

**Cooney v City of New York Dept. of Sanitation**

2013 NY Slip Op 33360(U)

April 30, 2013

Sup Ct, New York County

Docket Number: 650113/2013

Judge: Geoffrey D. Wright

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

JUDGE GEOFFREY D. WRIGHT

PRESENT: \_\_\_\_\_  
*Justice*

PART 62

Index Number : 650113/2013  
COONEY, ROBERT  
vs  
CITY OF NEW YORK DEPARTMENT  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 4, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in  
accordance with the annexed hereto decision

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

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: 4/30/13

\_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
ROBERT COONEY,

Plaintiff

Index # 650113/2013

-against-

DECISION

CITY OF NEW YORK DEPARTMENT OF  
SANITATION, NEW YORK CITY CIVIL SERVICE  
COMMISSION.

Defendant.

**Present:**

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion to Dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 2 _____
Replying Affidavits.....	_____ 4 _____
Memorandum.....	_____ 3 _____
Other.....cross-motion.....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant, New York Department of Sanitation (“DSNY”) move to dismiss pursuant to CPLR 3211(a)(7) the complaint against them by Plaintiff, Robert Cooney which seeks to challenge the decision of DSNY’s refusal to hire him and that of the New York City Civil Service Commission (“CCSC”) as the appellate agency who made the final decision to disqualify him on the basis of his disability. Plaintiff claims discrimination under the New York City/New York State Human Rights law.

In 2007 Plaintiff took and passed the written and physical test for Sanitation Worker. In August 2011 Plaintiff was advised he would be hired off the list created by the test. He appeared for a pre-employment medical exam at the DSNY medical facility and revealed he had psoriasis on his body. Plaintiff explained at that time, he was being

treated by his doctor for his psoriasis with a topical cream and ointment. Dr. Remy Obas, DSNY Medical Director (“OBAS”) reviewed the medical documents he had been provided by Dr. Ashely, the DSNY physician who examined Plaintiff and determined that Plaintiff was not medically qualified for the position. On or about September 26, 2011 Plaintiff received a Notice of Medical Disqualification from DSNY informing him it had been determined that the psoriasis on exposed areas, i.e., his hands, was still symptomatic. In addition, Plaintiff was advised of his right to appeal and that his appeal must explain why he believes the action was incorrect and that he could provide supporting medical evidence.

On October 6, 2011, Plaintiff appealed his determination to the CCSC. In support of his appeal, he submitted a note from his physician, Dr. Sara L. Tarsis (“Tarsis”) which stated Plaintiff had been seen on October 4, 2011 “with a resolving dermatitis on his palms” and that “the condition should resolve with typical conditions and should not interfere with his ability to work.” In their response to Plaintiff’s appeal, CCSC submitted a letter from Obas which noted that a physical exam was performed by Dr. Ashley and had confirmed that Plaintiff had psoriasis on the palms and upper thigh and that plaintiff had “failed to meet the medical standard for skin disorders,” as set forth in DSNY’s medical standards. DSNY’s medical standards specifically note that psoriasis “may disqualify a candidate if continuous therapy is required and job environment aggravated the condition.” In addition, Obas explained in the letter, that cuts and lacerations were common for sanitation workers and that Plaintiff, in performing the job duties would be very susceptible to infections because of his skin lesions especially because they were on his hands. Obas pointed out that Plaintiff would often be working in conditions and exposed to elements that would likely irritate and exacerbate his condition and that the use of gloves, which were required for the job, would exacerbate plaintiff’s condition. He further explained that psoriasis was incurable and that studies show that even if a patient’s skin appears to be clinically healthy and free from lesions, such is not necessarily the case because the skin preserves a number of biochemical, immunological, and functional changes. Lastly, Obas commented that the note provided by Dr. Tarsis failed to state the condition is not chronic and therefore will not recur periodically.

Plaintiff’s appeal was denied on February 8, 2011 finding no reversible error in the documentation submitted by Plaintiff and DSNY. Plaintiff commenced an Article 78 on June 7, 2011. On January 4, 2012, Judge Louis York heard oral arguments. The Judge determined that because the CCSC was the final arbitrator they were a necessary party to the action and that Plaintiff failed to include them. The Judge found this fatal to the proceeding and dismissed the case. Plaintiff commenced the instant proceeding on or about January 8, 2013.

In the context of a motion to dismiss, employment discrimination cases are generally analyzed under a lenient notice pleading standard, whereby the plaintiff need not plead specific facts, but must give respondents "fair notice" of the nature and grounds of her claims. (*Swierkiewicz v Sorema N.A.*, 534 U.S. 506, 514-515, 122 S. Ct. 992, 152 L. Ed. 2d 1 [2002]; *Vig v New York Hairspray Co., LP*, 67 AD3d 140, 144, 885 N.Y.S.2d 74 [1st Dept 2009]). However, "bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true on a motion to dismiss." (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 891 N.Y.S.2d 32 [1st Dept 2009], quoting *O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 604 N.Y.S.2d 67 [1st Dept 1993]). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. *Nonnon v. City of New York*, 9 N.Y.3d at 827; *Harris v. IG Greenpoint Corp.*, 72 A.D.3d 608, 609, 900 N.Y.S.2d 44 (1st Dep't 2010).

The State Human Rights Law and the City Human Rights Law provide, in pertinent part, that it is an unlawful discriminatory practice for an employer, because of an individual's age, race, national origin, sex, or sexual orientation, "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Executive Law § 296 [1] [a]; Administrative Code §8-107 [1] [a]). Discrimination claims brought pursuant to the State and City Human Rights Laws are reviewed under a burden-shifting framework. (*McDonnell Douglas Corp. v Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 429, 821 N.E.2d 519, 788 N.Y.S.2d 281 [2004]; *Forrest v Jewish Guild for Blind*, 3 NY3d 295, 305, 819 N.E.2d 998, 786 N.Y.S.2d 382 n 3 [2004]). A plaintiff alleging discrimination has the initial burden of establishing, prima facie, that: (1) she was a member of a class protected by the statutes; (2) she was actively or constructively discharged or suffered adverse employment action; (3) she was qualified to hold the position from which she was terminated; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*Ferrante v American Lung Ass'n*, 90 NY2d 623, 629, 687 N.E.2d 1308, 665 N.Y.S.2d 25 [1997]; *Balsamo v Savin Corporation*, 61 AD3d 622, 623, 877 N.Y.S.2d 146 (2d Dept 2009); *Nelson v HSBC Bank*, 41 AD3d 445, 446, 837 N.Y.S.2d 712 (2d Dept 2007). Once the plaintiff satisfies this burden, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the adverse action taken. (*Stephenson v Hotel Empl. & Rest. Empl. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270, 844 N.E.2d 1155, 811 N.Y.S.2d 633 [2006]). If the defendant produces such evidence, the plaintiff must then show that the proffered reason was a pretext for discrimination. (*Ferrante*, 90 NY2d at 629-630).

In this case, Plaintiff argues that his psoriasis is a disability and that a reasonable

accommodation, specifically, allowing Plaintiff to utilize gloves would have been a sufficient and simple accommodation and that DSNY's failure to do this constitutes discrimination under the New York City/New York State Human Rights Law.

DSNY argues that all sanitation workers are required to wear gloves and that Dr. Obas specifically noted in his letter to the CCSC that gloves will only exacerbate the condition as *"performing this type of work with skin lesions, especially on the hands, makes one very susceptible to infections."* Moreover, DSNY argues that the Notice of Examination issued by the Department of Citywide Administrative Services ("DCAS") for exam 6063 clearly states that:

*"Medical guidelines have been established for the position of Sanitation Worker. You will be examined to determine whether you can perform the essential functions of the position of Sanitation Worker. Where appropriate, a reasonable accommodation will be provided for a person with a disability to enable him or her to take the examination, and/or to perform the essential functions of the job."*

They further argue that as part of their job duties, workers are exposed to germs, toxic chemicals, stings from insects and animal bites while collecting garbage and that the Notice of Exam states *"They ...load and unload waste materials and bulk items; monitor collected waste for hazardous or toxic materials;"* Further, they contend that Plaintiff was given an opportunity to submit medical documentation to refute his medical disqualification for his psoriasis and that he provided a note from his doctor which indicated only that his *"condition should resolve with typical conditions and should not interfere with his ability to work."* DSNY argues that Plaintiff's note from his doctor was inadequate, unpersuasive, and did not reflect that Plaintiff's physician was aware that he applied for the sanitation worker position or that Plaintiff could work in that type of environment.

Plaintiff's allegations that he was discriminated against due to his psoriasis is without merit and unsupported by the record. While it is unfortunate that Plaintiff was medically disqualified, his disqualification does not give rise to an inference of discrimination. Further, Plaintiff was given an ample opportunity to submit medical documentation to substantiate his position and did so. That his appeal was denied does not mean the CCSC did not consider Plaintiff's medical documentation. This Court notes that while Plaintiff passed the written and the physical portion of the examination, he was not an employee of the DSNY, rather he was a candidate for employment. As such, his passing the civil service examination did not confer a right to that position. Accordingly, the motion to dismiss by DSNY is granted.

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: April 30, 2013

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JUDGE GEOFFREY D. WRIGHT  
 Acting Justice of the Supreme Court