| **Watson v Emblem Health Servs.** |
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| 2016 NY Slip Op 32819(U) |
| June 17, 2016 |
| Supreme Court, New York County |
| Docket Number: 103253/2012 |
| Judge: David B. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 58

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SUZETTE WATSON,

Plaintiff(s),

-against-

EMBLEM HEALTH SERVICES,
Defendant(s)

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Index No.: 103253/2012

**DECISION/ORDER**
Hon. David B. Cohen

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion:

| Papers | Number |
|---|---|
| Notice of Motion and affidavits annexed | 1 |
| Opposition and Exhibits | 2 |
| Reply | 3 |

Upon the foregoing cited papers, the decision/order on this motion for summary judgment is:

Suzette Watson ("plaintiff") was an employee of Emblem Health Services ("defendant"). Over several years, plaintiff had taken ill and missed time from her employment. In 2009, plaintiff was out on sick leave and followed company policies by filing the appropriate leave claim. In May 2011, plaintiff had a discussion with defendant's human resources department about defendant's sick leave time policy. In June 2011, plaintiff suffered a relapse of her illness and missed time at work. Plaintiff was last in defendant employer's office on June 6 or 7, 2011, and on June 20, 2011, plaintiff's doctor issued a note concerning plaintiff's need for additional, immediate medical leave until July 10, 2011. According to the undisputed depositions of



during this time period, as plaintiff's

supervisors Jeff Mealing ("Mealing") and David Gates were entering plaintiff's time as "paid time off" ("PTO") in defendant's time keeping system. During this time period, plaintiff did not apply for family medical leave or other sick time, including short-term leave or disability, and did not file the necessary claim.

On July 8, 2011, as plaintiff's PTO was nearly diminished, Mealing contacted defendant's human resources department for guidance as to how to enter plaintiff's time after the exhaustion of the PTO. Mealing was then reminded of defendant's policy regarding sick leave which required a filing with defendant's sick-leave benefits administrator, Hartford, if an employee was out sick for more than five days. Mealing then attempted to contact plaintiff to discuss plaintiff's absence. On July 8, 2011, Mealing called and emailed plaintiff, who was recuperating out of the United States, asking plaintiff to contact Mealing regarding plaintiff's time off.

On or about July 11, 2011, plaintiff contacted Mealing and discussed her ongoing recuperation and that she was not prepared to return to work. Mealing then advised plaintiff to contact defendant's human resources department to discuss the ongoing situation. Plaintiff did so and was advised to contact Hartford right away and file a claim. Plaintiff alleges that for several days she tried to contact Hartford without success but eventually on July 13, 2011, did make contact, assisted by her friend Kayle Nicholls. Plaintiff further alleges that during this phone call, she was advised that since she did not have all the information being requested by Hartford, she could file the claim retroactively, at a later date and therefore did not commence filing her claim.[1]

[1] Although plaintiff and Kayle Nicholls both submitted affidavits stating these facts (and also submitted phone records) Hartford has no record of this conversation. In any event, it is undisputed that plaintiff did not initiate a claim on July 13, 2011.

It is undisputed that the next time plaintiff contacted Hartford was August 3, 2011 and filed a claim on that day.

On July 18, 2011, defendant terminated the plaintiff's employment by letter. In the letter, defendant stated that plaintiff had "been out on an unapproved leave since July 1, 2011." The letter also stated that as of July 18, 2011, plaintiff had still not contacted Hartford to file for short-term disability or relief under the Family Medical Leave Act ("FMLA"). In early August 2011, upon plaintiff's return to the United States, plaintiff contacted defendant and sought reinstatement. Plaintiff submitted documentation to defendant relating to her condition and also told defendant that Hartford had advised her that she could file her claim at a later time. Plaintiff also submitted the documentation to Hartford in support of her late disability claim. On August 15, 2011, Hartford approved plaintiff for retroactive pay under FMLA for the period of June 20, 2011 – July 20, 2011. In September 2011, after a review of whether plaintiff complied with the leave policy, defendant denied plaintiff's reinstatement request based upon a finding that plaintiff had not complied with defendant's policy.

