Cooney v City of New York Dept. of Sanitation
2020 NY Slip Op 32524(U)
July 30, 2020
Supreme Court, New York County
Docket Number: 650113/2013
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **62**

Justice

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ROBERT COONEY,

Plaintiff,

- v -

CITY OF NEW YORK DEPARTMENT OF SANITATION, NEW YORK CITY CIVIL SERVICE COMMISSION

Defendant(s).

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INDEX NO. 650113/2013

MOTION DATE 3/26/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, the decision on defendants' motion seeking summary judgment, dismissing plaintiff's action is as follows:

Plaintiff commenced the instant action alleging, *inter alia*, that the Department of Sanitation's rejection of plaintiff as a candidate for employment constituted discrimination, pursuant to New York State Human Rights Law § 296 ("NYSHRL") and New York City Human Rights Law § 8-107 ("NYCHRL") and seeking to compel the Department of Sanitation to employ him.

Plaintiff took and passed the written test for sanitation workers in October 2007 and passed the physical test on November 17, 2007. On August 24, 2011, plaintiff was advised that he would be hired and appeared for a pre-employment medical exam. Dr. Joseph J. Ashley MD conducted a medical examination on September 7, 2011 and reported that plaintiff displayed "erythemoatous papules of various sizes on palms, thighs, and buttocks; psoriasis treated with creams and ointments; psoriasis on exposed area, hands, still symptomatic." Department of Sanitation's

Medical Director, Dr. Remy Obas MD, subsequently reviewed all medical documents and concluded that plaintiff was "still symptomatic" on September 7, 2011. On September 26, 2011, plaintiff received a notice of medical disqualification from defendant, the City of New York Department of Sanitation.

Plaintiff appealed this determination to the New York City Civil Service Commission, submitting a note from his attending physician, Dr. Sara L. Tarsis, MD, which stated that the skin irritation that the plaintiff suffered was "a resolving dermatitis" that "should resolve with topical" medication and "should not interfere with his ability to work."

In the response to plaintiff's appeal, Dr. Obas noted that a physical examination of plaintiff performed by Dr. Ashley confirmed the plaintiff had psoriasis on the palms and upper thigh and that plaintiff "failed to meet the medical standard for skin disorders" as set forth in the Department of Sanitation's medical standards. The Department of Sanitation's medical standards noted that psoriasis "may disqualify [a candidate] if continuous therapy is required and job environment aggravates the condition." Dr. Obas further explained that cuts and lacerations were common for sanitation workers, and plaintiff would be very susceptible to infections because of his skin lesions, and especially because they were on his hands. Dr. Obas highlighted that the use of gloves, which are required for the job would exacerbate plaintiff's condition. Dr. Tarsis' note was also reviewed by Dr. Obas who found that the note "fail[ed] to state that the condition is not chronic and therefore will not recur periodically."

On February 8, 2011, the New York City Civil Service Commission issued a "Notice of Civil Service Commission Action", which affirmed the earlier determination that plaintiff is not medically qualified for the position of sanitation worker.

Plaintiff commenced an Article 78 proceeding on or about June 7, 2011 seeking an order: (1) declaring that the decision to deny plaintiff appointment as a sanitation worker constituted discrimination on the basis of disability in violation of the NYSHRL and NYCHRL; and (2) requiring that the Department of Sanitation be enjoined from failing to employ plaintiff as a sanitation worker. On or about January 4, 2012, Justice Lois B. York dismissed the petition and disposed of the proceeding.

Plaintiff commenced the instant action on or about January 8, 2013. The Department of Sanitation moved to dismiss the complaint. On May 16, 2013, Justice Geoffrey Wright granted the motion and dismissed the complaint holding that "[w]hile it is unfortunate that plaintiff was medically disqualified, his disqualification does not give rise to an inference of discrimination." Plaintiff appealed to the Appellate Division, First Department, who granted plaintiff's appeal on the grounds that the motion to dismiss, CPLR 3211(a)(7), should not have been granted because plaintiff sufficiently stated a cause of action for discrimination. Defendants filed their answer on August 10, 2015, and issue was joined. A deposition of plaintiff, Robert Cooney, was conducted on November 30, 2018. A deposition of Dr. Norman Maron, the current Department of Sanitation Director, was held on December 4, 2018. A deposition of Dr. Joseph J. Ashley was held on January 4, 2019. Plaintiff filed a Note of Issue on August 30, 2019. Defendants now move for summary judgment dismissing the complaint.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732 (1985). The proponent

of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

To establish a *prima facie* case of discrimination by failure to accommodate under the NYSHRL and NYCHRL, a plaintiff is required to demonstrate that (1) the employee has a disability under the relevant statute, (2) an employer covered by the statute has notice of her disability, (3) with reasonable accommodations, she could perform the essential functions of her job, and (4) her employer refused to make such accommodations (see *Urena v Swiss Post Solutions, Inc.* 2016 U.S. Dist. LEXIS 128856, at *2 [SDNY Sept 21, 2016]).

A disability is defined in the NYSHRL as:

> "(a) a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (see Executive Law § 292[21]).

Under the NYCHRL, "disability" is defined by physical and mental impairments and defendants can only raise the inability of the employee "with reasonable accommodation, satisfy the essential requisites of the job" as an affirmative defense (see *Jacobsen v NY City Health & Hosps Corp*, 22 NY3d 824, 835 [2014], quoting Admin Code of City of NY § 8-107[15][b]).

It is undisputed that plaintiff's psoriasis constitutes a disability and that defendants had notice of said disability by virtue of plaintiff's disqualification from employment. As such, the issue is whether, with reasonable accommodations, plaintiff can perform the essential functions of the job and whether defendants denied plaintiff said accommodations.

If an employee has a physical impairment that prevents the employee from performing the core duties of his or her job even with a reasonable accommodation, the employee does not have a disability covered by the statute, and consequently, the employer is free to take adverse employment action against the employee based on that impairment (see *Jacobsen v NY City Health & Hosps Corp*, 22 NY3d 824, 834 [2014]). The [disability discrimination] claim must be supported by substantiated allegations that "upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or her] job, and the employee bears the burden of proof on this issue at trial" (see Id).

Plaintiff never requested a reasonable accommodation from the Department of Sanitation, and in fact stated that he had dermatitis and not psoriasis. Despite plaintiff's lack of a request for a specific accommodation, plaintiff argues that "Moreover, even in the absence of a specific request by an employee, an employer generally has an independent duty to investigate feasible accommodations." *LaCourt v. Shenanigans Knits, Ltd.*, 966 N.Y.S.2d 347 at *4 (Sup. Ct. New York County 2012), citing *Phillips*, 66 A.D.3d at 189 ("a request for accommodation need not take a specific form"), overruled on other grounds, 22 N.Y.3d 824, 837 (2014). See also *Moliscia v.*

B.R. Guest Holdings, 928 N.Y.S.2d 905, 915 (Sup. Ct. New York County 2011) ("Although defendants claim that plaintiff did not request an accommodation, it is not disputed that they were aware of his disability and were informed that he needed three to six months to be able to return to work"); and *Glaser v. Gap Inc*., 994 F.Supp.2d 569, 580 (S.D.N.Y. 2014) ("The Second Circuit therefore imposed a duty to reasonably accommodate an employee's disability if the employer knows or reasonably should know that the employee is disabled. In such [a] scenario, despite the absence of a request by the employee, the A.D.A contemplates an interactive process to assess whether the employee's actual or perceived disability can be reasonably accommodated. The NYSHRL has been interpreted in similar fashion"). This view comports with statutory and regulatory language, which provides, under the NYSHRL, that "[t]he employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested." NYCRR 466.11(j)(4).

Here, plaintiff's "correspondence to formally appeal" states, "[t]he dermatitis that the doctor evidence was merely that, a dermatitis which with the help of topical medication has almost entirely cleared itself from my skin by the date of this letter. As proof I am including a note stating as much from my attending physician, Sara L. Tarsis, MD, PLLC (see NYSCEF Doc No 53). The Official New York State Prescription Note stated that the skin irritation that the plaintiff suffered was "a resolving dermatitis" that "should resolve with topical" medication and "should not interfere with his ability to work" (see NYSCEF Doc No 54).

Dr. Sara L. Tarsis signed an affidavit on October 18, 2012, which states, "I have been treating Mr. Cooney for psoriasis. I have currently prescribed Enbrel, a self-administered injection to be administered twice weekly and a topical cream, Vanos. This combination seems to be working for Mr. Cooney as his psoriasis is currently well controlled with minimum coverage on

the upper legs and backside. Continuous treatment for the psoriasis on his hands that was present in August 2011 has not been necessary. On October 4, 2011, I wrote a note for Mr. Cooney outlining the current state of his psoriasis and the fact that it should not interfere with his ability to work." Dr. Tarsis uses the language of "seems to be working" and "should not interfere with his ability to work," but does not state that gloves would accommodate the plaintiff's psoriasis to allow him to work for the Department of Sanitation.

The burden is placed on the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business (see *Jacobsen v NY City Health & Hosps Corp*, 22 NY3d 824, 834 [2014]).

Dr. Obas stated that, "[s]anitation workers are exposed to germs, chemicals, stings from insects and animal bites while collecting garbage. Cuts and lacerations are a part of their everyday work. Performing this type of work with skin lesions, especially on the hands, makes one very susceptible to infections. The use of gloves will only exacerbate the condition." The Court notes that in his complaint, plaintiff specifically suggests that gloves would be a reasonable accommodation for plaintiff's disability, an accommodation that was specifically ruled out by Dr. Obas and which is not raised by plaintiff's expert. Hence, plaintiff does not have a reasonable accommodation available for work as a sanitation worker.

It is a well-settled legal principle that agencies are justified to rely on their own medical doctors in making a determination about medical fitness (see *Pergola v Safir*, 262 AD2d 34 [1st Dept 1999]).

Because the plaintiff's condition may prevent plaintiff from performing in a reasonable manner the activities involved in the job or occupation sought, the plaintiff's contention that the defendant violated Executive law § 296 in denying him appointment because of a "disability,"

must be disposed of summarily (see *Mainze v Suffolk Cty Dept of Civil Service, et al*, 159 AD2d 627 [2d Dept 1990]). There is no other legally protectable interest which flows from the passing of a civil service examination other than DSNY's evaluation of plaintiff's fitness for the position (see *Hurley v Board of Educ of City of NY*, 270 NY 275, 279 [1936]).

As such, defendants have established that there is no reasonable accommodation which will allow plaintiff to fulfill the core duties of the job of sanitation worker, based upon the medical documentation and plaintiff has failed to raise an issue of fact rebutting same.

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/30/2020
DATE

HON. LAURENCE L. LOVE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE