

Conti v Auburn Community Hosp.

2023 NY Slip Op 34629(U)

April 3, 2023

Supreme Court, Cayuga County

Docket Number: Index No. E2022-0576

Judge: Thomas G. Leone

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SUPREME COURT
COUNTY OF CAYUGA

STATE OF NEW YORK

AUBREY CONTI,

Plaintiff,

-vs-

Index No. E2022-0576

AUBURN COMMUNITY HOSPITAL,

Defendants.

BEFORE: HON. THOMAS G. LEONE
Acting Supreme Court Justice

APPEARANCES:

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DECISION & ORDER

Leone, Thomas G., J

I. **FACTS**

On August 26, 2021, an unprecedented regulation of the New York State Department of Health (“DOH”) became effective that, in sum and substance, mandated all employers in the healthcare field, including hospitals, to require all employees who have contact with patients or coworkers be vaccinated with at least one dose of a COVID-19 vaccine by September 27, 2021 as a condition of employment. The regulation set forth only one exemption to the otherwise mandatory vaccination requirement, a medical exemption.

On September 3, 2021, Scott A. Berlucchi, the President and CEO of Defendant Auburn Community Hospital, sent a letter to all employees advising that the newly enacted DOH mandate required all employees of the hospital to be vaccinated. The letter advised employees that Defendant “[understood] that employees have the right to refuse the vaccination however, this refusal will result in you being unable to work at [Auburn Community Hospital] without an [*sic*] qualifying exemption.” The letter asserted that Defendant “respect[s] that employees have differing opinions about the COVID-19 vaccines; however, it is the responsibility of the Hospital to abide by Public Health Law regulation – we do not have a choice in this matter.”

Importantly, the letter went on to state that, under Defendant's interpretation of the regulation, Defendant does not have the ability to extend “a religious exemption as an alternative to vaccination. We remain available to discuss the accommodations process with you and engage in the interactive process regarding accommodations.” The letter instructed employees interested in pursuing such accommodations to contact the Employee Health Office “for forms or information about the accommodations process.”

On September 24, 2021, Plaintiff submitted paperwork to Defendant outlining her religious beliefs, explained how the vaccine was contrary to said religious beliefs, and requested as her preferred accommodation a religious exemption to the DOH vaccination mandate. According to Plaintiff, Defendant simply denied the request for a religious exemption, did not consider or investigate the feasibility of an alternative reasonable accommodation that could permit her to continue her employment but not be subject to the vaccination requirement, and simply terminated her employment at the conclusion of her shift.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on August 9, 2022 with the filing of a summons and complaint. Plaintiff's complaint essentially breaks down into two central claims: Defendant had the power to grant a religious exemption to the DOH vaccination mandate and improperly failed to exercise this authority, and, alternatively, Defendant failed to consider the feasibility of, much less provide, reasonable accommodations outside of a religious exemption that could have permitted Plaintiff to continue to perform her job without compromising her religious views.

Defendant moved to dismiss the complaint pursuant to CPLR section 3211(a)(7). In support of their motion, Defendant attached the affidavit of Thomas Filiak, the interim Senior Vice President of Humans Resources of Defendant, Exhibit A (the letter sent to employees by the CEO and President of Defendant), Exhibit B (documents Plaintiff submitted to Defendant), and a memorandum of law.

On December 27, 2022, Plaintiff submitted in opposition to the motion to dismiss an affirmation by Jordan El-Hag, Esq.

On December 29, 2022, Defendant submitted a memorandum in reply to Plaintiff's response.

The Court has considered all of the parties' submissions.

III. ANALYSIS AND DECISION

Defendant seeks dismissal of the complaint for failure to state a cause of action pursuant to CPLR § 3211. On a motion to dismiss the complaint for failure to state a cause of action, the test is not whether the complaint states a cause of action but whether Plaintiff has, in fact, a cognizable cause of action (*Robello v. Orofino Realty Co.*, 40 N.Y.2d 633 [NY 1976]; *D'Amico v. Correctional Med. Care, Inc.*, 120 A.D. 3d 956 [4th Dept. 2014]).

In conducting its evaluation, this Court must construe the complaint "in the light most favorable to the plaintiff and all factual allegations [will] be accepted as true. Further, . . . the complaint [will] be construed liberally and all reasonable inferences [will] be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v. Keybank National Ass'n*, 159 A.D.3d 618 [1st Dept 2018]; *University Hill Realty, Ltd. v. Akl*, 2023 WL 2622690 [4th Dept. 2023]).

Plaintiff's complaint essentially breaks down into two themes: (1) Defendant had the power to grant a religious exemption as an accommodation and discriminated against Plaintiff

when it failed to grant her such an accommodation, and (2) Defendant failed to consider the feasibility, much less extend, alternative reasonable accommodations that would have permitted her to continue her employment without compromising her religious beliefs. Defendant responds by asserting that under the DOH regulation it lacked the power to grant the exemption requested by Plaintiff, and it therefore acted properly and lawfully when it dismissed Plaintiff from employment.

The DOH vaccination mandate at issue is codified under 10 NYCRR 2.61. This regulation dictated that “covered entities [were to] continuously require personnel to be fully vaccinated against COVID-19, absent receipt of an exemption as allowed [by subdivision [d][1] of the regulation]” (10 NYCRR 2.61[c]). The term “covered entities” was broadly defined to include hospitals (10 NYCRR 2.61[a][1][i]). The regulation required that “covered entities shall require all personnel to receive at least their first dose before engaging in activities covered under paragraph (2) of subdivision (a) of this section” (*Id.*). “Personnel” included “all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease” (10 NYCRR 2.61[a][2]).

The regulation included a section dedicated to the “exemptions” of the vaccination mandate (10 NYCRR 2.61[d]). However, only one class of exemptions was included in the regulation, a “medical exemption” (10 NYCRR 2.61[d][1]). Under this exemption, individuals who could provide certification from “any licensed physician, physician assistant, or certified nurse practitioner that immunization with COVID-19 vaccine is detrimental to the health of the member of a covered entity's personnel” were not required to be vaccinated under the regulation (*Id.*). Other than a medical exemption, the regulation does not list any other exemptions, including but not limited to an exemption for bona fide religious protestations. Indeed, the term “religion” and any derivation of the term is noticeably absent from the regulation.

Plaintiff contends that Defendant has always had the power and ability to grant employees, including her, a religious exemption from the DOH vaccine mandate, and Defendant therefore religiously discriminated against her when Defendant failed to provide her with such a reasonable accommodation.

Reviewing the DOH regulation on its face, there is no verbiage that could be interpreted as granting “covered entities” the power to authorize an exemption to the DOH vaccination mandate on anything other than medical grounds. The regulation facially includes only one exemption to the vaccination requirement, the medical exemption (10 NYCRR 2.61[d]). As a matter of statutory interpretation, the specific inclusion of one exemption must be considered to exclude all other alternative exemptions (McKinney's Cons Laws of NY, Book 1, Statutes § 240 [“The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded”]).

This reading is consistent with the history behind the language that was ultimately selected to be included in the final enacted version of the regulation (*see We the Patriots, Inc. v. Hochul*, 17 F.4th 266, 282-283 [2nd Cir. 2021] [observing the counsel who authorized the regulation specifically considered including a religious exemption in the regulation; however, they instead elected to treat the COVID-19 vaccine like measles and rubella and not include a religious exemption]). Thus, Plaintiff's position that Defendant could have granted a religious exemption cannot rest on the plain language of the regulation itself.

Plaintiff submits that *We the Patriots, Inc. v. Hochul* (17 F.4th 368 [2nd Cir. 2021]) stands for the proposition that Defendant was lawfully able to grant a religious exemption. The Court disagrees with Plaintiff's interpretation. There, the Second Circuit identified there was nothing in its decision that “bar[s] an employer from providing an employee with a reasonable *accommodation* that removes the individual from the scope of the rule” (*Id.* At 370) (emphasis added). In other words, the Court was essentially explaining that there was nothing precluding an employer from adjusting the scope of an employee's job description so that the employee does fall under the definition of “personnel” within the regulation, and the regulation's vaccination requirement would therefore not be triggered for the employee.

However, the Second Circuit made clear that such an action was an “accomodat[ion] – *not* exempt[ion]” (*Id.*) (emphasis added). Thus, *We the Patriots, Inc.* does not, contrary to Plaintiff's contentions, authorize “covered entities” to grant blanket religious exemptions to employees who would fall under the definition of “personnel” as per the regulation. The absence of a religious exemption for individuals who could be classified as “personnel” has repeatedly

been found not to render the regulation unconstitutional (*see We the Patriots USA, Inc. v. Hochul*, 2021 WL 4048670 [E.D.N.Y. September 2, 2021]; *see also Dr. A. v. Hochul*, 567 F.Supp.3d 362 [N.D.N.Y. October 12, 2021]); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 [2nd Cir Nov. 4, 2021]; *see also We the Patriots, Inc. v. Hochul*, 17 F.4th 368 [2nd Cir. 2021]; *Does 1-2 v. Hochul*, 2022 WL 4637843 [E.D.N.Y 2022]).

Taken together, Defendant, an entity which the parties do not dispute is a “covered entity” under the regulation, was correct when it came to the legal conclusion that it lacked the power and authority under the DOH regulation to grant a religious exemption to any employee who otherwise fell under the definition of “personnel” as defined by the regulation. Being that the parties do not dispute that Plaintiff’s job description at the time would qualify her as “personnel” under the regulation, it must logically follow that Defendant did not err when it adopted its position that it could not grant Plaintiff a religious exemption as to permit her to continue her employment without alteration and not violate the State regulation.

Forcing Defendant to exempt Plaintiff from the vaccine requirement but simultaneously permit her to continue her normal employment functions would constitute an undue hardship for Defendant, as it would effectively be requiring Defendant to violate the law (*see Does 1-2 v. Hochul*, 2022 WL 4637843 [E.D.N.Y 2022] [*citing Lowman v. NVI LLC*, 821 F. App’x 29, 32 [2nd Cir. 2020] [upholding the lower court’s dismissal of a Title VII claim where an employer could not have granted an employee’s accommodation request without violating federal law]).

Thus, Plaintiff has failed to articulate a cognizable cause of action for discrimination based upon Plaintiff’s refusal to grant a religious exemption to the DOH vaccine mandate, as Defendant simply did not have the legal authority to grant such an accommodation.

While Plaintiff did not have the power to grant a religious *exemption* to the vaccination mandate, Plaintiff did have the power to construct a religious *accommodation* to Plaintiff’s situation (*We the Patriots, Inc. v. Hochul*, 17 F.4th 368, 370 [2nd Cir. 2021]). As an alternative ground, Plaintiff submits that Defendant did not investigate or consider the feasibility of any alternative accommodations, did not engage her in an “interactive process” in any way, and instead simply terminated her employment at the end of her shift because of her religious views. Plaintiff submits this course of action constitutes a failure to accommodate that renders her termination improper, unlawful, and discriminatory.

The parties do not dispute that shortly after the passage of the DOH regulation, but before Plaintiff's request for religious accommodations, the President and CEO sent a letter to all employees addressing the implications of the DOH regulation on its employees (*see* Plaintiff's Ex. 1). In this letter, employees were advised that Defendant, although unable to grant "a religious exemption as an alternative to vaccination" to permit individuals with religious objections to continue their jobs as normal, otherwise "remain[ed] available to discuss the accommodations process with [employees] and engage in the interactive process regarding accommodations" (*Id.*).

According to the allegations of Plaintiff, which the Court must accept as true for purposes of the instant motion, when she accepted the invitation to engage in the promised "interactive process" for a religious accommodation, Defendant did not engage in such a process, summarily rejected her preferred accommodation to continue her job as normal without vaccination, did not investigate nor consider the feasibility of other forms of reasonable accommodations, and merely instructed Plaintiff to "turn in her badge at the end of her shift."

Accepting Plaintiff's recitation as true, while Defendant claimed they were willing to make accommodations for individuals with bona fide religious objections, they realistically created a blanket policy that gave Defendant two options without an opportunity to investigate alternative accommodations: (1) cast aside her religious objections and get vaccinated or (2) be terminated. Put differently, Plaintiff alleges that there was not even an attempt to investigate, much less extend, an accommodation to Plaintiff's religious beliefs, and her summary termination was based solely on those religious beliefs.

Defendant asserts in its reply brief that "Plaintiff's constant interaction with patients and staff was an essential part of her job duties that could not be removed. Stated differently, Plaintiff could not be a registered nurse at the Hospital if she was not interacting with patients and staff" (Def. Reply Memo. Of Law at 3). The intrinsic problem with this argument is that the Court is not in possession of facts that permit it to reach this conclusion.

While Plaintiff's Complaint identifies that traveling patient care was part of her typical employment, the filings before this Court do not definitively establish, as Defendant claims, that Plaintiff's job inherently required in-person interactions and there were no reasonable accommodations, like tele-medicine, that could have been applied to Plaintiff's employment so that she could continue working with Defendant without violating her religious beliefs. The

affidavit of Thomas Filiak, the interim Senior Vice President of Human Resources, does not describe Plaintiff's position, does not assert that any alternative accommodations other than an exemption were considered or explored, or identifies that there was no conceivable accommodation that could be extended to Plaintiff that could have permitted her to continue her employment without violating her religious beliefs. Instead, the affidavit simply identifies that Defendant did not believe it could grant a religious exemption under the DOH regulation, his department received Plaintiff's request for an exemption, and it, on behalf of Defendant, denied the request for a religious exemption.

The letter from the President and CEO noted that, despite the absence of a religious exemption, Defendant was willing to consider alternative reasonable accommodations and engage in employees such as Plaintiff in an "interactive process for accommodations" where an employee presented a religious objection. As it must, the Court is compelled to infer from this statement that Defendant was aware of the existence of potential reasonable accommodations that employees such as Plaintiff could potential avail themselves of that could permit them to continue their employment without compromising their religious beliefs. Yet, again taking Plaintiff's allegations as true, Defendant overtly failed to engage Plaintiff in the promised "interactive process" or otherwise so much as attempt to investigate the feasibility of reasonable accommodations that could have resulted in Plaintiff's continued employment.


Assuming these facts and inferences to be true, Plaintiff has established a cognizable legal theory of liability that Defendant failed to investigate or extend reasonable accommodations, there existed reasonable accommodations that could have permitted Plaintiff to continue her employment, and Plaintiff's failure to investigate the feasibility of such potential accommodations constitutes discrimination because of religion (*see generally Phillips v. N.Y.C., et al.*, 66 A.D.3d 170 [1st Dept 2009] [*cited favorably in Martin v. United Parcel Service of America, Inc.*, 104 A.D.3d 1173 [4th Dept 2013] [in disability discrimination case under New York State Human Rights Law for failure to consider accommodation, "[a]t the very least ... an employee who proposes an accommodation ... triggers a responsibility on the employer's part to investigate that request and determine its feasibility. An employer who fails to do so, and instead terminates the employee ... has discriminated 'because of' disability within the meaning of the ADA"]]).

At this stage of the litigation process, the test is not whether Plaintiff presents a cause of action that is likely to succeed at trial or even survive motion practice. “It may very well be that at the conclusion of discovery, there was no way for the Defendant to accommodate the Plaintiff’s request” (Plaintiff’s Attorney Affirmation in Reply to Defendant’s Motion to Dismiss at para 14). However, at this juncture of the litigation process, the Court must merely review the four corners of the complaint in the light most favorable to Plaintiff, provide Plaintiff with every favorable inference that can be drawn from the facts contained within the complaint, and seek out any cognizable cause of action (*see Cole v. O’Tooles of Utica, Inc.*, 222 A.D.2d 88, 90 [4th Dept 1996]). Giving the pleadings a liberal construction, the Court finds that Plaintiff has sufficiently plead a cognizable cause of action for failure to accommodate Plaintiff’s religious beliefs.

Based upon the foregoing, it is hereby:

ORDERED that Defendant’s motion to dismiss Plaintiff’s Complaint is hereby *denied*.

Dated: April 3, 2023.



Hon. Thomas G. Leone,
Acting Supreme Court Justice