Lanci v. Arthur Andersen, LLP

United States District Court for the Southern District of New York

March 28, 2000, Decided ; March 29, 2000, Filed

96 Civ. 4009 (WK)

Reporter
2000 U.S. Dist. LEXIS 3954 *; 10 Am. Disabilities Cas. (BNA) 1004

PETER LANCI, Plaintiff, - against - ARTHUR ANDERSEN, LLP, Defendant.

Disposition: [*1] Defendant's motion for summary judgment DENIED.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN1[] **Summary Judgment, Burdens of Proof**

In ruling on a motion for summary judgment, a court regards the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in his favor.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

Some cases have ruled that all facts set forth in a movant's U.S. Dist. Ct., S.D.N.Y., R. 56.1 statement are deemed to be admitted by the nonmoving party, except those specifically controverted by the nonmoving party's own statement. United States District Court judges in the Southern District of New York, however, have been reluctant to grant summary judgment on the basis of this technical violation.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Major Life Activities

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > General Overview

HN3[] **Protection of Disabled Persons, Americans With Disabilities Act**

The Americans with Disabilities Act, *42 U.S.C.S. § 12102(2)(A)* defines a "disability" as a physical or mental impairment that substantially limits one or more of the major life activities. According to Equal Employment Opportunity Commission regulations, a life activity is "substantially limited" if an individual is either unable to perform, or is significantly restricted as to the condition, manner, or duration of performance of that activity as compared to an average person in the general population. *29 C.F.R. § 1630.2(j)(1) (1999)*. A court should consider the following factors in making such a determination: (i) The nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. *29 C.F.R. § 1630.2(j)(2)*.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Medical Inquiries

HN4[] **Protection of Disabled Persons, Americans With Disabilities Act**

Whether a person has a disability under the Americans with Disabilities Act, *42 U.S.C.S. §§ 12101-12213*, is an individualized

inquiry. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others. 29 C.F.R. § 1630.2(j) app. at 402.

Business & Corporate
Compliance > ... > Discrimination > Disability
Discrimination > ADA Enforcement

Civil Rights Law > ... > Protection of Disabled
Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disability
Discrimination > Scope & Definitions > General Overview

HN5 **Disability Discrimination, ADA Enforcement**

A person must be presently -- not potentially or hypothetically -- substantially limited in order to demonstrate a disability under the Americans With Disabilities Act, 42 U.S.C.S. §§ 12101-12213. Even when someone's symptoms can be mitigated only over an extended period of time, as opposed to being immediately correctable, his claim cannot stand unless his life activity remains substantially limited once the corrective measure is implemented.

Civil Rights Law > ... > Protection of Disabled
Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disability
Discrimination > Scope & Definitions > General Overview

HN6 **Protection of Disabled Persons, Americans With Disabilities Act**

An Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1630.2(j)(2), directs a court to consider the duration or expected duration of the impairment in deciding whether it is substantially limiting under the Americans with Disabilities Act, 42 U.S.C.S. §§ 12101-12213. An impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. The tendency of symptoms to return comprises a related factor. Chronic or episodic disorders that are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms, may be disabilities.

Civil Rights Law > ... > Protection of Disabled
Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disability
Discrimination > Scope & Definitions > General Overview

HN7 **Protection of Disabled Persons, Americans With Disabilities Act**

A plaintiff who has shown a "disability" under the Americans With Disabilities Act, 42 U.S.C.S. §§ 12101-12213 must also show that his employer fired him because of his handicap.

Civil Procedure > Judgments > Summary
Judgment > Evidentiary Considerations

Labor & Employment Law > ... > Disability
Discrimination > Employment Practices > Medical
Inquiries

Civil Procedure > ... > Summary Judgment > Burdens of
Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing
Materials > General Overview

Civil Rights Law > ... > Protection of Disabled
Persons > Americans With Disabilities Act > Scope

Business & Corporate
Compliance > ... > Discrimination > Disability
Discrimination > Federal & State Interrelationships

HN8 **Summary Judgment, Evidentiary Considerations**

To defeat an employer's motion for summary judgment in a suit under the Americans With Disabilities Act, 42 U.S.C.S. §§ 12101-12213, a plaintiff must produce sufficient evidence to support a rational finding that the reasons proffered by the employer were false, and that more likely than not, his disability was the real reason for his discharge. The pertinent question is whether plaintiff's main case contains evidence sufficient to draw an inference that the prohibited motive was a substantial factor in the adverse employment decision.

