

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp X Dec _____ Appearance _____ CCP- _____ Here _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

RAYMOND A. GAY,

Plaintiff

-against-

MEDI-RAY, INC.,

Defendant.

Index No. 12360/01

DECISION AND ORDER

FILED & ENTERED

ON 9/22/05

WESTCHESTER
COUNTY CLERK

FILED
SEP 22 2005
Leona N. Spang
County Clerk
County of Westchester

QA

This matter came before the Court for a non-jury trial which began June 6, 2005 and was tried over a period of six days. In this action, Plaintiff, Raymond Gay ("Gay") alleges that Defendant, Medi-Ray, Inc. ("Medi-Ray") terminated his employment in violation of Labor Law §740. For the reasons which follow, the verdict is for the Defendant.

The following facts were adduced at trial. Medi-Ray is a small, privately-held corporation with its principal place of business in Tuckahoe, New York. The company manufactures lead-lined containers which hold radioactive materials for use in the medical and pharmaceutical fields. In addition, the company recycles and decontaminates lead containers it receives from hospitals and other sources.

Medi-Ray primarily manufactures the lead containers at its Tuckahoe facilities, which are located at 135, 150, 160 and 191 Marbledale Road in Tuckahoe. The manufacturing process requires melting of lead ingots that are thereafter cast into the desired shapes, followed by sandblasting and finishing. The recycling process requires stand alone, idle time, for the radioactivity of the containers to decay to acceptable levels. During a typical week, Medi-Ray receives approximately eighty thousand pounds of lead.

Plaintiff, Gay, was hired by Medi-Ray in 1971 and worked there continuously until he was fired on February 2, 2001. Initially, Gay performed general labor for the company, but was promoted until, at the time of his firing, he held the third highest management position after Ralph Farella, the President and Barry Dansky, the Vice President. Gay's responsibilities included, *inter alia*, overseeing the entire manufacturing process, supervising plant personnel, and ensuring regulatory compliance, although Dansky was the company liaison to the Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA") and was responsible for providing compliance reports to these agencies.

Because Medi-Ray is a manufacturing facility using hazardous and radioactive materials, such as lead, several

regulatory agencies monitor its compliance with various environmental and safety regulations. In addition to the two agencies listed above, Medi-Ray is also monitored by the New York State department of environmental conservation ("NYSDEC") and the Westchester County Department of Health ("WCDOH"). Medi-Ray is required to submit annual reports to the EPA describing its use of hazardous materials and the agencies may perform unannounced inspections of its facilities. In 1999, Medi-Ray was cited by OSHA for non-compliance with several federal regulations, including elevated ambient lead levels in the work environment.

In 2000, the Teamsters Local 1205 (the "union") commenced efforts to organize the laborers at Medi-Ray, alleging that the workers required better compensation and safer working conditions. In a November 24, 2000 correspondence to Medi-Ray's management, Farella and Dansky, the union stated that if Medi-Ray did not address its concerns about worker's salaries and working conditions, it would contact Medi-Ray's customers and provide them with information on alternative suppliers and urge them to boycott Medi-Ray. There was uncontroverted testimony that union representatives visited Medi-Ray management and re-iterated these statements. Both Farella and Dansky testified that they believed the union had received information about Medi-Ray's clients, including contact

information, customer requirements and purchasing information. The union requested information on the company's working conditions on January 12, 2001.

On January 29, 2001, Medi-Ray presented a confidentiality agreement (the "Agreement") to its management staff. The cover letter accompanying the Agreement stated that its purpose was to prevent unauthorized disclosure of confidential information and thereby protect the company's business interests. By its terms, the Agreement prohibited the disclosure of various types of information related to product manufacturing, company administration, and customer identity and relations. It further prohibited the disclosure of "EPA, OSHA or SARA matters". Finally, the Agreement provided that if management personnel refused to sign the Agreement by February 2, 2001, their employment would be terminated.

At the January meeting, the entire management staff was informed that their continued employment depended on their willingness to sign the Agreement.

Plaintiff, Gay, refused to sign the Agreement, and at a meeting between himself and Dansky, on February 2, 2001, Dansky provided Gay a letter terminating his employment. There was conflicting testimony at trial, concerning the conversation between Gay and Dansky at this meeting. Dansky testified that

Gay made no threats to disclose any Medi-Ray violations of environmental or safety regulations and that he did not mention the elevated levels of lead in his blood. Gay testified, however, that he told Dansky that he would not sign the Agreement because it would prevent him from disclosing violations to OSHA or the EPA and that he intended to make such disclosure. Gay also testified that he told Dansky that he had a high blood lead levels, which he had become concerned about during the union organizing campaign.

After termination of Gay's employment, his attorney contacted Medi-Ray and requested medical coverage and provided documentation of his elevated lead levels. This lawsuit was commenced thereafter.

The only claim before the Court is that Gay's employment was terminated in retaliation for his threatening to report the company's violations of 29 C.F.R. § 1910.1096, which regulates the use of radioactive materials, including permissible employee exposure, training, incident reporting and other safety precautions, and 40 C.F.R. § 264.94, concerning lead levels in groundwater, to the appropriate governmental authorities.

The Legislature enacted Labor Law § 740 in 1984, to protect employees from retaliatory action for reporting an employer's wrongful conduct. The statute prohibits retaliation where:

An employee discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety.

Labor Law § 740(2)(a).

The statute further provides that it shall be "a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section. Labor Law § 740(4)(c). *Rodgers v. Lenos Hill*, 251 A.D. 2d 244, 246, 674 N.Y.S. 2d 670, 672 (1st Dept. 1998).

Thus, to succeed on a claim under Labor Law § 740, it is essential that Plaintiff prove the existence of a causal connection between the employer's action and the Plaintiff's reporting or threatening to report, the employer's wrongful activity. It is precisely this causal connection, however, which is missing in the instant case. On the contrary, the preponderance of the credible evidence establishes that Gay was

fired, not for threatening to report Medi-Ray's violations but for refusing to sign the Agreement.

Gay testified that in the thirty years of his employment, prior to his termination, he had never disclosed, nor threatened to disclose, any violations by Medi-Ray to any governmental agency. Moreover, it is uncontroverted that Gay did not threaten to disclose any such violations when first presented with the Agreement and cover letter, on January 29, 2001. It was not until he was presented with a letter of termination on February 2, 2001, that Gay claims he threatened to disclose any violations.

The conflict between Gay's deposition and trial testimony concerning the details of his conversation with Dansky on February 2, 2001, render Gay's version of the events unreliable. Gay's deposition testimony makes no mention of any threat to report Medi-Ray's violation to a governmental agency during the February 2, 2001 meeting with Dansky, although, his testimony at trial, was that he had made such threats. In addition, Gay testified that he refused to sign the Agreement because it would have prohibited him from reporting Medi-Ray's violations to the governmental agencies. This is not the equivalent of a threat to report an actual violation as required by Labor Law § 740. *Roach v. Computer Assoc. Int'l*,

Inc., 224 A.d.2d 676, 677, 638 N.Y.S.2d 699, 700 (2d Dept. 1996). Moreover, this testimony is belied by Gay's admission that his counsel had advised him, that the Agreement could not prevent him from reporting any wrongdoing by Medi-Ray.

Prior to the February 2, 2001 meeting, Medi-Ray had clearly stated to its management personnel the reasons why Medi-Ray required them to sign the Agreement and the consequences of not doing so. Further, management staff was instructed to seek legal counsel and Medi-Ray provided the name and phone number of its counsel, for anyone who had questions concerning the Agreement. Thus, it is uncontroverted that Medi-Ray announced its decision to terminate the employment of any management staff who refused to sign the Agreement, prior to Gay's making any threat to report any violations.

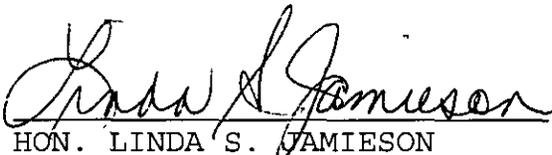
Further, it is undisputed, that every other management employee did in fact sign the Agreement and that no other management staff was fired.

Gay also testified that over the course of his employment, he had complained to Farella and Dansky on numerous occasions, about Medi-Ray's unlawful activities, yet he was never fired on any of these occasions.

Accordingly, the Court finds that Plaintiff was fired because he refused to sign the Agreement and that the termination of his employment was lawful.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 22, 2005


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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