

Gillis v New York State Educ. Dept.

2013 NY Slip Op 33578(U)

April 10, 2013

Sup Ct, NY County

Docket Number: 152152/2012

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

ROBERT PATRICK GILLIS,

Plaintiff,

- v -

THE NEW YORK STATE EDUCATION DEPARTMENT,

THE NEW YORK STATE BOARD OF REGENTS, THE OFFICE OF THE PROFESSIONS, AND THE COMMITTEE ON PROFESSIONS, JOHN KING JR., AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, FRANK MUNOZ, AS DEPUTY COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK AND HEAD OF THE OFFICE OF THE PROFESSIONS, MERRYL H. TISCH, AS CHANCELLOR OF NEW YORK STATE BOARD OF REGENTS, AND HARRY PHILLIPS III, AS HEAD OF THE COMMITTEE ON PROFESSIONS.

Defendants.

INDEX NO. 152152/2012

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

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4

Plaintiff Robert Patrick Gillis (“Plaintiff”) brings this action alleging that he was unlawfully discriminated against on the basis of his sexual orientation by the defendants in violation of the New York State Human Rights Law, N.Y. Exec, Law 290 et. seq. (“NYSHRL”), and New York City Human Rights Law, N.Y.C. Admin. Code 8-101 et seq. (“NYCHRL”). Plaintiff also references alleged violations of “State Constitutional guarantees of equal protection and common law.” Defendants The New York State Education Department, the New York State Board of Regents, the Office of the Professions, the Committee on Professions, John King Jr., as

Commissioner of Education of the State of New York, Frank Munoz, as Deputy Commissioner of Education of the State of New York and Head of the Office of the Professions, Meryl H. Tisch, as Chancellor of New York State Board of Regents, and Harry Phillips III, as Head of the Committee on Professions (collectively, "Defendants") move to dismiss Plaintiff's First Amended Complaint.

Plaintiff was licensed in July 1979 by the NYS Education Department ("SED") to practice medicine as a physician in the State of New York. He was a practicing psychiatrist. In 2000, plaintiff was accused by a patient of inappropriate drug use and sexual activity during treatment.

In or about 2000, the New York State Department of Health, State Board for Professional Medical Conduct (the "OPMC") charged Plaintiff with fourteen counts, or "specifications", alleging that he engaged in sexual contact with a patient and had willfully harassed, abused or intimidated the patient. OPMC also alleged that Plaintiff practiced with gross negligence, gross incompetence, negligence on more than one occasion, incompetence on more than one occasion, and engaged in fraudulent practice. Effective February 29, 2000, Plaintiff agreed not to contest the fourteen specifications of professional misconduct brought against him by OPMC and voluntarily surrendered his medical license.

On April 8, 2003, Plaintiff submitted an application to SED for the restoration of his medical license. Plaintiff's application was considered by multiple bodies which all recommended that his application be denied. As a first step in the process, pursuant to Education Law §6511, SED sent Plaintiff's restoration application to the OPMC at the NYS Department of Health for its comments regarding the request. By letter, dated October 6, 2003, the OPMC opposed Plaintiff's application, observing that "[t]here is nothing contained in the petition that provides assurance the applicant would not repeat the same misconduct that led to the loss of his privilege to practice medicine."

A peer committee, consisting of three members of the State Board of Medicine, was then convened. The committee met with Plaintiff and his attorney on July 13, 2004 and issued a report, dated March 5, 2005, which unanimously recommended the application be denied. They found that "the applicant has failed to demonstrate adequate remorse and rehabilitation before this panel to warrant a restoration of his license at this time."

Following the issuance of the peer committee report, the matter was referred to the Committee on the Professions (“COP”). The COP consists of three SED officers charged with reviewing the petitions for restoration of professional licenses which have been revoked or surrendered and submitting its recommendations to the Board of Regents for final determinations. On January 13, 2011, the COP issued its report which was in accord with the recommendation of the Peer Committee denying plaintiff’s application. Plaintiff was provided an opportunity to respond to the report and did so. On February 8, 2011, the Board of Regents issued a final determination adopting the recommendation of the Peer Committee and the COP to deny the application and denied plaintiff’s petition for restoration of his license. The denial was embodied in a final order of former SED Commissioner, David M. Steiner, dated March 8, 2011.

Plaintiff alleges that in denying his application for the restoration of his license to practice medicine, the defendants treated him differently than allegedly similarly situated heterosexual doctors who, despite having allegedly committed comparable acts of sexual and drug-related professional misconduct with patients, were permitted to resume the practice of medicine in some fashion and were not required by the defendants to demonstrate the same level of remorse for their misconduct that he was.

By a petition filed on July 19, 2011, plaintiff commenced an Article 78 proceeding in Supreme Court, Albany County, Index No. 4913-11 against seven of the eight defendants named in the present action. Plaintiff sought a judgment “[a]djudging and declaring that respondent’s decision of March 30, 2011... as [sic] unreasonable, arbitrary, capricious and an abuse of discretion; and ordering respondents to fully examine the record taken as a whole and review it absent any discriminatory animus.”

Plaintiff asserted a claim that the decision to deny reinstatement of his license was discriminatory. He alleged that because he was homosexual, he was held to a higher standard and treated differently than “several dozen heterosexual doctors accused of sexual misconduct over the years.”

On March 12, 2012, Justice Henry F. Zwack of the Supreme Court, Albany County, issued a Decision, Order and Judgment dismissing the petition. The court considered plaintiff’s arguments and rejected them, holding that “[t]here is no evidence before this Court to establish that a petitioner was treated differently than

heterosexual doctors, or that his sexual preference affected respondents' determination to deny petitioner's application for restoration of his medical license." Instead, the court concluded that:

The Court finds that petitioner has not established that the determination to deny petitioner's application for reinstatement of his medical license was arbitrary and capricious or lacking a rational basis. The Court does not find evidence that the determination was based solely or improperly upon lack of remorse of petitioner. The determination was also based in part upon petitioner's lack of rehabilitation in the eyes of respondents due to his inability to sufficiently explain the cause for the misconduct. Respondents also indicated disbelief of petitioner's argument that one limited transgression occurred in light of the charges upon which he based the surrender of his license on. The Court finds that consideration of the facts and circumstances were granted to petitioner's application, and the letters from petitioner's psychiatrist were expressly considered and commented upon. There is no evidence before this Court to establish that petitioner was treated differently than heterosexual doctors, or that his sexual preference affected respondents' determination to deny petitioner's application for restoration of his medical license. In summary, the Court finds that a balanced evaluation of all the circumstances resulted in the Board's final determination and the Court does not find that the Board abused its discretion.

Plaintiff commenced an action on April 26, 2012 in State Supreme Court, New York County. Since that complaint purported to allege a federal equal protection claim arising under the U.S. Constitution as well as the discrimination claims under the NYSHRL, NYCHRL, State Constitution and common law, on May 23, 2012, the defendant removed the action to the U.S. District Court for the Southern District of New York. After removal, on June 19, 2012, plaintiff filed the First Amended Complaint with the Southern District Clerk. That complaint is identical in all respects to the initial complaint except for deletion of the reference to violation of the Federal Constitutional guarantee of equal protection in the description of the nature of the action. On July 3, 2012, the District Court remanded the case to this court because there was no longer any basis for federal subject matter jurisdiction.

Plaintiff's First Amended Complaint asserts allegations of discrimination based

upon his sexual orientation which were previously advanced in his Article 78 proceeding in Albany County, but this time he bases his allegations on NYS Human Rights Law (“NYSHRL”) and NYC Human Rights Law (“NYCHRL”). In language virtually identical to that used in his Article 78 petition and briefing, he alleges that in denying his petition for the restoration of his license, the defendants treated him differently than allegedly similarly situated heterosexual doctors who, despite having committed comparable acts of professional misconduct, were permitted to resume the practice of medicine in some fashion.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants move to dismiss the First Amended Complaint, asserting that collateral estoppel precludes plaintiff from asserting identical claims to those he asserted in his Article 78 Petition. There, the Court found no evidence that plaintiff was treated differently than heterosexual doctors or that his sexual preference affected defendants’ determination to deny plaintiff restoration of his medical license. “Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same.” (*Parker v. Blauvelt Volunteer Fire Company, Inc.*, 93 NY2d 343 [1999]). The doctrine applies if the issue in the second action is identical “to an issue which was raised, necessarily decided and material in the first action” and the plaintiff had a “full and fair opportunity to litigate the issue in the earlier action.” (*Parker*, 93 NY2d at 349).

In addition, Defendants move to dismiss the First Amended Complaint on the basis that it fails to state a claim under both NYCHRL and NYSHRL.

Both the NYCHRL and the NYSHRL place the initial burden upon the plaintiff to demonstrate a prima facie case of discrimination. “To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination.” (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305 [2004] (citations omitted).

Once the plaintiff proves a prima facie case, “[t]he burden then shifts to the 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.*). “In order to nevertheless succeed on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.” (*Id.*)

Here, Plaintiff’s First Amended Complaint pleads the three elements. Plaintiff alleges that (1) he is a homosexual; (2) he was qualified to be reinstated as a doctor because he met regularly with a therapist to explore and understand his reasons for his poor judgment, he has participated in community service, and has demonstrated remorse for his actions; and (3) he suffered adverse employment action when the committee rejected his application to be reinstated as a doctor.

However, Plaintiff fails to plead facts that this adverse action occurred under circumstances giving rise to an inference of discrimination. Plaintiff alleges statistical evidence from which he contends one may infer discrimination against homosexual physicians applying for license restorations and anecdotal information of allegedly similarly situated heterosexual physicians who were permitted to resume practice by Defendants despite professional misconduct comparable to Plaintiff’s. These allegations are not sufficient to plead an inference of discrimination. Plaintiff’s allegations of a “statistical inference” of discrimination based on a database of disciplinary actions, which does not categorize physicians by a heterosexual or

homosexual label, do not give rise to an inference of discrimination. Furthermore, there are no facts upon which to compare Plaintiff's misconduct with the misconduct alleged against the population of heterosexual doctors plaintiff concludes were equally culpable.

In any event, Defendants have proffered a legitimate nondiscriminatory reason for plaintiff's termination. (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305 [2004] (citations omitted); *Mete v. New York State Off. of Mental Retardation & Dev. Disabilities*, 21 A.D.3d 288, 296-97 [1st Dep't 2005]). Plaintiff has failed to plead facts which indicate that the fourteen specifications of professional misconduct along with letters from plaintiff's own psychiatrist and plaintiff's inability to explain the cause for his misconduct, the reasons stated for denying plaintiff restoration of his license, were pretextual. Accordingly, plaintiff's NYSHRL and NYCHRL causes of action are dismissed pursuant to CPLR §3211.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss the complaint herein is granted and the First Amended Complaint is severed and dismissed as against Defendants, with costs and disbursements to Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Defendants; and is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 10, 2013


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE