Frantz v XL Diamonds LLC

2025 NY Slip Op 32697(U)

July 16, 2025

Supreme Court, New York County

Docket Number: Index No. 151672/2022

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** *Justice* **PART** **04**

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YANIV FRANTZ,

Plaintiff,

- v -

XL DIAMONDS LLC, ROCHESTER DIAMONDS AND GOLD, INC., AVINOAM KIMCHY, MICHAEL INDELICATO,

Defendants.

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INDEX NO. 151672/2022

MOTION DATE 04/28/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion for JUDGMENT - SUMMARY.

In this action, plaintiff asserts claims for employment discrimination based on disability in violation of Administrative Code §8-107 (also known as the New York City Human Rights Law or "NYCHRL") and Executive Law §296 (also known as the New York State Human Rights Law or "NYSHRL"), against his former employer XL Diamonds LLC ("XL Diamonds"), and XL Diamonds' founder, Michael Indelicato, and CEO, Avinoam Kimchy, alleging that defendants fired him from his position as a manager at XL Diamonds because he contracted COVID-19. Upon the foregoing documents, plaintiff's motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted, for the reasons set forth below.

FACTUAL BACKGROUND

The following factual recitation is adapted from the examination before trial testimony of plaintiff, Kimchy, and Indelicato and are undisputed unless otherwise noted.

On Monday December 13, 2021, plaintiff woke up feeling ill and took a Polymerase Chain Reaction test ("PCR") for COVID-19. He texted Kimchy, who told him to rest and let him know

the results of the PCR test. On the morning of Tuesday, December 14, 2021, plaintiff texted Kimchy that he was still feeling sick and would not come into work. Later that day, he notified Kimchy that his PCR test results were positive for COVID-19 (NYSCEF Doc No. 12, Frantz tr at 173-174). Plaintiff testified that Kimchy instructed him not to return until ten days had passed and he had tested negative (*id.* at 181). Kimchy, by contrast, maintains that he told plaintiff to return after either quarantining for ten days or receiving a negative COVID-19 test (NYSCEF Doc No. 13, Kimchy tr at 45).

Plaintiff took two more PCR tests, on December 20, 2021 and December 21, 2021, respectively. He received the result from the first of these tests December 22, 2021, a Wednesday (NYSCEF Doc No. 12, Frantz tr at 178-179). As the test was positive, plaintiff believed that he could not go into the office, and instead traveled to Tulum, Mexico on December 22, 2021 (*id.* at 182). Plaintiff did not tell anyone at XL Diamonds about this trip (*id.* at 183-185). At some point during his trip, plaintiff spoke to Kimchy on the phone and told him that he would be back in the office on Monday, December 27, 2021 (*id.* at 183-184). Plaintiff returned to New York on December 26, 2021, at which point his PCR test from December 21, 2021 came back negative (*id.* at 179). Plaintiff returned to work on December 27, 2021, and was fired on that date (*id.* at 186).

Plaintiff testified that he had never been given a negative evaluation during his employment with XL Diamonds or a warning that he might be terminated and was not told why he was being fired (*id.* at 188, 228-229). Kimchy testified that plaintiff was terminated because he had left the country on an unannounced vacation during a busy time of year for XL Diamonds without consulting defendants and that if he had come in to work on December 23rd or 24th he would not have been fired (NYSCEF Doc No. 13, Kimchy tr at 55, 59-60). Indelicato similarly testified that

plaintiff was fired because of his "poor decision" to go on vacation "during a time when we needed him desperately" (NYSCEF Doc No. 14, Indelicato tr at 33).

Plaintiff now moves for summary judgment as to liability on his NYCHRL claim, relying on guidance from the New York City Human Rights Commission that actual or perceived infection with COVID-19 is a protected disability under the NYCHRL, and arguing that Kimchy's testimony that plaintiff would not have been fired if he had reported for work on December 23rd or 24th—i.e., when plaintiff was still testing positive for COVID—establishes that one of the motivating factors behind plaintiff's termination was his COVID-19 diagnosis.

Defendants oppose the motion and cross-move for summary judgment dismissing this action, asserting that the evidence in the record does not support an inference of discriminatory animus but, to the contrary, establishes that the sole reason for plaintiff's termination was his poor judgment in leaving on a vacation during the work week while ostensibly waiting for test results without first communicating with anyone at XL Diamonds.

DISCUSSION

"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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]).

Both Executive Law §296(1)(a) and Administrative Code 8–107(1)(a) provide that it is an unlawful discriminatory practice for an employer to, as pertinent here, discharge an employee because of a disability. To establish a prima facie case of employment discrimination under these statutes,[1] plaintiff must prove that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action or was, at least, treated differently based on his membership in this protected class; and (4) this adverse action or different treatment occurred under circumstances giving rise to an inference of discrimination (*see Pastor v August Aichhorn Ctr. for Adolescent Residential Care, Inc*., 238 AD3d 645, 645 [1st Dept 2025]). Once plaintiff has established that these requirements are satisfied, the burden shifts to defendants to rebut the presumption of discrimination by establishing a legitimate, independent, non-discriminatory reason for the adverse or different treatment (*see Hamburg v New York Univ. School of Medicine*, 155 AD3d 66, 73 [1st Dept 2017]). If defendants are successful in doing so, the burden shifts back to plaintiff to prove either that the non-discriminatory reason offered by defendants is entirely pretextual or that the defendants were <u>also</u> motivated by discriminatory animus in addition to their non-discriminatory reason for the adverse or different treatment (*id.*).

Plaintiff fails to establish that he is a member of a protected class or that he was terminated under circumstances giving rise to an inference of discrimination. On this first point, plaintiff's relatively brief illness is not a disability under either the NYSHRL or NYCHRL. The term "disability" is defined under the NYSHRL as "a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function... [and] which, upon the provision of reasonable

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[1] Executive Law §300 was amended in 2019 to clarify that NYSHRL claims accruing after that amendment are to be interpreted in the same manner as the NYCHRL (*see Syeed v Bloomberg L.P.*, 41 NY3d 446, 451 [2024]), the NYSHRL claims here are properly assessed using the liberal approach employed under the NYCHRL (*see e.g., Hunold v City of New York*, 216 NYS3d 550 [Sup Ct, NY County 2024]; *Cannizzaro v City of New York*, 82 Misc 3d 563, 577 [Sup Ct, NY County 2023]).

accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law §292[21]). The NYCHRL, in turn, defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code §8–102[16][a]). However, "under the NYSHRL … temporary conditions do not qualify as a disability under the discrimination laws" and "[e]ven under the most liberal and broad construction of the NYCHRL" a single, temporary illness of less than two weeks "with no subsequent long-lasting or permanent physical disability," such as the one at issue, here does not qualify as a disability[2] (*Dillon v Silverman*, 2014 NY Slip Op 30934[U] [Sup Ct, NY County 2014] [internal citations omitted]; *see also Phillips v City of New York*, 66 AD3d 170, 198 [1st Dept 2009] ["temporary conditions do not constitute disabilities under the ADA and other statutes"]).

Plaintiff has also failed to establish that his termination occurred under circumstances permitting an inference of discrimination. In general, "[d]iscriminatory motivation may be inferred from, among other things, invidious comments about others in the employee's protected group, or the more favorable treatment of employees not in the protected group" (*Rodriguez v New York City Hous. Auth.*, 225 AD3d 458, 459 [1st Dept 2024] [internal citations and quotations omitted]), neither of which are at issue here. To the contrary, the uncontradicted affidavit of Debra L.

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[2] The New York City Commission on Human Rights' statement that "the Commission considers actual or perceived infection with COVID-19 to be protected as a disability under the New York City Human Rights Law" (*see* NYSCEF Doc No. 15) does not support a contrary conclusion. In this statement, cited by plaintiff, the Commission also adopted the U.S. Equal Employment Opportunity Commission guidance "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" and this guidance, in turn, references another "primary EEOC publication about COVID-19" clarifying that "[a] person is 'regarded as' an individual with a disability if the person is subjected to an adverse action … because the person has an impairment, such as COVID-19 or Long COVID … <u>unless the actual or perceived impairment is objectively both transitory (lasting or expected to last six months or less) and minor</u>" (*see What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [last accessed July 15, 2025] [emphasis added]). Plaintiff's illness falls within this exception for transitory and minor impairments.

Fletcher, XL Diamonds's head of Human Resources, establishes that all other XL Diamonds employees who contracted COVID-19 had gone on sick leave and returned without being fired and that there was no "company policy of firing employees who were sick or had become ill for any reason including being infected with COVID" (NYSCEF Doc No. 23, Fletcher aff at ¶¶ 5-6).

Finally, even assuming that plaintiff has established his prima facie case, defendants have proffered a legitimate non-discriminatory reason for firing plaintiff, i.e., that instead of waiting for a negative COVID-19 test result so he could return to work, he went on a vacation during the work week without first discussing it with his employer (*see Dedewo v CBS Corp*., 18 CIV. 9132 (AKH), 2022 WL 1031588, at *7 [SDNY Apr. 5, 2022] [defendant's motion for summary judgment dismissing action for, inter alia, discriminatory discharge, granted where evidence established that plaintiff was fired because she "took an unauthorized vacation when told she was needed at her job, and was willfully late in returning to her job"]). "In the face of this evidence, plaintiff [has] failed to come forward with any evidence raising an issue of fact as to whether these reasons were mere pretext for discrimination (under the State HRL) or whether discrimination was one of the motivating factors for the demotion (under the City HRL)" (*Kwong v City of New York*, 204 AD3d 442, 444 [1st Dept 2022] [internal citations omitted]). Accordingly, defendants have established their entitlement to summary judgment dismissing this action.

In light of the foregoing, it is

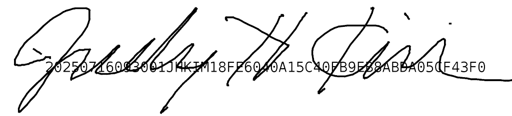
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that defendants shall, within fifteen days of the date of this decision and order serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "EFiling" page on this Court's website).

This constitutes the decision and order of the Court.



7/16/2025				HON. JUDY H. KIM, J.S.C.
DATE				
CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
	GRANTED	X DENIED	GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE