

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

JEFFREY PHILPOTT,

Plaintiff,

v.

16 CV 6778 (AKH)

STATE UNIVERSITY OF NEW YORK,

Defendant.

-----x

New York, N.Y.
March 5, 2019
4:46 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

APPEARANCES

THE LAW OFFICES OF STEWART LEE KARLIN, P.C.
Attorney for Plaintiff
BY: DANIEL E. DUGAN

OFFICE OF THE ATTORNEY GENERAL
Attorney for Defendant
BY: DAVID B. DIAMOND

1 (Case called)

2 THE COURT: So we have Daniel Dugan representing
3 Jeffrey Philpott; David Diamond representing State University
4 of New York.

5 It's the motion of the State University so let me hear
6 you. At the podium, please.

7 MR. DIAMOND: Thank you, your Honor. Good afternoon.

8 I know that the motion has been fully briefed. So I
9 won't --

10 THE COURT: Do what you have to do.

11 MR. DIAMOND: Thank you very much, your Honor.

12 As the Court likely recalls, the plaintiff in this
13 case is a former vice-president of the student affairs and
14 international programs.

15 THE COURT: You know what, it might be good if I give
16 you a core set of facts that seem to come out of the case and
17 then you can do your argument.

18 MR. DIAMOND: Sure.

19 THE COURT: So this is defendant's motion for summary
20 judgment.

21 MR. DIAMOND: Thank you.

22 THE COURT: Plaintiff claims that he suffered
23 employment discrimination in violation of Title VII. He
24 alleges that the State University of New York, or SUNY,
25 subjected him to a hostile work environment based on his sexual

1 orientation, that it terminated him based on that orientation
2 and in retaliation for his complaints of discrimination.

3 Plaintiff's allegations relate primarily to the conduct of his
4 supervisor, Dr. David Heath, president of SUNY.

5 Defendant moves for summary judgment.

6 In November 2009 plaintiff applied for the position of
7 vice-president of student affairs at the SUNY College of
8 Optometry.

9 On March 11, 2010 Dr. Heath offered plaintiff the
10 position and plaintiff accepted. At the time plaintiff had
11 been in a several-year relationship with his domestic partner,
12 Dan Molnar. It appears that Heath was aware of that
13 relationship and therefore of plaintiff's sexual orientation.

14 Plaintiff held an important position in SUNY. He was
15 vice-president of student affairs and was responsible for the
16 educational components of the nonclass college experiences; for
17 example, career development, engagement of professional
18 development, interpersonal activities and the like.

19 On July 1, 2013, three years into his job, his role
20 was expanded to include responsibility for the international
21 programs. And in the fall of that year he was given a salary
22 increase of ten thousand dollars. There's a dispute what it
23 was for, whether, as defendant claims, to give him extra
24 compensation or, as plaintiff claims, to recognize a change in
25 the cost of living. But regardless of the label, clearly it

1 showed a confidence by Dr. Heath and the SUNY administration in
2 plaintiff. Plaintiff received an annual performance evaluation
3 during each year. And presumably it was favorable.

4 Under his contract, his employment was terminable at
5 will. One condition of his job was that he was required when
6 he needed to take vacation leave or sick leave to make requests
7 of Dr. Heath and notify the administration. That's the
8 background.

9 In the spring of 2011 Heath offered to set up a career
10 counseling meeting with plaintiff's domestic partner, Dan
11 Molnar. Plaintiff alleges that Dr. Heath used it for the
12 purpose of prying into their relationship, which I don't think
13 that is of any relevance.

14 Following the meeting, Dr. Heath told plaintiff that
15 plaintiff's partner lacked focus and might struggle to find
16 employment in New York City. Again, I don't think there's any
17 relevance to this.

18 In 2013 plaintiff informed Dr. Heath that the
19 relationship with Molnar had ended and Heath commented that
20 plaintiff's marriage or "whatever you want to call it," was a
21 distraction to the college.

22 Plaintiff alleges various comments that indicate a
23 hostile sexual environment.

24 In September 2014 during a conversation about
25 recognizing gay marriages, Dr. Heath said a gay marriage should

1 not be called a marriage; it should be called something else
2 equal to marriage but different.

3 On January 17, 2015 plaintiff told Dr. Heath of his
4 drug addiction to amphetamines and methamphetamines. Dr. Heath
5 allegedly said gay people first had HIV and now it's drugs and
6 this had to be handled. According to plaintiff these comments
7 referred to plaintiff's concern about his responding to a
8 hostile work situation by using a substance common in the gay
9 community.

