

Hakim v Washington Mut. Bank

2007 NY Slip Op 31127(U)

March 30, 2007

Supreme Court, Queens County

Docket Number: 0013920/2004

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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MERRISA HAKIM,	x	Index	
		Number	<u>13920</u> 2004
Plaintiff,		Motion	
-against-		Date	<u>December 20,</u> 2006
WASHINGTON MUTUAL BANK,		Motion	
		Cal. Number	<u>17</u>
Defendant.			
<hr/>			
	x		

The following papers numbered 1 to 10 read on this motion by defendant Washington Mutual Bank for an order granting summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits (A-V)	1-5
Supplemental Affirmation	6-8
Memorandum of Law	
Opposing Memorandum of Law-Affidavit-Exhibits (A-G) ..	9-10
Reply Memorandum of Law	

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Merrisa Hakim commenced this action on July 13, 2004, and alleges in her first, second and third causes of action that defendant Washington Mutual Bank violated the Family and Medical Leave Act (29 USC § 2614 et seq.). In her fifth and sixth causes of action, plaintiff alleges that the defendant discriminated against her by failing to reasonably accommodate, and firing her for a medical disability, in violation of the Human Rights Law (Executive Law § 296), and the City Human Rights Law (Administrative Code of the City of New York § 8-101 et seq.). Plaintiff seeks to recover back pay, front pay, all benefits, damages for emotional distress, punitive damages, attorneys' fees and costs, and an offer to reinstate her to her position as a bank teller.

On July 30, 2004 plaintiff removed this action to the United States District Court for the Eastern District of New York, and defendant served its answer on August 6, 2004, and interposed 14 affirmative defenses.

On January 5, 2005 the parties filed a stipulation in federal court, dismissing the first, second, and third causes of action, and remanding the fourth and fifth causes of action to this court. The parties have completed discovery and the note of issue was filed on June 30, 2006. Defendant has timely moved for summary judgment, pursuant to CPLR 3212(a).

Plaintiff Merrisa Hakim alleges that defendant discriminated against her on the basis of disability by failing to accommodate her and terminating her employment. In June 2001, plaintiff commenced working for the Dime Savings Bank as a part-time bank teller at a branch in Seaford, New York. The Dime Savings Bank thereafter merged with Washington Mutual Bank. In May 2002, plaintiff obtained a transfer, as a full-time teller, to a branch in Forest Hills, New York. At her deposition, plaintiff testified that on June 11, 2002, she was off from work and went to her doctor, as she felt dizzy and was concerned about a mark on her face. The doctor diagnosed her as anemic, and determined that the mark on her face was Herpes Simplex. Plaintiff testified that she had been diagnosed as having anemia a few years earlier, and that it "comes and goes." Plaintiff stated that her doctor told her to take a few days off from work in order to rest, and that she took medication for three or four days to treat her Herpes Simplex. Her doctor gave her a medical note for the period of June 11 to June 22, 2002. On June 12, 2002, plaintiff telephoned Christopher Lindsey, the Assistant Branch Manager, and told him that she was ill and needed to take a few days off from work in order to rest. She testified that on either June 13 or June 14, she telephoned the bank and sought to speak to Mr. Edwards, the Branch Manager, but that Mr. Lindsey told her that Edwards would not speak to her unless she was coming back to work. She stated that she was not given an opportunity to explain why she was unable to immediately return to work. Shortly thereafter, Ms. Hakim telephoned Mr. Edwards and when asked if she was coming back to work, she said "no", she could not come back. She testified that she informed Mr. Edwards that she had a doctor's note, but was not given an opportunity to give the note to her employer when she returned to work. Ms. Hakim alleges in her complaint that she returned to work on June 22, 2002, but testified that she returned to work on June 24, 2002, at which time she was terminated. Plaintiff testified that she was told that she was terminated for insubordination. The termination notice submitted by plaintiff states that she was terminated due to unsatisfactory performance.

Defendant now seeks summary judgment dismissing the complaint and asserts that plaintiff cannot establish a discrimination claim as a matter of law, as she never informed it that she had contracted Herpes Simplex or that she suffered from any medical condition, and never requested an accommodation for a known medical condition or disability.

Defendant further asserts that plaintiff was terminated for repeated balancing errors, a legitimate and non-discriminatory reason. Plaintiff testified that during the course of her employment as a bank teller, she received and understood that she was required to follow Washington Mutual's Balancing Standards, and knew that the failure to adequately perform balancing standards could result in corrective action, including termination. Plaintiff received training as regards the Balancing Standards and testified that cash would be entrusted to her, balanced daily and secured in the vault as soon as possible after balancing. Plaintiff's testimony and the documentary evidence submitted herein establish that during the time she was employed at the Seaford branch she received a written warning on September 17, 2001 from her then supervisor, Barbara Romano, for having eight teller differences (over \$10.00 and \$340.00 in shortages). The warning documented these differences, repeated the instructions given to her to write break-downs for all cash transactions, and to check the backs of all checks for signatures and account numbers, and her failure to consistently do this. This warning stated that her next difference over \$10.00 would result in a final warning. On October 16, 2001, plaintiff's register was short \$299.00, and she was given a final warning and her probationary period was extended to December 17, 2001. After plaintiff transferred to the Forest Hills Branch, she received a written Performance Improvement Notice on May 31, 2002 for numerous teller differences that occurred on April 26 (over \$290.00), May 6 (short \$144.00), May 7 (short \$70.00, and \$44.00 recovered), and May 17, 2002 (short \$100.00 when she gave a customer too much money). Plaintiff confirmed the accuracy of these amounts in a Teller Difference Check-Off List dated April 26, 2002, and Teller Difference Recap forms dated April 26, May 7, 17 and 30, 2002. The May 31, 2002 Performance Improvement Notice detailed these teller differences which totaled \$579.00 in unlocated cash. This warning stated the procedures plaintiff was required to follow for counting cash taken from the draw, and for making change for a customer, and stated that **"Immediate satisfactory performance is required, and must continue thereafter. Please understand that failure to remedy the problem may result in further performance counseling or termination of employment."** Plaintiff was also provided with Washington Mutual's Balancing Standards on May 31, 2002. Between June 1 and June 11, 2002 plaintiff worked a total of 11 days, during which time she recorded

outages over \$10.00 in five days for a total of \$2,052.04 out of balance - on June 3 she was over \$479.00, on June 4 she was short \$352.00, on June 6 she was short \$100.00, on June 7 she was over \$571.00, and on June 8 she was short \$550.04. Plaintiff acknowledged that the Balancing Performance Log accurately reflects the differences she had between June 1 and June 11, 2002 in the amount of \$2,052.00.

In order "[t]o establish its entitlement to summary judgment in [a] ... discrimination case, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual" (DelPapa v Queensborough Community Coll., 27 AD3d 614 [2006]; Cesar v Highland Care Ctr., Inc., 2007 NY Slip Op 1063, 2007 App Div LEXIS 1482 [2007]; see Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004]; Ferrante v American Lung Assn., 90 NY2d 623, 632 [1997]; Romney v New York City Tr, Auth, 8 AD3d 254 [2004]).

To state a prima facie case of employment discrimination due to a disability under Executive Law § 296, and Administrative Code of the City of New York § 8-107, a plaintiff must show that he or she suffers from a disability and that the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment (see Matter of McEniry v Landi, 84 NY2d 554, [1994]; Pimentel v Citibank, N.A., 29 AD3d 141 [2006]; Thide v New York State Dept. of Transp., 27 AD3d 452, 453, [2006]; Timashpolsky v State Univ. of N.Y. Health Science Center at Brooklyn, 306 AD2d 271, 272, [2003], lv denied 1 NY3d 507 [2004]). The term "disability" is defined as "physical, medical or mental impairments that do not prevent the complainant from performing in a reasonable manner the activities involved in the job." (Pembroke v New York State Office of Court Admin., 306 AD2d 185 [2003], citing Executive Law § 292 former [21]). If the plaintiff succeeds in establishing a prima facie case, the burden of proof shifts to the employer to demonstrate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employer's action was motivated by legitimate nondiscriminatory reasons (see Matter of McEniry v Landi, supra, at 558; Timashpolsky v State Univ. of N.Y. Health Science Center at Brooklyn, supra, at 272). If the employer establishes that it had valid nondiscriminatory reasons for its action, the burden shifts back to the plaintiff to raise a triable issue of fact as to whether the stated reasons were pretextual (see Cooks v New York City Tr. Auth., 289 AD2d 278 [2001]).

The Human Rights Law defines the term "disability" as "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law § 296[1]). The Human Rights Law makes clear, however, that it only applies to "disabilities which, upon the provision of reasonable accommodations, do not prevent the [plaintiff] from performing in a reasonable manner the activities involved in the job or occupation ... held" (Executive Law § 292[21]; Burton v Metropolitan Transportation Corp., 244 F Supp 2d 252 [2003]; see also Fama v American International Group, Inc., 306 AD2d 310 [2003], lv denied 1 NY3d 508 [2004]; Giaquinto v New York Telephone Co., 135 AD2d 928, 929 [1987], lv denied 73 NY2d 701 [1998]; accord Matter of Schmitt v Kiley, 124 AD2d 661, 662[1986], lv denied 69 NY2d 612 [1987]). Moreover, pursuant to the statute, "a reasonable accommodation" is an action taken by an employer that permits the disabled employee "to perform in a reasonable manner the activities involved in the job ... provided, however that such actions do not impose an undue hardship on the business" (Executive Law § 292 [21-e]). "A claim of disability discrimination arising from discharge of an employee based on failure to accommodate is not made out unless the employee's request for a reasonable accommodation has been denied by the employer" (Anyan v New York Life Ins. Co., 192 F Supp 2d 228 [2002], affd 2003 US App LEXIS 13786, 2003 WL 21523167 [2003]; accord Mazza v Bratton, 108 F Supp 2d 167, 176 [2000], affd 2001 US App LEXIS 6185, 2001 WL 363513 [2001]; Brown v Triboro Coach Corp., 153 F Supp 2d 172, 186 [2001]; Clark v New York State Electric & Gas Corp., 67 F Supp 2d 63 [1999]).

An employer cannot have discriminated against an employee on the basis of a known disability where the employer learns of the disability only after firing the employee (see Priore v N.Y. Yankees, 307 AD2d 67, 71 [2003]; see also Ling Chen v Citigroup Inv., Inc., 2004 US Dist LEXIS 24895 [2004]; Woolley v Broadview Networks, Inc., 2003 US Dist LEXIS 2716 [2003]; McKinney v New Process Gear Div. of New Venture Gear, Inc., 2000 US Dist LEXIS 9787, [2000]; Kolivas v Credit Agricole, 1996 US Dist LEXIS 17478 [1996], affd 125 F3d 844 [1997]). Here, Mr. Edwards states in an affidavit that Ms. Hakim never told him why she took sick days in June 2002. Mr. Edwards further states that when Ms. Hakim returned to work on June 24, 2002, he terminated her due to her continued unsatisfactory job performance. Plaintiff testified that other than her boyfriend, she did not inform her family and friends that she had contracted Herpes Simplex, as it was a private matter, and that she did not recall informing anyone at Washington Mutual that she had

contracted Herpes Simplex or that she had any other medical condition. There is no evidence that anyone at the bank knew that Ms. Hakim had any medical disability, prior to her termination. Although Ms. Hakim stated that Edwards and Lindsey did not give her an opportunity to explain her illness, she also stated that she would have only provided Mr. Edwards with this information if he asked her for a medical reason for her absence. At the most, plaintiff informed the defendant that she would not be in for a few days, and that she had a doctor's note. The doctor's note, dated June 22, 2002, does not specify any medical disability and only states that Ms. Hakim was under the doctor's care from June 11 to June 22, 2002, and that "she was advised rest as part of treatment. She is fit to work now." The fact that plaintiff informed her employer that she was out of work due to an illness is insufficient to establish that she informed her employer that she was disabled within the meaning of the statute. Accordingly, absent any evidence that plaintiff informed the defendant of her alleged disability, and proof that she "could perform the essential functions of the job with ... reasonable accommodation" (Simms v City of New York, 160 F Supp 2d 398 [2001]), she cannot maintain a cause of action based upon Executive Law § 296 and New York City Administrative Code § 8-107.

Plaintiff's affidavit, deposition testimony, and the arguments presented by her counsel are insufficient to present any triable issues of fact. The court, therefore, finds that as defendant has demonstrated that plaintiff cannot establish a prima facie case for discrimination, the court need not reach the issue of whether she was terminated for a legitimate and non-discriminatory reason.

In view of the foregoing, defendant Washington Mutual Bank's motion for summary judgment dismissing plaintiff's remaining causes of action, pursuant to New York Executive Law § 296 and New York City Administrative Code § 8-107, is granted.

Dated: March 30, 2007

J.S.C.