SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 4

SANTIAGO VALENTIN, JR.,

Plaintiff(s),

HON. JOHN A. FUSCO

-against-

DECISION AND ORDER

STATEN ISLAND UNIVERSITY HOSPITAL and JAMES WINSTON,

Index No. 104522/08

Motion No. 3909 - 002

Defendant(s).

The following papers numbered 1 to 6 were marked fully submitted on September 16, 2011.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendants STATEN ISLAND UNIVERSITY HOSPITAL and JAMES WINSTON, with Supporting Papers, Exhibits, and Memorandum of Law (dated November 30, 2010)	1,2
Affirmation in Opposition by Plaintiff, with Exhibits and Memorandum of Law (dated January 8, 2011)	3,4
Reply Affirmation and Memorandum of Law by Defendants STATEN ISLAND UNIVERSITY HOSPITAL and JAMES WINSTON (dated April 5,2011)	5,6

Upon the foregoing papers, defendants' motion for summary judgment is granted and the complaint is dismissed.

Plaintiff commenced this employment discrimination action against defendants STATEN ISLAND UNIVERSITY HOSPITAL (hereinafter "SIUH") and JAMES WINSTON, alleging

violations of the State and City Human Rights Laws (Executive Law §296 and section 8-107 of the Administrative Code of the City of New York), following the termination of his employment as a Senior Patient Care Assistant by SIUH in June of 2008.

By way of background, plaintiff was initially hired by SIUH in 2003 as an Environmental Services Worker ("ESW") and, as a member of Local 1199 SEIU United Healthcare Workers East, the terms and conditions of his employment were governed by a Collective Bargaining Agreement entered into between the League of Voluntary Hospitals and Homes of New York (of which SIUH is a member) and said Union. To the extent relevant, it appears that plaintiff sustained a work-related injury to his right knee in March of 2004, and was absent from work for several days. According to plaintiff, he was subsequently threatened by his then-supervisor, defendant JAMES WINSTON (hereinafter WINSTON), who required him to return to work notwithstanding the purported need for further physical therapy for his knee. Plaintiff did not return, and as a result claims to have received a Notice of Disciplinary Action from WINSTON regarding his continuing absenteeism.

Upon returning to work later that year, plaintiff allegedly sustained another work-related injury, this time to his back, in February of 2005, and was purportedly advised to stay out of work for one week in order to allow his back to heal properly. He later applied for Worker's Compensation and was granted a medical leave of absence. During that time period, plaintiff appears to have requested that his employer transfer him to a position that was less strenuous, but was denied a transfer because other employees were said to have had greater seniority.

Throughout 2006, plaintiff claims that he would occasionally take off from work in order to receive medical treatment for his back injury. He further claims that on each such occasion, he provided defendants with medical documentation explaining his absence. This was disputed by SIUH, which claimed that plaintiff failed to comply with its policies and procedures concerning leaves of absence by failing to provide the proper medical documentation of his need for medical treatment.

In May of 2007, SIUH sent plaintiff a letter regarding his failure to comply with these policies and procedures, but claims that plaintiff never responded. Accordingly, plaintiff's employment by SIUH was terminated on or about June 4, 2007. Plaintiff thereupon filed a grievance, which eventually resulted in his reinstatement in August, 2007. From that time forward, plaintiff remained on medical leave related to his back injury until he was able to obtain a another position commensurate with his physical abilities.

In March of 2008, SIUH accepted plaintiff's request for a job transfer to the position of Senior Patient Care Assistant ("SPCA"), which SIUH claims represented a promotion. After he was medically cleared for the SPCA position without physical restrictions by his treating physician, plaintiff was automatically placed on three months probation in his new job. In this particular, SIUH maintains that one of the standard requirements to pass probation is that the employee perform in a satisfactory manner, which included regular attendance. However, it is undisputed that plaintiff was absent from work on at least 13 occasions during his probationary period. Based on these allegedly excessive work absences and an alleged incident of violence in the workplace, it was determined that plaintiff had failed to successfully complete his

probationary period, and his employment with SIUH was again terminated. As a result, plaintiff commenced the within action, claiming, *inter alia*, that he was subjected to discrimination and fired due to his physical disability in violation of both the State and City Human Rights Laws (hereinafter "NYSHRL" and "NYCHRL", respectively), as well as in retaliation for his success in filing a grievance against the Hospital which resulted in his reinstatement in August 2007.[1] Plaintiff also claims that upon his failing probation in his new position, he should have been returned to his previous position as an ESW.

In the current application, defendants move for summary judgment contending that there are no material issues of fact requiring a trial of this action. According to defendants, section 301 of the Labor Management Relations Act (29 USC §185[a]) establishes the exclusivity of federal jurisdiction in law suits involving the alleged violation of contracts between an employer and a labor organization; that plaintiff's claims against SIUH arise out of its alleged violation of the terms of a union bargaining agreement; and that any state claims made by plaintiff under NYSHRL and NYSHRL have been preempted by federal labor law, thereby depriving this Court of subject matter jurisdiction.

Alternatively, defendants argue that each of plaintiff's discrimination claims must fail as a matter of law since there is no proof that his employment with the Hospital was terminated because any disability or attempt at retaliation, or that the Hospital failed to accommodate his purported disability. Instead, defendants maintain that they tried to accommodate plaintiff on

[1] Plaintiff was terminated at that time for allegedly failing to follow Hospital procedure requiring the medical documentation of sick leave.

numerous occasions by (1) allowing him to take time off when he needed medical treatment; (2) allowing him to take extensive leaves of absence in accordance with the Family Medical Leave Act even though he did not qualify for such leave; and (3) and offering him a new position at higher pay after he returned from medical leave and was physically "cleared" for that job by his treating physician.

With regard to plaintiff's claim of retaliation, defendants argue that plaintiff never engaged in a "protected activity", which is a necessary element of any claim of retaliation (*see* Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 312-313). Although plaintiff claims that the filing of a grievance upon termination constitutes a protected activity, defendants argue that plaintiff's union representatives have admitted that the grievance did not include any claim that defendants had engaged in any type of discriminatory conduct. Accordingly, defendants contend that plaintiff cannot now be heard to claim that he was retaliated against based on the success of a grievance against discrimination in the work-place. They further argue that even if plaintiff had engaged in a protected activity, there is no proof that any such activity was causally related to the subject termination almost one year later. According to defendants, when plaintiff's employment was reinstated following his grievance, he remained on inactive status until March of 2008, when his bid for transfer to a SPCA position was accepted, he was medically cleared to return to work as a SCPA, and his acceptance of that position constituted a promotion accompanied by a salary increase. These facts, according to defendants, belie any inference that plaintiff's final termination was causally related in any way to his prior successful grievance.

Finally, defendants contend that WINSTON is entitled to summary judgment since there is no proof that he aided or abetted the hospital, or actually participated in any of the alleged discriminatory acts against plaintiff. In fact, defendants argue that there is no proof that WINSTON had any association with plaintiff after April of 2007, when the latter ceased employment as an ESW. Therefore, WINSTON cannot be held accountable for any alleged discrimination which took place after plaintiff accepted the job of SCPA.

In opposition, plaintiff contends that he became disabled due to work-related injuries sustained while working as an ESW, and that he was thereafter routinely discriminated against and eventually fired in 2008 due to these disabilities. According to plaintiff, after he injured his knee, it was necessary that he take some time off from work. It was then that he claims the first act of discrimination occurred, *i.e.*, when he was threatened by his supervisor, defendant WINSTON, that he was not allowed to take any additional time off from work. According to plaintiff, it was after that occurrence that he was denied his numerous requests for a job transfer.

