

Evans v City of New York

2007 NY Slip Op 32549(U)

August 7, 2007

Supreme Court, New York County

Docket Number: 0114498/2001

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

- Index Number : 114498/2001
EVANS, JOHN
vs
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 114498/2001
MOTION DATE 5/9/07
MOTION SEQ. NO. 001
MOTION CAL. NO. 2

T motion to/for JS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
12
34
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

**NOTICE IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

Dated: 8/7/07 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
JOHN EVANS,
Plaintiff,
-against-

Index Number. 114498/01
Mot. Seq. No. 001
Cal. No. 2

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES, and
RONALD E. WILKERSON,
Defendants.

DECISION AND ORDER

-----X
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Papers considered in review of this motion for summary judgment :

Papers	Numbered
Notice of Motion, Affidavits, Memo of Law	1, 2
Affirmation in Opposition, Memo of Law	3, 4
Reply Memo of Law	5

FILED

AUG 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

PAUL GEORGE FEINMAN, J.:

Defendants move for summary judgment and dismissal of the complaint against them pursuant to CPLR 3212. For the reasons state below, the motion is granted.

Plaintiff alleges that defendants unlawfully caused the constructive discharge of his employment because of his disability in violation of Executive Law §296(1)(a) and Administrative Code §8-107(1)(a). Plaintiff further alleges that defendants discriminated against him because of his post-traumatic stress disorder ("PTSD") by denying his requests for sick leave and by failing to provide him with a reasonable accommodation for his disability. In addition, plaintiff claims that defendants engaged in a "campaign of harassment and discrimination" which forced him to

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unwillingly retire from the Department of Homeless Services where he had been employed since 1981. (Aff. in Opp. Exhibit B, p.3).

Plaintiff is a combat veteran of the Vietnam War, serving two tours of duty there between 1967 and 1970, and receiving, among other recognitions, a Purple Heart for being wounded during his first tour. Plaintiff began his employment with the Department of Homeless Services in 1981 at its Camp LaGuardia Men's Shelter. There he eventually rose to the civil service position of Assistant Superintendent of Welfare Shelters, a position he shared with several others at that location. In 1996, plaintiff was diagnosed with post-traumatic stress disorder resulting from his service in the military; at the time his symptoms were considered "mild." (Not. of Mot. Exhibit B, EBT Testimony of John Evans, 35:19 [hereinafter Evans EBT]). Plaintiff claims that he was able to control his disability by taking sick leave "within the guidelines of time and leave usage." (Evans EBT, 65:20).

Defendant Ronald Wilkerson became the director of Camp LaGuardia sometime in 1997, and he was specifically asked by his superiors to "monitor the time and leave of all shift supervisors." (Not. of Mot. Exhibit C, EBT Testimony of Ronald Wilkerson, 56:8-9 [hereinafter Wilkerson EBT]). Defendant determined that there had been abuse of time and leave at that location, and that in particular plaintiff had abused leave procedures by "taking time that he did not have [and/or without] prior authorization or approval." (Wilkerson EBT, 89:22-23). Thereafter, plaintiff Evans and defendant Wilkerson became involved in a series of disputes over plaintiff's use of sick leave and other absences from work. Plaintiff claims that Wilkerson "began to systematically deny every request for leave submitted by the plaintiff, notwithstanding the fact that plaintiff had sufficient sick leave balances to cover all requested time." (Plaintiff's Memo of Law,

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p. 4,5). Defendant Wilkerson counters that he “granted some of plaintiff’s leave requests, he also denied some of plaintiff’s leave requests ‘based on the policies and procedures of time and leave, as well as the needs of the operation.’” (Defendant’s Memo of Law, p.2). Plaintiff alleges that the defendant used his condition of post traumatic stress disorder against him. (Evans EBT, 52:11-13). Wilkerson admits to seeing documentation by November of 1998 which stated that the plaintiff had post traumatic stress disorder, but denies that this knowledge affected his decisions to deny plaintiff’s requests for leave. (Wilkerson EBT, 80:19-25, 96:7-12). In addition, plaintiff admits that he “never asked for a reasonable accommodation.” (Evans EBT, 62:25).

Plaintiff further alleges that as a result of his “terrible” relationship with Wilkerson and the “last screaming match that [he] had with Mr. Wilkerson,” he went through a “crisis” which left him unable to report to work and forced him to resign from his position with the Department of Homeless Services. (Evans EBT, 41:14, 60:18, 60:11). About two weeks after plaintiff’s last day of work on December 21, 1998, he checked into the Montrose VA Hospital in Montrose, NY on January 4, 1999 for a period of 45 days in order to receive treatment for his PTSD. (Plaintiff’s Memo of Law, p. 6).

Thereafter, plaintiff brought a claim against defendants pursuant to Section 296(1)(a) of the Executive Law and Section 8-107(1)(a) of the Administrative Code, both of which make it an “unlawful discriminatory practice for an employer... because of disability... to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.” (Executive Law §296[1][a]; NYC Code §8-107[1][a]). Defendants move for summary judgment pursuant to CPLR 3212.

According to CPLR 3212 (b), a motion for summary judgment shall be granted where,

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“upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... [a] motion for summary judgment shall be supported by... depositions and written admissions.”

Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395, 404 (1957). The Court has held that “to grant summary judgment it must be clear that no material or triable issue of fact is presented” and “issue-finding, rather than issue-determination is the key to the procedure.” Further, “this drastic remedy should not be granted where there is any doubt as to the existence of such issues.” *Sillman* at 404.

“The Human Rights Law broadly 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.’” *McEniry v Landi*, 84 NY2d 554, 559 (1994). “A complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated. Once a prima facie case is established, 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 employee's termination was motivated by a legitimate nondiscriminatory reason.” *McEniry* at 558. “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.” *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 453 (2nd Dept. 2006).

“Reasonable accommodation is defined as actions taken by employer which ‘permit an employee ... with a disability to perform in a reasonable manner the activities involved in the job or

occupation sought or held... provided, however that such actions do not impose an undue hardship on the business.” *Pimentel v Citibank*, 29 AD3d 141, 145 (1st Dept. 2006), *citing* Executive Law §292(21-e). “New York City’s Human Rights Law requires that an employer ‘shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job.’” *Pimentel* at 145, *citing* Administrative Code §8-107(15)(a). However, plaintiff has the “initial burden of showing that he proposed and was refused an objectively reasonable accommodation.” *Pembroke v NY State Office of Court Admin.*, 306 AD2d 185, 185 (1st Dept. 2003). To establish constructive discharge a plaintiff must show that the “the employer, rather than acting directly, deliberately ma[de] an employee's working conditions so intolerable that the employee [wa]s forced into an involuntary resignation.” *Morris v Schroder Capital Mgt. Intl. & Schroder Inv. Mgt. N. Am.*, 7 NY3d 616, 621 (2006).

Viewing the facts in a light most favorable to the plaintiff, plaintiff has established a prima facie case by establishing that he suffers from a disability, namely post traumatic stress disorder, and that this condition caused him to take absences which were the basis of his disagreements and tension with the defendant Wilkerson and ultimately lead to his resignation. However, defendants have countered with a “legitimate non-discriminatory reason” for denying many of his requests for leave. Specifically, that approving his leave requests would “hurt the agency” because it would leave his shift uncovered or force the agency to pay overtime compensation to his replacement. (Wilkerson EBT, 43:19). Therefore, plaintiff must raise a triable issue of fact as to whether these reasons are “pretextual,” and that it is “more likely than not” that plaintiff’s disability was the real reason for the discriminatory treatment. *Ferrante v American Lung Ass’n*, 90 NY2d 623, 630 (1997). Here, plaintiff references a memo from a superintendent at Camp LaGuardia as proof of

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Wilkerson's discriminatory intent. The memo is addressed to Wilkerson and points out that plaintiff is a senior member of the staff and entitled to a certain amount of sick leave days a year, and that no paid overtime had been issued up to that time for his absences. The memo then concludes by questioning "why are you singling out ASW Evans?" (Aff. in Opp., Exhibit H). While this memo may be further indication of the difficult relationship between plaintiff and defendant Wilkerson, it does not meet the burden of production of evidence showing that it is "more likely than not" that Wilkerson's reasons for denying plaintiff's leave requests were pretextual, and the real reason was discrimination against the plaintiff because of his disability. The memo notably contains no reference to the plaintiff's medical condition and makes no allegation of discrimination by defendant Wilkerson.

Plaintiff also argues that Wilkerson's treatment of him resulted in his unwilling retirement and he was therefore constructively discharged from Camp LaGuardia. Specifically, plaintiff contends that "Wilkerson's repeated denials of his leave requests and failure to accommodate his disability left him unable to cope with the symptoms associated with his PTSD." (Plaintiff's Memo of Law, p. 12). Here, defendants have proffered a legitimate reason for denying plaintiff's leave requests that is neither discriminatory nor deliberately intended to make plaintiff's employment so intolerable that he would be forced to resign, specifically that the facility requires a certain level of staffing and scheduling, and plaintiff's taking of unauthorized and unscheduled time was disruptive to the smooth functioning of the facility. (Wilkerson EBT, 89:17-19).

Plaintiff admits that he "never asked for a reasonable accommodation." (Evans EBT, 62:25). Therefore, "plaintiff failed to satisfy his initial burden of showing that he proposed and was refused an objectively reasonable accommodation." *Pembroke* at 185. Here, plaintiff has not

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established that the defendants refused to give him a reasonable accommodation, or that defendants were aware of what reasonable accommodation he was requesting and how that was related to his disability. Plaintiff has not established that his desire to continue taking sick leave to deal with his PTSD was objectively reasonable, and did not "impose undue hardship on the business." *Pimentel* at 145. To the extent it could be surmised that plaintiff requested the freedom to take leave as he needed, such a request could be deemed unreasonable. *Pembroke* at 185.

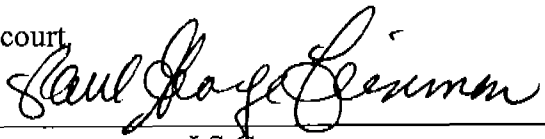
As defendants have established that there was a legitimate non-discriminatory reason for denying plaintiff's requests for leave and there is not sufficient evidence that defendants deliberately made the plaintiff's working conditions so intolerable that he was forced to retire as to constitute a triable issue of material fact, defendants' motion for summary judgment must be granted pursuant to CPLR 3212. Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted, and that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the clerk shall enter judgment accordingly.

This constitutes the decision and order of the court,

Dated: August 7, 2007
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

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