

Donnelly v TForce Final Mile LLC
2020 NY Slip Op 32771(U)
August 21, 2020
Supreme Court, New York County
Docket Number: 451882/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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THOMAS DONNELLY,

Index No. 451882/2019

Plaintiff

- against -

DECISION AND ORDER

TFORCE FINAL MILE LLC (a/k/a DYNAMEX),
and JP MORGAN CHASE & CO.,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff sues under the New York City Human Rights Law (NYCHRL) claiming defendants unlawfully discriminated against him when they failed to provide a reasonable accommodation for his disabilities and instead terminated his employment. Defendants move to dismiss the complaint based on his failure to plead such a claim. C.P.L.R. § 3211(a)(7).

I. THE COMPLAINT

Plaintiff alleges as follows. Defendant TForce Final Mile LLC, a same-day delivery service and plaintiff's employer for 20 years, assigned plaintiff to work as a messenger at defendant JP Morgan Chase & Co., an international financial services firm, where he delivered packages throughout his employment shift. He was jointly employed by TForce Final Mile and JP Morgan Chase until the termination of his employment August 23, 2018.

In 2017, plaintiff developed urinary control problems,

including the frequent and urgent need to urinate, later diagnosed as benign prostatic hyperplasia. To address this medical condition, plaintiff, who also is cognitively impaired, carried a plastic bottle in the event that he urgently needed to urinate and a bathroom was not readily available.

On August 21, 2018, JP Morgan Chase sent plaintiff to retrieve a package from the Depository Trust and Clearing Corporation. While plaintiff sat in the messenger waiting area, he suddenly needed to urinate. Because JP Morgan Chase frequently dispatched plaintiff to this location, he knew that no bathroom was readily available and therefore turned his back to the waiting area and began to urinate into his plastic bottle. The security guard assigned to monitor the waiting area observed plaintiff urinating and ordered him to leave.

Plaintiff returned to JP Morgan Chase's office, where he later was escorted from the building. On August 23, 2018, plaintiff met with a TForce Final Mile operations manager, who spoke by telephone with a JP Morgan Chase employee. During the telephone conversation, the JP Morgan Chase employee informed the TForce Final Mile operations manager that JP Morgan Chase would no longer permit plaintiff to be assigned to work at its firm. Plaintiff also wrote and signed a statement that described the earlier incident and referred to his "bladder condition." Aff. of Jeffrey W. Brecher (Nov. 21, 2019) Ex A. (Compl.) ¶ 33. After

receiving plaintiff's written statement, TForce Final Mile terminated his employment August 23, 2018.

II. STANDARDS APPLICABLE TO DEFENDANTS' MOTION

Defendants bear "the burden of establishing that the complaint fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). In evaluating defendants' motion to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). If the complaint fails to allege facts that fit within his claimed legal theory, dismissal is warranted. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007). Although defendants may not rely on evidence outside the pleaded claim, plaintiff may rely on admissible evidence to supplement and remedy any defects in his complaint. Nonnon v. City of New York, 9 N.Y.3d at 827; Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); US Suite LLC v.

Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013).

III. PLAINTIFF'S CLAIMS OF DISCRIMINATION AND FAILURE TO PROVIDE AN ACCOMMODATION

The NYCHRL, N.Y.C. Admin. Code § 8-107(1)(a), prohibits an employer from discharging an employee because of a disability, which is defined as "any physical, medical, mental or psychological impairment." N.Y.C. Admin. Code § 8-102(16)(a). Both plaintiff's benign prostatic hyperplasia and his cognitive impairment qualify as disabilities. Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d 881, 882, 885 (2013); Jacobsen v. New York City Health & Hosps. Corp., 22 N.Y.3d 824, 835-36 (2014); New York State Unified Ct. Sys. v. New York State Div. of Human Rights, 180 A.D.3d 555, 556 (1st Dep't 2020); Watson v. Emblem Health Servs., 158 A.D.3d 179, 182 (1st Dep't 2018).

When an employer is informed about an employee's disability, New York City Administrative Code § 8-107(15)(a) requires the employer to make a reasonable accommodation that enables the disabled employee to satisfy the essential requisites of the job position. After an employer receives a request for an accommodation, Administrative Code § 8-107(28) requires the employer to engage in a cooperative dialogue with the disabled employee within a reasonable period after receiving the request. A request need not, however, be in a specific form, be in writing, refer to any law, or use the terms "reasonable

accommodation." Watson v. Emblem Health Servs., 158 A.D.3d at 182; Phillips v. City of New York, 66 A.D.3d 170, 189 (1st Dep't 2009). The employer bears the burden to plead as an affirmative defense that no reasonable accommodation would allow the employee to satisfy the essential requirements of the job without undue hardship to the employer. Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d at 885; Jacobsen v. New York City Health & Hosps. Corp., 22 N.Y.3d at 835; Hosking v. Memorial Sloan-Kettering Cancer Ctr., ___ A.D.3d ___, 2020 WL 3272721, at *3 (1st Dep't June 18, 2020). The availability of a reasonable accommodation therefore is not an issue that the court may determine upon a pre-answer motion such as this one.

A. Plaintiff Alleges That Defendants Received Notice of His Disabilities.

Defendants urge instead that plaintiff's claim be dismissed because plaintiff fails to allege their notice of his disability. As set forth above, plaintiff alleges that he expressly notified defendants about his physical disability when he provided a written statement describing his "bladder condition" during the meeting August 23, 2018, before defendants terminated his employment. Brecher Aff. Ex A. (Compl.) ¶ 33. Hosking v. Memorial Sloan-Kettering Cancer Ctr., ___ A.D.3d ___, 2020 WL 3272721, at *1; Watson v. Emblem Health Servs., 158 A.D.3d at 184; Chernov v. Securities Training Corp., 146 A.D.3d 493, 494 (1st Dep't 2017); Duckett v. New York Presbyt. Hosp., 130 A.D.3d

473, 474 (1st Dep't 2015). According to his complaint, which the court at this juncture must accept as true, defendants also "were aware of . . . his readily apparent cognitive limitations," Brecher Aff. Ex A. (Compl.) ¶ 1, "a cognitive impairment that affects his ability to communicate." Id. ¶ 9.

Plaintiff further alleges that, after receiving notice of his disabilities, defendants failed to engage in the required cooperative dialogue to create a reasonable accommodation for him. N.Y.C. Admin. Code §§ 8-107(15)(a), 8-107(28); Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d at 885; Jacobsen v. New York City Health & Hosps. Corp., 22 N.Y.3d at 840; Hosking v. Memorial Sloan-Kettering Cancer Ctr., ___ A.D.3d ___, 2020 WL 3272721, at *6; Watson v. Emblem Health Servs., 158 A.D.3d at 184-85. In response to the information about plaintiff's disabilities, instead of engaging in a cooperative dialogue with plaintiff to create a reasonable accommodation that would allow him to carry out his messenger responsibilities, defendants terminated his employment. Plaintiff's allegations, accepted as true, thus state a claim for disability discrimination against defendants.

B. Plaintiff Alleges That He Did Not Engage in Misconduct.

Defendants maintain further that they terminated plaintiff's employment because of his misconduct August 21, 2019, which occurred before they knew of his bladder condition, and that they were not required to excuse misconduct stemming from a disability

of which they were unaware. Hazen v. Hill Betts & Nash, LLP, 92 A.D.3d 162, 170-71 (1st Dep't 2012). According to the complaint, defendants were aware of plaintiff's cognitive limitations before August 21, 2020, and therefore were aware that plaintiff might encounter difficulty communicating his bladder condition to his employer and might not know how to address it while on the job. More significantly, plaintiff seeks to rebut defendants' claim that he engaged in any misconduct in the first instance, relying in part on an Administrative Law Judge's finding January 29, 2019, in granting plaintiff unemployment insurance, that his acts were "due to circumstances beyond his control" and "do not constitute misconduct in connection with his employment." Aff. of Robert Halpern (Dec. 17, 2019) Ex. 1, at 3.

Although administrative determinations regarding unemployment insurance lack preclusive effect in this action, N.Y. Labor Law § 623(2); Silberzweig v. Doherty, 76 A.D.3d 915, 916 (1st Dep't 2010), plaintiff still may maintain in this action the same claim that he successfully maintained in the administrative proceeding. Morse v. Fidessa Corp., 165 A.D.3d 61, 70 (1st Dep't 2018); Derrick v. American Intl. Group, Inc., 126 A.D.3d 576, 576 (1st Dep't 2015); Sandiford v. City of New York Dept. of Educ., 94 A.D.3d 593, 595 (1st Dep't 2012); Silberzweig v. Doherty, 76 A.D.3d at 916. To this end, plaintiff presents his affidavit sworn to February 28, 2020, to which

defendants replied March 2, 2020. The parties stipulated to the court's consideration of this supplemental affidavit and reply.

To support the inference that plaintiff engaged in no misconduct that provided a basis for defendants' termination of his employment and that therefore the termination was based unlawfully on his disabilities, plaintiff attests:

I urinated with my back turned. This was so there was no way to disrespect anyone. So to watch what was being done. . . . I meant no disrespect or to be rude. But there was no other[] choice. I had to do so there. My condition often attacks me. Making it hard for me to control it.

Aff. of Robert Halpern (Feb. 28, 2020) Ex. 1. This explanation, combined with the complaint, supports the inference that plaintiff's urination into a bottle was intended to be unobservable to and respectful of other persons and under the urgent circumstances was the only means available to him to refrain from urinating uncontrollably, in a manner that would have been readily observable and disrespectful. Plaintiff thus shows in this action, just as the Administrative Law Judge found in the administrative proceeding, that his acts were due to circumstances beyond his control and did not constitute misconduct in connection with his employment.

Plaintiff's conduct was not a willful, wanton, or unethical pattern of behavior in disregard of his employee's interests, see Hazen v. Hill Betts & Nash, LLP, 92 A.D.3d at 170-71, but was a direct result of his physical impairment with which he was

trying, within his cognitive limitations, to cope. While he might have found a better way to cope, such as with medication or undergarments, and such alternatives might have been available to him without defendants actually providing them, plaintiff's cognitive limitations may have inhibited his recognition of these or other alternatives. Had defendants only engaged in a cooperative dialogue with plaintiff between August 21 and 23, 2018, they might have suggested these or other alternatives.

IV. CONCLUSION

For the reasons explained above, the court denies defendants' motion to dismiss plaintiff's claims of discrimination and failure to accommodate him due to his disabilities under the NYCHRL. C.P.L.R. § 3211(a)(7). Defendants shall answer the complaint within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f). The parties shall convene for a Preliminary Conference September 17, 2020, at 12:00 noon, via telephone, to be arranged by the court.

DATED: August 21, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
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