

**Hudson v NYU Hosps. Ctr.**

2013 NY Slip Op 31410(U)

June 27, 2013

Sup Ct, NY County

Docket Number: 157998/12

Judge: Joan M. Kenney

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C.  
Justice

PART 8

Index Number : 157998/2012  
HUDSON, CHAD  
vs.  
NYU HOSPITALS CENTER  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. 157998/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 20 were read on this motion to/for Dismiss  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1-18  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 19  
Replying Affidavits \_\_\_\_\_ | No(s). 20

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 6/27/13

Joan M. Kenney  
J.S.C.  
**JOAN M. KENNEY**  
J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

-----X

Chad Hudson,

Plaintiff,

-against-

**DECISION AND ORDER**  
Index Number: 157998/12  
Motion Seq. No.: 001

NYU Hospitals Center,

Defendant.

-----X

**KENNEY, JOAN M., J.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmations, Exhibits	1-18 <sup>1</sup>
Opposition Affirmation	19
Reply Affirmation	20

In this discrimination action, defendant NYU Hospitals Center (the Hospital), moves for an Order, pursuant to CPLR 3211, dismissing the action.

**Factual Background**

Plaintiff alleges in the complaint that he was fired from his employment because: (1) he is African American; and (2) he was retaliated against regarding the Hospital's opposition to his unemployment benefits.

On September 28, 2009, plaintiff was hired as a temporary housekeeper at the Hospital for Joint Disease's Environmental Services Department. Plaintiff became a permanent employee on July 19, 2010.

On December 13, 2011, plaintiff transferred to a probationary orthopedic technician position in the Hospital for Joint Disease's Department of Surgical Services and Central Supply

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<sup>1</sup>A DVD of a surveillance video was referenced in Exhibit J of the Moving Papers. This Court requested a copy of the DVD and same was provided to this Court by defendant to plaintiff (see letter dated May 28, 2013 attached).

(SSCS). Plaintiff's supervisors in the SSCS were: Luciano Iaboni, who approved plaintiff's transfer; Dennis Campbell; and Maria Hancock. In 2012, the SSCS had 56 employees, 46 of whom were African American.

The incident which led to plaintiff's termination was recorded on the Hospital's videotape surveillance security system and was shown as evidence in plaintiff's administrative appeal. The video establishes that plaintiff and another employee (the 2<sup>nd</sup> employee) were present in the break room on the evening of January 31, 2012. The video establishes the following recorded occurrences:

- ▶ at 5:56pm plaintiff and the 2<sup>nd</sup> employee are in the break room when the other employee checks his phone, returns it to his bag and exits the break room;
- ▶ at 6:06pm while plaintiff is still in the break room, the 2<sup>nd</sup> employee returns and checks his phone again;
- ▶ at 6:09pm the 2<sup>nd</sup> employee disconnects his phone from the charger and leaves the charger plugged into a wall outlet with one end of the charger cord in his closed bag and then leaves the break room;
- ▶ at 6:10pm, when the 2<sup>nd</sup> employee leaves, plaintiff goes to the other employee's bag, examines it, and sees the charger cord in the closed bag. Plaintiff then exits the break room;
- ▶ at 6:23pm the 2<sup>nd</sup> employee returns to the break room and accesses his bag then exits the break room;
- ▶ at 7:17pm plaintiff returns to the break room;
- ▶ at 7:18pm plaintiff goes to the 2<sup>nd</sup> employee's bag, opens it, and looks inside. The charger cord falls out of the bag. Plaintiff unplugs the charger from the wall outlet and examines it. Plaintiff plugs the charger back into the wall outlet when a third employee enters the room and exits the break room;
- ▶ at 7:20pm plaintiff enters the break room, goes directly to the wall outlet, puts on a cap, unplugs the charger from the wall outlet and leaves the break room with the charger;

- ▶ at 7:41pm the 2<sup>nd</sup> employee enters the break room, realizes that his charger is missing, and exits the room. The 2<sup>nd</sup> employee returns to the room with Ms. Hancock and a 4<sup>th</sup> employee to search for the charger.

The next day on February 1, 2012, Mr. Iaboni and Mr. Campbell reviewed the video and met with plaintiff and his union delegate to discuss the videotaped occurrence. During the meeting, plaintiff conceded that he took the charger and that the charger was not his.

On February 3, 2012, the Hospital terminated plaintiff's employment on grounds that plaintiff had stolen the 2<sup>nd</sup> employee's charger (the theft). On February 6, 2012, the Hospital notified the plaintiff's union of the termination, which the union grieved on February 10, 2012. On March 7 and 14, 2012, plaintiff contested his termination. On April 6, 2012 the Hospital upheld plaintiff's termination and the union did not appeal the decision to terminate plaintiff's employment.

On February 29, 2012, plaintiff filed a charge of discrimination with the New York State Division of Human Rights, alleging that he had been terminated because of his race. On May 14, 2012, plaintiff withdrew the complaint against the Hospital.

On June 6, 2012 plaintiff had a hearing on his unemployment benefits claim before the State of New York Unemployment Insurance Appeal Board. The Hospital opposed plaintiff's unemployment benefits claim.

On November 9, 2012, plaintiff filed the instant complaint against the Hospital alleging that he was terminated because of his race and that the Hospital's opposition to plaintiff's unemployment benefits application was merely used as a form of retaliation.

On December 26, 2012, the State of New York Unemployment Insurance Appeal Board held that the Hospital's termination of plaintiff's employment, for theft, was proper and dismissed

plaintiff's unemployment benefits claim on the merits.

### Discussion

"A motion to dismiss for failure to state a claim assumes truth of complaint's material allegations and whatever can be reasonably inferred therefrom. A motion to dismiss for failure to state a claim should be denied if, from pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." (*McGill v Parker*, 179 AD2d 98 [1st Dept. 1992]).

"To prevail on motion to dismiss based on documentary evidence, documents relied upon must definitively dispose of plaintiff's claim." (*Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1st Dept. 1995]). A "proponent of motion to dismiss on ground of a defense founded upon documentary evidence is required to provide such evidence conclusively establishing a defense to the asserted claims as a matter of law." (*IMO Industries Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10 [1st Dept. 1999]).

A plaintiff alleging racial discrimination in employment has the initial burden of establishing a prima facie case, demonstrating that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was terminated from employment or suffered an adverse employment action; and (4) the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. (*Dickerson v Health Management Corp. of America*, 21 AD3d 326 [1st Dept. 2005]).

Dismissal of [an] employee's race discrimination action against [a] former employer [is] warranted, where allegations in the complaint established that employer had good cause to terminate employee. (*Perkins v Lynch*, 309 AD2d 587 [1st Dept. 2003]).

Once an employee establishes *prima facie* case of racial discrimination, employer bears

burden of establishing legitimate nondiscriminatory business reason for its actions, and if it sustains its burden, employee must establish by preponderance of evidence that the "business" reason proffered is not true and is pretext for discrimination. (*NY Telephone Co. v NYS Div. of Human Rights*, 222 AD2d 234 [1st Dept. 1995]).

The Hospital's Personnel Policies and Rules of Conduct state, "Should you not follow the Hospital's rules, regulations and procedures you will be subject to disciplinary action including suspension or termination. Although the following is not intended to cover all possible violations, some of the more serious are noted:... 17. Theft, Fraud, misappropriation or unauthorized possession or use of property belonging to the Hospital, employee, patient, or any other person." (Moving papers, Exhibit D).

Plaintiff signed as to his receipt of this policy on September 2, 2009. (Moving papers, Exhibit E). Exhibit F of the moving papers contains the documentation of a number of occurrences of the Hospital terminating employees for theft, including the theft of socks from a supply closet, and the theft of cups.

Here, while plaintiff meets the first three prongs of a discrimination claim, he fails to satisfy the fourth. The termination occurred under circumstances that did not give rise to an inference of discrimination. Per the rule in *Perkins*, the Hospital had good cause to terminate plaintiff in this instance. Plaintiff was observed on video surveillance with the other employee and the phone charger before the theft occurred. Plaintiff was then observed on video going into the other employee's bag and removing the charger. Plaintiff then admitted to taking the charger in the February 1, 2012 meeting. This was a clear violation of Hospital policy, a policy that plaintiff had agreed to when he executed receipt of the Hospital's policy on September 2, 2009. Moreover, the Hospital has demonstrated, by submission of numerous documentation that other employees were

terminated for theft. As such, the Hospital is illustrating that terminating plaintiff's employment for theft was not an isolated occurrence that has never been done before to other employees. Based on these facts, there is no inference of discrimination.

"To make out a claim of retaliation under the Human Rights Law, the complaint must allege that: (1) plaintiff engaged in a protected activity by opposing conduct prohibited thereunder; (2) defendants were aware of that activity; (3) plaintiff was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action." (*Fletcher v Dakota, Inc.*, 99 AD3d 43 [1st Dept. 2012]).

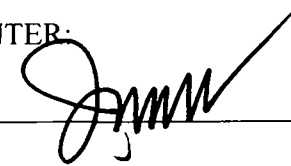
Here, although plaintiff engaged in a protected activity by filing for the unemployment benefits and defendant was aware of this activity (based on their opposition of plaintiff's application), the ultimate denial of these benefits was not due to any purported retaliatory action by defendant, but rather the fact that plaintiff was fired from his job, for cause (theft), and therefore not entitled to receive unemployment benefits. Accordingly, it is hereby

ORDERED, that the within motion is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant and against plaintiff, dismissing the complaint.

Dated: 6/27/13

ENTER:

  
\_\_\_\_\_  
Joan M. Kenney, J.S.C.