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| Hockenjos v MTA Metro-N. R.R. |
| 2018 NY Slip Op 32694(U) |
| October 16, 2018 |
| Supreme Court, New York County |
| Docket Number: 156596/2016 |
| Judge: Anthony Cannataro |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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| JOHN HOCKENJOS | INDEX NO. | <u>156596/2016</u> |
| | MOTION DATE | <u>03/01/2018</u> |
| | MOTION SEQ. NO. | <u>001</u> |

Plaintiff,

- v -

MTA METRO-NORTH RAILROAD,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89

were read on this motion SUMMARY JUDGMENT.

Upon the foregoing documents, it is decided that

HON. ANTHONY CANNATARO:

Plaintiff in this action asserts claims under New York City Human Rights Law (NYCHRL) that he was discriminated against by defendant based on his disability and retaliated against for requesting reasonable accommodations. Defendant moves for summary judgment asserting that plaintiff is collaterally estopped from asserting these claims and that they fail as a matter of law.

Plaintiff commenced an action against defendant in federal district court in March 2014 alleging claims under Family and Medical Leave Act (FMLA) and NYCHRL.

The district court granted summary judgment in favor of defendant, dismissing plaintiff's FMLA claims and declining to exercise jurisdiction over plaintiff's NYCHRL claims by dismissing them without prejudice. The district court's decision was affirmed by the United States Court of Appeals, Second Circuit in August 2017. Plaintiff then commenced the instant action on August 8, 2016.

Plaintiff began working for defendant as an assistant director in 1998. In 2002, plaintiff was moved to the position of senior scope engineer, where he reported to his immediate supervisor, Kim Smith, and the head of his department, John Kennard. Plaintiff's responsibilities required that he participate in the development of master plans and associated scopes, schedules, and budgets. Plaintiff was required to interact with multiple departments, synthesize information, create written work product, and coordinate and collaborate with management. Plaintiff's job performance was reviewed annually. For the majority of plaintiff's tenure, he received positive performance reviews and discretionary cost of living raises despite noted difficulties with communication. Beginning in 2010, plaintiff's performance suffered due to personal problems. Plaintiff was absent for all or part of 95 days during 2011. Plaintiff began seeing a doctor in late 2011, nevertheless, his problems escalated after an arrest in February 2012.

Plaintiff's supervisors, Smith and Kennard, referred him to the company's employee's assistance program for counseling in or around June 2012. When Smith contacted human resources for advice on how to best help plaintiff improve his performance, it was recommended that plaintiff partake in a time management course, which he did in August 2012. It was also recommended that plaintiff meet with Smith and Kennard to develop a path forward, which they scheduled for September 2012 and prepared for with an agenda on how he could improve his performance.

Plaintiff requested several accommodations to assist in improving his performance, including the ability to go on leave without advanced scheduling,

permission to arrive late, limit the number of projects he was assigned at once, and extended deadlines. In response, defendant permitted plaintiff to arrive 30 minutes late each day and use unscheduled vacation time for a period of six months. Defendant also offered plaintiff assistance with meeting deadlines and support with his work product. However, as discussed in their September 4, 2012 meeting, these accommodations came with reprimands and close monitoring.

Plaintiff was granted three weeks of FMLA leave in September 2012. After returning from leave, plaintiff continued to take many days off before the end of the year, some of which were unpaid. In October 2012 plaintiff began seeing a psychologist and attended 12 therapy sessions prior to his termination. On January 18, 2013 Smith and Kennard met with the director of human resources to discuss terminating plaintiff. On February 14, 2013 plaintiff was granted FMLA leave for another several weeks. Smith produced a memorandum detailing the reasons for plaintiff's termination on February 26, 2014. When plaintiff returned from FMLA leave on March 20, 2013, he was informed that his employment had been terminated.

Defendant maintains that plaintiff was terminated based on his poor performance rather than for his disability or in retaliation for requesting a reasonable accommodation. Defendant argues that plaintiff's claims should be precluded based on collateral estoppel principles in that the issue of defendant's motivation for terminating plaintiff was necessarily decided in the federal action. Defendant further argues that plaintiff's claims based on the refusal to provide a reasonable accommodation should be dismissed as no reasonable accommodation exists that would allow plaintiff to satisfy the essential requirements of his job. Plaintiff counters that his termination was directly related to his disability and need for accommodations.

"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

demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets this initial burden, the burden shifts to the opposing party “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a summary judgment motion, facts are viewed in the light most favorable to the non-moving party (*See William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

The doctrine of collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). “The doctrine of collateral estoppel applies where first, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination” (*Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 138 [1st Dept 2014] [internal citations omitted]). “Where a federal court declines to exercise jurisdiction over a plaintiff’s state law claims, collateral estoppel can still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff’s state claims” (*Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 [1st Dept 2014]).

The courts of this state employ the framework established in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 [1973] to assess claims under NYCHRL. Namely, once a plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the defendant to rebut the presumption of discrimination by providing a legitimate, independent and nondiscriminatory reason to support its employment decision. If the defendant meets this burden, the plaintiff may still avoid summary judgment by

establishing that the reasons proffered by the defendant for its adverse employment action are merely pretextual (*See, Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also, Williams v New York City Health & Hosps. Corp.*, 44 Misc 3d 1231(A) [Sup Ct 2014]).

It has been established here that plaintiff initially brought an action in federal court on substantially identical facts. Plaintiff's claims in the federal action centered around his right to FMLA leave, and his claim that he was terminated in retaliation for exercising those rights and for requesting a reasonable accommodation for his disability. That court found that rather than being terminated for exercising his FMLA rights, "defendant has met its burden of showing that plaintiff's termination was based on his poor job performance" (*Hockenjos v Metro. Transportation Auth.*, 2016 Wage & Hour Cas 2d (BNA) 157816 [S.D.N.Y. May 18, 2016], *affd sub nom. Hockenjos v Metro-N. R.R.*, 695 Fed Appx 15 [2d Cir 2017]).

Defendants have established entitlement to summary judgment on plaintiff's first and third causes of action based on collateral estoppel. The federal court found "overwhelming evidence that plaintiff's job performance was poor" due to plaintiff's failure to meet expectations in his performance review, excessive absenteeism, unresponsiveness, difficulty in completing assignments and more (*See id.*). As such, that court found that defendants put forward evidence of legitimate, non-discriminatory reasons for plaintiff's termination.

The federal court declined to exercise supplemental jurisdiction over the NYCHRL claims. However, as in *Williams*, defendants establish *prima facie* entitlement to summary judgment as the dispositive issue, the reason for plaintiff's termination, was identical in the federal action and was resolved against the plaintiff who had a full and fair opportunity to contest it and litigate in the prior action (*See Williams*, 44 Misc 3d 1231(A) [Sup Ct 2014]). Further, despite the fact that "the City HRL must be construed liberally and independently to accomplish their uniquely broad and remedial purposes,"

plaintiff has not established an issue of fact about defendant's nondiscriminatory reason for termination (*See Simmons-Grant* at 141). Thus, plaintiff is estopped from asserting his first and third claims.

The remaining claim for refusing to provide a reasonable accommodation cannot be determined at this stage of litigation. Under NYCHRL, an employer is required to "make reasonable accommodation to enable a person with disability to satisfy the essential requisites of a job" (*Romanello v Intesa Sanpaolo, S.P.A.*, 22 NY3d 881, 885 [2013]). The burden lies with the employer to prove that accommodating the disabled employee would constitute an undue hardship because even with such accommodation the employee could not satisfy the essential requisites of the job (*See id.*). To demonstrate that defendants failed to reasonably accommodate plaintiff's disability, plaintiff must show that "1) [he] was disabled within the meaning of the statutes; 2) the employer had notice of the disability; 3) [he] could perform the essential functions of her job, with a reasonable accommodation; and 4) the employer refused to make a reasonable accommodation" (*LaCourt v Shenanigans Knits, Ltd.*, 38 Misc. 3d 1206[A] [Sup Ct 2012]). Whether an accommodation would be effective and whether it would cause undue hardship is case-specific and requires an individualized, interactive process. Thus, it has been held that "the issue of whether an accommodation is reasonable is normally a question of fact, unsuited for a determination on summary judgment" (*See id.* [internal citations omitted]).

Here, it is not contested that plaintiff suffered from a disability and that the employer had notice of such disability. However, the parties contest whether plaintiff could still perform the essential functions of the job even with a reasonable accommodation. While defendants maintain that the requested accommodations—late arrival, permission to take vacation without advance notice, limited multitasking, and extended deadlines—prove that plaintiff could not perform his job, this is a fact-specific question that requires deeper inquiry into plaintiff's work product and the comparison

to his prior work and the work of other employees. Similarly, what qualifies as the essential functions of plaintiff's job is also a fact-specific inquiry and prohibits summary judgment on this issue. Further, it was noted throughout plaintiff's employment that he had difficulty communicating and interacting with colleagues and managers. Despite this critique, plaintiff held his job for a period of 13 years and did not receive poor evaluations during this time.

The parties also contest whether defendant refused to make any such accommodations. Defendant alleges that they provided access to the employee assistance program, and time management, offered of closer assistance and deadline adjustments, as well as permission to arrive late. Plaintiff views the employee assistance program and time management course as additional burdens rather than accommodations and claims that he was admonished for his requests. Reasonable accommodations, and whether the requests would create an undue hardship, are determined through a case-specific, individualized interactive process. Based on the forgoing, it is necessary to conduct further discovery on the issue of refusal to provide reasonable accommodations. Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of defendant and against plaintiff on the first and third causes of action as follows; and it is further

ORDERED that the first and third causes of action are severed and the balance of the claims are continued; and it is further

ORDERED that the action shall continue as to the second cause of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 490, 111 Centre Street on December 12, 2018, at 2:15 PM.

10/16/2018
DATE



ANTHONY CANNATARO, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |