SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----------X

KIMBERLEY JARRETT,

Plaintiffs,

-against-

MANHATTAN AND BRONX SURFACE TRANSPORTATION OPERATING AUTHORITY,

Defendants.

----------X

Index No.: 150116/2017

Mot. Seq. 1

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmation/Memo of Law	1	5-11
Plaintiff's Memo of Law in Opposition	2	14
Defendant's Affirmation in Reply/Memo of Law	3	16, 19

LISA A. SOKOLOFF, J.

This is an employment discrimination action brought under New York State and New York City Human Rights Laws by Plaintiff Kimberley Jarrett, an employee of Defendant Manhattan and Bronx Surface Transportation Operating Authority (MABSTOA), based on her gender, religion, race and national origin.

Defendant moves to dismiss the amended complaint based upon lack of jurisdiction, statute of limitations, and failure to state a cause of action.

Ms. Jarrett was hired by MABSTOA as an Administrative Associate for the Department of Buses in September of 2007. She alleges that her supervisor, Derrick Lawson, an Assistant Chief Officer, treated her discriminatorily by remarking on her wardrobe, physical characteristics as a Jamaican-American woman, and practice of Catholicism. His comments included telling Plaintiff that her body looked "really good,"

she had "really beautiful legs," that her mother "must have had [Plaintiff] when she was a teenager," calling Plaintiff "uppity," and upon her return from maternity leave in 2009, remarking, "Look at your body. Wow, it really snapped back."

According to Plaintiff, Lawson began to retaliate against her for her informal complaints, curtailing her job duties by refusing to allow her to forward phone calls and correspondence to him, instead requiring her to go through her co-worker. Lawson also proposed a scheduling change which would have required Plaintiff, a practicing Catholic, to work on Sunday, and sought proof that Plaintiff attended church on Sundays.

In late March 2009, Plaintiff complained about Lawson's retaliation to the New York City Transit Authority (NYCTA) and her union. The union declined to bring a grievance and NYCTA's internal EEO office ultimately concluded there was no reasonable cause to find the Plaintiff was harassed or that her supervisors discriminated or retaliated against her.

Lawson then reassigned Plaintiff from her Queens work location, to the Zerega Avenue Maintenance and Training Facility in the Bronx, a much longer commute for Plaintiff who requested that she not be transferred, but was refused. Plaintiff alleges that a third complaint to her union went unanswered.

Before her start date at Zerega, with the help of her NYC council person and then Mayor Bloomberg, Plaintiff found reassignment on November 30, 2009, as an Administrative Associate at Medical Assessment Center (MAC) #1. Shortly thereafter, Plaintiff was moved to MAC #5 where she claims she was harassed by her supervisor, Asa Boisseau, who repeatedly asked her about the circumstances surrounding Plaintiff's departure from her prior department. When Plaintiff complained, Boisseau was transferred to MAC 1 where she was later promoted.

Plaintiff worked at MAC 5 for several years, claiming she was unaware of ongoing retaliation by her colleague, Dr. Kerrison who allegedly falsely accused her of stealing time and stalking a co-worker. He also made discriminatory comments to Plaintiff including, "lightskinned bitch," "just because you have good hair you aren't better than everyone else," and "just because you are Jamaican, that does not mean you're not Black."

In the summer of 2016, Plaintiff's position reported to a new union, TWU local 100 (Local 100). After hearing that Plaintiff had applied for over 50 promotions for which she was qualified without receiving a single interview, a Local 100 representative agreed to investigate. During his investigation, he was told by the Vice President of Human Resources, Patricia Lodge, that Plaintiff's resume was disregarded for filing a written report about a superintendent.

Plaintiff claims to have suffered severe emotional distress as a result of the harassment and discrimination at MABSTOA on the basis of her gender, color, religion and race, in violation of the New York State Human Rights Law (NYSHRL) (New York State Executive Law § 296 *et seq.*) and of the New York City Human Rights Law (NYCHRL) (New York City Administrative Code § 8–107).

Plaintiff filed her employment discrimination claim on January 4, 2017. Since the statute of limitations for claims under both the State and City Human Rights Law is three years (CPLR § 214 [2]; NYC Administrative Code § 8–502[d]; *Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016)], the violations alleged to have occurred by Lawson before January 4, 2014, including the claims of religious discrimination, are time-barred.

Plaintiff argues that the statute should be tolled by the continuing violation

doctrine, which "extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statute of limitations" (*Quinn v Green Tree Credit Corp.*, 159 F3d 759, 765 (2d Cir 1998).

"The doctrine has generally been limited to situations where there are specific policies or mechanisms, such as discriminatory seniority lists or employment tests" (*Crosland v City of New York*, 140 F Supp 2d 300, 307 [SD NY 2001], *affd* 54 Fed Appx 504 [2d Cir 2002]; *Armstrong v Sensormatic/ADT*, 100 AD3d 492 [1st Dept 2012), and where "a series of separate acts ... collectively constitute one 'unlawful employment practice,' " such as a hostile work environment (*National R.R. Passenger Corp. v Morgan*, 536 US 101 [2002]). The doctrine does not apply, however, to discrete discriminatory acts that are not part of a discriminatory policy or practice, "even when they are related to acts alleged in timely filed charges" (*Id.* at 113; *Farrugia v North Shore University Hosp.*, 13 Misc3d 740 [Sup Court, NY Co 2006]).

Here, the continuing violation exception does not save the amended complaint's untimely claims. There is no allegation of any specific policy or practice of discrimination, other than Plaintiff's broad assertion that there was an organization-wide instruction to ignore Plaintiff's internal job search effort, which, as alleged, is not necessarily attributable to discriminatory conduct.

Furthermore, the record does not establish a basis for applying the continuing violation doctrine because it was not until the summer of 2016 that the Local 100 representative spoke to Human Resources. The complaint provides no information as to when Plaintiff wrote to HR, the supervisor about whom she complained, or whether Plaintiff's complaint letter alleged discriminatory conduct by the supervisor.

Additionally, the separate and discrete acts of alleged retaliation by Lawson occurred between September 2007 and November 2009, long before the timely allegations involving Dr. Kerrison and John Caragorious, to constitute a continuing violation. Therefore, Plaintiff's claims concerning Lawson's conduct, including all religious discrimination claims, are time-barred.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Wald v Graev*, 137 AD3d 573 [1st Dept 2016]). Nevertheless, it is axiomatic that factual allegations that consist of bare legal conclusions are not entitled to the general presumption that the facts pleaded are presumed to be true (*Mamoon v Dot Net Inc.*, 135 AD3d 656 [1st Dept 2016]).

Additionally, employment discrimination cases are reviewed under a liberal notice pleading standards such that a plaintiff need not give specific facts, but only give "fair notice" of the nature of the claim and its grounds (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009). As Plaintiff has pleaded that she is in a protected class as a Jamaican-American woman, the undoubtedly discriminatory remarks by Dr. Kerrison has given Defendants fair notice about the nature of her claims.

The NYSHRL and NYCHRL make it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment, because of the individual's race, color or sex (Executive Law § 296[1][a]; Administrative Code § 8-107[a]).

The standards for establishing unlawful discrimination under the New York City

Human Rights Law, like the New York State Human Rights Law, are the same as the federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 330 n.3 [2004]; *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]).

To state a claim of discrimination, a plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Talwar v Staten Island University Hosp.*, 610 Fed Appx 28 [2d Cir 2015]; *Forrest v Jewish Guild for the Blind*, 3 NY3d at 305; *Askin v Department of Educ. of City of New York*, 110 AD3d 621 [1st Dept 2013]).

However, NYCHRL affords protections broader than the NYSHRL (*Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]; *Williams v New York City Housing Authority*, 61 AD3d 62 [1st Dept 2009] and should be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]). For example, NYCHRL does not require that a plaintiff suffer a materially adverse employment action in order to succeed in an antidiscrimination action (*O'Halloran v Metropolitan Transp. Authority*, 154 AD3d 83 [1st Dept 2017] quoting Administrative Code § 8-107 [7]. In fact, NYCHRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. Moreover, failure to promote qualifies as an adverse employment action (*Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]).

Here, Plaintiff alleges, in conclusory fashion, that while at MAC 5, she was

harassed by her supervisor, Asa Boisseau, without any indication of the basis for the harassment or any allegation that it was rooted in discrimination. The same is true of the proposed one-hour change to Plaintiff's work schedule directed by her MAC 1 supervisor, John Caragorious. These allegations of harassment and retaliation are bare legal conclusions and, in the context of a motion to dismiss, are not presumed to be true (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014).

Notwithstanding Plaintiff's promotion in November 2014 to her current title of Senior Administrative Assistant, affording Plaintiff's complaint a liberal construction and giving her allegations every favorable inference, the court finds that it is possible that, as result of her complaints of discriminatory conduct by Dr. Kerrison, Plaintiff suffered retaliation in the form of a blanket disregarding of Plaintiff's job applications.

Accordingly, Defendant's motion to dismiss the complaint is granted with respect to Plaintiff's claims based on conduct by Boisseau and Caragorious as they fail to state a cause of action, granted with respect to Plaintiff's claims based on conduct by Lawson as they are time-barred, and denied with respect to Plaintiff's claims based on conduct by Dr. Kerrison. This constitutes the decision and order of the court which will be e-filed.

Dated: December 18, 2017
New York, New York

ENTER:

Lisa A. Sokoloff, J.S.C.