

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

2017 NY Slip Op 30423(U)

March 2, 2017

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 commenced the instant action seeking to recover damages arising from defendant's alleged employment discrimination and retaliation against plaintiff based on his national origin. By a decision and order dated September 16, 2016, the court denied plaintiff's motion for summary judgment on his two causes of action for retaliation in violation of the New York State Human Rights Law and the New York City Human Rights Law, respectively, and granted defendant's cross-motion for summary judgment dismissing plaintiff's complaint except as to plaintiff's causes of action for retaliation based on defendant's commencement of a legal action against plaintiff. Plaintiff now moves for an Order pursuant to CPLR § 2221(d) for leave to reargue the portion of the court's prior decision dismissing plaintiff's causes of action for retaliation based on defendant's termination of plaintiff's employment and, upon reargument, for the court to deny the defendant's cross-motion for summary judgment dismissing these causes of action. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Defendant is an organization that promotes Czech and Slovak culture and 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. In 2012, defendant reduced plaintiff's wages and informed plaintiff that he would no longer be reimbursed for his travel expenses. On or about August

14, 2012, plaintiff's counsel sent a letter to Milada Stastny ("Stastny"), defendant's president, stating that plaintiff had retained her to represent him with respect to his claims of employment discrimination, harassment and retaliation based on his national origin. On or about August 21, 2012, plaintiff was terminated from his employment. Thereafter, on or about October 3, 2012, plaintiff filed an Equal Employment Opportunity Commission complaint, which was dismissed on June 11, 2013. On or about June 12, 2012, defendant commenced an action in the Supreme Court of Queens County against Hruska and Jana Samkova ("Samkova"), plaintiff's wife and defendant's treasurer, 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 asserting 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.

Plaintiff previously moved for summary judgment on his causes of action for retaliation and defendant cross-moved for summary judgment dismissing plaintiff's complaint. By a decision and order dated September 16, 2016, the court denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment dismissing plaintiff's complaint except as to plaintiff's causes of action for retaliation based on plaintiff's commencement of the Benevolent Society Action. The court held that, although plaintiff had established a *prima facie* case for retaliation based on the termination of his employment, defendant had articulated legitimate, non-retaliatory reasons for its decision to terminate plaintiff's employment through its submission of 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. The court found that plaintiff had failed to provide any evidence that defendant had a retaliatory motive for its decision to terminate plaintiff's employment or that these non-retaliatory reasons were pretextual, or false, except as to the unauthorized charges on defendant's credit card as plaintiff testified at his deposition that he had never used defendant's credit card for personal expenses.

Plaintiff's motion for leave to reargue the court's prior decision is granted. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. *See* CPLR § 2221(d)(2).

In the present case, plaintiff has established that he is entitled to reargument of the court's prior decision as he has shown that the court overlooked or misapprehended matters of fact or law. Specifically, the court finds that it failed to properly consider whether the strong temporal correlation between plaintiff's protected activity, namely plaintiff's counsel's letter informing defendant that plaintiff would be bringing claims for discrimination, harassment and retaliation, and defendant's adverse action, namely the termination of plaintiff's employment, is sufficient to raise an issue of fact as to whether the reasons put forth by defendant for the termination of plaintiff's employment were merely a pretext.


Upon reargument, the court finds that its determination that defendant was entitled to summary judgment dismissing plaintiff's causes of action for retaliation based on the termination of his employment was erroneous as the strong temporal correlation between the protected activity and the adverse action raises an issue of fact as to whether the reasons put forth by defendant for the termination of plaintiff's employment were merely a pretext. On a motion for summary judgment to dismiss a complaint alleging retaliation, the court is required to conduct a specific burden shifting analysis. 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. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313 (2004). If the 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. *Williams v. The City of New York*, 38 A.D.3d 238, 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were merely a pretext. *Id.*; *Delrio v. City of New York*, 91 A.D.3d 900, 901 (2d Dept 2012). A "strong temporal correlation" between the plaintiff's protected activity and the defendant's adverse employment action alone is sufficient to raise an issue of fact as to whether the employer's non-retaliatory reasons for the adverse action were merely a pretext. *See Delrio*, 91 A.D.3d at 902. *See also La Marca-Pagano v. Dr. Steven Phillips, P.C.*, 129 A.D.3d 918, 921 (2d Dept 2015) (finding a strong temporal correlation between the plaintiff's protected activity and the adverse employment action where the defendant terminated the plaintiff's employment one day after the defendant received a legal demand letter from the plaintiff's attorney protesting the alleged discrimination).

In the present case, just as in *Delrio*, the court finds that the strong temporal correlation between the protected activity and the adverse action raises an issue of fact as to whether the non-retaliatory reasons for the termination put forth by defendant were merely a pretext. Defendant terminated plaintiff's employment only one week after plaintiff's counsel sent defendant a letter regarding plaintiff's intention to bring discrimination, harassment and retaliation claims, which the court finds to be a strong temporal correlation.

Accordingly, plaintiff's motion for leave to reargue the portion of the court's prior decision dismissing plaintiff's causes of action for retaliation in violation of the New York State Human Rights Law and the New York City Human Rights Law based on defendant's termination of plaintiff's employment is granted. Upon reargument, the court denies defendant's prior cross-motion for summary judgment dismissing plaintiff's causes of action for retaliation based on defendant's termination of plaintiff's employment and hereby reinstates these causes of action. This constitutes the decision and order of the court.

DATE: 3/2/17


 KERN, CYNTHIA S., JSC
 HON. CYNTHIA S. KERN