Plaintiff further contends that after he sustained a second work-related injury as an ESW in 2007, he was again required to take time off from work in order to receive physical therapy and medical treatment. During that time, plaintiff claims that he consistently provided the hospital with the proper medical documentation regarding his absences. Contrary to defendants' contentions, he denies the hospital's claim that he never responded to its requests, *e.g.*, for medical documentation regarding this second injury and the resulting need to take additional time off. Instead, he claimed that he was wrongfully terminated in retaliation for taking time off. As a result, plaintiff sought the assistance of his union and filed a grievance which, after a hearing,

resulted in his reinstatement to employment by the hospital. He thereafter remained on medical leave under the Family and Medical Leave Act ('FMLA") until March of 2008. It is undisputed that upon his return to work, plaintiff was transferred to the position of Senior Patient Care Assistant.

Notwithstanding this transfer, which he had previously requested and for which he had been medically cleared, plaintiff claims that his new position proved extremely stressful and physically demanding as a result of his prior knee and back injuries. He alleges that he made numerous complaints of these medical problems interfering with his performance, but was told to do his best and that he would be eligible for a transfer to a different position if his current job became too demanding. In fact, plaintiff claims that he was assured that a transfer to a less demanding position was being worked on. Plaintiff further maintains that between April and July of 2008, he applied unsuccessfully approximately 13 times for transfer to a less physically demanding position. Moreover, he claims that despite these physical difficulties, he received several letters from patient's families commenting on his outstanding patient care. Nevertheless, plaintiff was told that he had failed his probation due to excessive absences, and was fired.

According to plaintiff, the adverse employment action of which he complains is comprised of his twice being fired by defendant hospital, and that its claims of excessive absence were meant to conceal that he was wrongfully fired as a result of his medical disabilities, as well as in retaliation for the filing of a successful grievance. As for the first firing, plaintiff claims that he was terminated under circumstances giving rise to an inference of discrimination due to the absences necessitated by his physical disabilities rather than the claimed failure to provide proper

medical documentation. As for his failing probation as a SCPA due to excessive absenteeism, plaintiff argues that it is undisputed that the Hospital knew of his medical disabilities when he was given the position and wrongfully refused to accommodate his request for a physically less demanding job.

Plaintiff argues that his termination as a SCPA was also in retaliation for his opposition to and the complaints made about his initial wrongful termination, as well as his complaints of disability discrimination upon being reinstated. Under the circumstances of this case, it is argued that the foregoing must be seen as an adverse employment action. In support, plaintiff maintains that his termination as a SCPA less than a year after he won his grievance is strong evidence of retaliation, as is the fact that he was placed in an extremely stressful and demanding job for someone with both a knee and a back injury. In addition, he notes that all of his requests for transfer to a less stressful job were rejected, which forced him to take time off and resulted in his termination for excessive absenteeism. Finally, plaintiff claims that the short time span between the two firings demonstrates the presence of a causal connection which only bolsters his claims of retaliation. In this regard, plaintiff notes that his second termination occurred only months after successfully grieving his first termination and as a result of the Hospital's continued refusal to accommodate his disability by transferring him to a less stressful position within the hospital.

Defendants' motion for summary judgment is granted.

With regard to the issue of federal preemption, it was previously held by this Court in its Decision and Order dated May 19, 2009, that plaintiff's claims of discrimination were properly brought in the Supreme Court. As is evident on its face, the complaint specifically alleges causes

of action under both the City and State Human Rights Laws for disability discrimination, and involves matters separate and apart from any contractual dispute that may be governed by the relevant collective bargaining agreement. The mere presence of a binding collective bargaining agreement does not required an employee to forfeit his right to a judicial forum in which to pursue his or her claims of discrimination (*see* Grovesteen v. New York State Pub. Empls. Fedn., AFL-CIO, 265 AD2d 784). For any surrender of such right of access to the courts, the contractual waiver must be "clear and unmistakable" (*see* Wright v. Universal Mar Serv Corp., 525 US 70, 80). The agreement at bar is not of this nature. Accordingly, plaintiff's election to pursue a judicial resolution was proper (*see* Ambrosino v. Village of Bronxville, 58 AD3d 649, 652).

Nevertheless, defendants are entitled to summary judgment. In this regard, defendants have successfully established their prima facie right to judgment as a matter of law on the claims of discrimination brought by plaintiff, while the latter has failed to rebut this showing or raise a triable issue of fact.

In order to prevail on a motion for summary judgment in a case such as this, a defendant must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for the challenged actions, the absence of any material issue of fact as to whether said explanations are pretextual. In that event, summary judgment constitutes "a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources" (Matter of Suffolk County Dept. of Social Servs. [Michael V.] v. James M., 83 NY2d 178, 182).

With regard to both the State and City Human Rights Laws, a plaintiff carries the initial burden of establishing a prima facie case of discrimination by demonstrating that he or she (1) is a member of a protected class; (2) was qualified to hold the position; (3) was the subject of termination or suffered another adverse employment action; and (4) said adverse action occurred under circumstances giving rise to an inference of discrimination (*see* Ferrante v. American Lung Assn., 90 NY2d 623, 629). If satisfied, the burden then shifts to the defendant/employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*id*. [internal quotation marks and citations omitted]). However, in order to succeed on a claim of discrimination, it is plaintiff who bears the ultimate burden of proving that any presumptively legitimate reasons proffered by the defendant were merely a pretext for discrimination, *i.e*, that the stated reasons were false and that discrimination was the real reason for the employer's actions (*id.* at 629-630).

At bar, while plaintiff alleges that he was discriminated against because of (1) his physical disabilities and (2) in retaliation for the filing a successful grievance, it is the opinion of this Court that defendants have provided sufficient proof establishing a legitimate, nondiscriminatory reason for his eventual discharge, *i.e*., that he failed probation as a SPCA due to excessive absenteeism. In opposition, plaintiff has failed to raise triable issues of fact establishing that the reasons for dismissal were (1) false and (2) merely a pretext for discrimination or in retaliation for his prior success.

To establish a cause of action for disability discrimination, a plaintiff must show first, that he or she suffers from a disability, and next, that the disability caused the behavior for which he was terminated (*see* Matter of McEniry v. Landi, 84 NY2d 554, 558). The term "disability" is broadly defined under the NYSHRL as any physical, mental or medical impairment ... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or ... a record of such an impairment or ... a condition regarded by others as an impairment ... which, upon the provision of reasonable accommodations, do[es] 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]; *see* Staskowski v. Nassau Community Coll, 53 AD3d 611). The NYCHRL defines "disability" more briefly as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." (N.Y. City Admin. Code §8-102[16][a]). In either event, the law is designed to prevent discrimination against a person who has a disability, but who can still function as a productive worker with reasonable accommodation (*see* Giaquinto v. New York Tel Co., 135 AD2d 928). Also, an employer's failure to provide a reasonable accommodation to an employee's known disability is a form of discrimination under both the NYSHRL and NYCHRL. However, if the individual's disability actually prevents he or she from performing the job in a reasonable manner, then a discharge based on poor performance does not constitute unlawful discrimination (*id*. at 929). Moreover, it should be noted that an employer's obligation to provide reasonable accommodation does not require that it hold a position open indefinitely for occupation by an injured or temporarily disabled employee (*see* Parker v. Columbia Pictures

Industries, 204 F3d 326, 338 [2d Cir 2000; *cf.* Gross v. FBL Fin Servs, __US __, 129 SCt 2343 [2009]). Neither is an employer is not required to provide a disabled employee with either extended paid leave or indefinite unpaid leave (*see* Scott v. Memorial Sloan-Kettering Cancer Center, 190 FSupp2d 590, 597 [SDNY 2002]).

Here, even though plaintiff claims to be disabled due to his previous work-related injuries, the evidence before the Court indicates that plaintiff was reasonably accommodated by providing him with significant leaves of absence following each of his alleged injuries. In fact, it appears that he was permitted to remain on medical leave longer than the time to which he was entitled. Additionally, notwithstanding his subsequent probationary discharge, he was ultimately "promoted" to a higher-paying position, for which he concedes he received medical clearance. Also, since regular attendance is usually a fundamental element of employment (*id.*), a discharge based on a disability which actually prevents the employee from reporting to work or performing his job in a reasonable manner does not constitute unlawful discrimination (*see* Camporeale v. Airborne Freight Corp., 732 FSupp 358 [EDNY 1990] affd 923 F2d 842 [2d Cir 1990]; *cf.* Executive Law §296[1][a]; N.Y. City Admin. Code §8-107[1][a]). Since it is undisputed that plaintiff at bar was absent from work on at least 13 occasions during his probationary period as a SCPA due to his alleged disability, his discharge did not constitute an unlawful discriminatory practice (*see* Matter of Silk v. Huck Installation & Equip. Div., 109 AD2d 930, 930-931).

Insofar as plaintiff asserts a claim of retaliation, under both the State and City Human Rights Laws it is unlawful to retaliate against an employee for opposing or contesting alleged discriminatory practices (*see* Executive Law §296[7]; N.Y. City Admin Code, §8-107[7][i]).

However, in order to state such a claim, a plaintiff must show that he or she (1) has engaged in a protected activity; (2) the employer was aware of such participation; (3) an adverse employment action was taken based upon that activity; and (4) there exists a causal connection between the protected activity and the adverse action (see Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 313; *see also* Lambert v. Macy's East, Inc., 84 AD3d 744).

In this case, plaintiff claims that SIUH fired him in retaliation for filing a grievance against his 2007 firing and successfully having his employment reinstated. However, it is the opinion of this Court that plaintiff's claim of retaliation fails on several levels. In the first instance, plaintiff has failed to establish that he engaged in a protected activity. In particular, the filing of a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim as plaintiff alleges (*id.* at 307). Here, plaintiff's grievance challenged his termination for failing to comply with Hospital practices and procedures, not unlawful discrimination. Secondly, plaintiff has failed to successfully establish a causal connection between the success of his grievance and his subsequent termination for excessive absenteeism. Contrary to plaintiff's contention, the time-frame separating the grievance and his failure of probation is not a sufficient basis, standing alone, to establish a causal connection between the former and his termination (*id.* at 313). In this regard, it should be noted that plaintiff never raised the issue of discrimination during the grievance process, or at any time proximate to those proceedings.

Finally, with regard to plaintiff's claim against defendant WINSTON, it is well settled that an individual employee may be held liable for aiding and abetting discriminatory conduct if that

individual actually participates in the conduct of an employer giving rise to the discrimination claim (*see* Matter of Medical Express Ambulance Corp. v. Kirkland, 79 AD3d 886, 888) . However, where no violation of either statute has been established against an employer, an individual cannot be held liable for aiding and abetting (*see* Strauss v. New York State Dept. of Educ., 26 AD3d 67, 73). Hence, in light of the above findings, defendant WINSTON cannot be held individually liable since his employer has been free of any discriminatory conduct. In any event, there is no proof raising triable issues of fact with regard to WINSTON's involvement in the alleged discrimination against plaintiff. Even though plaintiff reported to WINSTON during the first four years of his employment with SIUH, there is no proof that WINSTON aided and/or abetted any discriminatory conduct against plaintiff subsequent to the filing of his grievance. In fact, he was no longer plaintiff's supervisor at the time that the alleged discrimination took place. Therefore, WINSTON is also entitled to judgment dismissing the claims against him.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and the complaint is hereby dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

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Hon. John A. Fusco, J.S.C.

Dated: November 23, 2011