

Furman v Miteq, Inc.

2007 NY Slip Op 30789(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0021942/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/19/06
ADJ. DATE 11/20/06
Mot. Seq. # 001 - MD

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VLAD FURMAN,	:	LOUIS GINSBERG, P.C.	
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	:		
- against -	:		
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	:		
-----X			

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 16 - 25; Replying Affidavits and supporting papers 26; Other 14, 15, 27; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#001) by the defendant for summary judgment dismissing the complaint, pursuant to CPLR 3212, is denied.

The summons and verified complaint in this action were filed on or about September 7, 2004 and issue was joined by the filing of defendant's answer on or about October 4, 2004. Discovery has been completed, and the note of issue was filed on or about May 10, 2006.

This is an action alleging a violation of New York Human Rights Law § 296. Plaintiff Vlad Furman (Furman) alleges that he was terminated from his employment with the defendant Miteq, Inc. (Miteq) after advising his employer that he had prostate cancer. It is undisputed that plaintiff began his employment with Miteq located at 100 Davids Drive, Hauppauge, Suffolk County, New York on or about February 1998 as a part-time employee and thereafter, in June of 1998, he became a full-time employee as an intermediate technician in the Special Mixer Products Department. It is also undisputed that plaintiff received an annual review and raise on or about June 6, 1999 and June 4, 2000. It is undisputed that on or about April 2001 plaintiff was diagnosed with prostate cancer. Plaintiff alleges that after learning of his diagnosis he informed his supervisor at Miteq, Steven Spohrer of his condition.

Plaintiff states that he advised his employer of his condition since it would cause him to frequently be away from his station to use the bathroom. Plaintiff states that due to his condition he was out of work for 3 weeks for surgery in August 2001 and in November 2002 he was out of work for 3 weeks for a leg infection. Plaintiff alleges that subsequent to advising his employer of his condition his work environment changed. It is undisputed that his annual review was postponed in June 2001 until September of 2001 and in September of 2001 his review was postponed until December 2001. It is also undisputed that in March of 2002 defendant conducted plaintiff's employment review, upgraded plaintiff and changed his future review from an annual review to a review after 18 months. Plaintiff further alleges that subsequent to his employer learning of his disability problems arose concerning damage micro-units he had worked on. Plaintiff alleges that units which he had tuned, and which had passed inspection, were returned to him damaged. Plaintiff alleges that the frequency of units being returned to him increased after his surgery and became so prevalent that he complained to his supervisor and thereafter, on or about October 20, 2003, he complained to defendant's human resources department. Plaintiff alleges that on or about October 30, 2003 he was instructed to sign a two page document which he was told was a job description and instructions. Plaintiff states that subsequent to signing the document he learned that it was a written reprimand¹ and on November 3, 2003 he presented a letter to his employer withdrawing his signature from the reprimand resulting in his termination.

Defendant Miteq now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that plaintiff was terminated for legitimate business reasons. Defendant states that the plaintiff refused to comply with instructions from supervisors, that his job performance was unsatisfactory, that he failed to use the proper tools to tune instruments, that he damaged units and that he was counseled with regard to these problems and failed to improve. In support of its motion Miteq submits, *inter alia*, an affirmation of counsel which is limited to reciting the attached exhibits², copies of the pleadings, a copy of plaintiff's employment application, an excerpted copy of the deposition transcript of Vlad Furman, a copy of the Miteq, Inc. employee handbook, a copy of the reprimand dated October 30, 2003, an affidavit by Jeanine Corrao, Director of Human Resources at Miteq, Inc., and an affidavit by Andrea Marinozzi, Senior Human Resources Generalist at Miteq, Inc..

Plaintiff opposes this motion on the grounds that the reason given for plaintiff's dismissal is pretextual and was fabricated by defendant in order to serve as a basis for his termination. Furman submits in opposition, *inter alia*, an affirmation of counsel which is limited to reciting the exhibits attached³, excerpted portions of the deposition transcript of Vlad Furman, copies of the employee status change forms, and affidavits from Alexander Bonel, Lidiya Furman, Vladimir Faynberg, Elizabeth Mtui and Vlad Furman.

¹Plaintiff states that he is Russian and since the document was in English he required additional time to read and comprehend the document.

²Pursuant to CPLR 3212 (b) an affidavit in support of a summary judgment motion shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. CPLR 3212 (b)

³see above.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial (*see, Romano v St. Vincent's Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1991]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (*see, Schulz v Esposito*, 210 AD2d 307, 619 NYS2d 774 [1994]) and, since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where the material issue of fact is "arguable," summary judgment must be denied (*see, Salino v IPT Trucking*, 203 AD2d 352, 610 NYS2d 77 [1994]). Furthermore, the party opposing summary judgment is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 759 NYS2d 171 [2003]).

Discrimination claims brought under New York Executive Law § 296 are analytically identical to claims brought under Title VII of the Civil Rights Act of 1964, 42 USCS § 2000e *et seq.*, and are reviewed under the same standard (*Pfeiffer v Lewis County*, 308 F.Supp2d 88 [2004]). To establish a prima facie case of discrimination, a plaintiff must show that he suffered an adverse employment action due to his disability. The term "disability" in the Human Rights Law is defined as a "physical, mental or medical impairment . . . which does not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." (NY Executive Law § 292 [21]). In the instant matter, it is undisputed that the plaintiff is a member of a protected class, that his disability did not prevent him from performing the activities involved in his position and that plaintiff suffered an "adverse employment action" when he was terminated. The issue then becomes whether his termination was related to his disability.

Miteq states that it manufactures microwave transmission equipment and systems and that plaintiff was responsible for testing and tuning micro-units. Miteq claims that plaintiff was discharged for insubordination in that he failed to follow instructions of his supervisors concerning the tools that he used and for misconduct by falsely accusing co-workers of damaging equipment. Miteq claims that plaintiff was provided with a microscope and tools to tune units and that contrary to instructions he used a wooden stick to tune units and a jewelers loop instead of a microscope. Defendant states that as a result of plaintiff ignoring instructions units tuned by plaintiff were scratched and damaged. In contrast, plaintiff states that damage to the units was the result of sabotage by other employees and that from the beginning of his employment he used the tools provided by Miteq including a wooden stick "Q-Tip" and jewelers loop. Plaintiff claims that prior to the diagnosis of his disability the tools he used to tune the equipment was not an issue. Plaintiff states that it was only after the diagnosis of his disability and surgery that units were returned to him damaged which occurred on an escalating basis from the diagnosis of his disability until his termination. In support of this position plaintiff submitted affidavits from various individuals who had been employed by Miteq stating that it was a common practice to use a wooden stick and jewelers loop as part of the necessary tools to perform their job functions. Miteq counters these affidavits stating that those individuals did not work in the same unit as plaintiff and that the essential tools for their job responsibilities would not have been similar to plaintiff's.

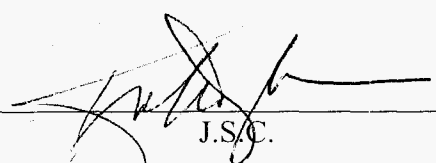
Defendant also states that Steve Spohrer, the Department Head of Special Mixer Products, Joseph Zacchino and Paul Batedo counseled plaintiff on numerous occasions about the importance of using the tools and microscope provided. This Court notes however, that the record is devoid of any evidence establishing when these counseling sessions occurred in relation to plaintiff's period of employment and the diagnosis of his disability and defendant did not submit any written reprimands prior to the reprimand immediately preceding plaintiff's termination. In addition, this Court notes that defendant's submissions do not address plaintiff's claims that prior to his diagnosis he received annual reviews and upgrades and that after his diagnosis his annual review was postponed for nine months.

Summary judgment in employment discrimination cases must be approached with great caution, especially when the employer's intent is at issue (*Fitzgerald v Alleghany Corp.*, 904 F.Supp 223 [1995]). In order for the defendant to succeed on its motion for summary judgment, it had the burden of setting forth evidentiary facts to establish its defense sufficiently to entitle it to judgment as a matter of law. Once this is accomplished, the plaintiff must establish a genuine issue of material fact through either direct, statistical or circumstantial evidence as to whether the employer's reasons for discharge were false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision (*id.*).

While Miteq has stated a valid business reason for Becker's discharge "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means" (*Matter of New York City Bd. of Educ. v Batista*, 54 NY2d 379, 383, 446 NYS2d 1, 2 [1981]; *see, Matter of Holland v Edwards*, 307 NY 38, 45, 1954 NY Lexis 1009 [1954]). Miteq's valid non-discriminatory reason for terminating Furman however does not entitle it to judgment as a matter of law. The generalized submissions of the defendant are insufficient on a motion for summary judgment since they do not address the postponement of plaintiff's annual review which was close in time to his diagnosis. In addition, the defendant did not address plaintiff's claim that from the beginning of his employment he utilized the wooden stick "Q-Tip" and jewelers loop as well as the microscope and tools without consequence. Further, the submissions of the defendant do not establish when they discovered that plaintiff was allegedly using inappropriate tools and when any counseling or reprimands occurred regarding his use of inappropriate tools.

Construing the facts in a light most favorable to the non-moving party (*see, Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 759 NYS2d 171 [2003]) defendant has failed to establish its entitlement to judgment as a matter of law and its motion for summary judgment is denied.

Dated: MAR 26 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION