

**Hruska v Bohemian Citizens' Benevolent Socy. of
Astoria. Inc..**

2016 NY Slip Op 31727(U)

September 16, 2016

Supreme Court, New York County

Docket Number: 158593/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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VIKTOR HRUSKA,

Plaintiff,

DECISION/ORDER
Index No. 158593/2014

-against-

BOHEMIAN CITIZENS' BENEVOLENT SOCIETY
OF ASTORIA, INC.,

Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff Viktor Hruska (hereinafter referred to as "Hruska" or "plaintiff") commenced the instant action against defendant Bohemian Citizens' Benevolent Society of Astoria, Inc. ("Benevolent Society" or "defendant") seeking to recover damages arising out of defendant's alleged employment discrimination and retaliation against plaintiff based on plaintiff's national origin. Plaintiff now moves for an Order pursuant to CPLR § 3212 for partial summary judgment on his causes of action for retaliation. Defendant cross-moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint. The motion and cross-motion are resolved as set forth below.

The relevant facts are as follows. Defendant is an organization that was originally founded to promote Czech culture, and that now promotes both Czech and Slovak culture. Although members of the Benevolent Society were originally required to be Czech, the Benevolent Society now accepts persons of both Czech and Slovak origin as members. Defendant also operates a restaurant and bar. Plaintiff, who is from the Czech Republic, began working as a maintenance employee for defendant in or around June 2009.

On or about July 23, 2012, defendant reduced plaintiff's wages from a \$1,380.00 salary per week to \$22.00 per hour. According to the deposition testimony of Milada Stastny ("Stastny"), defendant's president between 2012 and 2014, plaintiff's wages were reduced because Jana Samkova ("Samkova"),

plaintiff's wife or partner and defendant's treasurer, increased plaintiff's wages without the authorization of the Board of Directors or the General Manager. Thereafter, plaintiff was informed by defendant that he would no longer be reimbursed for his travel expenses. Stastny testified that defendant no longer reimbursed plaintiff for his travel expenses because he inflated his mileage in his travel reimbursement requests. Plaintiff was terminated from his employment with defendant on or about August 21, 2012. Stastny testified that defendant was terminated because he inflated his mileage in his reimbursement requests, he was "not very efficient" and "[h]is work was not really that great, to put it mildly."

Plaintiff, in contrast, claims that defendant reduced his wages and began searching for a reason to terminate his employment due to its anti-Czech bias and desire to fill his position with a person of Slovak origin. Plaintiff claims that defendant began investigating his eligibility to work in the United States and required him to complete an inventory assignment that was not part of his job description. Plaintiff further claims that defendant gave him a new credit card to use for purchasing materials on or about May 16, 2012 and made him personally liable for unauthorized charges but denied him access to the account to verify expenditures. Plaintiff made oral complaints about the alleged discrimination to Lubos Spacek ("Spacek"), the General Manager, in June 2012 and to Stastny in August 2012.

On or about August 14, 2012, counsel for plaintiff sent a letter to Stastny stating that plaintiff had retained her to represent him with respect to his claims of employment discrimination, harassment and retaliation. Stastny acknowledged receipt of the letter and stated that she would show it to defendant's Board of Directors on or about August 18, 2012. On or about August 21, 2012, plaintiff was terminated from his employment. Spacek, who is Slovak, informed plaintiff of the termination. Thereafter, on or about October 3, 2012, plaintiff filed an Equal Employment Opportunity Commission ("EEOC") complaint, which was dismissed on June 11, 2013. On or about June 12, 2012, the Benevolent Society commenced an action in the Supreme Court of Queens County against Hruska and Samkova, asserting causes of action for breach of contract, breach of fiduciary duty, fraud and unjust enrichment based on Samkova's allegedly unauthorized increase of Hruska's salary and Samkova's approval of allegedly unauthorized credit card payments and improper travel expenses (the "Benevolent Society Action"). The Benevolent Society Action

was dismissed as against Hruska on May 13, 2014 by a decision and order of Justice Janice A. Taylor for failure to state a cause of action. Plaintiff then commenced the instant action, which asserts causes of action for (1) discrimination based upon national origin in violation of the New York State Human Rights Law (“NYSHRL”), (2) discrimination based upon national origin in violation of the New York City Human Rights Law (“NYCHRL”), (3) retaliation in violation of the NYSHRL and (4) retaliation in violation of the NYCHRL.

The court first considers the portion of defendant’s cross-motion for summary judgment dismissing plaintiff’s causes of action for employment discrimination. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

On a motion for summary judgment to dismiss a complaint alleging employment discrimination, the court is required to conduct a specific burden shifting analysis. This standard requires plaintiff to establish a *prima facie* case by demonstrating (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action and (4) circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). An inference of discrimination may arise “merely from the fact that the position was filled or held open for a person not in the same protected class.” *Sogg v. American Airlines, Inc.*, 193 A.D.2d 153, 156 (1st Dept 1993). If the plaintiff establishes his *prima facie* case using this analysis, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.* at 802-04. Once the defendant satisfies its burden, it becomes the plaintiff’s burden to show that defendant’s stated reason was merely a pretext for discrimination by demonstrating that the stated reasons were false and that discrimination was the real reason or to show that, regardless of any legitimate motivations the defendant

may have had, the defendant was motivated at least in part by discrimination. *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 127 (1st Dept 2012).

In the present case, the portion of defendant's cross-motion for summary judgment dismissing plaintiff's causes of action for employment discrimination is granted. As an initial matter, plaintiff has made a *prima facie* showing of employment discrimination as he has established that he is a member of a protected class as a person of Czech national origin, that he is qualified for the position of maintenance worker through his experience with electrical work, plumbing work, carpentry work, plastering and painting, general construction work and maintenance of information technology systems and that he suffered the adverse employment actions of the denial of mileage reimbursement, the reduction of his wages and the termination of his employment. Plaintiff states in his affidavit that he was replaced by a person or persons of Slovak national origin, which raises an inference of discrimination.

Pursuant to the *McDonnell Douglas* burden shifting analysis, the burden now shifts to the defendant to articulate legitimate, non-discriminatory reasons for its decisions to deny plaintiff mileage reimbursement, reduce his wages and terminate his employment. Defendant has met its burden with regard to its decision to deny plaintiff mileage reimbursement by submitting Stastny's deposition testimony that plaintiff overstated mileage in reimbursement requests. Further, defendant has met its burden with regard to its decision to reduce his compensation by submitting Stastny's deposition testimony that plaintiff's wages were increased by Samkova without the authorization of the Board of Directors or the General Manager. Defendant has also articulated legitimate, non-discriminatory reasons for its decision to terminate plaintiff's employment. Defendant has submitted Stastny's deposition testimony that plaintiff overstated mileage in reimbursement requests, that there were unauthorized charges on defendant's credit card in plaintiff's possession, that plaintiff did not timely complete the inventory assignment and that plaintiff's work performance was generally unsatisfactory, in part due to his failure to arrive at and leave from work on time on several occasions. Defendant has also submitted a written warning and formal discipline letter from Spacek regarding plaintiff's failure to complete the inventory assignment.

In response, plaintiff has failed to provide any evidence that these reasons were mere pretext for discrimination or that the defendant was motivated at least in part by discrimination. “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). However, the “mere fact that [plaintiff] may disagree with [the] employer’s actions or think that [plaintiff’s] behavior was justified does not raise an inference of pretext.” *Melman*, 98 A.D.3d at 120-21. In the present case, plaintiff has failed to provide evidence that the reasons articulated by defendant were false and that discrimination was the real reason for the adverse employment actions, and instead merely contends that defendant has failed to sufficiently prove that these reasons were legitimate. With regard to the decision to deny mileage reimbursement, defendant has failed to submit any evidence, or even state in his affidavit, that he did not overstate his mileage in reimbursement requests. Further, with regard to the decision to reduce his wages, plaintiff has failed to submit any evidence that Samkova increased his wages with the approval of the Board of Directors. In addition, with regard to the decision to terminate his employment, although plaintiff testified at his deposition that he never used defendant’s credit card for personal expenses, he has failed to submit any evidence that he did not overstate his mileage in reimbursement requests, that he timely completed the inventory assignment and that he always arrived at and left work on time. Plaintiff’s claim that the inventory assignment was not part of his job description and that he was given insufficient instruction on how to complete the activity fails to establish that this reason for his termination was pretext as the mere fact that plaintiff disagreed with defendant’s assignment of this task and the amount of instruction does not raise an inference of pretext. Further, plaintiff testified during his deposition that he was unable to complete the inventory assignment on time not because he was given insufficient instruction, but because “[t]he time for it [the inventory assignment] was too short, so I was simply not able to make it. I couldn’t manage it because I had different tasks.” Further, plaintiff’s evidence that Stastny was satisfied with his work performance on certain occasions before his employment was terminated does not establish that defendant did not terminate his employment due, in part, to poor work performance, particularly given Stastny’s deposition testimony that

