Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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WILSON R. GARCIA,

Plaintiff,

-against-

PENINSULA NEW YORK PARTNERS d/b/a
PENINSULA HOTEL,

Defendant.

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Index No.: 15892/06
Motion Date: 6/4/08
Motion Cal. No.: 12
Motion Seq. No.: 3

The following papers numbered 1 to 19 read on this motion by defendant Peninsula New York Partnership for an Order, pursuant to CPLR §3212, granting the motion for summary judgment, and dismissing the Amended Verified Complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1 - 7
Memorandum of Law	8 - 10
Affirmation in Opposition-Memorandum of Law-Exhibits.....	11 - 15
Reply Affirmation-Exhibits.....	16 - 17
Reply Memorandum of Law	18 - 19

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

Plaintiff Wilson R. Garcia ("plaintiff") commenced this action initially against defendants Peninsula New York Partners d/b/a Peninsula Hotel ("Peninsula Hotel") and Hong Kong and Shanghai Hotels, Limited ("HSH"), alleging that defendants, plaintiff's employer, discriminated against him on the basis of his disability, and failed to make accommodations for his disability in violation of the New York State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of the City of New York § 8-101 et seq.). By order of this Court dated December 7, 2006, the motion of HSH to dismiss the complaint as to it was granted, and plaintiff was granted leave to serve an amended complaint; the amended complaint names Peninsula Hotel as the sole defendant. Plaintiff seeks to recover compensatory and punitive damages, and attorney fees for the physical and emotional harm allegedly inflicted by Peninsula Hotel.

Pertinent Facts

Peninsula Hotel is a luxury hotel located at Fifth Avenue and 55th Street, New York, New York, that consists of sixteen guest floors. Plaintiff began his employment with Peninsula Hotel on October 13, 1998, as a houseman, a position in which the employee is assigned to work interchangeable tasks as floor housemen, lobby porters or linen room attendants, as provided in the collective bargaining agreement between the Hotel Association of the City of New York, of which Peninsula Hotel is a member, and the New York Hotel and Motel Trades Council, AFL-CIO. From 2003 through 2006, plaintiff was scheduled to work the morning shift as a lobby porter for two (2) days and as a floor houseman for three (3) days on guest floors seventeen (17) to twenty (20), depending upon hotel occupancy, business needs and staffing requirements. The lobby porter cleans the lobby, mezzanine, executive offices and adjacent bathrooms, restocks toilet paper and tissues, polishes railings, removes smudges from mirrors, vacuums, shines shoes and transports amenities to the guest floors. The floor houseman cleans guest floor hallways; vacuums and shampoos carpets and expunges stains on walls, mirrors and windows; dusts moldings, baseboards, lamps and furniture; deep cleans up to five (5) guest rooms, moving and polishing furniture, removes and restores cleaned drapes, blinds and curtains; transports garbage from backlandings to a central location for removal; and responds to guest requests conveyed by beeper in the assigned section.

Plaintiff claims that Peninsula Hotel, notwithstanding it knowledge that he suffers from depression and asthma, discriminated against him by refusing to change his assignments, by assigning to him tasks that were impossible to complete, by harassing him, and refusing to accommodate his special needs. On May 8 and 9, 2003, plaintiff was hospitalized at Elmhurst Hospital for major depression, a fact that he allegedly communicated to Francea Clark, Peninsula Hotel's Director of Human Resources, with his submission of the medical records reflecting his hospital admission and the diagnosis of depression disorder and asthma. Approximately six months later, plaintiff again became ill and took a three month disability leave for major depression from January 15, 2004 to March 13, 2004. The medical documentation related to this leave allegedly was given to Francea Clark, as well as Alfredo Victoria, one of his supervisors. On July 13, 2005, plaintiff again was admitted to Elmhurst Hospital Center for stress and depression, and transferred from there to Presbyterian Hospital in White Plains, where he remained for nine days; the medical documentation for these admissions from July 13 to July 22, 2005, also allegedly were given to Francea Clark. Notwithstanding his documented medical conditions, plaintiff alleges that he was assigned more work than his non-disabled co-workers, was constantly pressured and harassed by his supervisors, resulting in his sending a letter to the general manager of Peninsula Hotel on December 28, 2005, detailing his illness and the alleged stress, pressure and harassment at the workplace. On March 1, 2006, plaintiff left his employment with Peninsula Hotel allegedly because his depression worsened as a result of discriminatory conduct of his supervisors at Peninsula Hotel. Subsequently, on April 3, 2006, plaintiff filed a verified complaint with the New York State Division of Human Rights, alleging that Peninsula Hotel discriminated against him because of his disability and failed to reasonably accommodate him; earlier, on October 31, 2005, plaintiff had filed a charge with the Equal Employment Opportunity Commission, which was dismissed with a right to sue.

Discussion

Defendant Peninsula Hotel moves for summary judgment dismissing the amended complaint. It is beyond cavil that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos , 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The New York State Human Rights Law prohibits an employer from discriminating against an employee because of a disability (Executive Law § 296[1]). 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. McEniry v. Landi, 84 N.Y.2d 554, 558 (1994); Pimentel v Citibank, N.A., 29 A.D.3d 141 (2nd Dept. 2006); Thide v New York State Dept. of Transp., 27 A.D.3d 452, 453 (2nd Dept. 2006); Timashpolsky v State Univ. of N.Y. Health Science Center at Brooklyn, 306 A.D.2d 271, 272,[2003], lv denied 1 N.Y.3d 507 (2004). Siano v. Dolce, 256 A.D.2d 582 (2nd Dept. 1998). See, also, Staskowski v. Nassau Community College, __ A.D.3d __. __ N.Y.S.2d __, 2008 WL 2814808 (2 nd Dept. 2008); McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d 676 (2nd Dept. 2006). 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 A.D.2d 185 (2nd 2003), citing Executive Law § 292 former [21]), and is limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job held (see Executive Law § 292[21]." Staskowski v. Nassau Community College, __ A.D.3d __. __ N.Y.S.2d __, 2008 WL 2814808 (2nd Dept. 2008); McKenzie v. Meridian Capital Group, LLC, 35 A.D.3d 676 (2nd Dept. 2006)[same]. Summary judgment is appropriate in cases where the defendant can demonstrate that the plaintiffs will not be able to establish a prima facie case of intentional discrimination. See, Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295 (200); Thompson v. Lamprecht Transport, 39 A.D.3d 846 (2nd Dept. 2007).

To prevail on a summary judgment motion on this ground, Peninsula must demonstrate either plaintiff's failure to establish every element of intentional discrimination , or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. Morse v. Cowtan & Tout, Inc., 41 A.D.3d

563 (2nd Dept. 2007); Johnson v. NYU Hospitals Center, 39 A.D.3d 817 (2nd Dept. 2007), leave to appeal denied, 9 N.Y.3d 805 (2007); Cesar v Highland Care Ctr., Inc., 37 A.D.3d 393, 394 (2nd Dept. 2007); DelPapa v Queensborough Community Coll., 27 A.D.3d 614 (2nd Dept. 2006); see Forrest v Jewish Guild for the Blind, 3 N.Y.3d 295, 305 (2004); Ferrante v American Lung Assn., 90 N.Y.2d 623, 632 (1997); Romney v New York City Tr, Auth, 8 A.D,3d 254 (2nd Dept. 2004). Here, Peninsula Hotel contends that plaintiff has failed to establish a prima facie case for discrimination based either upon disability. It points to plaintiff's deposition testimony in which he acknowledged that many non-disabled housemen complained about excessive workload, could not recall whether he made any request for a shift change, and conceded that he did not request any accommodation based upon his disability. Peninsula Hotel further demonstrated that plaintiff was never given a written warning or suspended for failure to complete his assignment, but was given a verbal coaching and counseling for failing to advise management of an incomplete assignment, and submitted evidence that during the relevant time period, thirteen coaching and counseling sessions were given to four non-disabled housemen for reasons similar to plaintiff. Peninsula Hotel further demonstrated that, in response to plaintiff's requests, he was offered reasonable accommodations, including several leaves of absence, retraining and a position as a linen room attendant to alleviate the stress of multitasking, pressure and scrutiny inherent in the floor houseman and lobby porter positions. Peninsula Hotel also submitted proof that plaintiff did not apply to be classified as disabled by Workers Compensation until May 15, 2006. In short, Peninsula Hotel established prima facie that plaintiff was not subjected to any adverse or disparate treatment in employment due to any disability.

In opposition, plaintiff submitted proof that Peninsula Hotel was advised each time that he was hospitalized, and concludes that Peninsula Hotel thus was fully aware that he was suffering from depression, and that because of his depression, Peninsula, in May 2003 began to deny plaintiff equal terms and conditions of employment. As illustrative of this claim, plaintiff contends that he was scrutinized more by his supervisors than the other non-disabled employees, that his schedule was changed without his consent on numerous occasions, that he was subjected to harassment through the placement of false accusations in his personnel file and by disciplining him for failure to complete impossible work assignments. Plaintiff alleges that as a result of the disparate treatment and Peninsula Hotel's failure to make reasonable accommodations, he was forced to leave his employment because his depression worsened as a result of the discriminatory conduct. In short, plaintiff is arguing that Peninsula Hotel's reasoning underlying actions taken with respect to him were untrue. Plaintiff's affidavit, deposition testimony, and the arguments presented by his counsel, however, are insufficient to present any triable issues of fact.

The fact that plaintiff may have informed his employer that he was out of work due to an illness is insufficient to establish that he informed his employer that he was disabled within the meaning of the statute. The record before this Court shows that Peninsula Hotel had valid, nondiscriminatory reasons for its action. The burden then shifted back to plaintiff to raise a triable issue of fact as to whether the stated reasons were pretextual. Cooks v New York City Tr. Auth., 289 A.D.2d 278 (2nd Dept.2001); see Matter of McEniry v Landi, supra, at 558; Timashpolsky v State Univ. of N.Y. Health Science Center at Brooklyn, supra, at 272. This plaintiff failed to do. In

addition, 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]).

Nor as claimed does the record support plaintiff's claim that he was subjected to a hostile work environment because of his disability. "A hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment " (citations and internal quotations omitted). Morse v. Cowtan & Tout, Inc., supra. Here, Peninsula Hotel made a prima facie showing that plaintiff was not harassed on the basis of his medical condition; in opposition, plaintiff failed to raise a triable issue of fact. Moreover, plaintiff's claim that he was subjected to intentional infliction of emotional distress does not lie. "It is well established that the tort of intentional infliction of emotional distress consists of four elements: '(1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress' (citations omitted). 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' (citations omitted)." Andrews v. Bruk, 220 A.D.2d 376 (2nd Dept. 1995); see, Howell v. New York Post Co., Inc., 81 N.Y.2d 115 (1993); Scarfone v. Village of Ossining, 23 A.D.3d 540 (2nd Dept. 2005); Melnik v. Saks & Co., 292 A.D.2d 430 (2nd Dept. 2002). Finally, plaintiff cannot establish his claim of constructive discharge. "In order to maintain a cause of action for constructive discharge, a plaintiff must show that his or her employer deliberately made working conditions so intolerable that he or she was forced into involuntary resignation (citations omitted)." Nelson v. HSBC Bank USA, 41 A.D.3d 445 (2nd Dept. 2007). Again, in opposition to Peninsula Hotel's prima facie showing with respect to the workplace, plaintiff failed to raise a triable issue of fact.

In view of the foregoing, defendant Peninsula Hotel's motion for summary judgment dismissing plaintiff's causes of action, pursuant to New York Executive Law § 296 and New York City Administrative Code § 8-107, is granted, and the complaint hereby is dismissed.

Dated: August 20, 2008

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J.S.C.