10 A third such instance occurred on April 17, 2015 when
11 Heath compared homosexuality to Dr. Heath's eye condition
12 calling both genetic misfires and saying that the question
13 becomes, and certainly the answer is yes, they're being treated
14 with rigorous therapy.

15 My ruling is that none of this constitutes an instance
16 of a sexually hostile environment created by comments made by
17 Dr. Heath.

18 Plaintiff alleges also that Heath belittled him at
19 public events beginning December 2011 by calling plaintiff
20 sensitive or frenetic after plaintiff had made a speech or
21 presentation.

22 Plaintiff testified that he thought Heath had referred
23 to him as flamboyant. He couldn't recall the specific
24 circumstance when this was said.

25 Plaintiff alleges that a person he was supervising,

1 Gui Albieri, SUNY's director of admissions and marketing, had
2 private conversations with plaintiff's boss, Dr. Heath, about
3 plaintiff's personal life and in the spring of 2014 said to
4 plaintiff: We're only work associates, not friends. You know
5 Albieri's wife, referring to his wife, and I did not want our
6 children to be around homosexuality, at least not in their
7 formative years. On another occasion Albieri allegedly
8 suggested that he and plaintiff should switch salaries because
9 plaintiff's team doesn't have kids. Plaintiff also made the
10 unsupported claim that Albieri and Heath discussed his gay
11 lifestyle.

12 These are comments, even if true, by someone being
13 supervised by the plaintiff do not constitute and make out a
14 sexually hostile environment.

15 The plaintiff alleges that Dr. Heath harassed and
16 terminated another gay employee, Francisco Lomparte, on the
17 basis of Lomparte's sexual orientation. But there was no
18 adverse employment reaction to the plaintiff in any respect.
19 Plaintiff complained about the treatment that Lomparte but did
20 not appear to have any effect on the employment.

21 Heath gave plaintiff positive performance evaluations
22 for his first three academic years. At some point around
23 mid 2013 plaintiff began smoking crystal methamphetamine. By
24 January 2015 he was periodically injecting the drug. And he
25 continued to use crystal methamphetamine through the

1 termination of his employment. Plaintiff asserts that his
2 chemical dependency was caused at least in part by the
3 emotional harm he suffered as a result of the discrimination.

4 I do not accept this as an excuse for a drug
5 addiction.

6 Defendant claims that Heath gave plaintiff a less
7 favorable evaluation for the 2013/2014 academic year when he
8 was smoking methamphetamine and injecting the drug. Plaintiff
9 disputes that. He also disputes the two justifications put
10 forth by Heath for the less favorable evaluation: His having
11 failed to draft a strategic positioning paper for SUNY's
12 international programs by the end of the 2013/2014 year. There
13 is no issue that that paper was late. Another reason was poor
14 working relationships with several SUNY employees that the
15 plaintiff claims that's mere pretext.

16 Defendant claims that plaintiff's performance
17 deteriorated significantly, further deteriorated significantly
18 during the 2014/2015 academic year and cites seven instances.

19 Plaintiff having accepted two students into an
20 advanced standing program having to do with an alliance with
21 Wenzhou University in China before the program had been
22 established and before receiving translations of the student's
23 foreign course work necessary for determining eligibility.

24 Another instance is plaintiff twice disobeyed
25 Dr. Heath's instruction not to contact certain third parties

1 outside of SUNY about matters of concern to Heath.

2 Plaintiff did not comply with Heath's instructions to
3 provide timely notification to a French optical institute of
4 SUNY's intent to discontinue an exchange program between SUNY
5 and that institute and caused the institute to enroll students
6 in the program, thereby forced SUNY to offer the program.

7 In another instance some of plaintiff's supervisees
8 were uncomfortable working for him because of his unpleasant
9 demeanor and frequent absences from the job or late arrivals to
10 the job or early departures from the job.

11 Another instance is that he failed to complete a study
12 about the feasibility of establishing a doctoral of optometry
13 program at the Arab American University in Jenin, I believe
14 that's in Jordan, by the deadline provided to him, creating the
15 need for Dr. Heath and two other employees to be involved to
16 draft and complete the report.

17 Plaintiff failed to complete revisions to SUNYs
18 student code of conduct by the deadline provided to him or by
19 the beginning of the academic year for which the code was
20 applicable.

21 And plaintiff again failed to complete a strategic
22 positioning paper for international programs this time for the
23 2014/2015 year.

24 Dr. Heath testifies that he expressed dissatisfaction
25 with plaintiff's 2014/2015 academic year performance and having

1 identified many of the issues discussed above.

2 Plaintiff denies that he ever received a negative
3 performance.

4 On September 2, 2015 during plaintiff's performance
5 evaluation plaintiff accused Heath of discriminating against
6 him on the basis of his sexual orientation. That day plaintiff
7 reported Heath's conduct to Douglas Schading SUNY's director of
8 human resources.

9 Plaintiff claims that Schading told him that the issue
10 was between the plaintiff and Dr. Heath. Plaintiff complained
11 of discrimination by Heath to SUNY.

12 On October 15, 2015 plaintiff did not appear for a
13 morning meeting with Heath and another employee and failed to
14 have notified Heath in advance that he would be absent. That
15 morning plaintiff wrote an e-mail to Schading indicating that
16 he needed to take a one- to two-week emergency leave. Schading
17 replied asking if plaintiff was taking sick leave or annual
18 leave. Schading did not receive a response. Plaintiff did not
19 communicate further with Dr. Heath and did not ask Dr. Heath
20 for permission to take leave until the following day.

21 Over the following two days plaintiff did not return
22 to the office. He communicated with Dr. Heath and primarily
23 Schading via texts. Schading approved the leave request
24 without Heath's prior approval on October 17, 2015.

25 Heath decided to terminate plaintiff on October 17,

1 2015. He claims that Heath -- that plaintiff's acts of
2 insubordination in connection with the leave request and poor
3 work performance over the prior two academic years caused him
4 though believe that plaintiff's continued employment would not
5 be in the best interests of SUNY. He instructed Schading to
6 send plaintiff a memorandum directing plaintiff to appear for a
7 meeting on October 21, 2015 or some alternative time. Heath
8 and Schading did not hear from plaintiff. On or about
9 October 21, Schading sent plaintiff a letter indicating that
10 he'd be terminated and proposing a separation agreement between
11 them and requesting a response from plaintiff by November 4,
12 2015, a deadline that was extended to November 20, 2015.

13 On November 20, 2015 Heath sent plaintiff a letter
14 notifying plaintiff that his employment had been terminated.

15 OK.

16 Mr. Diamond.

17 MR. DIAMOND: Thank you, your Honor.

18 Why don't I take some of the facts that you have just
19 or hopefully I'll take all of the important facts I think that
20 are decisive of the motion actually in reverse order here.

21 Let's look at the post October 15 conduct. As you
22 explained, your Honor, as of October 15, on the morning of
23 October 15 plaintiff didn't come to work that day, didn't
24 notify Dr. Heath that he was -- would not be in, missed a
25 prescheduled meeting, told nobody that he would be in other

1 than contacting, at some point, the director of human
2 resources. Didn't come to work the next day. No leave for
3 either of those two days.

4 THE COURT: So clearly there was reason to terminate
5 him.

6 MR. DIAMOND: Indeed.

7 THE COURT: For insubordination and for failing to
8 follow the rules of the employment.

9 MR. DIAMOND: Indeed, your Honor.

10 THE COURT: Do you take issue with that, Mr. Dugan?

11 MR. DUGAN: Yes, I do, your Honor.

12 THE COURT: Why?

13 MR. DUGAN: In those e-mails when he was asking for
14 leave he explained he was partially -- it was because of
15 discrimination and the harassment he was suffering at the hands
16 of David Heath. That's why he went to Doug Schading. Doug
17 Schading had said you can come to me in this position.

18 THE COURT: So tell me. He complained that he was
19 discriminated against.

20 MR. DUGAN: Again.

21 THE COURT: But did not follow the rules of the game.

22 MR. DUGAN: He went to the HR director to request this
23 leave. Dr. Heath also said to Doug Schading that he could take
24 care of the plaintiff's leave.

25 THE COURT: The rules required him to ask Dr. Heath.

1 MR. DUGAN: Prior to Dr. Heath making the decision to
2 terminate him, he communicated to Doug Schading that Doug
3 Schading can handle the leave for Mr. Philpott. There were
4 conversations to that effect. It wasn't until after that that
5 Dr. Heath decided that he was going to terminate plaintiff's
6 employment.

7 MR. DIAMOND: Your Honor, may I respond?

8 THE COURT: Yes.

9 MR. DIAMOND: That's not the way the facts play out
10 the undisputed facts play out. The e-mails and the facts as
11 you recounted them are accurate. And the e-mails that support
12 that in our motion papers essentially --

13 THE COURT: Did Dr. Heath tell Dr. Schading --

14 MR. DIAMOND: Excuse me?

15 THE COURT: Did Heath tell Schading that Schading
16 could decide whether or not to give leave?

17 MR. DIAMOND: No.

18 What happened, your Honor, was that college policy as
19 a threshold matter requires -- and this is admitted by the
20 plaintiff -- requires the plaintiff to ask Dr. Heath for leave
21 before taking any leave, before taking any leave. OK.

22 It also requires him to specify whether that leave
23 will be sick leave or vacation days, OK. This is another
24 element of the policy, another policy requirement that was
25 required that was known to plaintiff and which he admitted.

1 What happened was he failed to -- by failing to come
2 to work on October 15 in the morning to a prescheduled
3 meeting -- this man is the vice-president of student affairs
4 and international programs. There's only a set of
5 vice-presidents who are -- who are coequal to him who are
6 beneath the president. This is one of the highest executive --

7 THE COURT: Do you want to comment on that, Mr. Dugan?
8 Because what it seems to me is that here was a meeting. He was
9 supposed to be there. And he didn't show up.

10 MR. DUGAN: Yes. And he e-mailed on that day
11 requesting a leave.

12 MR. DIAMOND: That's not requesting leave before the
13 leave is taken, your Honor.

14 THE COURT: Folks, just a minute.

15 He didn't ask for leave in advance.

16 MR. DUGAN: He sent --

17 THE COURT: He has a meeting scheduled and he just
18 doesn't show. How would it be if I scheduled a meeting and you
19 had an opportunity to tell me in advance and you didn't, just
20 didn't show up.

21 MR. DUGAN: He explained it was an emergency, your
22 Honor, and that's why he was absent for it.

23 THE COURT: What was the emergency?

24 MR. DUGAN: I'd like to correct one point.

25 THE COURT: What was the emergency?

1 MR. DUGAN: He was asking for an emergency leave.

2 THE COURT: What was the emergency?

3 MR. DUGAN: His health at that point. That's why he
4 was requesting the leave. Due to the discrimination and
5 harassment that he was suffering, which is included in the
6 e-mail to Doug Schading. I just want to backtrack to the --

7 THE COURT: He gave no --

8 MR. DUGAN: -- the policy.

9 THE COURT: He gave no detail. He didn't say what the
10 emergency was. He just said he needed to take a one- to
11 two-week emergency leave.

12 MR. DUGAN: Correct.

13 THE COURT: That does not excuse absence at a
14 scheduled meeting.

15 MR. DUGAN: I understand, your Honor.

16 Again, I just want to -- we were going back and forth
17 on the policy for asking for leave. Defendant's 56.1
18 statement. No. 42. Dr. Heath indicated to Mr. Schading that
19 plaintiff was not going to contact him directly about his leave
20 request. Mr. Schading should handle the matter. That's the
21 defendant's undisputed facts.

22 And, again, they're not citing to a policy. They're
23 saying that Dr. Heath didn't have someone go to HR previously
24 to request leave; that people just -- it had been his
25 experience that someone had not gone to HR instead of

1 contacting him directly. Again, there's a reason why plaintiff
2 contacted HR. That discriminating official was Dr. Heath.

3 THE COURT: I have your positions on this.

4 MR. DUGAN: Thank you.

5 THE COURT: What other arguments do you want to make,
6 Mr. Diamond?

7 MR. DIAMOND: Your Honor, I want to touch -- I want to
8 touch on that, if I may.

9 THE COURT: I've already got it. I don't need
10 anymore.

11 MR. DIAMOND: Lets turn now, let's move the clock
12 forward a little bit further. We go to October 17. And during
13 October 16 and October 17, as you can see from the e-mails,
14 from the declaration of Doug Schading that's introduced in our
15 motion papers, that he contacted the plaintiff at least three
16 times and asked him: What type of leave are you taking?

17 Now this is not the supposed discriminator who is
18 asking him this.

19 THE COURT: And plaintiff did not respond.

20 MR. DIAMOND: That's right. That, again, is another
21 violation of the college's policies, which the plaintiff has
22 admitted he knew of and which were required of him.

23 THE COURT: Mr. Dugan, I want you to go back and tell
24 me why you think there was a termination because of
25 discrimination. Here was a man who was hired, Dr. Heath

1 knowing that the man was gay, and the instances of supposed
2 harassment that you noted I ruled on already that I don't think
3 they're sufficiently significant or even constitute harassment
4 and it appears that they were insufficient reasons to terminate
5 him; namely, his narcotics addiction, his failure to show up in
6 class, his poor work performance, and his unexplained absences
7 and failure to follow the rules for leave. All those are
8 sufficient to show that the plaintiff -- that the defendant has
9 satisfied its burden of proof to show a nonpretextual
10 termination notwithstanding allegations of discrimination.

11 MR. DUGAN: The plaintiff's position is that those
12 cited reasons are merely a pretext for discrimination.
13 Dr. Heath has said that the performance issues that he laid out
14 to plaintiff, which plaintiff disputes, at the November 2 --
15 excuse me, September 2 meeting were not sufficient to terminate
16 him at that time. He said himself he decided after that
17 meeting and didn't say this to plaintiff, but he decided after
18 that meeting that they were going to revisit his continued
19 employment after the 2015/2016 school year, specifically citing
20 June 2016 they would look at it. So those cited performance
21 issues were not enough in Dr. Heath's mind to terminate
22 plaintiff's employment at that time.

23 What changed? Plaintiff made a complaint of
24 discrimination on that same date directly to Dr. Heath and made
25 it to Doug Schading.

1 Now fast forward to the time of the termination. The
2 leave was granted by Doug Schading. Dr. Heath had given him
3 the responsibility to deal with plaintiff's leave, as we just
4 saw. Doug Schading granted that leave. Dr. Heath at the end
5 of the weekend he said decided that he wanted to terminate
6 plaintiff's employment.

7 Again, this was following and in close temporal
8 proximity to the complaints of discrimination that were made.

9 THE COURT: That's retaliation.

10 MR. DUGAN: Yes.

11 THE COURT: We're not up to that.

12 MR. DUGAN: OK.

13 THE COURT: Just tell me about discrimination.

14 MR. DUGAN: Discrimination. So, again, Dr. Heath was
15 the sole determining official to terminate plaintiff's
16 employment. Doug Schading, who is the VP of -- I'm sorry the
17 assistant in HR said he handles workplace complaints. He
18 handles performance issues. He never saw any documentation of
19 any performance issues with plaintiff. And then with the
20 comments made by Dr. Heath, which exhibit discrimination,
21 they're directly discriminatory on their face, specifically
22 referring to plaintiff's sexual orientation. And then at the
23 time he then is the sole determiner of -- to terminate
24 plaintiff's employment even after leave had been granted.

25 THE COURT: OK. Tell me about retaliation.

1 MR. DUGAN: Me, your Honor?

2 THE COURT: Yes. Mr. Dugan.

3 MR. DUGAN: So as I had started to say, plaintiff made
4 his complaints of discrimination, made them directly to
5 Dr. Heath. He then made them to Doug Schading.

6 THE COURT: Discrimination in what respect?

7 MR. DUGAN: Discrimination --

8 THE COURT: What we've just been talking about?

9 MR. DUGAN: The discrimination we've just been talking
10 about. Discrimination due to sexual orientation and that there
11 was a pattern of discrimination at this school. He made his
12 complaints to Doug Schading. The response by Doug Schading was
13 not an appropriate response for the school. He simply told him
14 to deal with it with his supervisor who plaintiff was
15 complaining of as the discriminating official.

16 Fast forward. He then follows up and makes a
17 complaint again when he's asking for leave on October 16. Doug
18 Schading confirms that was another complaint of discrimination.

19 There was no investigation of the -- from September 2
20 on. No one investigated the complaint. It's 45 days. There
21 was not a proper response from the college. Nothing was done
22 by HR to look into this complaint at all, was simply told to
23 deal with it, with Dr. Heath.

24 Then the second complaint of discrimination was made
25 on October 16, confirmed by Doug Schading.

1 Then he makes and he approves his leave, again, in
2 close temporal proximity. Dr. Heath again was on notice that
3 he had raised sexual orientation discrimination and harassment
4 again on October 16. With that knowledge Dr. Heath, while
5 plaintiff was on leave, decides to terminate his employment two
6 days later.

7 THE COURT: All right. Mr. Diamond.

8 Comment on the point that Mr. Dugan just made that
9 when HR heard of the complaint it refused to act.

10 MR. DIAMOND: May I -- I'm just going to get a glass
11 of water, your Honor.

12 When it refused -- the question was about the refusal
13 to act on behalf of the --

14 THE COURT: HR did not do what HR was supposed to do.

15 (Continued on next page)

16

17

18

19

20

21

22

23

24

25

1 THE COURT: That's what Mr. Dugan just said.

2 MR. DIAMOND: Right. Regardless -- indeed, accepting
3 plaintiff's allegation as true, which we must on this motion,
4 although --

5 THE COURT: You've had discovery. You've had full
6 discovery.

7 MR. DIAMOND: Right. Accepting it as true, although
8 we would dispute that, that events occurred that way, that that
9 was shading his response, it still doesn't vitiate the
10 legitimate nondiscriminatory reason that Dr. Heath had for
11 terminating his employment.

12 THE COURT: There was no investigation, and HR did not
13 intervene.

14 MR. DIAMOND: We don't know that there was no
15 investigation. That is a supposition based on that single
16 statement.

17 THE COURT: You would know. Was there?

18 MR. DIAMOND: There was at least an investigation, a
19 discussion is my understanding, of the allegations of
20 discrimination by this plaintiff, against SUNY CO and, in
21 particular, against Dr. Heath.

22 THE COURT: The record shows that plaintiff went to
23 Shady, and the record shows that plaintiff went to Heath, but
24 it did not show any conversations about the subject between
25 Shady and Heath.

1 MR. DIAMOND: The record also shows --

2 THE COURT: Is that right?

3 MR. DIAMOND: Between Shady and Heath?

4 THE COURT: Yes.

5 MR. DIAMOND: Yes, there are some conversations
6 between Shady and Heath shortly before Dr. Heath decided to
7 terminate his employment.

8 THE COURT: But not proximate to the complaint.

9 MR. DIAMOND: Proximate to the complaint, no. I
10 believe that hasn't been fleshed out. I'm not competent that
11 they doesn't exist, but I don't think there is a record fact on
12 that.

13 THE COURT: I'm ready to rule. You can sit.

14 First of all, I grant summary judgment dismissing the
15 complaint. I find that there is no discrimination or proof of
16 discrimination and no proof of retaliation which in both
17 respects defendant has shown clearly and convincingly that
18 plaintiff was terminated for cause, at least not for any reason
19 of discrimination or retaliation.

20 Summary judgment may be granted if there is no genuine
21 dispute as to any material facts and the movant is entitled to
22 judgment as a as a matter of law. A genuine issue of material
23 fact exists if the evidence is such that a reasonable jury
24 would return a verdict for the nonmoving party.

25 In viewing the evidence, I view it in the light most

1 favorable to the party opposing summary judgment, and I draw
 2 all reasonable inferences in favor of that party without making
 3 any evaluations of credibility.

4 Under the familiar McDonnell Douglas rule, in a
 5 discrimination case, the moving party bears the initial burden
 6 of establishing that no genuine -- I'm sorry. That plaintiff
 7 is in a protected class, and clearly he is in a protected class
 8 with regard to his gender in a case charging gender
 9 discrimination.

10 The burden then shifts to the defendant to come
 11 forward with a reasonable answer showing no discrimination and
 12 no retaliation. The defendant has done that.

13 The burden then shifts to the plaintiff to show that
 14 there was discrimination. The plaintiff has failed to do that,
 15 and in the context of retaliation, I find that the proof is
 16 overwhelming beyond a material issue existing that defendant's
 17 reason for termination and action of termination was because of
 18 insubordination, for failing to follow the rules, and of poor
 19 performance in the instances that I've cited earlier, namely,
 20 failing to finish items on time, failing to come to meetings on
 21 time, taking leave inappropriately, not seeking permission in
 22 advance, and the like.

23 The defendant has satisfied its burden of establishing
 24 no genuine factual dispute exists, and plaintiff has failed to
 25 show specific facts that would require a trial.

1 Plaintiff has failed to show a sufficiently severe or
2 pervasive work environment that would alter the conditions of
3 his employment and create an abusive working environment.

4 And plaintiff has failed to show that defendant
5 retaliated, and defendant has shown that the action taken was
6 not for retaliation and not a pretext for retaliation but
7 because of the conduct I discussed earlier.

8 Accordingly, defendant's motion for summary judgment
9 is granted. A summary order will issue shortly reflecting
10 those findings and granting judgment to the defendant
11 dismissing the complaint. Thank you very much.

12 MR. DUGAN: Thank you, your Honor.

13 MR. DIAMOND: Thank you, your Honor.

14 (Adjourned)

15

16

17

18

19

20

21

22

23

24

25