Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Innocenzo Catanzaro and Moustafa Fawzy,

Plaintiffs,

- against -

City of New York and The New York City Department of Environmental Protection,

Defendants.

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Index Number: 25554/11

Motion Date: 3/27/12

Motion Cal. Number: 5

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendant, City of New York, for an order to dismiss the complaint against them.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition-Exhibit.....	6-8
Memorandum of Law.....	9
Reply.....	10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants to dismiss the complaint purssuant to CPLR 3211(a)(5) and (7) is granted.

Plaintiff Fawzy and plaintiff Catanzaro became employed by the New York City Department of Environmental Protection (DEP) in August 1988 and July 1990, respectively, in the Division of Emergency Response and Technical Assessment (DERTA), a subdivision of DEP that responds to immediately dangerous situations that imperil the life and health of the public, which situations include events involving radiological, biological and chemical materials and terrorist attacks. In 1995, Fawzy was promoted to Director of DERTA. In 1997, Catanzaro was promoted to the position of Director of the HAZMAT Unit and Deputy Director of DERTA.

Beginning in 2006, plaintiffs began complaining to the DEP

Deputy Commissioner Robert Alvatroni, DEP senior staff and officials from the New York City Office of Emergency Management, Office of Labor Relations, the Department of Citywide Administrative Services and the Mayor's Office of Operations that following the World Trade Center Commission Report, Alvatroni improperly volunteered DERTA staff members to perform operational duties, which included entering the "hot zone" where hazardous materials are located, without conferring upon them "first responder" status or OSHA worker classification, thereby circumventing OSHA requirements for medical surveillance and medical examinations afforded to first responders or OSHA workers. They also complained that DEP submitted false information to the New York City Employee Retirement System regarding DERTA staff medical examinations.

In August 2008, Fawzy and his DERTA team were at the Tennis Center at Flushing Meadow Park as part of a security force covering the U.S. Open under the aegis of the NYPD Hazmat Operations Branch. Fawzy informed Alvatroni that DERTA would not go into the hot zone because it would violate OSHA.

Plaintiffs allege in their complaint that as a result of their complaints and actions, they suffered the following adverse employment actions:

The day after Fawzy told Alvatroni that his team would not go into the hot zone, Alvatroni fired him, but the next day reinstated him and directed him to fire Catanzaro.

In August 2008, the New York City Department of Investigation conducted a background check on Fawzy under the pretext that such was standard procedure for anyone whose salary exceeded $80,000 annually, even though he earned more than that threshold salary for many years but had never before been subjected to a background check.

On September 17, 2008, Alvatroni and DEP Bureau of Environmental Compliance Commissioner Michael Gilsenan demanded that Fawzy provide them with various schedules and other organizational documents regarding Fawzy's work allegedly in order to micro-manage him and to gather information about his work to better be able to recruit his replacement.

On October 14, 2008, Gilsenan excluded Fawzy from a meeting.

On October 31, 2008 and in January 2009, Fawzy and Catanzaro applied to the City for an appointment under Section 55-a of the New York State Civil Service Law, which permits municipalities to

employ persons in civil service positions on a non-competitive basis who are certified by the Department of Vocational and Educational Services for Individuals as disabled. Despite being certified as disabled, defendants withheld the processing of plaintiffs' applications and delayed the approval of Fawzy's application for approximately five months.

Plaintiffs also allege that they were overlooked as candidates for a new position that was posted on December 9, 2008, that of Executive Director of DERTA. They allege that the requirements for this position were made to be a non-technical degree and a background in Finance, even though the tasks required of this position were of a technical nature and identical to the duties Fawzy was performing, thereby eliminating plaintiffs for eligibility for this position. Plaintiffs allege that they submitted their resumes for the position anyway, but were not interviewed. On January 8, 2009, Avaltroni informed Fawzy that he had appointed one Gregory Hoag as Executive Director of DERTA. Fawzy alleges that such action was designed to supplant Fawzy. Gilsenan also falsely suggested to DERTA personnel at a meeting that Fawzy was not made the Executive Director because he was not interested in the position. Both Fawzy and Catanzaro also allege that on January 12, 2009, Hoag promoted DERTA personnel not affiliated with plaintiffs while passing over more deserving personnel who were affiliated with plaintiffs.

Plaintiffs also allege that certain DEP employees published false and slanderous material to Fox 5 Local News in August 2008 to January 2009 resulting in a news report that plaintiffs had abused overtime and promoted the misuse of DEP vehicles. Plaintiffs allege that Avaltroni, DEP Acting Commissioner Steve Lawitts and DEP Public Affairs had knowledge that the report based upon false information would air, but, in retaliation, did nothing to prevent the report from airing.

On January 21, 2009, DERTA was summoned to the Dow Jones building because envelopes suspected of containing agents classified as weapons of mass destruction were discovered by the NYPD and FBI. Fawzy informed Avaltroni, Hoag and Gilsenan that the DERTA team would not enter the hot zone. In retaliation, Hoag ordered Fawzy off the scene immediately and threatened the DERTA personnel with termination if they did not enter the hot zone. The next day, Fawzy was locked out of his pager and blackberry, his DEP truck was towed from his home, the contents of his office were packaged and removed, his office was taken over by Hoag and DERTA staff were sent an e-mail notifying them that Fawzy was removed from his in-house title and was being transferred.

In response to plaintiffs' complaint on February 2, 2009 to the New York State Public Employees Safety & Health Bureau (PESH) that DEP failed to provide them with a baseline medical examination, annual OSHA medical examinations and medical surveillance and to classify DERTA personnel properly, PESH initiated an investigation into the complaint and sustained the complaint. Catanzaro was subsequently given a baseline medical examination on May 25, 2009. However, despite the fact that Catanzaro's examiner found him fit for duty, DEP falsely notified him that he failed the examination and thereafter began excluding him from DERTA meetings, failed to assign him any specific responsibilities and also reassigned his tasks by prohibiting him from responding to incidents and communicating with dispatched DERTA personnel and stripped him of his authority to allocate duties and assignments. This retaliatory conduct precluded him from accruing overtime. This action effectively constituted a demotion and a reversion to his civil service title he was appointed to in 1998 along with a significant reduction in salary.

In further retaliation against Catanzaro, Disciplinary Counsel Representative Carla Lowenheim falsely claimed in June 2009 that she had a recording and written statements showing that Catanzaro ordered DERTA personnel to use City vehicles to collect petition signatures regarding the first responder issue, in an attempt to discipline him. However, at his disciplinary hearing in July 2009, Lowenheim failed to submit the alleged recording or statements. On August 6, 2009, Catanzaro attended another hearing concerning these charges, but DEP at that time altered its allegation to contend that Catanzaro overheard Fawzy ordering employees to use City vehicles and failed to countermand that command. The Hearing Officer, in his order issued on his last day of employment with DEP, dismissed the charges against Catanzaro as frivolous.

In retaliation against Fawzy, DEP demoted him on March 3, 2009 to his old title of Assistant Chemical Engineer, with a concomitant 67 percent reduction in salary.

On March 11, 2009, DEP also proffered unsubstantiated charges against Fawzy in an attempt to terminate him.

On April 22, 2009, DEP finally processed Fawzy's Section 55-a appointment with full knowledge that his demotion disqualified him from receiving the appointment and informed him that his 55-a disability was disapproved because of his demotion to his civil service title.

On March 9, 2010, Catanzaro and Fawzy each filed a separate complaint in Federal District Court for the Southern District of

New York (10-CV-1825 and 10-CV-1827, respectively) against the City and DEP and named individuals, interposing various federal and state causes of action, including a cause of action for retaliation under §75-b of the New York Civil Service Law. They filed amended complaints on May 12, 2010. Defendants thereafter moved for summary judgment dismissing the complaints. Pursuant to the memorandum order issued by Judge Jed S. Rakoff on January 24, 2011, the motion was granted to the extent that all of plaintiffs' federal claims were dismissed and the court declined to exercise supplemental jurisdiction over the state law claims.

The present action was thereafter commenced on July 22, 2011 asserting only a cause of action for retaliation under §75-b of the Civil Service Law.

The City contends that the complaint must be dismissed in its entirety because all of plaintiffs' claims, with the exception of Catanzaro's claim that disciplinary charges were proffered against him in June 2009, are barred by the statute of limitations, that plaintiffs are not eligible for protection under §75-b of the Civil Service Law, even with respect to Catanzano's otherwise timely claims, that all their §75-b claims must be dismissed because plaintiffs failed to serve a prerequisite notice of claim and that plaintiffs claims are barred by res judicata.

The City contends that since plaintiffs filed their original complaint in federal court on March 9, 2010, all of their claims of retaliatory acts that took place prior to March 9, 2009 are barred by the one-year statute of limitations governing a §75-b cause of action. The City argues that since the only alleged act of retaliation that occurred after March 9, 2009 is Catanzaro's claim that disciplinary charges were proffered against him in retaliation for his complaints, only that claim is timely, and all other claims are time-barred.

Civil Service Law §75-b(3)(c) provides that, except where adverse or disciplinary action against an employee is subject to binding arbitration, "the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law." Labor Law §740(4)(a) (Article-20-C), provides that an employee may institute a civil action "within one year after the alleged retaliatory personnel action was taken."

Plaintiffs, in opposition, contend that all their claims are timely under the tolling provision of CPLR 205(a) and pursuant to the continuing violation doctrine.

Plaintiffs' counsel's first argument is that although the underlying action was commenced on July 22, 2011, since plaintiffs first commenced their action in federal court asserting a cause of action under §75-b on March 9, 2010, CPLR 205(a) applied to toll the statute of limitations for six months after the federal court issued its order on January 24, 2011 declining to exercise jurisdiction over their state §75-b claims – or until July 24, 2011 -- and, therefore, the same claims asserted in the present action are not time-barred.

However, there is no issue as to the time period after March 9, 2010. The City calculated the one-year statute of limitations deadline as of March 9, 2010, the date of commencement of the action in federal court, contending that only those claims that accrued more than one year prior to that date are time-barred (thus, in apparent recognition that the commencement of the District Court actions operated as a toll of the statute of limitations). It is not disputed that the statute of limitations time clock on plaintiffs' cause of action under Civil Service Law §75-b stopped on March 9, 2010 and did not resume until July 24, 2011. It is thus clear that all claims of retaliatory actions allegedly occurring prior to March 9, 2009 are time-barred. CPLR 205(a) does not apply to toll claims that were already time-barred on the date the statute of limitations was tolled. Consequently, all of Fawzy's claims of retaliation, except for his claims that unsubstantiated charges were filed against him on March 11, 2009 in an attempt fire him and the allegedly deliberate withholding of processing of his Section 55-a application for disability until April 22, 2009 when his application was denied, must be dismissed as untimely.

Plaintiffs' counsel argues that since the complaint alleges a series of retaliatory acts continuing through April 22, 2009, all of the retaliatory acts alleged, going back to August 2008, are timely under the so-called "continuing violation" doctrine. Counsel's argument is without merit.

It is undisputed that the applicability of the continuing violation doctrine under the facts of the present matter is to be determined according to the standard set forth in National R.R. Passenger Corp. v Morgan (536 U.S. 101 [2002]). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging the act....Discrete acts such as termination, failure to promote, denial of transfer or refusal to hire are easy to identify. Each...retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'.

[Plaintiff] can only file a charge to cover discrete acts that 'occurred' within the appropriate time period...only incidents that took place within the timely filing period are actionable" (id. at 113-114; see also Hughes v United Parcel Service, Inc., 4 Misc 3d 1023[A][Sup Ct New York County 2004], citing National R.R. Passenger Corp. v Morgan). Moreover, it is undisputed that this standard applies to a cause of action under §75-b of the Civil Service Law (see,e.g., Donas v City of New York, 62 AD 3d 504 [1st Dept 2009]). The United States Supreme Court contrasted retaliation claims to which the continuing violation doctrine is inapplicable, with hostile work environment claims, to which the continuing violation doctrine may be applicable, reasoning, "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct" (536 U.S. 101, 115, supra).

All of the heretofore mentioned alleged acts of retaliation as set forth in the complaint are discrete, separate acts to which the limitation period applicable to §75-b causes of action are applicable. Moreover, plaintiffs have not interposed a cause of action alleging a hostile work environment claim, which, in any event, is a claim based upon allegations of discrimination (see National R.R. Passenger Corp. v Morgan, supra) and has nothing to do with claims of retaliation. Plaintiffs raise no issue of fact in this regard in opposition. Therefore, all claims of retaliatory actions occurring prior to March 9, 2009 are untimely, even if, arguendo, a private right of action under §75-b were available to plaintiffs.

However, even as to the ostensibly timely post March 9, 2009 claims, and indeed, even had defendants not raised the affirmative defense of statute of limitations for any of plaintiffs claims at all, the complaint must still be dismissed in its entirety since §75-b(3)(c) is not applicable to afford plaintiffs the remedy of commencing an action in a court of competent jurisdiction for damages or equitable relief on their claims of retaliation.

The City contends, correctly, that plaintiffs may not commence an action for retaliation pursuant to §75-b of the Civil Service Law because, as union members, they are subject to the grievance and disciplinary procedures contained in Article VI of their collective bargaining agreement and, therefore, their only avenue was to bring a grievance to binding arbitration.

Civil Service Law §75-b(3) sets forth the procedures and remedies available to a public employee who is asserting a retaliation claim. Civil Service Law §75-b(3)(a)and (b) provide that an employee may raise the defense of retaliation in a

grievance proceeding pursuant to a final and binding arbitration provision contained in a collective bargaining agreement. Moreover, §75-b(3)(c) provides, "Where an employee is not subject to any of the provisions of paragraphs (a) or (b) of this subdivision, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law." Plaintiffs undisputably were subject to a collective bargaining agreement (a copy of which is annexed to the moving papers) containing, in Article VI thereof, final and binding arbitration provisions. Therefore, since an action in a court of competent jurisdiction is available to an employee only where §§75-b(3)(a) and (b) are not applicable, defendants are entitled to dismissal of the complaint as a matter of law (see Shaw v Baldowski, 192 Misc 2d 635 [Sup Ct Albany County 2002]).

Since plaintiffs were precluded from commencing an action pursuant to §§75-b, the Court need not reach, and will not determine defendants' remaining grounds for dismissal.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: April 3, 2012

KEVIN J. KERRIGAN, J.S.C.