Civil Procedure > ... > Summary Judgment > Burdens of
Proof > General Overview

HN9 **Summary Judgment, Burdens of Proof**

In discrimination cases, trial courts should be cautious about granting summary judgment to an employer where the employer's intent is at issue.

Business & Corporate Compliance > ... > Labor & Employment Law > Discrimination > Accommodation

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Labor & Employment Law > ... > Disability Discrimination > Defenses > General Overview

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

HN10[] **Discrimination, Accommodation**

A suspicious sequence of events does not necessarily allow a plaintiff's claim under the Americans With Disabilities Act, *42 U.S.C.S. §§ 12101-12213*, to survive a summary judgment motion. Focusing simply on the timing of events may ignore the larger sequence of events and also the larger truth. Where an employer has warned and disciplined a plaintiff before he publicizes his disability and requests accommodation, the employee who is already on notice of performance problems should not be permitted to seek shelter in a belated claim of disability.

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Discharges & Failures to Hire

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > General Overview

HN11[] **Disability Discrimination, Federal & State Interrelationships**

The "same actor inference" is a strong legal presumption against discrimination that applies, under the Americans With Disabilities Act, *42 U.S.C.S. §§ 12101-12213*, when an individual accused of firing an employee based on his disability is the very same person who had hired the employee knowing of his disability.

Business & Corporate Compliance > ... > Labor & Employment Law > Discrimination > Accommodation

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > ... > Disability Discrimination > Evidence > General Overview

HN12[] **Discrimination, Accommodation**

A disabled worker is not entitled to keep his job under all circumstances. It must be established that a reasonable accommodation would enable the disabled worker adequately to perform his essential job functions. Under the Americans With Disabilities Act, *42 U.S.C.S. § 12111(8),(9)*, and an Equal Employment Opportunity Act regulation, *29 C.F.R. § 1630.9* app., if an employee becomes disabled, then he must inform his employer that he needs such an accommodation. Next, the employer and employee share the responsibility for proposing and fashioning an accommodation that will allow the employee to perform his essential duties.

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For Defendant: Lawrence R. Sandak, Sonnenschein Nath & Rosenthal, New York, NY.

For Defendant: Lawrence Z. Lorber, Sonnenschein Nath & Rosenthal, Washington, DC.

Judges: WHITMAN KNAPP, SENIOR U.S.D.J.

Opinion by: WHITMAN KNAPP

Opinion

MEMORANDUM & ORDER

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Plaintiff Peter Lanci (hereinafter "plaintiff" or "Lanci") sues his former employer, Arthur Andersen LLP (hereinafter "defendant" or "Andersen") under the Americans with Disabilities Act ("ADA"), *42 U.S.C. §§ 12101-12213*, and the

New York Human Rights Law ("HRL"), N.Y. Exec. Law § 290 et seq. Plaintiff claims that defendant fired him because he suffers from Tourette's Syndrome ("TS"), a neurological and psychological disorder.

Defendant moves for summary judgment on several grounds. For the reasons discussed below, we deny the motion.

BACKGROUND

HN1[] We regard the facts in the light most favorable to plaintiff, drawing all reasonable inferences in his favor. Quinn v. Green Tree Credit Corp. (2d Cir. 1998) 159 F.3d 759, 764. **[*2]**

In grade school, Lanci began to exhibit verbal and motor tics, the classic symptoms of Tourette's Syndrome. In later years, such tics included facial tics, neck and trunk rotation, eye blinking, and low audible grunts. Related psychological problems further challenged him, especially obsessive-compulsive disorder ("OCD") but also panic attacks, trouble socializing, and depression. He sometimes had to re-read a passage of text because his tics forced him to turn his head away from the page. He has required intermittent medication and therapy, and he received accommodations during important tests such as the SAT and the CPA qualifying exam.

For the most part, however, Lanci has succeeded in overcoming these obstacles. For example, he could keep in his tics in check during meetings, so long as he "released" them later. He excelled in his studies, earning a 3.9 grade point average in college and a 3.5 average while obtaining an M.B.A. from the well-regarded Stern School of Business Management at New York University.

In September 1991, Lanci joined defendant Andersen as a staff tax accountant. The head of the department, John Connolly, hired him knowing that he had TS. He admits that **[*3]** "practically everyone" at the office knew of his diagnosis yet nobody ever made a derogatory remark. It is undisputed that he received excellent performance reviews in 1991 and 1992. The parties, however, give starkly different interpretations of later reviews. Defendant maintains that, as Lanci became responsible for more projects, his evaluators observed that he had difficulty handling several projects at once (a skill they refer to as "multitasking") and often lost his composure when under pressure. By contrast, Lanci states that his performance was consistent with promotion. In fact, the firm elevated him to senior accountant in 1994 (although Andersen claims that it did so with serious reservations about his future with the firm).

Beginning in February 1995, Lanci's symptoms became significantly exacerbated, due mainly to a romantic relationship in which he was involved. He began to have serious obsessions that interfered with his ability to concentrate. In 1995, these exacerbated symptoms (and side effects from Klonapin, a medication) continued for several months, and his work suffered. During this period, he consulted a social worker, a behavioral therapist, and a psychiatrist. **[*4]** As discussed below, Lanci asserts that he asked Andersen for an accommodation so that he could stay employed while dealing with his illness.

The firm, however, decided to fire him, declaring that a consensus of managers had concluded that his continuing lack of multitasking proficiency made him unfit to continue in the company's demanding atmosphere. Andersen points out that 80% of accountants who begin their careers at Andersen leave within five years due to an "up or out policy" (i.e., either the employee receives a promotion within a fixed period or is terminated). Lanci argues that the firm served up his alleged incompetence as a mere pretext for firing him. The actual reason, he claims, was his Tourette's and Andersen's refusal to accommodate his disability.

DISCUSSION

PROCEDURAL MATTERS

(I.) Affidavit of Dr. Bertrand Winsberg

Lanci's opposition papers include an affidavit from expert witness Dr. Winsberg. Andersen claims that it has been unfairly surprised by this affidavit. We have already effectively ruled, however, that Lanci could secure this witness for this purpose. Thus, we have found that the affidavit has not unduly prejudiced the defendant.

In September **[*5]** 1999, Lanci's lawyer requested an extension of time to file his opposition so that he could obtain an expert on the medical aspects of TS. He noted that his original choice, Dr. Cathy Budman, decided not to testify and that he needed some other witness. At that time, Andersen submitted a letter to us opposing any time extension. On September 28, we granted Lanci's request, noting that we "have considered and rejected Andersen's arguments in opposition." Under the circumstances, Andersen knew or should have known that, by endorsing Lanci's time extension, we were implicitly endorsing his search for a new expert. Hence, Andersen should not be surprised that Lanci now submits an expert affidavit.

(II.) Local Civil Rule 56.1 Statements

Andersen complains that Lanci has not responded point-by-point to its statement of undisputed facts. HN2[] Some cases have ruled that all facts set forth in a defendant's Rule 56.1 statement are deemed to be admitted by plaintiff, except those specifically controverted by plaintiff's own statement. *See, e.g.,* Yoran v. Bronx-Lebanon Hosp. Ctr. (S.D.N.Y. June 10, 1999) 1999

U.S. Dist. LEXIS 8679, *1 n.1, No. 96 Civ. 2179, 1999 WL 378350, *1 n.1; Rodriguez v. Schneider (S.D.N.Y. June 29, 1999) 1999 U.S. Dist. LEXIS 9741, *4 n.3, No. 95 Civ. 4083, 1999 WL 459813, **[*6]** *1 n.3.

Judges in this District, however, have been reluctant to grant summary judgment on the basis of this technical violation. *See* Dawson Indus., Inc. v. Affiliated FM Ins. Co. (S.D.N.Y. 1992) 145 F.R.D. 327, 329 & nn.4-5 (citing cases). In our case, Lanci has filed an extensive Rule 56.1 statement, even though he has not formatted it optimally. So, in the spirit of preventing a technical default, we have accepted as true statements of disputed fact located elsewhere in Lanci's papers.

AMERICANS WITH DISABILITIES ACT

We are asked to decide (I) whether Lanci's illness falls within the ADA's definition of "disability"; (II) whether Andersen discriminated against Lanci based on such disability; and (III) whether Andersen unreasonably rejected a request to make an accommodation for Lanci's disability.

(I.) Did Lanci suffer from a "disability" under the ADA?

Only disabled people can claim relief under the ADA. HN3[↑] The statute defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). According to EEOC regulations, a life activity **[*7]** is "substantially limited" if an individual is either unable to perform, or is significantly restricted as to the condition, manner, or duration of performance of that activity as compared to an average person in the general population. 29 C.F.R. § 1630.2(j)(1) (1999). We should consider the following factors in making such a determination:

> (i) The nature and severity of the impairment;
> (ii) the duration or expected duration of the impairment; and
> (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting form the impairment.

Id. § 1630.2(j)(2).

(A.) Individualized determination

"HN4[↑] Whether a person has a disability under the ADA is an individualized inquiry." Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471, 119 S. Ct. 2139, 2147, 144 L. Ed. 2d 450; *see also* 29 C.F.R. § 1630.2(j), App. at 402 ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment… but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others. **[*8]** "). Hence, for our purposes we cannot label TS a disability *per se.*

We conclude that Lanci's ordinary, day-to-day symptoms do not constitute a disability. When his symptoms became exacerbated, however, we conclude that genuine issues of fact remain concerning whether Lanci had a disability.

We have found only one prior ADA case dealing with TS, Purcell v. Pennsylvania Dep't of Corrections (E.D. Pa. Jan. 9, 1998) 1998 U.S. Dist. LEXIS 105, No. 95 Civ. 6720, 1998 WL 10236. As demonstrated below, the *Purcell* case does not help us to dispose of the instant motion one way or the other. There, the plaintiff's claim survived a motion for summary judgment. The Court ascertained that Purcell, like Lanci, could suppress his tics while interacting with others, but only for a limited interval. *Id.* at *7. Several doctors reported that Purcell's disorders (which included TS and OCD) substantially limited his ability to interact with others or to communicate for "extended" periods of time. On that basis, the Court concluded that the plaintiff was substantially limited in the activity of interacting with other people. *Id.* at *8.

Also, like Lanci during 1995, Purcell's conditions limited his **[*9]** ability to think or concentrate, especially under stress. *Id.* at *1. Like the ability to communicate, these abilities are considered major life activities. 29 C.F.R. § 1630.2(i).

Purcell's problems appear worse than Lanci's in a couple of respects. First, Purcell suffered from coprolalia -- that is, he involuntarily shouted out obscenities. *Purcell*, 1998 WL 10236, at *1. That would certainly mar his ability to interact with others more than would Lanci's low but audible grunts. Second, Purcell had attention deficit hyperactivity disorder. *Id.* Again, this factor, not shared by Lanci, perhaps represented a major contribution to Purcell's inability to concentrate.

But, overall, we believe that Lanci's symptoms *during the acute phase* of his condition were sufficiently "severe" to weigh in favor of finding a "disability" under the ADA. When his conditions flared up, his TS interacted with his OCD, causing a flurry of aggravated symptoms. *See* 1 EEOC Technical Assistance Manual (1992) § 2.2(a)(iii) (an individual who has two or more impairments that are not substantially limiting by themselves, but that together substantially limit a major life activity, **[*10]** has a disability).

Lanci's health professionals assert that during 1995 he experienced severe symptoms. In particular, he apparently obsessed over a situation again and again for most of the work day, effectively preventing him from concentrating on assigned projects. While medication could partially alleviate such symptoms, the drug made him jittery and very drowsy for a few

months. We can permissibly take into account this side-effect. *See Sutton, 119 S. Ct. at 2149* ("individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited" would still fall within the statute's purview).

