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SHORT FORM ORDER

INDEX : 25407/12

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT:
Hon. ARTHUR G. PITTS

ROBERT CAHILL,

Plaintiff,

- against-

THE STATE OF NEW YORK STONY BROOK UNIVERSITY HOSPITAL (aka: STONY BROOK MEDICAL CENTER), and THE UNIVERSITY OF THE STATE OF NEW YORK AT STONY BROOK,

Defendants.

ORIG. RETURN DATE: 3/7/13
ADJOURNED DATE 3/7/13
MOTION SEQ. NO.:002-CDISPSJ

COPY

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Upon the following papers numbered 1 to 18 read on this motion dismissal
Notice of Motion and supporting papers 1-7 Notice of Cross-Motion and supporting papers
Affirmation/affidavit in opposition and supporting papers 8-10 affirmation/affidavit in reply and supporting papers _ Other 11-12/13-14/15-16/17-18 ; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendant The State University of New York, Stony Brook University Hospital (a/k/a Stony Brook Medical Center) and The University of the State of New York at Stony Brook's motion for an order dismissing plaintiff Robert Cahill's complaint is determined as follows:

The matter at bar is one sounding in unlawful discrimination pursuant to Human Rights Law, Executive Law 296 alleged on the basis of the plaintiff Robert Cahill age, sex and disability. Section 296 (1) (a) of the Executive Law provides that it shall be unlawful discriminatory practice "for an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges or employment."

The plaintiff is a 55 year old man who has been employed at defendant Stony Brook University Hospital since 1984, initially as a clinical assistant, and since 1989 as a nurse. In February, 2006 he

sustained a detached retina to his right eye resulting in permanent blindness to that eye. His personal physician examined him and gave written certification that he could return to work. Two other physicians also certified that he could return to duty. The defendant directed the plaintiff to be examined by three other physicians, each of who concluded that he could return to work. Notwithstanding those findings, the plaintiff alleges that the defendant waited approximately 10 months, until June, 2008, to advise him to return to work. When he returned to work he was not assigned to his prior position in the emergency department due to concerns about his ability to perform. After numerous requests and repeating and passing the EKG course and Critical Care Test, he was assigned to the emergency department in July or August, 2008, although not in the supervisory position he had previously held but as a staff nurse.

In or about June or July, 2009 the plaintiff received an unsatisfactory work evaluation and was informed that he had to submit to additional examinations regarding his eye. The evaluation was subsequently changed to satisfactory, although he was still required to undergo an additional examination. On July 22, 2009 he was examined by Dr. Gideon Schneck and was again, certified as fit to perform the duties of the Teaching and Research III position. Notwithstanding such conclusion, the plaintiff was assigned, not in a Teaching Research III position in the emergency department, but to a position handling patients who were admitted to the hospital but had not yet been assigned inpatient units.

An issue arose regarding getting medications on time with both the plaintiff and a female nurse assigned to his unit, and although they both met with a supervisor, only the plaintiff was called in for a counseling session on January 19, 2011. On or about June 14, 2011 the defendant Hospital issued a "Notice of Interrogation" to the plaintiff, said interrogation having taken place on that same date. On July 18, 2011 the defendant Hospital issued a "Notice of Discipline" against the plaintiff. A second "Notice of Interrogation" was issued on or about September 1, 2011, said interrogation having been held on September 9, 2011. A second "Notice of Discipline" was issued against the plaintiff on October 21, 2011. A third "Notice of Interrogation" was issued to the plaintiff and the interrogation was conducted on November 17 and December 1, 2011. On or about December 29, 2011 a fourth "Notice of Interrogation" was issued and the interrogation took place on January 6, 2012. A "Notice of Discipline" was issued against the plaintiff by the defendant Hospital on January 9, 2012. A fifth "Notice of Interrogation" was issued on or about January 19, 2012 and the interrogation was conducted on January 20, 2012. On or about February 21, 2012 the plaintiff was suspended without pay for an unspecified period of time.

The instant action was commenced by the filing of the summons and complaint on August 17, 2012, the plaintiff alleging in part that every discriminatory and disciplinary actions that were taken against him occurred subsequent to his disability. He further alleges that the disciplinary actions were imposed by female supervisors of the defendant Hospital while other younger female nurses, not disabled, were provided with greater support and accommodation, both clerically and professionally.

The defendants now move for an order dismissing the plaintiff's complaint on the grounds that it is time barred pursuant to CPLR 214 as well as that the complaint fails to state a cause of action pursuant to CPLR 3211 (a) (7). In determining whether a complaint pleads a viable cause of action, "the sole

criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." (***1414 Realty Corp. v. G & G Realty*** **Co** 272 A.D.2d 309, 707 N.Y.S.2d 885 [2nd Dept. 2000] citing ***Guggenheimer v. Ginzburg,*** 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182; see, ***Sutton v. Aurnou,*** 149 A.D.2d 687, 540 N.Y.S.2d 487) On a motion to dismiss addressed to the pleadings, the material allegations of the complaint are deemed to be true and the pleader given the benefit of every possible inference. The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. (***Marini v. D'Atolito,*** 162 A.D.2d 391, 557 N.Y.S.2d 45 [1st Dept. 1990])

"'To state a prima facie case of employment discrimination due to a disability under both the Executive Law 296 and the New York City Administrative Code 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' (***Ruane-Wilkens v. Board of Edu of City of NY,*** 56 AD3d 648, 649, 868 N.Y.S.2d 112 [2nd Dept 2008]); citations omitted. For these purposes (see Executive Law 292 [21]), the term 'disability' is limited to those conditions, which, upon the provision of reasonable accommodation, do not prevent the complainant from performing in a reasonable manner the activities involved in the job held (see ***Staskowski v. Nassau Community College,*** 53 AD3d 611, 862 N.Y.S.2d 544 [2nd Dept 2008]; ***McKenzie v. Meridan Capital Group, LLC,*** 35 AD3d 676, 677, 829 N.Y.S.2d 129 [2nd Dept 2006]). Thus, the law is designed to prevent discrimination against a person who has a disability but who, can still be a productive worker with reasonable accommodation. (see ***Giaquinto v. New York Tel Co.,*** 135 AD2d 928, 522 N.Y.S.2d 329 [3rd Dept 1987]) If the individual's disability actually prevents him or her from performing the job in a reasonable manner, then a discharge based on poor performance does not constitute unlawful discrimination. In order to set forth a prima facie case of failure to accommodate, a plaintiff must show that (1) he has a disability, (2) his employer had notice of the disability, (3) he could perform the essential functions of his job with reasonable accommodations, and (4) the employer refused to make such reasonable accommodations. (see ***Graves v. Finch Pruyn & Co.,*** 457 F3d 181, 184 [2d Cir 2006]) " (***Valentin v. Winston,*** 23 Misc 3d 1128 (A), 889 N.Y.S.2d 508 [Sup Ct, Richmond Cty 2009])

Human Rights Law 292(21) provides in part "that all provisions of this article dealing with employment, the term 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." As such, it is clear that to plead a cause of action for discrimination based upon a disability pursuant to Human Rights Law 292, the complaint must set forth allegations of an impairment which upon the provision of a reasonable accommodation, does not prevent him from reasonably performing his job. Herein, the complaint fails to allege such disability, and accordingly, the defendants' motion to dismiss the cause of action for disability based discrimination is granted.

By way of his complaint, the plaintiff also pleads a cause of action sounding in sex or gender based discrimination. The elements of a cause of action for unlawful termination based on gender are as follows:

(1) that he was within the protected class; (2) that he was qualified for the position in question; (3) he was denied the position; and (4) that the denial occurred under circumstances which give rise to an inference of unlawful discrimination (***Gilroy v. Continental Corporation,*** 237 A.D.2d 251, 655 N.Y.S.2d 397 [2nd Dept 1997]) Herein, the plaintiff has failed to plead allegations which would support an inference that he had suffered an adverse action because of gender. Although the complaint alleges certain instances which he submits are a basis of a gender based claim, it does not support an action for gender based discrimination because the allegations fail to plead that his treatment was different from a female nurse under similar circumstances. In support of the instant motion, the defendants correctly, by an analogy, submit that the plaintiff fails to allege that a woman returning to work after medical leave was exempted from re-orientation or being assigned preceptors as he was. Furthermore, the inference may be drawn from direct evidence, statistical evidence, or that the position discharged from was filled by a person not from the same protected class, none of which was pled. (***Anthony v. Nemic,*** 225 AD2d 883, 638 N.Y.S.2d 529 [3rd Dept 1996]) As such, the defendants motion to dismiss the cause of action for discrimination based upon gender is granted.

The complaint further pleads a cause of action sounding in age based discrimination. In pleading a cause of action sounding in age based discrimination pursuant to Executive Law 296, the plaintiff must establish that "(1) he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination." (***Stephenson c. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO,*** 6 N.Y.3d 265, 270, 811 N.Y.S.2d 633 [2006]) The plaintiff must further show that he was replaced by a person younger than himself, produce direct evidence of discriminatory intent or produce statistical evidence of discriminatory conduct. (***Mayer v. Manton Cork Corporation,*** 126 A.D.2d 526, 510 N.Y.S.2d 649 [2nd Dept 1987]) Herein, the plaintiff's complaint fails to proffer any allegations of discriminatory intent, knowledge of statistical evidence of age discrimination, or that he was replaced by a younger person, necessary elements to the cause of action pled. Accordingly, the motion to dismiss the cause of action for discrimination based on age is also granted.

The plaintiff's final cause of action is a claim based upon a hostile work environment. It is well settled that a hostile work environment exists when, judged by a reasonable person, the environment is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the circumstances of the plaintiff's employment. (***Quinn v. JPMorgan Chase,*** 12 Misc 3d 1160 (A), 818 N.Y.S.2d 212 [Sup Ct, New York Cty, 2006]) The elements of a cause of action for a claim based upon a hostile work environment are (1) the plaintiff is a member of a protected class; (2) the conduct or words upon which the claim is based were unwelcome; (3) the conducted or words were prompted solely because of his protected status; (4) the conduct or words created a hostile work environment which affected a term or condition of his employment; and (5) the defendant is liable for the conduct. The conduct complained of must be both objectively and subjectively offensive; that is, a reasonable person must find it offensive and the plaintiff must perceive it as such. (***Quinn v. JPMorgan Chase***, supra)

" The standard for a hostile work environment claim is a demanding one. The plaintiff must prove that the conduct was offensive, pervasive and continuous enough to amount to a constructive discharge. (see ***Kotcher v,. Rosa & Sullivan Appliance Ctr., Inc.,*** 957 F.2d 59, 62-62 (2d Cir. 1992) .....Among the factors to be considered in determining whether conduct is sufficiently hostile under the totality of the circumstances are: frequency; severity; whether the conduct is physically threatening or humiliating; and whether it interferes with an employee's performance." (***Scott v. Memorial Sloan-Kettering Cancer Center,*** 190 F. Supp 2d 590, 599 [SDNY 2002])

The acts pled by the plaintiff in his complaint which he alleges constitute a basis for a finding of a hostile work environment fail to meet the above criteria. Allegations that he was not allowed to return to work in his former position, requiring to attend a re-orientation class, assigning him preceptors and questioning him about job performance are clearly insufficient to meet such burden. As such, the defendants' motion seeking dismissal of the cause of action for a claim based on a hostile work environment is granted.

This shall constitute the decision and order of the Court.

Settle judgment.

So ordered.

Dated: Riverhead, New York
May 30, 2013

J.S.C.

CHECK ONE: _XX_ FINAL DISPOSITION ___ NON-FINAL DISPOSITION