

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 2nd day of November, two thousand nine.

5
6 PRESENT:

7 JOHN M. WALKER, Jr.,
8 GUIDO CALABRESI,
9 RICHARD C. WESLEY,
10 *Circuit Judges.*

11
12
13 Wilda Rios,

14 *Plaintiff-Appellant,*

15
16
17 v.

08-1262-cv

18
19 Department of Education,

20 *Defendant-Appellee.*
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24

1 FOR PLAINTIFF-APPELLANT: WILDA RIOS, *pro se*, Brooklyn,
2 NY.
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4 FOR DEFENDANT-APPELLEE: MICHAEL A. CARDOZO, Corporation
5 Counsel of the City of New York
6 (Assistant Corporation Counsel
7 Stephen J. McGrath and Ellen
8 Ravitch), New York, NY.
9

10 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,**
11 **AND DECREED** that the judgment of the district court is
12 **AFFIRMED.**

13 Plaintiff-Appellant Wilda Rios, *pro se*, appeals from
14 the judgment of the United States District Court for the
15 Eastern District of New York (Ross, J.), granting summary
16 judgment in favor of the defendant and dismissing
17 Appellant's complaint brought pursuant to Title VII of the
18 Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the
19 Americans with Disabilities Act of 1990, 42 U.S.C. § 12112,
20 *et seq.* ("ADA"). We assume the parties' familiarity with
21 the underlying facts, the procedural history of the case,
22 and the issues on appeal.

23 We review an order granting summary judgment *de novo*,
24 and ask whether the district court properly concluded that
25 there were no genuine issues of material fact and that the
26 moving party was entitled to judgment as a matter of law.

1 See *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300
2 (2d Cir. 2003).

3 Claims alleging discriminatory discharge under the ADA
4 are analyzed under the burden-shifting analysis established
5 by the Supreme Court in *McDonnell Douglas Corp. v. Green*,
6 411 U.S. 792, 802-05 (1973). *Heyman v. Queens Vill. Comm.*
7 *for Mental Health for Jamaica Cmty. Adolescent Program,*
8 *Inc.*, 198 F.3d 68, 72 (2d Cir. 1999). Accordingly, if a
9 plaintiff alleges a *prima facie* case of discrimination and
10 the employer demonstrates a legitimate, non-retaliatory
11 reason for the challenged employment decision, the plaintiff
12 must present evidence sufficient to permit a rational jury
13 to conclude that the employer's explanation is merely a
14 pretext for impermissible discrimination. *Id.* To establish
15 a *prima facie* case of discrimination under the ADA, a
16 plaintiff must show: (1) her employer is subject to the ADA;
17 (2) she is disabled within the meaning of the ADA; (3) she
18 is otherwise qualified to perform the essential functions of
19 her job with or without reasonable accommodation; and (4)
20 she suffered an adverse employment action because of her
21 disability. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 198
22 (2d Cir. 2004).

1 Here, the district court properly found that Appellant
2 could not establish a *prima facie* case of discrimination as
3 she was unable to demonstrate that she was "otherwise
4 qualified" within the meaning of the ADA because she could
5 not perform the "essential function" of regularly showing up
6 to work. See *Rodal v. Anesthesia Group of Onondaga, P.C.*,
7 369 F.3d 113, 120-21 (2d Cir. 2004) (distinguishing between
8 an employee's fundamental duties and those that are merely
9 marginal). The evidence demonstrates that Appellant
10 repeatedly failed to show up to work on time or at all for a
11 variety of reasons, many of which were unrelated to her
12 claimed disability. The Department of Education's ("DOE")
13 Rules and Regulations, as well as the measures DOE took to
14 rectify Appellant's excessive absences, including
15 disciplinary charges and suspension, indicate that DOE
16 considered attendance and punctuality to be "essential
17 functions" of the job. See 42 U.S.C. § 12111(8).

18 The *McDonnell Douglas* burden shifting analysis also
19 applies to retaliation claims brought pursuant to the ADA.
20 See *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir.
21 2002). To establish a *prima facie* case of retaliation under
22 the ADA, a plaintiff is required to show by a preponderance
23 of the evidence that: (1) she participated in a protected

1 activity under the ADA; (2) the defendant knew of the
2 protected activity; (3) the plaintiff experienced an adverse
3 employment action; and (4) a causal connection exists
4 between the protected activity and the adverse employment
5 action. *Id.*

6 Here, the district court properly found that Appellant
7 had failed to state a *prima facie* retaliation claim with
8 respect to her disciplinary charges and suspension as both
9 occurred prior to her City Commission on Human Rights
10 ("CCHR") complaints. Furthermore, even assuming that the
11 proximity in time between Appellant's filing of a complaint
12 before the CCHR and her suspension satisfies her *prima facie*
13 case of retaliation, she does not provide any evidence that
14 DOE's explanation that it suspended and ultimately
15 terminated Appellant on account of her absenteeism and
16 tardiness was pretextual.

17 We have considered all of Appellant's remaining
18 arguments on appeal and find them to be without merit,
19 substantially for the reasons stated by the district court.

20 Accordingly, the judgment of the district court is

21 **AFFIRMED.**

22
23 FOR THE COURT:
24 Catherine O'Hagan Wolfe, Clerk
25

26 By: _____