Plaintiff filed this action alleging a single count of discrimination pursuant to New York City Administrative Code 8-107(a). Specifically, plaintiff alleges that defendant engaged in unlawful discriminatory practice by terminating her based upon her disability. Following discovery, defendant filed this motion for summary judgment arguing that as a matter of law, no jury could find that defendant engaged in such practices.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept

1987]; *Rainer v Elovitz*, 198 AD2d 134 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

This claim was brought under the City Human Rights Law ("City HRL") contained within the New York City Administrative Code (8-107 et. seq.). The HRL now "explicitly requires an independent liberal construction analysis in all circumstances," an analysis that "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial purposes,' which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv. denied* 13 N.Y.3d 702 [2009]). HRL 8-130 provides that the "provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed." The Court of Appeals has emphasized that the amendment to Section 8–130 of the HRL was enacted to ensure the liberal

construction of the HRL by requiring that *all* provisions of the HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477–78 [2011]). HRL 8-130 further provides that "cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v City of New York*, 16 NY3d 472 [2011]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], and the majority opinion in *Williams v New York City Housing Authority*, 61 AD3d 62 [1st Dept 2009]" (N.Y.C. Code § 8-130(c)).

In *McDonnell Douglas Corp. v Green*, (411 US 792 [1973]), the Supreme Court set forth a three-prong burden-shifting approach in discrimination cases. It requires plaintiffs to make a prima facie showing of membership in a protected class and that an adverse employment action has been taken against plaintiff. Once that showing is made, the burden shifts to the defendant to demonstrate non-discriminatory reasons for the actions in question. If defendant is successful in meeting its burden, then plaintiff must show those reasons to be false or pretextual (*id.* at 802).

In *Bennett v Health Mgt. Sys., Inc.*, the Appellate Division, First Department provided guidance on how to address summary judgment motions under the City HRL in light of the three-step burden-shifting approach set forth in *McDonnell Douglas* and its requirement of the establishment of plaintiff's *prima facie* case. The *Bennet* court first stated "[w]here a defendant in a discrimination case has moved for summary judgment and has offered evidence in admissible form of one or more non-discriminatory motivations for its actions, a court should ordinarily avoid

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the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place. Instead, the court should turn to the question of whether the defendant has sufficiently met its initial burden" (*Bennet*, 92 AD3d at 39, 40). The *Bennet* Court then instructed:

> To summarize, then, for purposes of consideration of summary judgment motions in discrimination cases brought under the City HRL:
>
> (1) If a court were to find it necessary to consider the question of whether a prima facie case has been made out, it would need to ask the question, "Do the initial facts described by the plaintiff, *if not otherwise explained,* give rise to the *McDonnell Douglas* inference of discrimination?"
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> (2) Where a defendant has put forward evidence of one or more non-discriminatory motivations for its actions, however, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out. Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party, of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas*, mixed motive, "direct" evidence, or some combination thereof.
>
> (3) If the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.

*Bennett*, 92 AD3d at 45 [1st Dept 2011]. Even in those instances where plaintiff establishes a *prima facie* case, once the employer meets the burden by providing a legitimate reason for its action, the *prima facie* case does not necessarily entitle the employee to go to trial (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012]).

Guided by the above principals, here, defendant has set forth evidence of non-discriminatory motivations for its actions. Namely, that plaintiff, a manager, did not follow



[illegible] with Hartford, despite knowing the company policy and

even after being told that she needed to file said claim, until after she was already terminated. Defendant demonstrated that it told plaintiff to file the claim and checked with Hartford several times before initiating termination. The Court must now determine whether after drawing all reasonable inferences in plaintiff's favor, a jury could find defendant liable under any of the evidentiary routes (pretext under *McDonell*, mixed motive, "direct" evidence, or some combination thereof).

"Plaintiff has not provided any direct evidence or mixed motive evidence of discrimination. To the contrary, plaintiff's evidence shows that she had no issues with the company leave policy when she took leave in 2009 and followed procedures. In June 2011 she was permitted to be absent while being sick and not required at that point to file with Hartford. Once she had exhausted her PTO and still had not filed with Hartford, Mealing contacted plaintiff regarding her leave time and she was later told by defendant's human resources department to contact Hartford right away. To the extent that plaintiff may have called Hartford and may have been offered wrong or confusing information, that purported call was not reported to defendant despite defendant specifically asking Hartford whether a claim had been filed. It is equally clear that despite being told by defendant that she had to file a claim, plaintiff did not actually do so prior to her termination, even after purportedly speaking to Hartford on July 13, 2011. In making its termination decision, the information provided to defendant by Hartford was that no claim had been filed. Plaintiff has put forward no direct evidence of discrimination, nor any evidence that a discriminatory motive co-existed with the legitimate reasons supported by defendant's evidence.

Plaintiff's claim that the proffered reason, of failure to comply with company policy, is simply a pretext is also without merit. Plaintiff also argues that a number of other actions taken by defendant demonstrate that the proffered reason of failure to comply with company policy is a pretext. Specifically (1) plaintiff was not given any notification prior to her termination that her job was at risk; (2) plaintiff's supervisors were not disciplined despite their failure to timely notify defendant's human resources office that plaintiff was out sick as required by defendant's policies;[2] (3) at the time of Plaintiff's termination she was out for serious brain related medical conditions of which Defendant was aware;[3] (4) plaintiff was ultimately approved for FMLA paid leave for the time period which also covered the date of her termination, and despite being notified about the approval was not reinstated;[2] and (5) in August 2011, after the decision was made to terminate plaintiff and in consideration of the reinstatement request, defendant had a "negative attitude" towards plaintiff and stated in an email "the West Indies is nice this time of year."

However, contrary to plaintiff's assertions none of these actions in fact demonstrate any pretext. Plaintiff's mere assertion that defendant's explanations were pretextual is not enough (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]. "Although sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated . . . [a] prima facie case, combined with *no* evidence that the

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[2] According to defendant's policies, a supervisor is required to contact defendant's human resources manager administrator if an employee is absent for 5 consecutive business days due to illness. Here, despite being out of the office since at least June 7, 2011, Mealing did not reach out to human resources until July 8, 2011.

[3] This matter was not brought as a claim under the FMLA. The Court makes no rulings whether plaintiff's [illegible] for FMLA may violates the FMLA

stated justification is false other than plaintiff's unsupported assertion that this is so, may not (*id.* at 308). Plaintiff was terminated pursuant to a company policy that of which she was aware. She failed to comply with the policy despite being told to file her claim. When leaving in June, plaintiff failed to file the necessary claim with Hartford and was not disciplined for that. Despite her failure to file as required, she was provided with an extra notice to file on July 11, 2011. The fact that she wasn't specifically informed that her job was at risk (even though that was stated in the company policy) is not evidence of a pretext. If plaintiff had simply filed her claim any time from June 6, 2011 through July 18, 2011, she would not have been terminated. Similarly, the fact that plaintiff was retroactively approved for pay under FMLA and that defendant had a "negative attitude" in their review for reinstatement does not demonstrate in any way that the proffered reason for terminating plaintiff or for not reinstating plaintiff was discriminatory. The evidence consistently shows that plaintiff was terminated solely because, despite being told to file with Hartford, she did not do so until it was too late. "[I]t matters not whether the [employer's] stated reason for [the challenged action] was a good reason, a bad reason, or a petty one. What matters is that the [employer's] stated reason for [the action] was nondiscriminatory" (*Forrest*, 3 NY3d at 308).

Similarly, plaintiff's contention that she was terminated for failing to follow company policy while her supervisors were not, does not demonstrate that the proffered reason for her termination is just a pretext. First, the policy that plaintiff violated specifically provides that failure to contact Hartford would subject the employee to disciplinary action, including termination of employment, whereas plaintiff has produced no evidence of a similar punishment

required for the supervisor. Plaintiff has produced no evidence that other employees were not disciplined for the same policy violation for which she was terminated. Second, defendant has explained that because Mealing was charging the beginning of plaintiff's absence as PTO, as he was authorized to do as her supervisor, he did not have to treat her absence as sick leave and, thus, was not required to make the report. Only once Mealing was unable to record the time as PTO did plaintiff's continued absence become an issue for timekeeping purposes and he then reached out to plaintiff. In any event, whether defendant elected to discipline the supervisors for a different violation is a business decision. "The court in an employment discrimination case should not sit as a super-personnel department that reexamines an entity's business decisions" (*Melman*, 98 AD3d at 121 [1st Dept 2012]). The questioning of defendant's business judgment is insufficient to give rise to an inference of discrimination (*Kosarin-Ritter v Mrs. John L. Strong, LLC*, 117 AD3d 603 [1st Dept 2014]). Here, there is no evidentiary route that could allow a jury to find that discrimination played a role in plaintiff's termination. Plaintiff has also not met her burden to show that at least one of the reasons proffered by defendant is false and a pretext for discrimination.

For the above reasons, defendant's motion for summary judgment is granted and this matter is dismissed.

This constitutes the decision and order of the Court.

Dated: June 17, 2016
New York, NY

Hon. David B. Cohen, A.J.S.C.