UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES C. MCELWEE, Plaintiff, -against- COUNTY OF ORANGE, Defendants.	:	10 Civ. 00138 (KTD) MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, U.S.D.J.:

This is a discrimination action arising under Title II of the Americans with Disabilities Act of 1990 (the "ADA") and section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"). Defendant County of Orange ("Defendant") brings this Federal Rule of Civil Procedure 56 motion for summary judgment on the grounds that Plaintiff James McElwee ("Plaintiff") does not have a legally cognizable disability within the meaning of the ADA or the Rehabilitation Act, Plaintiff is not an "otherwise qualified" individual, and that the termination of Plaintiff was not because of his disability but rather for his inappropriate behavior.

For the following reasons, Defendant's motion for summary judgment is GRANTED.

I. *Factual Background*

Plaintiff began participating in a volunteer program at Valley View Center for Nursing Care and Rehabilitation ("Valley View"), a federally funded public entity, in 1996.[1] Plaintiff's Complaint contends that he is a "disabled individual who has Asperger's Syndrome, a developmental disorder on the autism spectrum characterized by problems in socialization and communication skills. This disorder substantially limits plaintiff's ability to communicate and associate with his peers and colleagues." (Compl. ¶ 6). Plaintiff's volunteer duties at Valley View included janitorial and housekeeping duties. Plaintiff contends that "[f]or the duration of [his] relationship with Valley View, he was regarded as a good and conscientious volunteer who greatly contributed to the facility." (Compl. ¶ 13).

On November 20, 2009, Martha Thompson ("Thompson"), a staff member at Valley View, informed Robin A. Darwin ("Darwin"), Valley View's Assistant Administrator, that Plaintiff was "acting inappropriately towards her and making her uncomfortable."

[1]For the purposes of this discussion, all facts detailed in this factual background are deemed admitted by both parties. *See* Defendant's Rule 56.1 Statement, Plaintiff's Reply to Defendant's Rule 56.1 Statement, & Plaintiff James McElwee's Affidavit.

Affidavit of Robin Darwin ("Darwin Aff.") at ¶ 5. Thompson and Darwin had a lengthy conversation regarding various incidents regarding Plaintiff, including:

1) Thompson telling Darwin that Plaintiff had waited for her in the "town center," a central area of the Valley View facility, and then walked behind her and followed her in the halls. Thompson told Darwin she had caught Plaintiff looking at her rear end while following her. *Id.* at ¶ 6.

2) Thompson telling Darwin that on September 25, 2009, there was an incident where she walked past Plaintiff in the hallway outside the cafeteria at Valley View. Thompson told Darwin that Plaintiff stopped and turned around to look at her as she passed. Thompson told Darwin that when she asked Plaintiff what was going on, he said that he thought someone was calling him. *Id.* at ¶ 7.

3) Thompson telling Darwin that on multiple occasions Plaintiff would follow her, and when Thompson stopped so that Plaintiff could pass, Thompson would stop and wait for her to walk again. *Id.* at ¶ 8.

4) Thompson telling Darwin that she was aware of at least two other women employed at Valley View that Plaintiff had made feel uncomfortable or had "bothered." *Id.* at ¶ 11.

Darwin followed up this discussion by contacting and speaking with Yvonne, one of the women that Thompson had identified that Plaintiff had made feel uncomfortable. Yvonne stated that Plaintiff engaged in the same type of behavior toward her that Thompson had previously described to Darwin, but that she was not really bothered by it. *Id.* at ¶ 12.

November 24, 2009 Meeting With Plaintiff

On November 24, 2009, Darwin and Amy Fey ("Fey"), Director of Activities at Valley View, met with Plaintiff to inform him that a complaint had been made about him and to discuss the allegations with him. *Id.* at ¶ 13. Darwin informed Plaintiff that she had received a complaint from a female employee that he was making feel uncomfortable and asked him if he knew who that might be. Plaintiff responded that he thought it was a social worker by the name of Lindsay. *Id.* at ¶ 16. Darwin then asked Plaintiff why he thought Lindsay would say that about him, to which he replied that he "look[s] at her and talk[s] to her." *Id.* When Darwin stated that it was not Lindsay who complained, Plaintiff responded that it might be a particular nurse's aid, whose name he could not identify. He stated "I talk to her too, and look at her." *Id.* at ¶ 17. Plaintiff then stated that God was trying to punish him because of his "history," and when Darwin asked him to explain this, he said that when he was in high school he "made a mean phone call to a girl, saying

nasty/dirty things" but that nothing ultimately happened because the cops told him that he was nice. *Id.* at ¶ 18.

Fey then took Plaintiff out of the room. During this time, Plaintiff told Fey that "there needs to be punishment and now," while making a motion with his hand across his throat, as if he was slitting his throat. *Id.* at ¶ 19. When Darwin called Plaintiff back into the office and asked him what he meant by that gesture, he stated that he "deserve[d] to be punished when [he does] bad things." *Id.* at ¶ 20. Plaintiff then began making faces that seemed like he was getting angry and stated "just when I think someone is going to pat me on the back someone stabs me," simultaneously putting his hand into a fist as if he were holding a knife and repeatedly making stabbing motions. *Id.* at ¶ 21. When Darwin informed Plaintiff that it was Thompson who made the complaint about him, Plaintiff stated "Oh, I should have known. I had a feeling she was going to turn me in." *Id.* at ¶ 23. Darwin then told Plaintiff to avoid any other contact with Thompson. *Id.* at ¶ 24.

Later this day, Darwin spoke with the Valley View Facility Administrator, Bill Pasocello, who told Darwin that she should conduct a further investigation regarding Plaintiff if she was considering terminating his volunteer services. *Id.* at ¶ 25.

November 25, 2009 Meeting With Plaintiff

On November 25, 2009, Darwin met with Plaintiff and informed him that she was disturbed by the situation, that she needed to investigate it more, and that he should leave and not return to the premises until he heard from her. *Id.* at ¶ 28. At this time, Plaintiff started to cry, said that Darwin was a conduit of God, that God was punishing him for what he had done in the past, and that God was telling him that he should not do these things anymore. *Id.* at ¶ 29. Plaintiff also made statements saying that he had been conducting research at the library over the last several months regarding domestic violence and sexual harassment to see if his own conduct qualified as either one. *Id.*

November 25, 2009 Investigative Meetings

On November 25, 2009, Darwin met with Liz Murphy ("Murphy"), one of the women that Thompson previously identified as being a woman who was made uncomfortable by Plaintiff's conduct. *Id.* at ¶¶ 30-31. Murphy recounted to Darwin the following details regarding Plaintiff:

1) Murphy stated that Plaintiff had a history of watching her and following her while she went for a walk on her breaks, a behavior pattern which had escalated since the prior spring, with Plaintiff increasingly becoming more visible over time. *Id.*

2) Murphy further recalled an incident in which she was distributing paychecks at the switchboard desk in the lobby and Plaintiff sat in the lobby and watched her the entire time. She stated that she then moved her chair so that she was out of his sight. *Id.*

3) Murphy stated that she went out of her way to avoid Plaintiff and give him the "cold shoulder." She further stated that she told the Valley View security guard, Eric Gould ("Gould"), about Plaintiff's behavior towards her and that Gould had informed her that he had other complaints from other women about Plaintiff. *Id.* at ¶ 32.

Darwin then met with Gould regarding Plaintiff's conduct. *Id.* at ¶¶ 33-34. During this meeting, Gould stated the following information regarding Plaintiff:

1) Gould stated that both Thompson and Murphy told him that Plaintiff's behavior made them uncomfortable. *Id.*

2) Gould stated that Thompson told him of an instance where Plaintiff was acting "unprofessionally and inappropriately" toward a woman wearing a revealing blouse. *Id.*

3) Gould stated that he had personally observed Plaintiff acting inappropriately around female nursing students and visitors. *Id.* at ¶¶ 37-38.

Darwin then met with Barbara Decker ("Decker"), a payroll department employee at Valley View. *Id.* at ¶¶ 39-40. Decker stated that Plaintiff had a stuffed dolphin that he asked women to pet and stated that there was a sexual innuendo in the way he acted with the stuffed dolphin. *Id.* at ¶ 41. Decker also stated that Plaintiff inquired about dating her daughter. *Id.* at ¶ 42. Decker stated that Plaintiff used to "watch [her] with peering eyes" and that she went out of her way to avoid him.

Next, Darwin met with Irene Simpson ("Simpson"), Activities Supervisor at Valley View. Simpson stated that Plaintiff had been asked in the past not to come in due to "overanxious" behavior, which included pacing and talking to himself. *Id.* at ¶ 45. Simpson stated that Plaintiff once said to her, "Do you realize what I could do to you?," in what she felt was a physically threatening way. *Id.* at ¶ 46. She stated that she was concerned due to the fact that he was physically large and might have had the potential to be violent. *Id.*

Darwin then spoke with Pat Matero ("Matero"), the Director of Admissions at Valley View. Matero stated that once Plaintiff came up to her and asked her how he would look in a Speedo. *Id.*

at ¶¶ 49-50. She further stated that she had observed Plaintiff "playing up" to the young aides with sexual innuendo. *Id.*

Finally, Darwin had a telephone conversation with Maureen Torelli ("Torelli"), the former Deputy Commissioner at Valley View. *Id.* at ¶ 51. Torelli stated that there was an issue that arose with Plaintiff's inappropriate behavior regarding Plaintiff carrying around a dolphin puppet and asking residents to pet it. *Id.* at ¶ 52.

Plaintiff's Termination

Defendant contends that based on Darwin's investigation, Darwin concluded that Plaintiff was a potential liability for sexual harassment of the staff, students, and visitors. In addition, Darwin claims that she observed disturbing and frightening behavior when Plaintiff was confronted with the allegations. Darwin consulted with Valley View's Facility Administrator, the County Executive's Office, and the County Law Department regarding the results of the investigation and wrote Plaintiff a letter on December 1, 2009, stating that his volunteer services were no longer needed.[2]

II. Legal Standard

[2] On December 10, 2009, Plaintiff and other special-needs individuals arrived at Valley View to sing Christmas carols for the residents. However, once Plaintiff arrived at the facility, Plaintiff was told by Valley View's security guard that he was not allowed inside the building "because of 'what had happened recently.'" (Compl. ¶ 19).

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of showing that no issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has made this showing, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (internal quotations and citation omitted). "[C]onclusory allegations" and "unsubstantiated speculation," will not defeat a motion for summary judgment. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). "There is no issue for trial unless there exists sufficient evidence in the record favoring the party opposing summary judgment to support a jury verdict in that party's favor." *Gonzalez v. Rite Aid of N.Y., Inc.*, 199 F. Supp. 2d 122, 129 (S.D.N.Y. 2002). In analyzing a summary judgment motion, the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in its favor.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. *Discussion*

In order to prevail under the disability acts, a plaintiff must show that "(1) that she is a qualified individual with a disability; (2) that the defendants are subject to one of the Acts; and (3) that she was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability." *Harris v. Mills*, 572 F.3d 66, 73-74 (2d Cir. 2009).

Defendant argues Plaintiff has not established a *prima facie* case, contending that Valley View was not aware of Plaintiff's alleged disability, that Plaintiff was not substantially impaired in a major life activity and thus does not qualify as "disabled" under the disability acts, that Plaintiff was not "otherwise qualified" by virtue of his inappropriate behavior, and that the termination of Plaintiff's volunteer position was not because of his alleged disability, but rather because of inappropriate behavior. Without addressing all of Defendant's contentions, I will solely focus on whether Plaintiff was "substantially impaired in a major life activity" and deemed "disabled" under the disability acts. For

the reasons set forth below, I find that Defendant is entitled to summary judgment as a matter of law because I find that no rational trier of fact could find that Plaintiff was substantially impaired in the major life activity of interacting with others and thus does not have a legally cognizable disability under the ADA or Rehabilitation Act.

The Second Circuit "follows 'a three-step process for determining whether a plaintiff has a disability' that is protected by the ADA." *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 201 (2d Cir. N.Y. 2004). Accordingly, "[w]e consider: (1) "whether the plaintiff suffered from a physical or mental impairment," (2) whether "'the life activity' upon which the plaintiff relied . . . constitutes a major life activity under the ADA," and (3) whether "the plaintiff's impairment 'substantially limited' [the] major life activity identified." *Id.* Plaintiff contends, and submits medical records, that he has been diagnosed with "Pervasive Developmental Disorder Not Otherwise Specified," and argues that his major life activity of "social interaction skills" is substantially limited by virtue of his inability to "communicate and associate with peers and colleagues." (Compl. ¶¶6-7). For purposes of this discussion, I find that this diagnosed disorder constitutes a mental impairment. *Jacques*, 386 F.3d at 201. However, for the reasons outlined below, I do not find that Plaintiff's impairment has "substantially limited" the "major life activity" of being able to interact with others.

In this Circuit, "interacting with others" constitutes a "major life activity" under the ADA. *Id.* at 203. However, there is a critical distinction between "getting along with others" and "interacting with others:"

> We return to the distinction between "getting along with others" (a normative or evaluative concept) and "interacting with others" (which is essentially mechanical). We hold that a plaintiff is "substantially limited" in "interacting with others" when the mental or physical impairment severely limits the fundamental ability to communicate with others. This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people -- at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.

Id. at 203-04. Plaintiff contends that his diagnosed disorder, his documented medical history, and his conduct at Valley View sufficiently evidence that he is "substantially limited" in his ability to interact with others. Defendant contends that, while Plaintiff may suffer from a diagnosed disorder, Plaintiff does not lack the basic fundamental ability to communicate with others that is required under the *Jacques* standard, but rather

his communication is merely "inappropriate, ineffective, or unsuccessful."

Until the date of his termination in 2009, Plaintiff had been a volunteer at Valley View since 1996. During this time, Plaintiff describes his volunteer duties as "helping staff and residents with housekeeping responsibilities, *i.e.*, janitorial assignments and transporting residents within the building to and from religious and social activities." Plaintiff contends that he was regarded as a good volunteer throughout his tenure as a volunteer at Valley View.

Plaintiff first contends that he qualifies under the *Jacques* standard by virtue of his diagnosis and mannerisms outlined in various psychological reports and affidavits submitted as exhibits to his Opposition. However, "the fact that plaintiff's treating physicians have confirmed that [he] indeed exhibits such behavior does not mean that [he] is disabled within the meaning of the statute." *Montgomery v. Chertoff*, No. 03 CV 5387 (ENV) (JMA), 2007 U.S. Dist. LEXIS 30519, at *24 (E.D.N.Y. Apr. 25, 2007) (holding that the plaintiff was not substantially impaired in her interactions with others despite the fact that "[p]hysicians who have treated plaintiff's ADHD have confirmed that plaintiff experiences difficulty interacting with others.").

Next, Plaintiff asserts that his ability to interact with others is a fact issue for the jury. However, I find that in the instant case, while Plaintiff may suffer from a diagnosed disorder, no reasonable jury could find that his demonstrated conduct evidences the fundamental limitations on the ability to communicate with others on the basic level that the *Jacques* court contemplated to qualify as disabled under the ADA and the Rehabilitation Act.[3] Plaintiff has not demonstrated that his mental impairment substantially impairs his ability "to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people -- at the most basic level of these activities." *Jacques*, 386 F.3d at 201. Rather, the events giving rise to this Action clearly show that Plaintiff's communications with others are within the "inappropriate, ineffective or unsuccessful" category that *Jacques* explicitly stated is not afforded protection. While it

[3] Moreover, Plaintiff's own affidavit submitted in support of his Opposition reveals an articulate individual who is able to clearly express his thoughts and ideas. *See id.* (finding that the plaintiff's "deposition [was] particularly revealing in that plaintiff[] presents as an articulate and perceptive witness."); *LaBella v. N.Y. City Admin. for Children's Servs.*, No. 02-CV-2355 (NGG) (KAM), 2005 U.S. Dist. LEXIS 18296, at *34 (E.D.N.Y. Mar. 11, 2005) (finding that "[the plaintiff's] deposition testimony reveals that he is relatively articulate" in interacting with others).

is clearly evident that Plaintiff's mental impairment has contributed to his inability to get along or effectively communicate with certain staff members, visitors, and residents, "mere trouble getting along with coworkers is not sufficient to show a substantial limitation." *Montgomery*, 2007 U.S. Dist. LEXIS 30519, at *24-25 (internal citation omitted).

Indeed, Plaintiff's listed duties as a volunteer, as well as the undisputed facts in the record giving rise to this Action show that Plaintiff is able to initiate contact and respond to people at the most basic level. Plaintiff's own affidavit details several instances of him corresponding with colleagues, recounting instances of Plaintiff joking and participating in conversations with several different individuals. The fact that Plaintiff's interactions turn out to be offensive, inappropriate, or unsuccessful, even as a manifestation of his diagnosed disorder, do not rise to the level of substantial limitation "at the most basic level." *Montgomery*, 2007 U.S. Dist. LEXIS 30519, at *25; *LaBella v. N.Y. City Admin. for Children's Servs.*, 2005 U.S. Dist. LEXIS 18296, at *34 ("Moreover, plaintiff's emotional and violent outbursts neither appear nor are claimed to be associated with any severe mental or physical impairment which affects plaintiff's ability to

interact with others at the most basic level.").[4] Plaintiff's behavioral abnormalities and asserted problems with being able to "communicate and associate with peers and colleagues," while significant, "go to the subjective quality of the communication, rather than the core question whether the plaintiff has the ability to communicate and thus interact with others." *Bell*, 398 F. Supp. 2d at 88.

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[4] Courts in other Circuits have followed this standard and accordingly found that a plaintiff's inability to exercise discretion or adequately subscribe to normative levels of appropriateness in social interactions do not rise to the level of being substantially impaired in the major life activity of interacting with others. *See Badri v. Huron Hosp.*, 691 F. Supp. 2d 744, 758 (N.D. Ohio 2010) ("While Plaintiff may not always have been able to exercise discretion in his conversation, and his discourse with others may not always have been entirely appropriate, there is no evidence that he was incapable of communicating with others."); *Desmond v. Mukasey*, 530 F.3d 944, 962 (D.C. Cir. 2008) (evidence that the plaintiff was "'depressed,' 'melancholy,' 'sulking,' [and] a 'sad sack,'" did not show plaintiff was substantially impaired in interacting with others but rather just inappropriate, ineffective, or unsuccessful); *Bonieskie v. Mukasey*, 540 F. Supp. 2d 190, 202 (D.D.C. 2008) ("[A]n impairment does not constitute a substantial limitation on one's ability to interact merely because it tends to reduce the subjective quality of one's interactions."); *Logan v. Nicholson*, No. H-04-4178, 2006 U.S. Dist. LEXIS 34359, at *22 (S.D. Tex. May 30, 2006) ("The court cannot subscribe to the view that Plaintiff's professed mood swings and stress-related symptoms experienced in contentious staff meetings are significant limitations to any major life activity."); *Bell v. Gonzales*, 398 F. Supp. 2d 78, 88 (D.D.C. 2005) ("[C]ommunications marked by hostility, argumentativeness, or a cantankerous manner - including ill humor, irritability, or a determination to disagree - are not sufficient to demonstrate a substantial limitation of the activity of interacting with others.").

IV. *Conclusion*

In summary, even assuming that Plaintiff has a mental impairment, I find that Plaintiff is not disabled under the relevant disability acts because he has not sufficiently shown that he is "substantially limited" in the major life activity of interacting with others. Thus, Plaintiff's *prima facie* case under these disability statutes is not met. Accordingly, Defendant's motion for summary judgment is GRANTED and Plaintiff's case is DISMISSED.

SO ORDERED.

Dated: New York, N.Y.
September 29, 2011

KEVIN THOMAS DUFFY, U.S.D.J.