Harricharan v Air Canada
2017 NY Slip Op 32815(U)
November 3, 2017
Supreme Court, Queens County
Docket Number: 712830/16
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

ANNA HARRICHARAN,

Plaintiff,

- against-

AIR CANADA,

Defendant.

Index No. 712830/16

Motion Date April 20, 2017

Motion Cal. No. 73

Motion Seq. No. 1

The following papers read on this motion by defendant Air Canada (Air Canada) for summary judgment dismissing the complaint of plaintiff Anna Harricharan.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 6-27
Affirmation in Opposition - Exhibits.....	EF 29-47
Reply Affirmation.....	EF 49-53

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff initially pursued the employment discrimination claims that are the subject of this action in federal court. In the federal lawsuit, the Honorable Judge Allyne R. Ross granted Air Canada summary judgment dismissing plaintiff's claim under the Family Medical Leave Act, while declining to exercise supplemental jurisdiction over the remaining claims for discrimination and retaliation under New York City Human Rights Law, Administrative Code of City of NY § 8-101 *et seq*. (NYCHRL). Plaintiff subsequently commenced the instant action to pursue recovery on the remaining NYCHRL claims for discrimination and retaliation, the latter of which plaintiff has abandoned since the making of this motion.

Plaintiff, a female employee of defendant, Air Canada, alleges that defendant discriminated against her on the basis of her alleged disability in violation of the NYCHRL. From July 27, 2009 until June 5, 2014, plaintiff worked as a Customer Service Representative for Air Canada at LaGuardia Airport, where she was responsible for assisting customers with tickets, checking in flights, and checking luggage.

On February 10, 2014, while opening the door to an airplane at work, plaintiff suffered a

dislocated disc in her back. She completed an injury report which was filed with the human resources department and signed by Station Manager Mary Wynne (Wynne).

On February 11, 2014, after notifying her supervisor, Customer Service Manager, Alfredo Hurtago, plaintiff left work half a shift early as a result of her back pain and in order to seek chiropractic treatment. Plaintiff obtained a note from her chiropractor, Dr. Boris Gershteyn, dated February 11, 2014, stating that plaintiff was present for treatment on that date. According to defendant, plaintiff never presented this note to anyone at Air Canada.

On February 12 and 13, 2014, plaintiff was unable to work due to her injury. Plaintiff had previously scheduled a one-week vacation for February 16, 2014 through February 20, 2014, during which time she and her boyfriend traveled to Miami and used plaintiff's flight benefits for the return flight. Plaintiff avers she continued to suffer significant back pain, but nevertheless returned to her regular work schedule on February 23, 2014. Following her return to work, she received physical therapy two to three times per week outside of work hours while taking over the counter pain relief medication. Plaintiff alleges that her employer was aware of this treatment.

In early March 2014, plaintiff's condition began to worsen. On March 2, 2014, she notified her supervisor at Air Canada via text message that she was unable to work due to pain from her back injury. She claims she sent the text message around 3:15 a.m., but allegedly it did not transmit until 8:00 a.m., long after her shift began at 4:30 a.m. One week later, on March 10, 2014, plaintiff avers she again attempted to call her supervisors that she was unable to report for work due to severe pain, but no one picked up the phone. Plaintiff obtained another note from her chiropractor stating that she was present for treatment on March 10, 2014.

Plaintiff was able to work on March 11, 2014 and March 12, 2014. On March 12, 2014, Wynne called plaintiff into a meeting regarding her two absences on March 2, 2014 and March 10, 2014. Plaintiff avers she tried to give her supervisor doctors notes for her absences in February and March 2014, but Wynne "refused" to accept them because the decision to suspend plaintiff had already been made. On that same day, defendant suspended plaintiff without pay pending discharge because of her absences, as documented in a letter dated March 11, 2014, which Wynne handed to plaintiff during the meeting. Plaintiff's security badge was confiscated, and she was instructed to leave the premises.

On March 13, 2014, plaintiff presented to Dr. Igor Stiller and was provided a note stating that she was partially disabled, requiring light duty for the period from March 13, 2014 through April 10, 2014. According to defendant, this note was not presented to anyone at Air Canada.

On June 5, 2014, plaintiff was terminated from Air Canada's employ. Plaintiff did not return to work at any point during the period from March 12, 2014, the date of her suspension, through June 5, 2014, the date of her discharge. Plaintiff then appealed the issuance of this 10-day suspension pending discharge, which she did not serve because it was held in abeyance while her appeal was awaiting a formal hearing. Her appeal was ultimately denied following a

hearing before the System Board of Adjustment.

Under the shifting burden analysis of *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), a plaintiff alleging employment discrimination in violation of the NYCHRL, which parallels the federal and state employment discrimination statutes, has the initial burden of showing that (1) he or she is a member of a protected class; (2) was qualified to hold the position; (3) 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. Once a plaintiff makes that prima facie showing, the defendant must come forth with evidence of a legitimate, non-discriminatory reason for its action or employment decision (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316-317 [2004]; *King v Brooklyn Sports Club*, 305 AD2d 465 [2003]). The burden shifts again, and plaintiff must establish by a preponderance of the evidence that the proffered reason is merely a pretext for discrimination (*see Forrest*, 3 NY3d at 316-317; *King*, 305 AD2d 465). Thus, when moving for summary judgment, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, non-discriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual (*see Nelson v HSBC Bank USA*, 41 AD3d 445, 446 [2007]; *Cesar v Highland Care Ctr., Inc.*, 37 AD3d 393, 394 [2007]).

The NYCHRL prohibits "an employer . . . because of [an] actual or perceived . . . disability . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment" (Admin. Code of City of NY § 8-107[1][a]). The NYCHRL defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (*Id*. at 102[16][a]). To establish a prima facie case of discrimination under the NYCHRL, plaintiff must demonstrate that she suffers from a disability, and that the disability caused the behavior for which she was terminated (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]; *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 [2006]; *Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271 [2003]).

In moving for summary judgment, Air Canada highlights the language in its attendance and absenteeism policy (the Attendance Policy) stating, "Absence without notification may be cause for *immediate dismissal* [emphasis added]." The Attendance Policy also obligated employees to report for work regularly and on time, and to provide specific reasons for absences and/or latenesses. According to the Wynne's affidavit, employees were required to notify an Air Canada manager and the station lead on duty that they were not coming in for the day at least two hours prior to the start of their shift. E-mails were periodically sent to employees to remind them of Air Canada's Attendance Policy and notification procedures for calling out sick.

Defendant argues that it had legitimate, non-discriminatory reasons for disciplining and ultimately terminating plaintiff's employment because plaintiff's poor attendance had been a problem long before the dislocation disc incident on February 10, 2014 and the onset of her alleged disability. Failure to maintain satisfactory records was considered grounds for

disciplinary action, including suspension pending discharge. In particular, defendant notes that it issued plaintiff a formal Warning Letter in 2012 and a Letter of Discipline on March 18, 2013 as a result of her poor attendance and repeated failure to notify management in advance that she could not report to work. Plaintiff also received a 10-Day Suspension commencing January 28, 2014 due her violations under the Attendance Policy as documented by a Letter dated January 22, 2014 which was sent to plaintiff in connection with four unexcused latenesses and two unexcused absences from work from late November 2013 to January 2014.

Plaintiff was sent another reminder of Air Canada's Attendance Policy on March 13, 2014. Nevertheless, plaintiff again violated said policy on March 2, 2014 and March 10, 2014 by failing to notify a manager at least two hours before her shift that she would not be reporting to work. Air Canada avers that as a result of the recent violations, as well as the accumulation of her prior attendance problems, plaintiff was issued a suspension pending discharge, as documented in the Letter dated March 11, 2014 mentioned above.

Additionally, Air Canada maintains that it could not have discriminated against plaintiff based on her disability, as it was never made aware of her alleged disability, given that plaintiff never informed Air Canada that she had any disability or injury requiring time off from work or any accommodation, nor did she ever request any leave from work on that basis. Thus, defendant contends, plaintiff's numerous and repeated attendance issues in violation of the Air Canada Attendance Policy provided a lawful basis for termination.

In response to the allegations in the complaint, the court finds that, even assuming that plaintiff's condition qualified as a disability under the NYCHRL, defendant offered ample evidence that plaintiff was terminated for a legitimate non-discriminatory reason unrelated to any disability, namely, that plaintiff repeatedly failed to timely report to work, provide advance notice of absences, and provide adequate documentation for her excessive attendance issues (*see Caban v New York Methodist Hosp.*, 119 AD3d 717, 718 [2014]; *Timashpolsky*, 306 AD2d at 273; *Blum v New York Stock Exch.*, 298 AD2d 343, 344 [2002]).

In opposition, plaintiff focuses on defendant's alleged failure to adhere to the disciplinary procedures set forth in the Attendance Policy, which provides for a verbal warning, letter warning, 3-day suspension, 10-day suspension, and suspension pending discharge. In particular, she claims that skipping the 3-day suspension and advancing to the suspension pending discharge, as well as defendant's alleged failure to meet with plaintiff upon her return from absences to evaluate the medical necessity thereof, raise questions as to the procedural irregularity and propriety of such actions. Moreover, she cites a non-disabled fellow employee with a worse attendance history who allegedly proceeded through all 5 steps of the discipline policy and was allegedly reinstated.

Contrary to plaintiff's assertions, the Discipline Policy expressly provides that absence without notification was grounds for immediate dismissal (Attendance Policy, annexed as Exhibit G to defendant's moving papers, at 3, and further states that, depending on the severity of the issue, Air Canada may accelerate the disciplinary process as necessary (Attendance

Policy, at 10). As defendant maintains that plaintiff had numerous opportunities to correct her attendance problems, which she did not do, it avers that plaintiff's absence without notification in March 2014 was the actual cause for immediate termination. Moreover, as defendant notes, plaintiff continued to violate the Attendance Policy during the pendency of her appeal of her 10-day suspension, which resulted in the issuance of additional disciplinary measures, that is, the suspension pending discharge.

Next, plaintiff's contention that defendant refused to accept and consider her multiple doctor's notes and excuse her absences does not constitutes circumstantial evidence of disability discrimination. In this regard, plaintiff testified that she never actually provided the two chiropractor's notes to her employer, and her alleged disability thus could not have been the reason for the disciplinary procedures taken (*see e.g. Tibbetts v Pelham Union Free Sch. Dist.*, 143 AD3d 806, 808 [2016]). Moreover, the notes themselves state solely that she was present for chiropractic treatment, did not reflect any restrictions on her ability to work, and are insufficient to provide notification of any disability to defendant. Likewise, the note dated March 13, 2014 from Dr. Stiller, stating that plaintiff was partially disabled and needed to be placed on light duty, was not even drafted until after the suspension pending discharge had already been issued on March 11, 2014.

Additionally, the court declines to consider plaintiff's assertion that another Air Canada employee with attendance problems and who was not disabled was treated more favorably than plaintiff during the discipline process, insofar as the only evidence submitted in that regard was inadmissible hearsay (*see Roche v Bryant*, 81 AD3d 707 [2011]; *Stock v Otis El. Co.*, 52 AD3d 816 [2008]). In any event, as defendant notes, such comparator was in fact terminated, and there is no merit to plaintiff's argument that she was selectively disciplined on the basis of her disability as compared to a non-disabled employee who she alleges was not disciplined for similar poor attendance (*see e.g. Rytelewski v Russo*, 127 AD3d 1207 [2015]).

In summary, there is no evidence of any conduct by defendant which gives rise to an inference of discrimination against plaintiff on the basis of her disability (*see Grella v St. Francis Hosp.*, 149 AD3d 1046 [2017]). The undisputed facts establish that plaintiff repeatedly failed to comply with Air Canada's Attendance Policy. Plaintiff's showing in opposition to the motion thus fails to raise a triable issue of fact as to whether the reasons for her termination were pretextual (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest*, 3 NY3d at 305; *Caban*, 119 AD3d at 718; *Timashpolsky*, 306 AD2d at 273).

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

Dated: November 3, 2017

DARRELL L. GAVRIN, J.S.C.