

Simmons v Village Plumbing & Heating NY Inc.

2023 NY Slip Op 32203(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 652787/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41

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MOSES SIMMONS,

Index No. 652787/2022

Plaintiff

- against -

DECISION AND ORDER

VILLAGE PLUMBING & HEATING NY INC.,
 ANTHONY PISCITELLI, CHRISTOPHER M.
 WEEKS, and COLLEEN A. GLENNON,

Defendants

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APPEARANCES:

For Plaintiff

Mohammed Gangat Esq.
 675 3rd Avenue, New York, NY 10017

For Defendants

Saul Zabell Esq.
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 1 Corporate Drive, Bohemia, NY 11716

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for discrimination based on his disability and for retaliation under the New York State and New York City Human Rights Laws. N.Y. Exec. Law § 296; N.Y.C. Admin. Code § 8-107. After defendants moved to dismiss the complaint based on plaintiff's failure to plead a claim against them, C.P.L.R. § 3211(a)(7), plaintiff filed an amended complaint with additional allegations against defendants. C.P.L.R. § 3025(a). The amended complaint also includes two new

claims against defendants for their failure to pay overtime compensation and provide accurate wage notices and statements.

Defendants now seek to dismiss the amended complaint's claims for disability discrimination and retaliation. C.P.L.R. § 3211(a)(7). At oral argument, plaintiff discontinued his retaliation claim under the New York State Human Rights Law. N.Y. Exec. Law § 296(7). For the reasons explained below, the court denies defendants' motion to dismiss the remaining discrimination and retaliation claims.

II. STANDARDS APPLICABLE TO DEFENDANTS' MOTION

Upon defendants' motion to dismiss plaintiff's complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. Sassi v. Mobile Life Support Services, Inc., 37 N.Y.3d 236, 239 (2021); Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Lawlor v. Wymbs, Inc., 212 A.D.3d 442, 443 (1st Dep't 2023). "Defendants bear the burden of establishing that the complaint fails to state a viable cause of action." Connolly v. Long Is. Power Auth., 30 N.Y.3d 719, 728 (2018). Dismissal is warranted only if the amended complaint fails to allege facts that fit within any cognizable legal theory. Sassi v. Mobile Life Support Servs., Inc., 37

N.Y.3d at 239; Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175; Han v. New York City Tr. Auth., 203 A.D.3d 511, 512 (1st Dep't 2022).

III. THE AMENDED COMPLAINT

According to the amended complaint, defendant Weeks, the regional manager of defendant Village Plumbing & Heating NY Inc., hired plaintiff as a pipe mechanic and plumber's helper around October 2021. On the morning of December 1, 2021, plaintiff sent a text message to Weeks that plaintiff had suffered an injury and could not work that day. Plaintiff received treatment for his injury later that morning and a doctor's note that restricted plaintiff from returning to work for one week.

Because plaintiff received no response to his text message to Weeks, plaintiff returned to work the next day, but submitted his doctor's note to Weeks and defendant Glennon, another manager of Village Plumbing. The following morning, December 3, 2021, Weeks instructed plaintiff to rest and comply with the doctor's orders. Plaintiff did not return to work after their conversation. On December 7, 2021, plaintiff attempted to contact Weeks and Glennon to determine plaintiff's future work schedule. Weeks responded with a text message, "I can't have you in tomorrow. We'll talk tomorrow." Aff. of Mohammed Gangat, Esq., Ex. A ¶ 36.

On December 8, 2021, Weeks explained to plaintiff that,

because Village Plumbing was overstaffed, Weeks was terminating plaintiff as the most recently hired employee. Plaintiff alleges that he was not the most recently hired employee and that, immediately after his termination, Village Plumbing posted an online job notice for his former position.

IV. PLAINTIFF'S CLAIMS OF DISCRIMINATION AND FAILURE TO PROVIDE A REASONABLE ACCOMMODATION

Plaintiff claims that defendants discriminated against him through their failure to provide a reasonable accommodation for his disability pursuant to the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Law (NYCHRL). N.Y.C. Admin. Code § 8-107(1)(a). The NYSHRL defines disability as:

(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic 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.

N.Y. Exec. Law § 292(21). NYCHRL defines a disability as "any physical, medical, mental or psychological impairment." N.Y.C. Admin. Code § 8-102(16)(a). Both statutes prohibit an employer from discharging an employee because of a disability. N.Y. Exec. Law § 296(1)(a); N.Y.C. Admin. Code § 8-107(1)(a)(2).

Defendants insist that plaintiff fails to allege a disability because he returned to work the day after his injury. His allegation that his disability prevented him from performing his job, however, must be assumed true at this juncture. Whether that allegation is true remains a factual question to be determined at a later stage. First Majestic Silver Corp. v. Heitz, 208 A.D.3d 1130, 1131 (1st Dep't 2022); Le Bihan v. 27 Washington Sq. N. Owner LLC, 205 A.D.3d 616, 618 (1st Dep't 2022). Certainly reporting to work does not establish the ability to perform the functions of the job as a matter of law. Plaintiff alleges that his doctor advised him to rest and not work for one week. While plaintiff does not expressly allege that he informed defendants about the specific nature of his injury, he does allege that his injury was "physical," Gangat Aff. Ex. A ¶ 45, which qualifies as a disability under both NYSHRL and NYCHRL. N.Y. Exec. Law § 292(21); N.Y.C. Admin. Code § 8-102(16)(a); Jacobsen v. New York City Health & Hosps. Corp., 22 N.Y.3d 824, 834 (2014); Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d 881, 884-85 (2013).

Although plaintiff's attorney presents the "doctor's note" alleged in the amended complaint, which is actually by a physician's assistant, indicating plaintiff suffered a wound that required sutures, no affidavit authenticates the note on personal knowledge so as to supplement the amended complaint. See AG

Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 (2005); VXI Lux Holdco, S.A.R.L. v. SIC Holdings, LLC, 194 A.D.3d 628, 628 (1st Dep't 2021); Ninth Space LLC v. Goldman, 192 A.D.3d 594, 594 (1st Dep't 2021); M & E 73-75, LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dep't 2020).

Nevertheless, plaintiff alleges that he provided his doctor's note to defendants, which raises a reasonable inference that plaintiff requested a leave of absence to recover from his injuries. Finally, plaintiff alleges that defendants discharged him based on his physical injury and his need for leave to recover. Plaintiff allegations, liberally construed, thus state a claim for disability discrimination against defendants.

V. PLAINTIFF'S CLAIM OF RETALIATION

To establish retaliation under NYCHRL, N.Y.C. Admin. Code § 8-107(7), plaintiff must demonstrate that he participated in a protected activity, that defendants knew of this activity and acted adversely against him, and a causal connection between the protected activity and adverse action. N.Y. Exec. Law § 296(7); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312-13 (2004); Franco v. Hyatt Corp., 189 A.D.3d 569, 571 (1st Dep't 2020). See Alshami v. City Univ. of New York, 203 A.D.3d 592, 593 (1st Dep't 2022). Plaintiff alleges that he notified defendants he both "suffered from disabilities as the result of medical conditions" and "requested reasonable accommodation" that

resulted in his termination. Gangat Aff. Ex. A ¶ 45. Defendants do not move to dismiss this claim based on plaintiff's failure to request an accommodation, but instead maintain that a request for a reasonable accommodation is not protected activity constituting grounds for a retaliation claim under New York City Administrative Code § 8-107(7).

The authority that defendants rely on, however, predated a 2019 amendment to the statute that codified a request for a reasonable accommodation as protected activity. N.Y.C. Admin. Code § 8-107(7)(v). To the extent that defendants rely on Martinez v. New York City Tr. Auth., 2020 N.Y. Misc. LEXIS 9931, at *34 (Sup. Ct. N.Y. Co. Sept. 15, 2020), the conduct at issue likely predated the statute. In any event, Martinez is unpersuasive since it did not consider Administrative Code § 8-107(7)(v).

Plaintiff also alleges a causal connection between his protected activity and defendants' retaliation. Although defendants insist that they discharged plaintiff because Village Plumbing was overstaffed and he was the most recently hired employee, he alleges that defendants' reasoning is pretextual, as defendants posted an online job notice for his position immediately after his termination. Franco v. Hyatt Corp., 189 A.D.3d at 571-72. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 305; Watson v. Emblem Health Servs., 158 A.D.3d 179,

185 (1st Dep't 2018). Because plaintiff's allegations demonstrate that plaintiff engaged in protected activity resulting in his termination, he states a claim for retaliation against defendants. Doe v. New York City Police Dept., 190 A.D.3d 411, 413 (1st Dep't 2021); O'Rourke v. National Foreign Trade Council, Inc., 176 A.D.3d 517, 517 (1st Dep't 2019).

VI. CONCLUSION

For the reasons explained above, the court denies defendants' motion to dismiss plaintiff's claims of discrimination and retaliation under the New York State and New York City Human Rights Laws, N.Y. Exec. Law § 296; N.Y.C. Admin. Code § 8-107, except for his retaliation claim under the New York State Human Rights Law, N.Y. Exec. Law § 296(7), which is discontinued. C.P.L.R. §§ 3211(a)(7), 3217(b). Defendants shall answer the complaint within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f). The parties shall appear for a Preliminary Conference September 12, 2023, at 10:00 a.m. via Microsoft Teams.

DATED: June 16, 2023



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.