Gallo-Schwartz v Consolidated Edison Co. of N.Y., Inc.
2013 NY Slip Op 32394(U)
October 8, 2013
Sup Ct, New York County
Docket Number: 104001/12
Judge: Donna M. Mills
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[* 1]

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

PRESENT : DONNA M. MILLS PART 58
Justice

ROSA GALLO-SCHWARTZ,

Plaintiff,

-v-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Defendants.

INDEX NO. 104001/12

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 3
Answering Affidavits– Exhibits	2
Replying Affidavits	4

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

FILED
OCT 08 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/5/13

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

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

ROSA GALLO-SCHWARTZ,

Plaintiff,

- against -

CONSOLIDATED COMPANY OF NEW YORK, INC., and JOHN A. GAFFNEY in his individual capacity,

Defendants.

INDEX NO.
104001/12

DECISION/ORDER

DONNA M. MILLS, J:

This case requires the Court to evaluate the sufficiency of a complaint alleging disability discrimination under the New York State Human Rights Law (State HRL) (Executive Law art 15) and the New York City Human Rights Law (City HRL) (Administrative Code of City of NY § 8-107) in the context of a motion to dismiss for failure to state a cause of action.

BACKGROUND

Plaintiff, Rosa Gallo-Schwartz brings this action asserting claims of disability discrimination under the State HRL and the City HRL, based on the termination of her employment with defendant Consolidated Edison Company of New York, Inc. (Con Ed) for taking company-paid sick leave under false pretenses. Plaintiff worked at Con Edison for 25 years as defendant John A. Gaffney's (Gaffney) secretary. Gaffney is a General Manager at Con Edison.

Plaintiff, a former Administrative Clerk in Con Edison's Customer Operations Department, was discharged in August 2010 for collecting sick pay under false pretenses. More specifically, after being away from work on paid sick leave for more than four months, video surveillance purportedly showed her driving herself to the nail salon, grocery shopping, walking a dog, and walking without apparent discomfort with a neck brace in her

hand after leaving Con Edison's office building after a Company-required medical appointment.

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wooton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards. For example, under the Federal Rules of Civil Procedure, it has been held that a plaintiff alleging employment discrimination "need not plead [specific facts establishing] a prima facie case of discrimination" but need only give "fair notice" of the nature of the claim and its grounds (Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514–515, 122 S.Ct. 992, 152 L.Ed.2d 1 [2002]). Applying these liberal pleading standards, this Court finds that plaintiff has stated causes of action for violations of both the State and City HRLs based on disability discrimination.

In making this determination, this Court notes that under both the State HRL and the City HRL, it is an unlawful discriminatory practice for an employer, because of an individual's disability, to refuse to hire or to discharge such individual, or otherwise to discriminate against such individual in the terms, conditions and privileges of employment. Executive Law § 296(1)(a); Admin. Code § 8–107(1)(a). To establish a case of disability discrimination, a plaintiff must show that he or she suffers from a disability, and the disability caused the behavior for which he or she was terminated (Matter of McEniry v.

Landi, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 644 N.E.2d 1019 (1994); see Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 146, 885 N.Y.S.2d 74 (1st Dept. 2009). The term "disability" is defined, under the NYSHRL, as "a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques ... [and] which, upon the provision of reasonable 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); see Phillips v. City of New York, 66 A.D.3d 170, 178, 884 N.Y.S.2d 369 (1st Dept. 2009); Pimentel v. Citibank, N.A., 29 A.D.3d 141, 145, 811 N.Y.S.2d 381 (1st Dept. 2006). The NYCHRL defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Admin. Code § 8–102(16)(a); see Phillips, 66 A.D.3d at 181, 884 N.Y.S.2d 369.

Here, the complaint alleges that plaintiff was in an automobile accident in March 2008; she subsequently took approximately eight months of paid sick leave over the time period from April 2008 to February 2009; in March 2010, she had surgery for her physical pain associated with the automobile accident, and was off work on paid sick leave continuously from that time until mid-August 2010. On August 18, 2010, she had a routine follow-up medical examination at Con Edison's Occupational Health Department, and thereafter, Gaffney informed plaintiff that she was being discharged for collecting sick pay under false pretenses.

Applying the liberal standard that is required of this Court in deciding whether or not plaintiff has stated a cause of action, this Court finds that plaintiff has sufficiently pleaded that she suffered from a disability when she was injured in the automobile accident, and also at the time when she was terminated. The complaint also successfully pleads that plaintiff was terminated from her employment with Con Edison because of her purported

disability.

As to Gaffney's culpability, the New York Court of Appeals has held that individuals may be liable under the State Human Rights Law only if they have an "ownership interest or any power to do more than carry out personnel decisions made by others" (Patrowich v Chemical Bank, 63 NY2d 541, 542 [1984]). However, the court did not specify under which subsection of Executive Law section 296 that individual would be liable (id.). Subsequent courts have interpreted Patrowich broadly and allowed individuals to be sued for discrimination (see Kaiser v Raoul's Restaurant Corporation, 72 AD3d 539 [1st Dept 2010]).

The plaintiff has alleged facts sufficient to state a cause of action against Gaffney pursuant to Executive Law section 296 (6), which imposes liability upon individuals who aid and abet an employer that commits employment discrimination in violation of Executive Law section 296 (1) (a) (see Strauss v New York State Dept. of Educ., 26 AD3d 67 [2005]).

The defendant's remaining contentions are without merit.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a conference in Room 574, 111 Centre Street, on Nov. 15th, 2013, at 10:00 AM.

Dated:

FILED
OCT 08 2013
COUNTY CLERK'S OFFICE
NEW YORK

ENTER

Donna M. Mills, J.S.C.

DONNA M. MILLS, J.S.C.