falls, 103 F.R.D. 164, 165-66, (W.D.N.Y. 1984) (citing United States Postal Serv. v. Brennan, 579 F.2d 180, 191 (2d Cir. 1978); Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984)). A motion to intervene may be properly denied if the applicant fails to satisfy any one of the requirements. See, e.g., In re Egri, 68 Fed. Appx. 249 (2d Cir. 2003). When deciding whether the motion to intervene is timely, the court has discretion to evaluate all surrounding factors including, "(1) how long the applicant had the notice of the interest before it made a motion to intervene; (2) prejudice to the applicant if the motion is denied . . . and (4) any unusual circumstances militating for or against a finding of timeliness." United States v. New York, 820 F.2d 554, 557 (2d Cir. 1987).

There is some question as to whether the Plaintiff-Intervenor's claims are timely. Defendant asserts that Pisani's NYSHRL and Rehabilitation Act claims are barred by the three year statute of limitations. See Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 307 (1983); Harris v. City of New York, 136 F.3d 243 (2d Cir. 1999). The proposed complaint states that the Plaintiff-Intervenor was fired on October 11, 1999. See proposed complaint at 38-39. Since this action was not commenced until

September 24, 2003, more than three years later, the claims would be time barred making it inappropriate to grant the motion to intervene. Plaintiff-Intervenor contends, however, that the NYSHRL claim is tolled because she affirmatively filed a complaint with the EEOC who then referred it to the New York State Division of Human Rights ("NYSDHR"). Pisani fails to show any reason for tolling to apply to the Rehabilitation Act claim, therefore, it is time-barred and intervention is not proper. Hence, the issue which must be addressed is whether tolling can be applied to the intervenor's action against the four individual unnamed defendants under the NYSHRL.

When bringing a Title VII action in court, a plaintiff must file a charge with the EEOC and receive from them a notice of the right to sue. See 42 U.S.C. § 2000e-5(f). The Plaintiff is also required to first file the charge with a state agency, when such an agency is available to grant relief from the discriminatory practice alleged. See U.S.C. § 2000e-5(c); See also Polakoff v. St. Lawrence Univ., No. 95-CV-1660, 1996 U.S. Dist. LEXIS 12292 (N.D.N.Y. August. 19, 1996). An amendment to Section 297.9 provides that there is no "forced" election of an administrative remedy when the complaint was referred to the NYSDHR by the EEOC. The clear intent of this amendment preserves the right to sue even when the EEOC refers the complaint to the NYSDHR. Id.

In Pan American Airways v. N.Y. Human Rights Bd., 61 N.Y.2d 544 (1982), the New York Court of Appeals held that the statute of limitations is tolled during the pendency of an NYSDHR proceeding and that the plaintiff must elect this administrative proceeding in order to toll the statute of limitations. Here, the Defendants argue that the form submitted to EEOC is not an affirmative action that constitutes an election. Pisani asserts that she made an election based on the specific language which was contained on the form near the signature area. This Court finds that the mere submission of the form was not enough of an affirmative action to toll the statute of limitations. Therefore, this Court denies the instant motion with regard to the NYSHRL.

However, even assuming that the claims were timely, in Polakoff, the Northern District found that "because plaintiffs EEOC charge asserts a claim only against the university and not the president individually, there has never been an administrative charge pending against the defendant. . . . As a result, there has never been a statutory bar preventing plaintiff from proceeding in court against the [d]efendant." Polakoff, 1996 U.S. Dist. LEXIS 12292, at *15-16. The same reasoning applies in the instant case. The individual unnamed defendants never had claims asserted against them and were not, therefore, statutorily barred from suit. Even if the claims were timely,

there could not possibly be any tolling as to the individuals who were originally unnamed.

Conclusion

In light of the foregoing, Plaintiff-Intervenor's motion to intervene in the existing suit is GRANTED. However, as stated above, Plaintiff-Intervenor cannot add a claim against the unnamed defendants nor can she add the Rehabilitation Act claim against the Defendant because it is time-barred.

Dated: Central Islip, New York
July 29, 2004

SO ORDERED


Joanna Seybert, U.S.D.J.