

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 2<sup>nd</sup> 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.*  
21  
22  
23  
24

1 FOR PLAINTIFF-APPELLANT: WILDA RIOS, *pro se*, Brooklyn,  
2 NY.  
3

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: \_\_\_\_\_