SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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EDWARD LETTAU

Plaintiff,

- v -

1199 SEIU NATIONAL BENEFIT FUND,

Defendant.

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INDEX NO. 158020/2018

MOTION DATE 01/12/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 32, 37

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by defendant is granted.

Background

Defendant is a multi-employer trust fund and plaintiff used to work for defendant. He claims that was fired because of his disabilities. Plaintiff alleges that he provided defendant with documentation from medical providers but defendant still fired him for missing too much work.

Defendants claims it did not discriminate against plaintiff and that his position as a telephone representative required timely and regular attendance. Defendant asserts that plaintiff was frequently absent during the entire time he was employed by defendant. In his last year of employment, defendant asserts that plaintiff was absent 68 times, which represented more than 25% of all workdays. Defendant contends that there was no documentation provided to show that his purported disabilities required work restrictions. Defendant claims it allowed plaintiff as much leniency as it could, but eventually decided to fire him.

In opposition, plaintiff claims that defendant's motion is premature. He claims that he has health problems that are not serious enough to collect disability insurance or Social Security Disability, but serious enough to require him to take a few days sick leave. Plaintiff points to his interrogatory responses about his various disabilities which allegedly include "diabetes, scoliosis, herniated discs, sciatica, hiatal hernia, gastritis and anxiety" (NYSCEF Doc. No. 37).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"The employee's complaint states a prima facie case of discrimination under both the State HRL and City HRL if the employee suffers from a statutorily defined disability and the disability caused the behavior for which the employee was terminated" (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 834, 988 NYS2d 86 [2014]).

"The City HRL forbids employment discrimination against physically and mentally impaired individuals, and employers may raise the inability of disabled employees to "with reasonable accommodation, satisfy the essential requisites of the[ir] job [s]" only as an affirmative defense to a City HRL claim. Thus, un-like the State HRL, the City HRL places the burden 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" (*id*. at 835).

Here, defendant attaches a copy of its attendance policy, which defines certain absences (NYSCEF Doc. No. 21). Excused absences require advanced written approval or when an employee is granted a leave of absence (*id*. at 2). These absences are not subject to discipline. Unexcused absences are unapproved absences and are subject to discipline (*id*.). The policy also contains progressive discipline for excessive absences and lateness (*id*. at 3). After 10 days of absence or 6 within 6 months, an employee receives a warning before discipline starts. Then every 2 absences within a 60-day period receives an increasingly harsh penalty starting with an oral warning and proceeding to a written warning, a second written warning, a suspension and eventually termination. An employee can "step back" a level of discipline by having one or fewer unexcused absences in a 90-day period.

Plaintiff's absence record shows that he progressed through the various steps in plaintiff's absence policy, including receiving a suspension, until he was fired (NYSCEF Doc. No. 23).

Plaintiff does not dispute these records and, therefore, there is no question plaintiff violated the attendance policy.

The question on this motion is whether plaintiff's termination was wrongful because of his disabilities under the New York City Human Rights Law ("NYCHRL"). Defendant attaches a grievance response regarding plaintiff's termination in which it observed that "Grievant has been disciplined for both excessive absence and lateness since 2005. Through his time, His Leadership team did advise him of FMLA so he would be able to address his health concerns as needed. The Grievant has been aware of the Family and Medical Leave Policy LA 3.0 which states that eligible employees must have worked at the Fund for at least twelve months and for at least 1,250 hours or as specified by law. From 2007-2016, the Grievant's Department leadership allowed grace periods, which offered the opportunity for the Grievant to obtain the hours necessary in order to be eligible for FMLA.

"Leadership also continuously worked with his excessive absence and lateness history due to his circumstances. However, it is imperative that the Fund hold all employees to the Attendance Policy as appropriate. The Grievant incurred five unexcused occurrences of absence from October 6, 2016- December 6, 2016 and was not eligible for FMLA at that time. The threshold to warrant termination is two occurrences. Once again, a grace period was given to allow the Grievant the opportunity to work towards improving his absence which may warrant a step back in progressive discipline. Unfortunately, the Grievant incurred three additional occurrences within the next thirty days" (NYSCEF Doc. No. 26).

Plaintiff's disciplinary history also shows that he received disciplinary actions in 2013, 2014 and in 2016 due his absences (*id*.). In 2015, defendant sent a letter informing plaintiff that he had 8 unexcused absences in a six-month period (*id*.). This context is critical because it

demonstrates that plaintiff was well aware of the absence policy—he had received prior suspensions—and yet he still continued to incur unexcused absences.

And the emails between plaintiff and defendant's HR (NYSCEF Doc. No. 24) show that plaintiff was not eligible for FMLA time but that the HR employees tried to work with plaintiff. On one occasion they asked plaintiff if he needed forms so he could go on disability leave (*id*. at 1).

Plaintiff's opposition, which only consists of an affirmation from plaintiff's counsel, does not raise an issue of fact. There are no documents attached showing that he gave defendant medical documentation that his disabilities prevented him from working. While there is no doubt that plaintiff suffered from various ailments, that does not mean he was permitted to simply ignore defendant's attendance policy or that he was fired because of a disability.

The fact is that nearly every person suffers from health issues from time to time. And defendant set up a policy to account for that—getting prior approval for absences. After all, plaintiff's job required him to be present. He answered calls from defendant's members so his physical presence was a key part of the job. And the record shows that defendant did everything from not counting certain unexcused absences against plaintiff's attendance record to meeting with plaintiff to try to get various appointments approved in advance.

Eventually, defendant had enough. Plaintiff kept taking unexcused absences and, according to defendant, plaintiff did not raise any disability as a defense to the progressive discipline imposed. Under defendant's policy, plaintiff received various penalties prior to his termination. The Court finds that plaintiff's termination was not because of any disability he may have; rather, he was fired because he did not utilize the proper procedures to get his absences excused or take a leave to account for his health problems. Plaintiff was not entitled to

simply not show up for work and not provide medical documentation of a disability that would require work restrictions.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

1/15/2021
DATE

ARLENE P. BLUTH, 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