Belli v NYC Dept. of Transp.
2020 NY Slip Op 30214(U)
January 24, 2020
Supreme Court, New York County
Docket Number: 156534/2018
Judge: Laurence L. Love

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE **PART** IAS MOTION 62

Justice

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MARK BELLI,

Plaintiff,

- v -

NYC DEPT. OF TRANSPORTATION, JOSEPH MASTROGUILIO, NYC HUMAN RESOURCES ADMINISTRATION, MAHESH PATEL,

Defendant.

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INDEX NO. 156534/2018

MOTION DATE 12/12/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 55, 56, 57, 58, 59, 60, 63, 64

were read on this motion to/for DISMISS.

Upon the foregoing documents,

This Order reads on defendants' motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff's failure to state a claim. Plaintiff states causes of action of; I) Department of Transportation's ("DOT") and New York City Human Resources Administration's ("HRA") violation of plaintiff's benefits according to the Personnel Service Bulletins, specifically "allowing employees a five-minute grace period for lateness and excused transit delays, allowing employees to take a conditional leave of absence from their employer, allowing employees to take excused time off with pay for blood donations and for job interviews at other New York City Agencies;" II) unlawful termination against DOT and Joseph Mastroguillo, for not being "given the opportunity to provide documentation for the transit delays which caused me to be more than 5 minutes late;" III) lost wages and benefits for "failing to reinstate to [plaintiff's] previous position in a timely manner in accordance with the requirements set forth in the

conditional leave of absence;" IV) retaliation, pursuant to NYCAC § 12-306(a)(1) & (3) and Labor Law § 704, by Mahesh Patel and HRA, for failing to implement rights under the Time & Leave Rules created by HRA; V) retaliation, pursuant to Labor law § 740 and Civil Service Law § 75b, by Mahesh Patel and HRA, for plaintiff's alerting them of the failure to have a licensed master plumber on staff to supervise and failing to implement an exposure prevention plan in accordance with OSHA regulations; and VI) discrimination, in violation of the New York City & New York State Human Rights Law by Mahesh Patel and HRA, for not providing plaintiff with a reasonable accommodation when exhibiting a medical condition.

Plaintiff Mark Belli started employment with HRA in the civil service position of plumber on April 9, 2012. After a one-year probationary period, plaintiff became a permanent employee of HRA.

Plaintiff highlights various benefits as part of his employment, "benefits that are memorialized in the Personnel Services Bulletins (PSBs) on the Department of Citywide Administrative Agencies website. These benefits include (i) a five (5) minute grace period for lateness, (ii) excused lateness for transit delays, (iii) excused time off from work to donate blood), (iv) take a leave of absence for qualified reasons, (v) to a reasonable accommodation for any form of disability, (vi) medical plan coverage & options, (vii) pension plan options, and (viii) excused time off for interviews at other New York City agencies." Plaintiff also states that he was required to work under the direction and continuing supervision of a licensed master plumber per New York City Administrative Code (see Title 28. Chapter 408.1).

Plaintiff was offered a position with another New York City Agency, the Department of Transportation ("DOT") on or about September 2016. Plaintiff applied for a Conditional Leave

of Absence from HRA and was served with written disciplinary charges from HRA pursuant to the Civil Service law on October 21, 2016.

Plaintiff continues in his complaint that he was "not satisfied with the working environment" at DOT and requested reinstatement to his position at HRA. Plaintiff sent a letter to Janet Phillips at the OSR/Office of Benefits Administration on April 12, 2017 wherein he requested reinstatement to his position as an HRA plumber. On April 17, 2017, plaintiff reported to work at DOT and was handed a letter from his supervisor wherein he was advised of his termination effective April 17, 2017.

Plaintiff believes he was fired due to lateness and alleges DOT and Joseph Mastroguillo did not follow the procedures outlined in the PSB for documenting and reprimanding employees for their lateness.

Plaintiff then sought to be restored to his position at HRA. After plaintiff received a letter dated September 1, 2017 advising him that "reinstatements are made at the discretion of the agency," and that HRA "was presently in the process of evaluating [his] request," he contacted an attorney.

Plaintiff's first cause of action for declaratory judgment alleges the Department of Transportation ("DOT") and New York City Human Resources Administration ("HRA") violated plaintiff's rights, by not allowing a five-minute grace period for lateness, a conditional leave of absence, and excused time off with pay for blood donations and for job interviews at other New York City Agencies per the Personnel Service Bulletin.

Plaintiff's probationary employment was terminated because he had seven instances of unexcused lateness,' sent an inappropriate note with unwanted sexual undertones to another

DOT employee, and other charges. Defendant exhibits the memorandum from the Department of Transportation dated March 22, 2017 stating the offenses by plaintiff Mark Belli.

The disciplinary charges allege plaintiff i) inappropriately used a Medicaid Eligibility worker's desk computer without permission and retrieved documentation off the desk, ii) was involved in a city vehicle collision and failed to comply with the correct reporting procedure, iii) inappropriately took photos of a client who was having a seizure after the security staff, immediate supervisors and a police Sergeant advised plaintiff numerous times to stop taking photos of the client and plaintiff refused, and iv) for inappropriately using the conference room after a previous direction to refrain from using agency equipment without prior permission.

Plaintiff's second cause of action for unlawful termination states, "defendants DOT and Joseph Mastroguillo took adverse action against me and terminated me without cause in violation of applicable law. I was never given the opportunity to provide documentation for the transit delays which caused me to be more than 5 minutes late. I should not have been terminated from job or penalized with the loss of time for any of these latenesses. I am entitled to a (5) minute grace period for lateness and a grace period for excused transit delays as provided in the PSBs."

Plaintiff was in a probationary position at DOT and may be terminated for cause, but not "in bad faith or for an improper or impermissible reason." It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law (see *Duncan v Kelly*, 853 NYS2d 260 [2008]). Contemporaneous, documentary evidence of petitioner's unsatisfactory performance in the probationary title rebutted the purported evidence of bad faith and sufficed to establish as a

matter of law that petitioner's demotion was in good faith (see *Fichter v Egan*, 223 AD2d 516 [1st Dept 1996]).

Defendant exhibits a "Charges and Specifications, Notice of Informal Conference, Notice of Section 75 Hearing, Notice of Step II Grievance hearing" document served on October 21, 2016. This document stated that an informal conference will be held "relating to Misconduct and/or Incompetence … preferred against [plaintiff]." This document states the grievances against the plaintiff and has plaintiff's signature along side the statement, "I already resigned (sic) today is my last day at work." Based on same, plaintiff's first and second causes of action must be dismissed.

Plaintiff's third cause of action alleges a failure to reinstate plaintiff to his previous position per the conditional leave of absence.

Defendant exhibits a letter from HRA dated February 23, 2018. The leave of absence from HRA was pursuant to PSB 200-10, to work for DOT. The leave of absence was concluded when plaintiff was reinstated to HRA effective October 20, 2017. Thus, plaintiff's third cause of action must fail.

Plaintiff's fourth cause of action states retaliation by Mahesh Patel and HRA under New York City Administrative Code ("NYCAC") § 12-306(a)(1) and (3), and New York Labor Law § 704.

NYCAC § 12-306 makes it improper for public employers to interfere with, restrain, or discriminate against any employee for the purpose of encouraging or discouraging membership in any public employee organization.

NY Labor Law § 704 in relevant part, makes an unfair labor practice for any employer to interfere with an employee's formation or association with an agency or plan.

The Court finds that plaintiff's complaint does not have any factual allegations or instances where HRA or its employs interfere with, restrained, or discriminated plaintiff's right to join or assist a public employee union.

Plaintiff's fifth cause of action alleged violation of labor Law Section 740 and Civil Service Law Section 75b. Plaintiff alleges "HRA has violated applicable law by failing to have a licensed master plumber on staff to supervise us and by failing to implement an exposure prevention plan in accordance with OSHA regulations."

In order to recover under a Labor Law 740 theory, the plaintiff has the burden of proving that an actual violation occurred, as opposed to merely establishing that the plaintiff possessed a reasonable belief that a violation occurred. [...] and, the violation must be of the kind that creates a substantial and specific danger to the public health or safety (see *Webb-Weber v Community Action for Human Servs*, 23 NY3d 448, 452-53 [2014]).

Plaintiff's bare accusation of "violated applicable law by failing to have a licensed master plumber on staff" does not fulfill the elements of a cause of action under Labor Law 740. Plaintiff does not explain how a "substantial and specific danger to the public health or safety" occurred. An employee's good-faith reasonable belief that an actual violation of a law, rule, or regulation occurred is insufficient; there must be an actual violation (see *Khan v State Univ of NY Health Sci Ctr*, 288 AD2d 350 [2d Dept 2001]).

Plaintiff's sixth cause of action alleges, "defendants Mahesh Patel and HRA engaged in an unlawful discriminatory practice in violation of the New York City Administrative Code and the New York State Human Rights law by not providing me with a reasonable accommodation when I complained of my medical condition."

Plaintiff states in his complaint, "that during the course of my employment with HRA, I injured my foot and my arm (& shoulder) on the job and was treated in a discriminatory manner when I requested a reasonable accommodation for my injuries – specifically, a request to wear sneakers when traveling to and from jobs, or when surveying a job or when I am performing administrative functions. Due to the work-related injury to my arm (& shoulder), I requested a special tool to make the performance of my job easier. Neither request ahs been granted to date and HRA has refused to take my requests seriously."

To state a claim for disability discrimination or a failure to provide a reasonable accommodation, plaintiff must show that (1) he was disabled within the meaning of the statutes, (2) the employer had notice of the disability, (3) plaintiff could perform the essential functions of his job with a reasonable accommodation, and (4) the employer refused to make a reasonable accommodation (see *McBride v BIC Consumer Prods MFG Co*, 583 F3d 92 [2d Cir 2009]; *Miloscia v BR Guest Holdings LLC*, 33 Misc 3d 466 [Sup Ct, 2011]).

Plaintiff's doctor's note from Dr. Howard I Baum, dated November 21, 2017 states "Mark's foot was inflamed du to excessive walking at work. Please accommodate him with 1) Not being required to wear his work boots when he is not doing plumbing or construction work. 2) Mark Belli has a range of motion problem with his right arm. Please provide to him a tool ridged model number 27108 faucet sink installer. He may go back to work November 22, 2017 at 100% full duty as a plumber." Plaintiff filed a "Reasonable Accommodation Request" form on December 8, 2017 for his arm and feet issues.

Defendant exhibits a "Reasonable Accommodation Request" response dated May 15, 2018 from the NYC Department of Social Services. The Request document states, "on January 12, 2018 and on April 16, 2018, the EEO Office informed you that updated medical

documentation was required. As of May 3, 2018, this office has yet to receive the requested documentation. As a result, this office determined that you failed to pursue your reasonable accommodation request."

Employer is not required to offer an employee a reasonable accommodation if the employee fails to prove that she could not perform the essential duties of her current position (see *Rappo v New York State Div of Human Rights*, 57 AD3d 217 [1st Dept 2008]).

A defendant's motion to dismiss must be granted and the complaint dismissed if the complaint consists of bare legal conclusions (see *Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *CD Music Co v Bassline, Inc*, 242 AD2d 654 [2d Dept 1997]).

Plaintiff also cross-moves for a sealing order, per 22 New York Codes Rules and Regulations (NYCRR") § 216.1 and for a preclusion/suppression Order, per CPLR 3103 (c).

22 NYCRR § 216.1(1)(a) provides, "a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part: except upon a written finding of good cause, which shall specify the grounds thereof." To demonstrate good cause, plaintiff must establish "compelling circumstances" exist to justify secrecy (see *Herald Co Inc v Weisenberg*, NY2d 378, 384 [1983]).

Plaintiff claims defendants violate the terms of an October 24, 2018 stipulation of settlement agreement by attaching the disciplinary charges, notice of informal conference, suspension letter, and other documents. However, plaintiff referenced these documents in the complaint and put them at issue.

Plaintiff's motion to strike defendants "paperwork," per CPLR 3103(c), because "the Defendants introduced documents relating to a disciplinary matter that cannot be introduced as

evidence in this case." Plaintiff put the disciplinary matters at issue in his complaint and defendants are entitled to respond.

Defendant's motion to dismiss, CPLR 3211, is GRANTED, as plaintiff's complaint does not substantiate an improper disciplinary measure nor an abuse of an unacceptable review procedure regarding plaintiff's employment. Plaintiff's cross-motion is likewise dismissed.

1/24/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED	DENIED	GRANTED IN PART		OTHER	
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	