she mistakenly believed that plaintiff had completed the work for which she commended him on one of those occasions and that plaintiff was inefficient and failed to arrive at and leave from work on time on several occasions.

Plaintiff has also failed to show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination. The mere fact that plaintiff was not accepted into membership of the Benevolent Society, while persons of Slovak origin allegedly were accepted, is not evidence that defendant was motivated by discrimination. Moreover, defendant's failure to admit plaintiff as a member is unrelated to defendant's denial of mileage reimbursement, reduction of plaintiff's wages and termination of plaintiff's employment. Further, the mere fact that plaintiff was replaced by a person or persons of Slovak origin, while sufficient to raise an inference as part of plaintiff's *prima facie* case, is not evidence that defendant was motivated by discrimination.

The court next considers plaintiff's motion for summary judgment on his causes of action for retaliation and the portion of defendant's cross-motion for summary judgment dismissing his causes of action for retaliation. To make out a *prima facie* case of retaliation under the NYSHRL or NYCHRL, the plaintiff must show that (1) he engaged in a "protected activity" known to defendant, (2) defendant took an adverse employment action and (3) there is a causal connection between the protected activity and the adverse employment action. See *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313 (2004). As part of a plaintiff's *prima facie* showing, a causal connection may be inferred between the protected activity and the adverse action from the close temporal proximity of the two events. *Treglia v. Town of Manlius*, 313 F.3d 713, 720-21 (2nd Cir. 2002). If plaintiff makes out a *prima facie* case of retaliation, the burden then shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. See *Williams v. The City of New York*, 38 A.D.3d 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were pretextual or that "a retaliatory motive played a part in the adverse employment action[] even if it was not the sole cause." See *id*; *Hicks*, 593 F.3d at 164-65.

Courts have held that the anti-retaliation provision of the NYSHRL "extends beyond workplace-related or employment-related retaliatory acts and harms." See *Hicks v. Baines*, 593 F.3d 159, 165 (2nd Cir.

2010) (interpreting Title VII's anti-retaliation provision and analyzing the plaintiff's NYSHRL claim under the same standard); *Landwehr v. Grey Adv.*, 211 A.D.2d 583, 584 (1st Dept 1995) (“[T]he IAS Court erred in finding that such a cause of action [for retaliation] was unavailable to plaintiff since he had already been discharged at the time of the alleged retaliatory conduct. There is no requirement that the retaliatory conduct occur against a current employee”). Courts have specifically held that the filing of a lawsuit may be retaliatory. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157 (3rd Cir. 1999); *Spencer v. International Shoppes, Inc.*, 902 F.Supp.2d 287, 295 (E.D.N.Y. 2012) (holding that the relevant inquiry is not whether the lawsuit had merit but whether “retaliatory intent played a motive in the filing of the...litigation”). Under the NYCHRL, the retaliation need not result in an adverse employment action, either in an “ultimate” employment action or in a “materially adverse change in the terms and conditions of employment,” to be actionable, as long as the retaliation was reasonably likely to deter a person from engaging in protected activity. *See New York Administrative Code § 8-107(7)*.

In the present case, plaintiff has made out his *prima facie* case of retaliation as he has established that he engaged in protected activities when he complained to defendant about the alleged discrimination and filed his EEOC complaint, that defendant took adverse actions against him by terminating his employment and commencing the Benevolent Society Action and that an inference of causation arises from the temporal proximity of plaintiff's engagement in the protected activities and the adverse actions. On or about August 14, 2012, counsel for plaintiff sent the letter to Stastny stating that plaintiff had retained her to represent him with respect to his claims of employment discrimination, harassment and retaliation, shortly before plaintiff was terminated from his employment with defendant on or about August 21, 2012. On or about October 3, 2012, plaintiff filed an Equal Employment Opportunity Commission (“EEOC”) complaint, which was dismissed on June 11, 2013. Shortly thereafter, on or about June 12, 2013, the Benevolent Society commenced its action against Hruska. In addition, Stastny's deposition testimony that the Board of Directors decided to commence the action because they had to “counteract” plaintiff's claim of discrimination is evidence of a causal connection between plaintiff's protected activity and the commencement of the Benevolent Society Action. Specifically, Stastny testified as follows:

Q. How was it determined that the Society should pursue legal action against Mr. Hruska?

A. Because he had a totally unfounded claim against us. I don't know.

Q. Was it determined through the board of directors' meetings or some other meeting?

...

A. It was determined by the board of directors.

Q. Upon what information or evidence did the board of directors base the decision to pursue legal action against Mr. Hruska?

A. He had a claim against us which was totally unfounded. It's – we had to counteract.

Q. My question is: What evidence or information did you have that supported the claims that were brought?

A. I don't know what you want from me there.

The court also finds that both termination from his employment and the commencement of a civil action against plaintiff were reasonably likely to deter plaintiff from engaging in further protected activity, pursuant to the NYCHRL standard.

To the extent that defendant contends that plaintiff has failed to make a *prima facie* showing of retaliation with regard to the commencement of the Benevolent Society Action because his EEOC claim had been dismissed before the commencement of the action, this contention is without merit. Neither the NYSHRL nor the NYCHRL require the plaintiff to be engaged in protected activity at the time of the retaliation.

The burden now shifts to the defendant to articulate legitimate, non-discriminatory reasons for its decisions to terminate plaintiff's employment and commence the Benevolent Society Action. Defendant has articulated legitimate, non-discriminatory reasons for its decision to terminate plaintiff's employment, as described *supra*. In response, plaintiff has failed to provide any evidence that the non-retaliatory reasons were pretextual or that defendant had a retaliatory motive for its decision to terminate plaintiff's employment. Thus, the portion of defendant's cross-motion for summary judgment dismissing plaintiff's causes of action for retaliation based on the termination of his employment is granted.

Defendant has also articulated legitimate, non-discriminatory reasons for its decision to commence the Benevolent Society Action. Stastny testified during her deposition that defendant believed plaintiff made unauthorized charges on defendant's credit card in plaintiff's possession and that plaintiff inflated his mileage in reimbursement requests. However, in response, plaintiff has provided Stastny's deposition testimony that the Board of Directors decided to commence the action because they had to "counteract"

plaintiff's claim of discrimination, which is evidence that defendant had a retaliatory motive for its decision to commence the Benevolent Society Action. Thus, as there is an issue of fact as to whether defendant had a retaliatory motive for its decision to commence the Benevolent Society Action, both plaintiff's motion for partial summary judgment and the portion of defendant's cross-motion for summary judgment dismissing plaintiff's causes of action for retaliation based on the commencement of the Benevolent Society Action are denied.

Defendant's contention that Stastny's deposition testimony regarding why the Board of Directors decided to commence the Benevolent Society Action is merely speculative as she did not vote with regards to that decision is without merit. It is undisputed that, as president of the Benevolent Society, Stastny conducted the meeting of the Board of Directors wherein they voted to commence the Benevolent Society Action, and thereby has personal knowledge of the discussion surrounding the vote. In addition, although Stastny testified that the Board of Directors commenced the Benevolent Society Action "[b]ecause [plaintiff] had a totally unfounded claim against us" but also stated "I don't know," which could indicate her doubt as to the reason the action was commenced, Stastny later clearly testified that the Board of Directors' decision was based on the fact that plaintiff "had a claim against us which was totally unfounded" and that "we had to counteract." Further, Stastny failed to clarify or alter the deposition transcript when she had the opportunity and defendant has failed to submit an affidavit from Stastny clarifying or altering her testimony.

Accordingly, plaintiff's motion for partial summary judgment is denied and defendant's cross-motion for summary judgment is denied as to plaintiff's causes of action for retaliation based on the commencement of the Benevolent Society Action, but is otherwise granted. It is hereby

ORDERED that plaintiff's causes of action for employment discrimination and his causes of action for retaliation based on the termination of his employment with defendant are dismissed.

This constitutes the decision and order of the court.

DATE: 9/16/16

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KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.