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SHORT FORM ORDER

INDEX No. 07-8075
CAL. No. 10-00228-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-2-10
ADJ. DATE 8-2-10
Mot. Seq. # 001 - MG; CASEDISP

EZIO VESSELLA, Plaintiff, - against - ASTRO MASONRY & SUPPLY COMPANY, LLC, Defendant.	FRANK & ASSOCIATES, P.C. Attorney for Plaintiff 500 Bi-County Boulevard, Suite 112N Farmingdale, New York 11735 GERALD LOTTO, ESQ. Trial Counsel to Borden, Skidell, Fleck & Stackel Attorney for Defendant 3330 Veterans Memorial Highway Bohemia, New York 11716

Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15 -29 ; Replying Affidavits and supporting papers 30-31 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for summary judgment dismissing the complaint is granted.

The instant action seeks relief based on the defendant employer's alleged discrimination and wrongful termination of the plaintiff's employment based on a disability, in violation of the New York State Human Rights Law. The plaintiff began his employment with the defendant as a truck driver in March of 2002. He was terminated in April of 2005. The complaint alleges that, throughout the course of his employment, the plaintiff performed his job in a satisfactory manner and was not criticized or disciplined for his work performance. It notes that he received raises from the defendant in May and September of 2004. The complaint alleges that prior to the plaintiff's employment with the defendant, in February of 1997, he was diagnosed with Multiple Endocrine Neoplasia Type 2A, and underwent surgery to remove his thyroid. At that time, he began seeing an endocrinologist for testing every six months to one year. In December of 2000, a tumor was found on plaintiff's left adrenal gland and he underwent surgery. In September of 2004, a small tumor was found on his right adrenal gland which required additional testing. As this testing could only be scheduled during the

day, the plaintiff either used vacation time or worked half day to attend these appointments. On January 3, 2005, the plaintiff sustained a work-related injury to his ankle and was unable to work for approximately three weeks. In February of 2005, the defendant sent the plaintiff to its own orthopedic surgeon for evaluation. The plaintiff was advised not to return to work for one week. The plaintiff presented a doctor's note to defendant, but the defendant refused to allow the plaintiff to follow the doctor's order or to make reasonable accommodations for him. On April 7, 2005, notwithstanding the plaintiff's need for time off to recover, the defendant terminated his employment based on his purported failure to return to work. The complaint alleges that this termination, and refusal to provide reasonable accommodation, amounted to an unlawful discharge in violation of the New York States Human Rights Law. The complaint seeks, *inter alia*, a judgment declaring that the defendant violated the New York State Human Rights Law, an injunction, and damages.

The defendant now moves for summary judgment dismissing the complaint on the grounds that the plaintiff is not entitled to recovery under the New York State Human rights Law.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***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, 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* ***McEniry v Landi***, 84 NY2d 554, 620 NYS2d 328 [1994]; ***Staskowski v Nassau Community Coll.***, 53 AD3d 611, 862 NYS2d 544 [2d Dept 2008]; ***Thide v New York State Dept. of Transp.***, 27 AD3d 452, 811 NYS2d 418 [2d Dept 2006]). Thus, under the facts of this case, the plaintiff is required to show that he had a disability that caused the behavior for which he was terminated (*see* ***McEniry v Landi***, *supra*; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, 306 AD2d 271, 761 NYS2d 94 [2d Dept 2003]). 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 (*see* ***McEniry v Landi***, *supra*; ***Thide v New York State Dept. of Transp.***, *supra*; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*). 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* ***Thide v New York State Dept. of Transp.***, *supra*; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*; ***Cooks v N.Y. City Transit Auth***, 289 AD2d 278, 734 NYS2d 207 [2d Dept 2001]).

In support of the motion, the defendant submitted, *inter alia*, the pleadings, the plaintiff's medical records, the plaintiff's deposition testimony, the affidavit of John Coconato, the deposition testimony of John Coconato, the affidavit of Anthony Esposito, the deposition testimony of Giuseppe Giaquinto (hereinafter Giuseppe), and the deposition testimony of Louie Giaquinto (hereinafter Louie). This evidence established the defendant's *prima facie* entitlement to summary judgment dismissing the action on the grounds that the plaintiff was not wrongfully terminated in violation of the New York Human Rights Law.

The evidence submitted demonstrated the defendant's entitlement to judgment, as a matter of law, by establishing that, at the time of the plaintiff's termination, he did not suffer a "disability" as defined by the New York Human Rights Law and/or that such "disability" did not engender the behavior for which he was terminated (*see*, ***Mortenson v Suffolk County Police Dept.***, 70 AD3d 700, 894 NYS2d 100 [2d Dept 2010]). Initially, the record belies the plaintiff's conclusory allegation that, at the time of his termination, he suffered a "disability" related to Multiple Endocrine Neoplasia Type 2A. Indeed, the plaintiff's sole allegation with respect to this condition was that, in September 2004, he was required to take time off for follow-up testing. It is undisputed that the plaintiff was permitted to take such time off to attend these appointments when necessary and that the need to attend such appointments were not the cause of the plaintiff's termination.

In a similar vein, the record belies the plaintiff's contention that, at the time of his termination, he suffered a "disability" related to his work-related ankle injury. The plaintiff sustained a work-related injury to his ankle on January 3, 2005. According to the plaintiff's testimony, he was instructed, by a physician, that he should not return to work for four to six weeks following the injury. The plaintiff did not apply for worker's compensation benefits, but was given three weeks off at full pay. He, thereafter, worked light duty assisting in the office, at full pay, for a fourth week. While the complaint alleges that in the beginning of February a physician told him to rest his ankle another week, the plaintiff admits that, after four weeks, he began driving again and continued driving up until the time of his termination, more than two months later. In addition, the plaintiff admits that, one or two days following his termination, he began employment with another company as a truck driver. Moreover, the evidence presented includes testimony and records indicating that during the time the plaintiff was purportedly disabled he was an active member of the volunteer fire department and continued to respond to calls. In any event, it is further noted that to the extent that the plaintiff contends that his ankle injury rendered him completely unable to drive, such injury would not qualify as a "disability" under the Human Rights Law (*see* ***D'Avilar v Cerebral Palsy Assns. of N.Y. State***, 63 AD3d 776, 880 NYS2d 515 [2d Dept 2009]; ***Rappo v New York State Div. of Human Rights***, 57 AD3d 217, 868 NYS2d 59 [1st Dept 2008]; ***Staskowski v Nassau Community Coll.***, *supra*; ***McCarthy v St. Francis Hosp.***, 41 AD3d 794, 840 NYS2d 800 [2d Dept 2007]; ***Fama v Am. Int'l Group, Inc.***, 306 AD2d 310, 760 NYS2d 534 [2d Dept 2003]; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*; ***Sherman v Kang***, 275 AD2d 1016, 713 NYS2d 597 [4th Dept 2000]; ***Lawson v High Bar Wholesale Food Distribs***, 217 AD2d 646, 629

NYS2d 807 [2d Dept 1995]; *see also*, ***Silk v Huck Installation & Equipment Div.***, 109 AD2d 930, 486 NYS2d 406 [3d Dept 1985]; *compare* ***Vig v New York Hairspray Co., L.P.***, 2009 NY Slip Op 6466, 5885 NYS2d 74 [1st Dept September 15 2009]). The Human Rights Law provides that, in matters involving employment, the term disability "shall be 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 or occupation sought or held (Executive Law 292[21][c]; *see* ***Staskowski v Nassau Community Coll.***, 53 AD3d 611, 862 NYS2d 544 [2d Dept 2008]). It is undisputed that the plaintiff's essential job duties with the defendant comprised driving a truck.

The evidence submitted also demonstrated the defendant's entitlement to judgment, as a matter of law, by establishing that the plaintiff's employment was terminated for a legitimate, non-discriminatory reason, which was unrelated to his alleged disability (*see* ***Flores v Doherty***, 71 AD3d 405, 894 NYS2d 751 [1st Dept 2010]; ***Thide v New York State Dept. of Transp.***, *supra*; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*; ***Hall v Paladino***, 210 AD2d 595, 619 NYS2d 402 [3d Dept 1994]; ***Taylor v New York Univ. Med. Ctr.***, 21 Misc3d 23, 871 NYS2d 568 [App. Term 2008]; *compare*, ***McEniry v Landi***, *supra*; ***Vig v New York Hairspray Co., L.P.***, *supra*). Indeed, the evidence submitted, which included the deposition testimony and affidavit of the defendant's general manager John Coconato, the deposition testimonies of the defendant's owners and/or operators Guiseppe and Louie Giaquinto, and the affidavit of the defendant's employee Anthony Esposito, established that the defendant had a valid reason for the plaintiff's termination. In this regard, Coconato testified that the plaintiff's work habits started to decline rapidly in the middle of 2004. Coconato, Guiseppe, Louie, and Esposito all testified, consistently, that the plaintiff was fired because of his poor work habits. Specifically, they testified that the plaintiff was frequently late, was frequently not where he was supposed to be during the course of the day, would frequently disappear and not respond when called on the radio, was caught sleeping in his truck on two separate occasions, was caught near his home and lying about his location, repeatedly called in sick because he had volunteered with the fire department the night before, was fighting with coworkers and was abusing the equipment. Esposito further averred that the plaintiff had admitted to him that he was caught driving his vehicle the wrong way and taking off to do something personal. Coconato testified that he talked to the plaintiff on at least three occasions with respect to his performance. Following his last conversation with the plaintiff, in March of 2005, he recommended that the plaintiff be terminated to Giuseppe and Louie. Both Giuseppe and Louie testified that they were told by several employees that the plaintiff was not fulfilling his job title and should be terminated. Louie testified that he had several conversations with the plaintiff about his performance and the plaintiff would tell him that he was "trying" and that he was having "family problems." Giuseppe and Louie recalled the conversation they had in which they discussed how they were unhappy with the plaintiff's performance, had given him more than enough chances, and were going to try to find somebody else. Louie testified that when he terminated the plaintiff, he told him that they were not going to need him anymore because he was not performing his job function. Coconato recalled that the day the plaintiff was terminated Giuseppe and Louie were annoyed because he had recently failed to come into work. Although the plaintiff denied some of this behavior during his deposition, he admitted that, on several occasions, he was late because he overslept, that he was caught driving in the opposite direction then he should have been traveling, and that he sometimes

stopped by the Fire Department where he volunteered for lunch. He also admitted that Giuseppe may have told him on one or two occasions that he needed to come in earlier. The plaintiff testified that he could not recall whether he was absent or came in late in the days prior to his termination.

In opposition to the defendant's *prima facie* showing, the plaintiff failed to submit sufficient evidence to raise a triable issue of fact as to whether he suffered a disability which engendered the behavior for which he was terminated, whether he could perform his duties in a reasonable manner with reasonable accommodation, whether his termination was based on his disability, or whether the reasons stated for his discharge were pretextual (*see* ***Thide v New York State Dept. of Transp.***, *supra*; ***Walker v Connetquot Cent. Sch. Dist.***, 7 AD3d 788, 776 NYS2d 848 [2d Dept 2004]; ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*; ***Hall v Paladino***, *supra*; ***Taylor v New York Univ. Med. Ctr.***, *supra*). Accordingly, the defendant's motion for summary judgment dismissing the complaint is granted. The Court declares that the defendant did not violate the New York State Human Rights Law, Executive Law § 296, *et seq.*, in terminating the plaintiff's employment (*see* ***Timashpolsky v State Univ. of N.Y. Health Sci. Ctr.***, *supra*; *see also*, ***Lanza v Wagner***, 11 NY2d 317, 229 NYS2d 380 [1962]).

Dated: 11/15/10

THOMAS F. WHELAN, J.S.C.