Regarding this stage of Lanci's illness, we do not reach the question of whether he was "precluded" from working in a broad range of jobs. *See, e.g., id. at 2151*. Instead, we find that expert evidence in the record attests that Lanci's intrusive thoughts significantly restricted his ability to *think* and to *concentrate*. The fact that, during this interval, Lanci came to work and did not always receive unsatisfactory performance evaluations provides evidence to the contrary but does not **[*11]** entirely refute the affidavits and notes of medical professionals.

In contrast, during most of his life, Lanci has tolerated a relatively mild form of TS. He stated that he has functioned well socially throughout his education and (at least) during his early years at Andersen. Although he affirms that he has endured a "social handicap" throughout his life, he has been substantially able to interact with others. More importantly, while his symptoms remain controlled, Lanci has achieved academically at an uncommonly high level. He clearly could think, concentrate, and work. He compensated for his impairment by "studying very, very hard." (Lanci Dep. at 114.) He then functioned very well at Andersen, a major accounting firm. Under the circumstances, we conclude that his day-to-day Tourette's has not been substantially debilitating. [1]

[*12] (B.) Duration or expected duration of the impairment

This brings us to the crucial point: The ADA does not recognize "temporary" disabilities. Since we have determined that Lanci's ordinary symptoms do not constitute a disability, we must now determine if his *acute* symptoms lasted long enough to fall under the definition. We find that we cannot grant summary judgment on this question because it involves disputed material facts.

As quoted above, the ***HN6***[↑] EEOC regulations ask us to consider the "duration or expected duration of the impairment" in deciding whether it is substantially limiting. *29 C.F.R. § 1630.2(j)(2)*; *cf. id.* pt. 1630 App., *§ 1630.2(j)*. "An impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be *at least several months*." 2 EEOC Compliance Manual (BNA 1997) § 902.4(d), at 902-30 (emphasis added). [2] The tendency of symptoms to return comprises a related factor: "Chronic or episodic disorders that are substantially limiting when active or have a high likelihood of recurrence in substantially **[*13]** limiting forms, may be disabilities." *Id.* § 902, at 3.

Two recent Second Circuit opinions relied upon these factors to preclude recovery. We find neither case to be controlling here. In *Ryan v. Grae & Rybicki, P.C. (2d Cir. 1998) 135 F.3d 867*, plaintiff Jessica Ryan suffered from ulcerative colitis, an incurable bowel condition. The symptoms varied markedly over time. For "long periods," she would not show any appreciable symptoms. Then, during the summer months of some years, she would experience severe impairment (requiring her to get to a bathroom within five to ten seconds of an attack of diarrhea or she would soil her clothes). *Id. at 868, 871*. The **[*14]** Court granted summary judgment for the employer. Although, like Lanci's, Ryan's disorder was severe when symptomatic, the fact that Ryan could "go for years without significant symptoms" and that "any residual effects of her colitis may be felt only for three or four months a year" weighed against finding a "disability." *Id. at 871*; *accord Glowacki v. Buffalo Gen. Hosp. (W.D.N.Y. 1998) 2 F. Supp. 2d 346, 351* ("The fact that plaintiff's impairment [due to manic-depressive psychosis] varies in intensity and is sporadic in nature weighs against a finding of substantial limitation.") As shown below, however, Lanci's aggravated symptoms allegedly continued for a significantly longer period than Ryan's.

The *Ryan* Court did not expressly analyze the weight that it may have attached to the "high likelihood of recurrence" of symptoms, which the EEOC states "may" demonstrate a disability. *See* EEOC Compliance Manual, *supra*. Ryan's severe attacks, like Lanci's, undoubtedly will return periodically;

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[1] In *Sutton, supra*, the Supreme Court held that "***HN5***[↑] a person [must] be presently -- not potentially or hypothetically -- substantially limited in order to demonstrate a disability" under the ADA. 119 S. Ct. at 2146. Even when someone's symptoms can be mitigated only over an extended period of time, as opposed to being immediately correctable, his claim cannot stand unless his life activity remains substantially limited once the corrective measure is implemented. *Barnett v. Revere Smelting & Refining Corp. (S.D.N.Y. 1999) 67 F. Supp. 2d 378, 390*. Presumably, self-accommodation is a form of corrective measure.

Except for his rare "outbreaks" of acute, severe symptoms, Lanci managed his "ordinary" symptoms (e.g., by studying hard) and led a relatively normal life. Thus, as a matter of law, his day-to-day symptoms do not constitute a disability.

[2] *See also* EEOC Guidance on Psychiatric Disabilities & the ADA (Mar. 25, 1997) No. 915.002, P 7 (a psychological impairment is substantially limiting only if it "lasts for *more than several months* and significantly restricts the performance of one or more major life activities during that time") (emphasis added).

nevertheless, the Court found that, overall, she was not disabled.

The other recent Second Circuit case has held that a seven-month impairment of ability **[*15]** to work, with vague residual limitations, constituted too short a duration to be "substantially limiting." In that case, the plaintiff required hospitalization and rehabilitation for a cerebral hemorrhage, in a "single acute episode" not expected to recur in the foreseeable future. *Colwell v. Suffolk County Police Dep't (2d Cir. 1998) 158 F.3d 635, 646*. This case does not control the one at bar, though, because Lanci's extreme symptoms, while rare, have not occurred just once, and we can reasonably expect that they will eventually resurface. *See* Winsberg Aff. at PP 14, 25; *cf. Sanders v. Arneson Prods., Inc. (9th Cir. 1996) 91 F.3d 1351, 1354* (a one-time, five-month period of psychological impairment with no residual effects held of insufficient duration); *McIntosh v. Brookdale Hosp. Med. Ctr. (E.D.N.Y. 1996) 942 F. Supp. 813, 820* (citing similar cases).

We now must inquire into the duration of Lanci's severe symptoms during 1995. Significant evidence indicates that Lanci experienced bad symptoms from about February 1995 to at least April 1995. (Lanci admits that his TS did not present problems during 1994.) By April 1995, Lanci **[*16]** presented more severe symptoms than he had ever had before.

Lanci's symptoms began to recede somewhat during April and May. Also, he admits that his problems were largely under control by the beginning of November 1995, after he was placed on a different medication. Significantly, he acknowledges that he did not request or require accommodation at his present employment, which began in mid-November.

Yet evidence in the record indicates that he had some seriously intrusive thoughts during the summer and indeed through late 1995. Donahoe's notes, in particular, reflect fluctuations in Lanci's symptoms, including a number of serious exacerbations. (*See* Lanci Dep. at 321, 355-56; Winsberg Aff. P 15; Notes of Donald Donahoe, Aug. 1995 - Mar. 1996.) It is true that variations in symptom intensity weigh against a finding of disability, *see, e.g., Glowacki, supra*, but the waxing and waning of Lanci's severe problems over the course of at least eight months distinguishes this case from *Ryan*, in which the plaintiff suffered only for three or four months at a time.

Overall, because Lanci has a recurring impairment and because his latest episode lasted longer than three **[*17]** or four months, we hold that *Ryan* and *Colwell* do not control the instant case and that summary judgment would be inappropriate.

(II.) Did Andersen fire Lanci with discriminatory intent?

HN7[↑] A plaintiff who has shown a "disability" under the ADA must also show that his employer fired him because of his handicap. *Wernick v. Federal Reserve Bank (2d Cir. 1996) 91 F.3d 379, 382*. In the case at bar, we find a genuine factual dispute concerning Andersen's motivation in terminating Lanci.

> *HN8*[↑] To defeat [the employer's] motion for summary judgment, [plaintiff] must produce sufficient evidence to support a rational finding that the reasons proffered by [the employer] were false, and that more likely than not, his disability was the real reason for his discharge…. The pertinent question is whether plaintiff's main case contains evidence sufficient… to draw an inference that the prohibited motive was a substantial factor in the adverse employment decision.

Barnett, 67 F. Supp. 2d at 391 (citations & internal quotation marks omitted).

The Second Circuit has instructed that, *HN9*[↑] in discrimination cases, trial courts should be cautious **[*18]** about granting summary judgment to an employer where, as in this case, the employer's intent is at issue. *Gallo v. Prudential Residential Servs. (2d Cir. 1994) 22 F.3d 1219, 1224*. However, we also note two points of law that favor Andersen:

First, *HN10*[↑] a "suspicious" sequence of events does not necessary allow a plaintiff's ADA claim to survive a summary judgment motion. It is true that Lanci was fired right after his outbreak of serious symptoms and his request for accommodations. But, focusing simply on the timing of events may "ignore[] the larger sequence of events and also the larger truth." *Soileau v. Guilford of Maine, Inc. (1st Cir. 1997) 105 F.3d 12, 16*. For example, an employer may have warned and disciplined a plaintiff before he publicized his present disability and requested accommodation. In that case, the employee who is "already on notice of performance problems" should not be permitted to "seek shelter in a belated claim of disability." "The ADA was not meant to prevent employers from taking steps to address poor performance by non-disabled employees." *Id. at 17 n.4*.

Second, Lanci must present substantial evidence to **[*19]** overcome the "strong presumption" against discrimination existing in this case by virtue of the "same actor inference." *HN11*[↑] This legal presumption applies, under the ADA, when an individual accused of firing an employee based on his disability is the very same person who had hired the employee knowing of his disability: "When the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [him] an invidious motivation." *Grady v. Affiliated Cent., Inc. (2d Cir. 1997) 130 F.3d 553, 560, cert. denied, 525 U.S. 936, 142 L. Ed. 2d 288, 119 S. Ct. 349 (1998)* (affirming summary judgment); *see also Dedyo v. Baker Eng'g N.Y., Inc. (S.D.N.Y. Jan. 13, 1998) 1998 U.S. Dist. LEXIS 132*, No. 96 Civ. 7152, 1998 WL 9376, *6.

Here, John Connolly hired Lanci knowing that Lanci had TS. In the spring of 1994, Connolly pushed through Lanci's promotion although some other managers voiced concerns. Ultimately, Connolly fired him.

Each side to this litigation spends a great deal of effort in interpreting defendant's written evaluations of Lanci's performance over the years. At first glance, one might conclude that Lanci did not have **[*20]** what it takes for a long-term career at the firm: We know that only one in five accountants who start at Andersen last for five years. Yet in his entire tenure at the company, Lanci received only one "Above Average High" rating in 26 performance reviews. He had, however, received many "Above Average" ratings (22 out of 26 evaluations prior to February 1995). In fact, he received six in a row from May 1994 through March 1995. Significantly, his boss, Connolly, admits that the mere "Above Average" rating would "typically be consistent [with] someone who would progress with the firm… to the next level." (Connolly Dep. at 309.) Joseph Perry, another tax manager, gave similar testimony:

> Q: Would a person who is typically receiving above average evaluations be somebody who was in jeopardy of losing their job?
>
> A: If they are getting above average across the board, no.

(Perry Dep. at 125.)

Indeed, the company defines "Above Average" in this context as: "High quality performance and good professional, personal, and leadership skills that indicate above average growth potential. Deficiencies are minor and *not expected to affect progress*." (Andersen Tax Staff Evaluation **[*21]** Report at 1) (emphasis added). [3] Thus, the record contains a fair amount of evidence that Lanci was capable of advancement.

One can certainly find clues in the evaluations that Lanci experienced difficulty in "multitasking." In late 1993, for instance, managers reported that he felt pressured by deadlines and "lacked the ability to work with minimal supervision." Lanci concedes that in 1994 he had "to learn to manage more than one project at a time." (Lanci Dep. at 542-43.) Then, in April 1994 and shortly thereafter, several managers apparently expressed serious reservations about promoting **[*22]** him. For example, Susan Mosoff wrote that he had trouble multitasking and that he would have to work on that problem. (Mosoff Evaluation Report, July 8, 1994, at 5.)

[3] It is also instructive to compare this language with the description of the other ratings. "Outstanding" is defined as: "Consistently excellent performance coupled with… skills that indicate very rapid future development is likely and expected." "Satisfactory high" is defined as: "Good performance and personal attributes. Deficiencies, if not corrected, could limit progress within the next one or two years." *Id.*

Yet one can find some contrary evidence as well. Various statements culled from the evaluations praise Lanci for being well-organized, working "extremely well under pressure," "willingly accepting additional responsibility," and so forth. Finally, Lanci points to (1) training that he allegedly received and (2) the firm's allegedly permitting him to demonstrate software to clients as evidence that, prior to his exacerbated symptoms, the firm had no intention of firing him.

Overall, while Andersen has come forward with potent factual support, we cannot say as a matter of law that Lanci's TS did not constitute a substantial contributing factor to the decision to fire him. For example, genuine issues of fact seem to exist regarding (1) the significance of his numerous "Above Average" ratings and (2) whether Lanci's promotion was merely "probationary." While we believe that it may prove difficult for Lanci to prevail on this point at trial, we find that summary judgment would not be appropriate.

(III.) Did Lanci adequately [*23] request & receive accommodation?

HN12[↑] A disabled worker is not entitled to keep his job under all circumstances. It must be established that a "reasonable accommodation" would enable the disabled worker adequately to perform his "essential job functions." If an employee becomes disabled, then he must inform his employer that he needs such an accommodation. *29 C.F.R. § 1630.9* (App.); *42 U.S.C. § 12111(8)*, *(9)*. Next, the employer and employee share the responsibility for proposing and fashioning an accommodation that will allow the employee to perform his essential duties. *Sidor v. Reno (S.D.N.Y. Sept. 19, 1997) 1997 U.S. Dist. LEXIS 14260*, No. 95 Civ. 9588, 1997 WL 582846, *6.

Here, factual disputes exist regarding (1) what accommodations Lanci requested, (2) whether such request was reasonable, and (3) to what extent it was granted. Thus, we deny summary judgment on this issue.

Maureen Grippa, Andersen's human resources director, testified that in late March 1995, Lanci informed her that he was having temporary symptoms and would need time off for doctors' appointments. She claims that she offered him time off from work, which he refused. In contrast, Lanci claims **[*24]** that she basically refused his request for an extended leave of absence. He strenuously maintains that he was neither given a significantly reduced work load nor allowed to work flexible hours. To back up this statement, he refers us to a statement by one of his bosses: "During [the] busy [tax] season when everyone is working long hours, Peter should make himself available to work the overtime necessary…" (Cappell Evaluation Report, May 18, 1995, at 5.)

At most, Lanci concedes that he was permitted a slightly

reduced work load in order to attend doctors' appointments. But, this was not necessarily sufficient accommodation: Lanci's medical expert affirms that a reasonable solution would have included a vacation or at least working from home.

It is not clear from the record whether Lanci properly asked to work at home. Even if he did, there remains a factual issue regarding whether he could possibly have accomplished the essential functions of his job without appearing at his office. *See, e.g., Gilbert v. Frank (2d Cir. 1991) 949 F.2d 637, 644* ("reasonable accommodation" does not mean elimination of any of the job's "essential functions"). After all, Lanci was **[*25]** a senior accountant and may not have been able effectively to function in isolation. We leave this issue to trial.

NEW YORK HUMAN RIGHTS LAW

Both sides agree that Lanci meets the broad definition of "disability" in the New York Human Rights Law ("HRL"). An HRL plaintiff must also show that his employer discriminated against him because of his disability. As analyzed above, Lanci raises a genuine issue regarding the real reasons why he was fired. Therefore, we deny Andersen's motion for summary judgment on this claim. Since we also refuse summary judgment on the federal claim, we continue to exercise supplemental jurisdiction over the HRL cause of action.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is DENIED.

SO ORDERED.

March 28, 2000

New York, New York

WHITMAN KNAPP, SENIOR U.S.D.J.