Mirza v HSBC Bank USA, N.A.

2009 NY Slip Op 31558(U)

July 13, 2009

Supreme Court, New York County

Docket Number: 109168/07

Judge: Michael D. Stallman

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SCANNED ON 7/16/2009

[*1]

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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

Index Number : 109168/2007
MIRZA, AFTAB
VS.
HSBC BANK USA, NA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 109168/2007

MOTION DATE 1/30/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 87

The following papers, numbered 1 to 9 were read on this motion for summary judgment; cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-U, V [Affidavit]- Z, AA-AE	1-3
Notice of Cross Motion— Affirmation — Exhibits A-C; Affidavit — Exhibits A-C	4-6
Affirmation — Exhibits A-U, V [Affidavit]- Z, AA-AF	7-8
Reply Affirmation – Exhibit A	9

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 7/13/09
New York, New York

J.S.C.

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 7

AFTAB MIRZA,

Plaintiff,

- against -

HSBC BANK USA, N.A.,

Respondent.

Index No.: 109168/07

DECISION and ORDER

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Aftab Mirza alleges that defendant HSBC Bank USA, N.A. (HSBC) unlawfully terminated his employment because of his disability, a heart condition, in violation of the New York State Human Rights Law (Executive Law § 296)(State HRL) and the New York City Human Rights Law (Administrative Code of the City of New York § 8-107)(City HRL). Plaintiff moves for summary judgment, pursuant to CPLR 3212, for the relief sought in the complaint. Defendant cross-moves for summary judgment dismissing the complaint.

The standards for summary judgment are well settled. The movant must establish the cause of action or defense, by submitting evidentiary proof in admissible form, "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212[b]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad*,

64 NY2d at 853. Once such showing has been made, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562. In reviewing a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party. *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

The essential facts in this case are largely undisputed. Plaintiff was employed by HSBC in its Trade Services Department, as a Letter of Credit Specialist, from 1999 until his termination in August 2005 (*see* Letter dated Feb. 9, 1999, Ex. B to Scheiner Aff. in Support of Plaintiff's Motion). In or around October 2001, plaintiff was treated for a heart condition, and subsequently was diagnosed with coronary artery disease (*see* Medical Reports, Exs. H & I to Scheiner Aff. in Support). His condition requires that he see his doctor on a quarterly basis, and be hospitalized to have his arteries cleaned, and stents put in, annually (Mirza Dep. at 14-15). He also occasionally requires hospitalization, on an emergency basis, if he experiences sudden chest pains (*id.* at 15, 21). According to plaintiff, during his employment with defendant, he was able to schedule time off in advance for his regular doctor visits and annual procedures, and used vacation time for unscheduled, emergency hospitalizations (*id.* at 14).

In or around April 2004, plaintiff requested and was granted

a leave of absence for knee replacement surgery, and was out of work for about six weeks (*id.* at 20, 21; *see* Complaint, ¶ 8). When he returned to work, he neither needed nor requested any accommodation as a result of his knee surgery (*id.* at 19-20). In August 2004, plaintiff was out of work for about a week for his annual angiography, after being admitted to the hospital for chest pains (*id.* at 21-23). Plaintiff was hospitalized again in February 2005, as a result of experiencing severe chest pain at work (*id.* at 17, 20). Plaintiff's requests for sick leave to attend to his medical condition were never denied (*id.* at 17, 22).

Plaintiff worked in the Exports department of defendant's Trade Services Operations, and identified his direct supervisor as Shirley Barno-Nkansah (Barno) (Mirza Dep., at 31, 32, 34). In early 2004, Bruce Sparke (Sparke) became Manager of the Exports department, reporting to Ian Wright (Wright), who was employed by defendant as a Senior Vice President and Head of Trade and Supply Chain Operations (Trade Services Operations) (*see* Wright Aff. in Support of HSBC's Cross-Motion, ¶¶ 2, 3, 5). According to defendant, Sparke was plaintiff's supervisor (*see* Response to Plaintiff's Request for Interrogatories, Ex. Y to Scheiner Aff. in Support, Interrog. No. 2), and Barno was a supervisor reporting to Sparke (*see* Wright Aff., ¶ 15). In April 2005, plaintiff received a written performance review for 2004 from Sparke (*see* 2004 Performance Plan and Performance Review, Ex. M to Scheiner Aff. in

Support). Sparke gave plaintiff an overall performance rating of "4," or "marginal," on a scale of 1 to 5, with 1 as the highest (outstanding) and 5 as the lowest (unsatisfactory) (*id.*). Prior to the 2004 evaluation, from 1999 through 2002, plaintiff received at least four evaluations, from other managers, rating his overall performance as "good," or "3," on the same 1 to 5 scale (*see* Evaluations, Exs. C-F to Scheiner Aff. in Support).

After he received his 2004 performance review, plaintiff attempted unsuccessfully to meet with Sparke to discuss his evaluation (Mirza Dep., at 31). Plaintiff also complained to Barno about his evaluation, and made an effort, through her, to schedule a meeting with Sparke (*id.* at 31-32, 35; *see also* Exs. N, O to Scheiner Aff. in Support). Sparke did not speak to plaintiff about the evaluation before or after he sent the performance review (*id.* at 36-37), and did not respond to plaintiff's requests to meet with him. In August 2005, plaintiff's employment with defendant was terminated, as part of defendant's downsizing of its Trade Services Operations (*see* HSBC Memo dated July 13, 2005, Ex. P to Scheiner Aff. in Support; Wright Aff., ¶¶ 8, 9, 19). According to defendant, plaintiff and four other employees from Trade Services Operations were selected to be terminated based on their performance reviews for 2004; two employees with similar ratings were retained (*see* July 13, 2005 Memo, Ex. P to Scheiner Aff. in Support; Wright Aff., ¶¶ 11-13, 15; Memo, Ex. R to Scheiner Aff. in

Support).

Plaintiff has alleged unlawful employment discrimination in violation of both the State and City Human Rights Laws, which make it an unlawful discriminatory practice for an employer to refuse to hire, to discharge, or to discriminate in compensation or in the terms, conditions or privileges of employment because of, as relevant here, an individual's disability. Executive Law § 296 (1)(a); Admin. Code § 8-107 (1)(a).

Generally, the framework for the analysis of employment discrimination cases brought under the State and City Human Rights Laws has been the same as that established by the United States Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*). *See Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *Middleton v Metropolitan Coll. of NY*, 545 F Supp 2d 369, 373 (SD NY 2008). Under *McDonnell Douglas Corp.*, the plaintiff has the initial burden to prove a prima facie case of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by presenting legitimate and nondiscriminatory reasons for its employment decision. If the defendant raises a genuine issue of fact as to whether it discriminated against the plaintiff, the presumption raised by the prima facie case is rebutted, and the burden shifts back to the

plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante*, 90 NY2d at 629-630. Pretext may be demonstrated "when it is 'shown *both* that the reason was false, *and* that discrimination was the real reason'." *id.* at 630, quoting *St. Mary's Honor Ctr. v Hicks*, 509 US 502, 515 (1993) (emphasis in original).

However, recent New York state and federal decisions have made clear that the provisions of the City HRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005])(Restoration Act), are "to be construed more broadly than federal civil rights laws and the State HRL" in order to accomplish the "uniquely broad and remedial purposes" of the City HRL. *Williams v New York City Hous. Auth.*, 61 AD3d 62, 74 (1st Dept Jan. 27, 2009); *see* Admin. Code § 8-130; *Ajayi v Department of Homeless Servs.*, 2009 US Dist LEXIS 51124, *24 n 8, 2009 WL 1704329, *8 n 8 (SD NY June 18, 2009); *Winston v Verizon Servs. Corp.*, 2009 US Dist LEXIS 52595, *12 n 2, 2009 WL 1739899, *4 (SD NY June 16, 2009); *Wilson v N.Y.P. Holdings, Inc.*, 2009 US Dist LEXIS 28876, *85-86, 2009 WL 873206, *29 (SD NY Mar. 31, 2009); *Ibok v Securities Indus. Automation Corp.*, 2009 US Dist LEXIS 32534, *17-18, 2009 WL 855926, *7 (SD NY Mar. 25, 2009); *Mandrova v Seabreeze Apparel LLC*, 22 Misc 3d 1134[A], 2009 NY Slip Op 50423[U] (Sup Ct, NY County Feb. 5, 2009). To that end, courts now must conduct an "independent liberal construction analysis" of

claims brought under the City HRL. *Williams*, 61 AD3d at 66.

Notwithstanding the recognition of this mandate to conduct a liberal and independent analysis of claims brought under the City HRL, courts have continued to apply the analytical framework established in *McDonnell Douglas Corp.* in employment discrimination cases decided after the 2005 enactment of the Restoration Act. *See Koester v New York Blood Ctr.*, 55 AD3d 447, 448 (1st Dept 2008); *Jordan v Bates Adv. Holdings, Inc.*, 46 AD3d 440, 442 (1st Dept 2007)(state law claim analyzed, but city law claim dismissed under same analysis); *Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 750 (Sup Ct, NY County 2006 [Acosta, J.]); *Mandrova v Seabreeze Apparel LLC*, 22 Misc 3d 1134[A], 2009 NY Slip Op 50423[U], *supra*; *Tu v Loan Pricing Corp.*, 21 Misc 3d 1104[A], 2008 NY Slip Op 51945[U], *8-9 (Sup Ct, NY County 2008); *Hanna v New York Hotel Trades Council*, 18 Misc 3d 436, 437-438 n 1 (Sup. Ct., NY County 2007); *Ajayi*, 2009 US Dist LEXIS 51124 at *24 n 8, 2009 WL 1704329, *8 n 8; *see also Winston*, 2009 US Dist LEXIS 52595 at *12 n 2, 2009 WL 1739899 at *4 (noting that plaintiff doubts the application of *McDonnell Douglas* but offers no alternative framework); *Wilson*, 2009 US Dist LEXIS 28876 at *85-86, 2009 WL 873206 at *29 (noting that "the precise contours of the amended New York City Human Rights Law ... and its analytical overlap with the familiar Title VII analysis remain unclear").

Accordingly, in this case, plaintiff must establish a prima

facie case of unlawful termination based on disability, by demonstrating that he suffers from a disability, he was qualified to hold the position, and he was discharged under circumstances giving rise to an inference of discrimination based on his disability. *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003); *Engelman v Girl Scouts-Indian Hills Council, Inc.*, 16 AD3d 961, 962 (2005); *see also Roberts v Ground Handling, Inc.*, 499 F Supp 2d 340, 357 (SD NY 2007). Defendant does not contest that plaintiff suffered from a disability as defined by the New York statutes, that he was qualified for the position, and that he was discharged. Defendant contends, however, that he was terminated for a legitimate, nondiscriminatory reason, namely, a reduction in force.

Plaintiff's allegations of discrimination rest primarily on the alleged conduct of department manager Sparke, and on the claim that another, similarly situated, non-disabled employee was not terminated at the time that plaintiff was. Although plaintiff does not claim that Sparke made any derogatory remarks about his disability (Mirza Dep. at 26), and does not claim that he was denied time off for his medical appointments and emergencies (*id.* at 17, 22), he claims that Sparke made a face, when plaintiff asked for leave, that showed he was unhappy that plaintiff had to go to the hospital so often (*id.* at 18, 23, 51). Plaintiff testified that Sparke offered him no assistance when he had chest pains, such as

calling an ambulance (*id.* at 18-19); did not ask how he was when he returned from knee surgery, or show any sympathy (*id.* at 18, 19, 25-26, 52); and seemed to be avoiding him when he returned from the hospital in August 2004 (*id.* at 26). Plaintiff further testified that Sparke made no comments to him when he needed knee surgery and needed to go to the hospital for chest pains, except to ask him, unsympathetically, what was happening to him (*id.* at 17, 24, 25). According to plaintiff, Sparke showed no concern for plaintiff's welfare, unlike managers before Sparke (*id.* at 51-52), and, as manager, Sparke should have consoled him and told him not to worry (*id.* at 19).

Plaintiff also testified that he did not understand why he received a poor evaluation, when all his previous reviews were good, and alleges that supervisor Shirley Barno never had negative comments about his work, and he could not explain why he got the marginal review (*id.* at 35). Although Barno signed the report and did not say she disagreed with it (*id.* at 35-36), plaintiff asserts that was because Barno could not say anything against a manager (*id.* at 36). Plaintiff contends that he received no indication from any supervisor that his work was not satisfactory, and that the poor review from Sparke was not warranted and was given to plaintiff because he had missed days of work due to his medical disability. Plaintiff also argues that evidence that a non-disabled employee with an equally low evaluation was not terminated

shows discrimination.

Assuming, for purposes of the instant motions, that plaintiff has made a prima facie showing of disability discrimination, defendant submits sufficient evidence that it had a legitimate, nondiscriminatory reason for terminating plaintiff's employment to rebut the presumption of discrimination. In his affidavit, Wright attests that defendant's Trade Services Operations processes trade documentation covering the financing of import and export transactions (Wright Aff., ¶ 3), and that since he became head of the department in 2002, its workforce has decreased in accordance with a decreasing volume of transactions as a result of changing industry demands (*id.*, ¶¶ 4-6). As head of defendant's Trade Services Operations, Wright monitors and works to improve the department's efficiency in processing transactions, and he determined, in early spring 2005, that a reduction in staff was necessary to increase the department's "efficiency ratio," which had decreased due to a decreased volume of work (*id.*, ¶¶ 6-8).

He determined, and advised department heads, that five employees needed to be terminated to increase the efficiency ratio, and that those five employees should be selected from the seven employees who received a rating of "4" for their 2004 performance review (*id.*, ¶¶ 10-11). As the Imports and Exports departments each had three employees with "4" ratings, Wright advised the managers of those departments that they each needed to select two

out of the three employees to be let go (*id.*, ¶¶ 12-13). Plaintiff was one of the three employees in Exports with a "4" rating, and he and another Exports employee, with a similar rating, were terminated. According to Wright, the third employee in Exports who was eligible for termination, a non-disabled employee, was retained, on the advice of his supervisors, because the quality and quantity of his work had improved (*id.*, ¶ 15; *see* Wright Memo, dated July 13, 2005; Ex. A to Wright Aff.).

It is well settled that a reduction in work force undertaken for financial reasons is a legitimate and nondiscriminatory reason for employment decisions. *See Matter of Laverack & Haines, Inc. v New York State Div. of Human Rights*, 88 NY2d 734, 738-739 (1996); *DiMascio v General Elec. Co.*, 27 AD3d 854, 855 (3d Dept 2006). Here, defendant also offers evidence that the method used to determine which employees would be terminated was nondiscriminatory.

Plaintiff's efforts to show that Sparke gave him a "4" rating because he was angry that plaintiff's disability caused him to miss days of work, are not supported by admissible evidence, and fail to raise a triable issue of fact as to whether defendant's proffered reason for termination was pretextual. To the extent that plaintiff argues that his performance was better than the non-disabled employee in his department who was not terminated, plaintiff relies on evidence which does not support his position

(*see* Sparke Memo dated Jan. 11, 2005, Ex. Q to Scheiner Aff. in Support). Neither does plaintiff offer any evidence that he was treated differently than other, non-disabled employees who were subject to termination. Plaintiff further fails to show that defendant hired a new employee to replace him.

Plaintiff's reliance on a document showing a ranking of employees in defendant's Trade Services Operation in 2004, which indicates that plaintiff was "Disabled," also is insufficient to raise a triable issue of fact as to the basis for his termination (*see* Staff Ranking - Exports, Ex. B to Wright Aff). Wright explains, without contradiction, that the "Disabled" notation next to plaintiff's name indicates that, because plaintiff was out of the office on disability at the time the ranking was done, he was not ranked (Wright Aff., ¶ 23). Neither, in any event, is there any evidence that this ranking list was used to select employees to be terminated in 2005. Notably, while plaintiff moves for sanctions against defendant for failing to produce this "smoking gun evidence," defendant submits credible evidence that this document in fact was produced to plaintiff during discovery in response to plaintiff's document demands (*see* Friedman Reply Aff.).

Thus, even considering all the evidence in a light most favorable to plaintiff, he offers insufficient evidence of actions or remarks made by defendant's decision-makers reflecting discriminatory animus to prove that defendant's legitimate reason

for terminating plaintiff was pretextual, or otherwise to warrant denial of summary judgment to defendant.

The branch of defendant's motion which seeks sanctions against plaintiff is denied. Although plaintiff, in reply, unnecessarily resubmitted his initial moving papers, including a nearly identical memorandum of law, the submission by itself does not demonstrate that plaintiff acted "to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130.1-1).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's cross motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 13, 2009
New York, New York

ENTER:

J.S.C.

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK