Silo v City of New York
2018 NY Slip Op 31089(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 150372/2013
Judge: Verna Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.VERNA L. SAUNDERS, J.S.C. PART 5

TIMOTHY SILO,
Plaintiff,
- against -

CITY OF NEW YORK, RAYMOND W. KELLY, In his capacity as Police Commissioner of the City of New York, and CASEY STEWART, Individually and as a psychologist employed by the New York Police Department,
Defendants.

INDEX NO. 150372/2013
MOT. DATE 3/15/18

MOT. SEQ. NO. 003

The following papers were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). 65-72
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). 73-89
Replying Affidavits	ECFS DOC No(s). 90-92

Plaintiff, Timothy Silo, initiated this case claiming he was wrongfully terminated from employment as a New York City Police Officer. Defendants, City of New York, Police Commissioner Raymond W. Kelly, and Casey Stewart, move the Court pursuant to CPLR 3212 seeking summary judgment and dismissal of the complaint in its entirety. Plaintiff opposes the motion contending that the defendants failed to establish that there are no triable issues of fact and that the defendants' motion is technically and procedurally flawed.

After a review of the papers submitted, the motion is granted in part and denied in part.

Plaintiff was appointed to the New York City Police Department ("NYPD") in July of 2008 and graduated from the police academy on December 31, 2008. Prior to his appointment and as part of his application, plaintiff underwent two psychological evaluations. Defendants allege that the evaluators noted concerns with plaintiff's credibility and with his past, which included a 1991 assault arrest and an arrest where plaintiff was charged with driving while intoxicated in 1997. Notwithstanding these past incidents, the evaluators found plaintiff fit for service, indicating that plaintiff had no record of current drinking problems and no alcohol-related incidents since 1997.

Thereafter, plaintiff was assigned to Police Service Area 2 ("PSA 2") in Brooklyn. During his probationary period with the NYPD, plaintiff received five civilian complaints; three of which were unsubstantiated, one was substantiated with no disciplinary action, and one was pending at the time of plaintiff's termination. Plaintiff asserts that he received satisfactory or above standards performance evaluations, made more than thirty-three arrests and maintained an exemplary attendance record. Plaintiff was rated competent on three probationary performance evaluations, which took place on the 10th, 16th, and 22nd months of his employment. Plaintiff claims he was not considered a disciplinary problem.

On December 16, 2009, plaintiff, along with five other officers, was engaged in a fight outside of a bar. Plaintiff alleges he was knocked unconscious and was later diagnosed with a concussion. Plaintiff and the other officers involved were found fit for duty approximately three hours after the incident. As alcohol was reported to be a factor in the altercation, all six officers were directed to be interviewed and evaluated by the NYPD's Psychological Services Division. Psychologist Casey Stewart interviewed plaintiff on January 12, 2010. Plaintiff asserts the evaluation, which felt like an interrogation, lasted over eight hours with only a lunch break and two other small breaks. Ultimately, Dr. Stewart found that

plaintiff was "psychologically unfit for police work," indicating that during the evaluation plaintiff was "withholding, inconsistent, and deceitful." Thereafter, on May 13, 2010, plaintiff was further evaluated by Dr. Walter Scanlon for risk for potential alcohol-related problems. Dr. Scanlon found that plaintiff was "defensive, evasive and deceptive." He concluded that plaintiff, in all likelihood, will experience alcohol-related problems in the future. On June 14, 2011, plaintiff was notified that he had been terminated from employment.

Thereafter, plaintiff commenced this action claiming that his firing was in violation of the New York State Human Rights Law (*NYSHRL*) and the New York City Human Rights Law (*NYCHRL*).

As an initial matter, plaintiff argues that the City's motion for summary judgment should be denied because it is technically and procedurally flawed. Specifically, plaintiff asserts that defendants failed to attach its answers to the motion and did not file same with the Court; failed to assert that issue has been joined; and neglected to outline the procedural history of the case. While the court acknowledges plaintiff's argument, the papers before the court are sufficient to consider the motion (*see Mercado v Ovalle*, 110 AD3d 539 [1st Dept 2013]; *In re Estate of Dietrich*, 271 AD2d 894 [3d Dept 2000]).

As to summary judgment, it is well-established that the "function of summary judgment is issue finding, not issue determination" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [NY 1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [NY 1985]). As summary judgment is a drastic remedy that deprives a litigant of his or her day in court, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *Assaf,* supra.

In assessing discrimination claims, New York courts have adopted the framework set forth in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]). In accordance with that analysis, "[t]he plaintiff must satisfy the minimal burden of making out a prima facie case. The burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to show that the proffered nondiscriminatory reason was a pretext and that the defendant actually discriminated against the plaintiff" (*Koester v New York Blood Ctr.*, 55 AD3d 447 [1st Dept 2008]). Moreover, an employer moving for summary judgment with respect to an employee's claims under the human rights laws of both the state and city of New York still retains the burden of showing that the evidence before the court presents no triable material issue of fact (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [NY 2014]).

As to the first prong of *McDonnell*, a review of the papers show that plaintiff has not made a *prima facie* case of discrimination under the *NYCHRL*. Section 8-107 of the Administrative Code (Code) of the City of New York states that:

> It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . disability. . .. To refuse to hire or employ or to bar or to discharge from employment such person...

Section 8-102 of the Code defines disability to mean "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Alcoholism is included under the definition of disability, but shall "only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse...." Thus, in order to state a *prima facie* case of discrimination under § 8-

107, the complainant must show that he or she "suffers from a disability and the disability caused the behavior for which the individual was terminated." (*see McEniry v Landi*, 84 NY2d 554 [NY 1994]).

Here, plaintiff maintains that he is not and has never been an alcoholic. He argues that defendant fired him because defendant wrongly "perceived" him to be an alcoholic and that defendant's action fall within the purview of the law because of that wrongful perception. In opposition, the City argues that while plaintiff was diagnosed as alcohol dependent, he does not fall under the protection of § 8-107 because at the time of his termination plaintiff was not recovering or had recovered, nor was free of such abuse.

An evaluation of the pertinent law shows that plaintiff cannot bring a disability discrimination claim based solely on a perception of untreated alcoholism. A mistaken perception of alcoholism is not a disability covered by the *NYCHRL* (see *Makinen v City of New York*, 30 NY3d 81 [2017] where the Court of Appeals held that sections 8-102 (16)(c) and 8-107 (1)(a) of the Code preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism). To gain protection under the Code, the plaintiff would have to show that he suffered from alcoholism and that he "(1) is recovering or has recovered, and (2) currently is free of such abuse" (*Id).* Here, plaintiff rejects any assertion that he is or has ever been an alcoholic. Thus, he has failed to make a *prima facie* claim of discrimination under the *NYCHRL.*

Similar to the *NYCHRL*, the *NYSHRL* "treat[s] alcoholism as an impairment that can form the basis of a disability discrimination suit" *(see McEniry,* supra). However, the statutes differ to the extent that NYSHRL proscribes discrimination on the basis of a perceived disability and is not limited to recovering or recovered alcoholics (*see* N.Y. Exec. Law §§ 292(21), 296(1)(a); *Makinen v City of New York*, 857 F3d 491 [2d Cir 2017]). Here, the Court finds that plaintiff has met his burden as to the first prong of *McDonnell* under § 296(1)(a) of the *NYSHRL*, and defendants fail to refute this showing.

Under *NYSHRL* § 296(1)(a) it is unlawful discriminatory practice "[f]or an employer or licensing agency, because of an individual's . . . disability . . . 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."

Section 292 defines the term disability to mean:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

To make a prima facie claim of discrimination under the *NYSHRL*, the complainant must show that he or she was disabled, and the disability was the basis for his or her firing. While here the plaintiff does not show that he in fact had a disability or any record of such impairment, the moving papers are replete with instances in which plaintiff is referred to as alcohol-dependent. Further, the documentary evidence provides a basis for the *prima facie* conclusion that plaintiff's firing was due to that perception.

Defendants argue that plaintiff must show that the perception was wrongful or incorrect. However, this is not what is mandated by the *NYSHRL* which requires that there was a perception of disability and a link between the plaintiff's firing and the disability (see *Petri v Bank of New York Co.*, 582 NYS2d 608 (Sup Ct, NY County 1992); *Makinen v City of New York*, 30 NY3d 81 (NY 2017)). Even if plaintiff had to show the perception was wrongful, defendants have failed to establish that there are no triable issues of fact. While defendants adamantly contend that plaintiff is alcohol-dependent, the documentary evidence annexed fails to conclusively demonstrate that fact. The evaluations of both Drs. Stewart and Scanlon found that plaintiff was at risk for future alcohol-related problems, not that he was, at the time of his employment with the NYPD, suffering from alcoholism. Accordingly, it is hereby,

ORDERED that defendants' motion for summary judgment is GRANTED as to plaintiff's second cause of action under the New York City Human Rights Law and DENIED as to plaintiff's first cause of action under the New York State Human Rights Law, and it is further

ORDERED that all parties are to appear for an early settlement conference on July 24, 2018, at 9:30 AM, Part DCM, Room 103, 80 Centre Street, New York, NY.

This constitutes the decision and order of the Court.

Dated: May 30, 2018

HON. VERNA L. SAUNDERS, 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**