

Halvatzis v Jamaica Hosp. Med. Ctr.

2016 NY Slip Op 30511(U)

March 28, 2016

Supreme Court, Queens County

Docket Number: 7605/2014

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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EILEEN HALVATZIS,	Number <u>7605/2014</u>
Plaintiff(s),	
-against-	Motion
	Date <u>January 29, 2015</u>
JAMAICA HOSPITAL MEDICAL CENTER,	
Defendant(s).	Motion Seq. No. <u>4</u>
-----x	

The following papers numbered 1 to 57 read on this motion by defendant, Jamaica Hospital Medial Center, pursuant to CPLR 3212, for summary judgment in its favor and an award of fees and costs associated with the making of this motion; and cross-motion by plaintiff, Eileen Halvatzis, pursuant to CPLR 3212, for summary judgment on the issue of liability and scheduling this matter for a trial on the issue of damages, or, in the alternative, pursuant to CPLR 3126, striking defendant's answer for failure to comply with discovery.

	<u>Papers Numbered</u>
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

At the outset, the court notes that plaintiff moved for summary judgment in the cross motion on December 23, 2015, when it was served, and thus, it is untimely as it was required to be made by December 12, 2015. Therefore, the cross motion is considered to

the extent it seeks alternative relief to strike the answer of defendant and as opposition to the motion.

The complaint makes the following allegations: Plaintiff, 54 years old at the time of commencement of this action, sued her employer for violations of New York State Human Rights Law, Executive Law § 296. Plaintiff was employed as a part-time (two days per week) pharmacist for 12 years. On or about February 2014, defendant informed plaintiff that it would only be employing full-time pharmacists. In addition, plaintiff alleges that she informed defendant that she is disabled due to removal of her thyroid, anxiety and depression, and thus she could work only two days per week. Plaintiff provided defendant medical documentation of her disability. Plaintiff further contends that defendant failed, neglected and refused to consider her age and disability when directing her to work full-time and defendant has not provided a medical report stating that plaintiff's disability is not valid.

Defendant claims that, as a result of restructuring its pharmacy department, it planned to eliminate part-time positions and replace them with full-time positions. The purpose of the change was to enhance the quality and maintain consistent services to patients as well as ensure compliance with applicable regulatory and accreditation standards. Plaintiff was offered the full-time position, which she initially declined, and then accepted in a letter, dated December 6, 2013. Another part-time employee was offered the second full-time position created and is currently serving in that position. Thereafter, plaintiff, through her union representative and defendant communicated about the full-time position, which was proposed to start late January 2014. Five days prior to the start date, plaintiff informed defendant that she would not accept the full-time position and requested that she continue to work in a part-time capacity due to medical issues. In response, defendant and plaintiff's union representative engaged in an interactive process that lasted several months and involved plaintiff's counsel in or about February 2014. Accommodations were discussed, but not agreed to, including transferring plaintiff to another part-time position at Medisys, the corporate parent of defendant. In February 2014, defendant agree to allow plaintiff to continue working part-time, three days per week, until April 11, 2014 and on April 14, 2014, plaintiff would work full-time. An agreement memorializing this understanding was drafted, but never signed. As part of this process, plaintiff submitted to defendant two letters from her psychiatrist, Dr. Annupriya Itteera, indicating that plaintiff could not work more than two days per week. In April 2014, defendant informed plaintiff that she would be required to work full-time starting on May 11, 2014 as no reasonable accommodation was identified that would enable plaintiff

to perform the essential functions of her full-time position as a pharmacist. On the proposed start date, plaintiff did not appear at work and was discharged.

Plaintiff contends that defendant still employs part-time pharmacists and has failed to comply with discovery requests for documentation and testimony that would lead to this information. Plaintiff further contends that defendant cannot maintain its department without part-time employees. In a document demand, dated October 20, 2015, plaintiff requested certain records from defendant. While the note of issue was filed on May 12, 2015, the parties continued to engage in discovery. In fact, in a so-ordered stipulation (Finnegan, CA-R) resolving defendant's motion to dismiss, plaintiff agreed to provide defendant with certain authorizations and responses to discovery demands. Depositions of plaintiff took place on October 13, 2015 and defendant on October 20, 2015. Prior to defendant's deposition, plaintiff made a document request, which was made six days prior thereto. (CPLR 3120.) Defendant objected to the request as, *inter alia*, waived, untimely and overbroad. After the deposition, plaintiff made the request again, which was objected to by defendant. Plaintiff maintains that the note of issue was filed pursuant to court order despite there being outstanding discovery. A review of the court's records shows that plaintiff did not move pursuant to CPLR 2004 for leave to extend its time to file a note of issue.

It is well settled law that to obtain discovery following the filing of the note of issue, a party must demonstrate unusual and unanticipated circumstances that developed after the filing of the note of issue. (see 22 NYCRR § 202.21[d].) Here, plaintiff has not demonstrated the kind of unusual and unanticipated circumstances that would warrant discovery after filing the note of issue. (*cf. Esteva v Catsimatidis*, 4 AD3d 210 [2004].) The information requested, to be presented at the deposition and subsequently sought pursuant to the deposition, could have been sought before the note of issue was filed. In addition, defendant's failure to respond to plaintiff's post-note of issue discovery demand did not rise to the level of willful, contumacious or bad faith conduct that warrants striking of the answer. (See *Esteva*, supra at 211.)

Accordingly, the cross motion is denied.

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 eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404

[1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649 [3rd Dept 1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2nd Dept 1974]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Once the movant has established his or her prima facie case, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, supra at 562; see also *Romano v St. Vincent's Medical Center of Richmond*, 178 AD2d 467, 470 [2d Dept 1991]; *Tessier v New York City Health & Hospitals Corp.*, 177 AD2d 626 [2d Dept 1991]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (*Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

An employee's complaint states a *prima facie* case of discrimination under the State Human Rights Law "if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee was terminated" (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 834 [2014]). On a summary judgment motion, the employer must demonstrate that there is no triable issue of fact as to whether the employer duly considered the requested accommodation" by "engag[ing] in a good faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested" (*Jacobsen*, 22 NY3d at 837 quoting *Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]; see *Parker v Columbia Pictures Indus.*, 204 F3d 326, 338 [2d Cir 2000]).

Defendant argues that plaintiff cannot perform the essential functions of her job with or without a reasonable accommodation and that working full-time is the essential function of the position. (See *Plourde v Snow*, 2006 U.S. Dist. LEXIS 96040 [E.D.N.Y. June 14, 2006]; *Foster v D.O.E. Theatre Arts Prod. Co. Sch.*, 2014 U.S. Dist. LEXIS 10445 [S.D.N.Y. Jan. 23, 2014]; *New York City Board of Educ.*, 283 AD2d 369 [1st Dept 2001].) Plaintiff alleges that she is capable of performing the essential functions of her position on a part-time basis, that is two days per week.

While a scheduling accommodation constitutes a reasonable accommodation, where the essential function of the position is to work full-time, converting the position to a part-time position would change the stated requirements of the position. (See *Foster*, supra at 14-15.) In addition, the "reassignment [which]

constitute[s] a reasonable accommodation" was offered to plaintiff and rejected. (See *Gill v Maul*, 61 AD3d 1159, 1161 [3d Dept 2009], citing *Pimentel v Citibank, N.A.*, 29 AD3d 141, 146-147 [1st Dept 2006], lv denied 7 NY3d 707 [2006].) The record demonstrates that defendant's sufficiently engaged in an interactive process to discover an accommodation workable to both plaintiff and defendant. Therefore, defendant has met its *prima facie* burden establishing that there is no triable issue of fact. In opposition, the submission of, *inter alia*, plaintiff's affidavit, conclusory letters from plaintiff's psychiatrist and transcript of defendant, failed to raise a triable issue of fact.

Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: March 28
, 2016

Denis J. Butler, J.S.C.