-GAY Chinnery v. New York State Office of Children-N-Family Services et al Doc. 50

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DOC #:
DATE FILED: 11/6/12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAURICE A. CHINNERY,

Plaintiff,

v.

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES and ROGER RASCO,

Defendants.

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10 Civ. 882 (DAB)

ORDER

DEBORAH A. BATTS, United States District Judge.

On March 23, 2012, United States Magistrate Judge George A. Yanthis issued a Report and Recommendation ("Report"), recommending that the Motion to Dismiss of the New York State Office of Children and Family Services ("Defendant") be GRANTED as to Plaintiff's New York State Human Rights Law ("HRL") claims and DENIED as to Plaintiff's Title VII claims. (Report at 17.) For the reasons set forth below, after conducting a de novo review of Parties' Objections where appropriate, the Report of Magistrate Judge Yanthis dated March 23, 2012 shall be modified as to the proper pleading standard for pro se plaintiffs. (Id at 11). The Report shall be adopted as to all other findings and recommendations. Accordingly, the Court GRANTS Defendant's

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Motion to Dismiss Plaintiff's HRL claims and DENIES Defendant's Motion to Dismiss Plaintiff's Title VII claims.

I. Objections to the Report and Recommendation

"Within fourteen days after being served with a copy [of a Magistrate Judge's Report and Recommendation], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2); accord 28 U.S.C. § 636(b)(1)(C). The Court may adopt those portions of the Report to which no timely Objection has been made, as long as there is no clear error on the face of the record. DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 339 (S.D.N.Y. 2009). A district court must review de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, "to the extent that the party makes only conclusory or general arguments, or simply reiterates the original arguments, the Court will review the Report strictly for clear error." DiPilato, 662 F. Supp. 2d at 339 (internal quotation marks and ellipses omitted); see also Ortiz v. Barkley, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) ("Reviewing courts should review a report and recommendation for clear error where objections are merely perfunctory responses, argued in an attempt to engage the district court in a rehashing of the same arguments

set forth in the original petition.") (internal quotation marks omitted). After conducting the appropriate levels of review, the Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1).

Plaintiff and Defendant have each filed timely Objections to Judge Yanthis's Report. Plaintiff objects to the Report's findings and recommendations regarding his HRL claims. Defendant objects to the Reports's findings and recommendations regarding Plaintiff's Title VII claims. The Court takes these arguments in turn here, applying a de novo review as appropriate to those portions of the Report addressed by specific Objections of the Parties.

II. Plaintiff's Objections

Plaintiff objects to the Report's recommendation that Defendant's Motion to Dismiss be granted as to his HRL claims. (See Pl. Obj. at 2.) Judge Yanthis bases his recommendation on jurisdictional grounds, finding that the Eleventh Amendment and the HRL's election-of-remedies provision bar Plaintiff from bringing his HRL claims in federal court. (See Report at 9-11.)

Objections of pro se parties are "generally accorded leniency and should be construed to raise the strongest arguments

that they suggest." Howell v. Port Chester Police Station, No. 09 Civ. 1651(CS), 2010 WL 930981, at *1 (S.D.N.Y. Mar. 15, 2010) (internal quotation marks omitted). "Nonetheless, even a pro se party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument." Id. (internal quotation marks omitted).

Although Plaintiff wholeheartedly disagrees with the Report's recommendation that his HRL claims be dismissed, his Objections do not specifically address Judge Yanthis's finding that the Court lacks subject matter jurisdiction. (See Pl. Obj. at 2.) Instead, they provide additional examples of Defendant's allegedly discriminatory employment practices. (See id.) Plaintiff's Objections are therefore insufficient to trigger de novo review of the Report's findings and recommendations as to the HRL claims, and the Court reviews this portion of the Report for clear error. The Court, having found none, adopts the Report's findings and recommendations regarding Plaintiff's HRL claims. The Defendant's Motion to Dismiss Plaintiff's HRL claims for lack of subject matter jurisdiction is granted.

III. Defendant's Objections

A. Pleading Standard for Title VII Claims of Pro Se Plaintiffs

Plaintiff claims that Defendant violated Title VII by discriminating on the basis of Plaintiff's race and sex and retaliating against Plaintiff after he filed formal complaints with Defendant's Office of Equal Opportunity and Diversity Development ("EODD") and the New York State Division of Human Rights ("NYSDHR"). In his Report, Judge Yanthis recommends that the Court deny Defendant's Motion to Dismiss as to Plaintiff's Title VII claims. (Report at 17.)

Defendant argues in its Objections that Judge Yanthis applies too liberal a standard of review in assessing the legal sufficiency of Plaintiff's Complaint. (See Def. Obj. at 3, 5, 7.) Specifically, Defendant appears to object to Judge Yanthis's finding that (1) to withstand a motion to dismiss, a Title VII plaintiff need not plead facts sufficient to establish a prima facie case of employment discrimination and retaliation, and (2) the Court "should not dismiss a pro se complaint 'for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (Report at 11-13 (quoting Hughes v. Rowe, 449 U.S. 5, 10 (1980)).)

Upon de novo review, the Court finds that to withstand a

motion to dismiss, Plaintiff is not required to plead facts sufficient to establish a prima facie case. The Supreme Court has held that "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002); see also Boykin v. KeyCorp., 521 F.3d 202, 212 (2d Cir. 2008)(citing Swierkiewicz to hold that Plaintiff need not establish prima facie case of discrimination to withstand Motion to Dismiss); Langford v. Int'l Union of Operating Eng'rs, Local 30, 765 F. Supp. 2d 486, 497 (S.D.N.Y. 2011) (noting that Swierkiewicz applies to Title VII claims of disparate treatment and retaliation). At the pleading stage, a plaintiff alleging discrimination in violation of Title VII must provide facts that give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 512. "[O]ur charge is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 327 (2d Cir. 2005) (internal quotation marks omitted). In addition, the plaintiff must have pleaded "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained, "when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles," the Supreme Court stated, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

The Supreme Court decided Twombly and Iqbal after Swierkiewicz, and a recent Second Circuit Summary Order notes that whether Swierkiewicz remains good law after Twombly and Iqbal is "somewhat of an open question in our circuit." Hedges v. Town of Madison, 456 Fed. App'x 22, 23 (2d Cir. 2012); see also Schwab v. Smalls, 435 Fed. App'x 37, 40 (2d Cir. 2011) (noting that "[q]uestions have been raised . . . as to Swierkiewicz's continued viability in light of Twombly and Iqbal" and pointing to a Third Circuit opinion finding that Twombly and Iqbal repudiated part of Swierkiewicz). However, the Circuit has

refrained from overturning Boykin, supra, or from otherwise deciding the issue. Instead, the Circuit has stated, "[A]t a minimum, employment discrimination claims must meet the standard of pleading set forth in Twombly and Iqbal, even if pleading a prima facie case is not required." Hedges, 456 Fed. App'x at 23. Other judges within this district have reconciled Swierkiewicz, Twombly, and Iqbal similarly. See, e.g., Anderson v. Davis Polk & Wardwell LLP, 850 F. Supp. 2d 392, 402 (S.D.N.Y. 2012) ("Reconciling Swierkiewicz, Twombly, and Iqbal, a complaint need not establish a prima facie case of employment discrimination to survive a Motion to Dismiss; however, the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim.") (internal quotation marks omitted); Shamilov v. Human Res. Admin., No. 10 Civ. 8745(PKC), 2011 WL 6085550, at *3, 4 (S.D.N.Y. Dec. 6, 2011) ("For complaints asserting claims of discrimination, the Iqbal plausibility standard applies in conjunction with the pleading standards set forth in Swierkiewicz . . . . Accordingly, to overcome a Rule 12(b)(6) motion to dismiss in an employment discrimination case, a complaint must give fair notice of the basis of plaintiff's claims and the claims themselves must be facially plausible."); Flores v. N.Y.C. Human Res. Admin., No. 10 Civ. 2407(RJH), 2011 WL 3611340, at *1 (S.D.N.Y. Aug. 16, 2011) ("Employment

discrimination complaints need not contain facts establishing prima facie cases of employment discrimination; instead such complaints must simply comply with Federal Rule of Civil Procedure 8(a)(2) and put the defendant on fair notice of what the plaintiff's claim is and the grounds upon which it rests."); Jackson v. NYS Dep't of Labor, 709 F. Supp. 2d 218, 223-24 (S.D.N.Y. 2010)("In the context of a discrimination claim, the Iqbal plausibility standard applies in conjunction with employment discrimination pleading standards. Employment discrimination claims need not contain specific facts establishing a prima facie case of discrimination.") (internal quotation marks omitted), appeal dismissed for lack of appellate jurisdiction, 431 Fed. App'x 21 (2d Cir. 2011).

Upon consideration of the Second Circuit's approach toward the Title VII pleading standard and that of other judges within this district, this Court adopts Judge Yanthis's finding that Plaintiff need not establish a prima facie case in order to survive Defendant's Motion to Dismiss. It is sufficient that Plaintiff's Complaint give fair notice of the basis of his claims, and that his claims be facially plausible under Twombly and Iqbal.

However, on de novo review of Defendant's related Objection, the Court modifies Judge Yanthis's findings regarding the proper

pleading standard for pro se complaints. The Report incorrectly states that a "court should not dismiss a pro se complaint 'for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (Report at 11 (quoting Hughes, 449 U.S. at 10).) Rather, "the 'plausibility' standard articulated in Twombly and Iqbal applies to the pleadings of pro se plaintiffs as well as to those of represented litigants." Thomas v. Calero, 824 F. Supp. 2d 488, 497 (S.D.N.Y. 2011). Even in the wake of Iqbal and Twombly, however, "we remain obligated to construe a pro se complaint liberally." Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009). A pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Boykin, 521 F.3d at 214 (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007)). The court should "interpret the complaint liberally to raise the strongest claims that the allegations suggest." Grimes v. Fremont Gen. Corp., 785 F. Supp. 2d 269, 282 (S.D.N.Y. 2011). The Court thus modifies Judge Yanthis's findings to reflect the correct standard for pro se complaints.

B. Plaintiff's Title VII Discrimination Claim

Defendant makes two Objections to the Report's findings

regarding Plaintiff's Title VII discrimination claim: (1) several actions Plaintiff claims Defendant undertook are not "adverse employment actions"; and (2) Plaintiff fails to plead facts that raise an inference of discrimination.

1. Adverse Employment Actions

Defendant argues that Judge Yanthis should have determined whether three of the five alleged employment actions were adverse. (Def. Obj. at 7-9.) The Court, upon de novo review, adopts Judge Yanthis's finding that it is unnecessary to decide at the pleading stage whether these three particular allegations constitute adverse employment actions. To survive a motion to dismiss, a plaintiff "must allege facts from which a trier of fact could plausibly conclude that he suffered an adverse employment action because of discrimination on the basis of the plaintiff's protected status." Williams v. City of New York, No. 11 Civ. 9679(CM), 2012 WL 3245448, at *4 (S.D.N.Y. Aug. 8, 2012) (citing Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007) (per curiam)). However, at the pleading stage, a court need not determine that every fact a plaintiff alleges amounts to an adverse employment action. Requesting this level of analysis "mistake[s] [Plaintiff's] burden at this stage in the litigation" because "whether certain employment actions qualify as adverse

for the purposes of Title VII, is a fact-specific inquiry . . . to be resolved at a later stage of litigation." Flores, 2011 WL 3611340, at *8 (internal quotation marks omitted).

The two cases Defendant cites are not to the contrary; they examine the adverseness of the alleged employment actions to determine whether a jury could plausibly conclude that Plaintiffs suffered any adverse employment action because of discrimination. See Salaam v. Syracuse Model Neighborhood Facility, No. 11 Civ. 948(MAD), 2012 WL 893487, at *5 (N.D.N.Y. Mar. 15, 2012)(finding that Plaintiff failed to allege plausibly any facts indicating that an adverse employment action had resulted from discrimination); Roff v. Low Surgical & Medical Supply, Inc., No. 03 Civ. 3655(SJF), 2004 WL 5544995, at *4 (E.D.N.Y. May 11, 2004) (finding that Plaintiff failed to allege plausibly any facts constituting an adverse employment action). In contrast, at least one of Plaintiff's allegations - his suspension without pay - plausibly constitutes an adverse employment action. See, e.g., Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 223 (2d Cir. 2001) ("[S]uspension without pay is sufficient to constitute an adverse employment action."); Satterfield v. United Parcel Serv., Inc., No. 00 Civ. 7190(MHD), 2003 WL 22251314, at *10 (S.D.N.Y. Sept. 30, 2003) ("[Plaintiff's] one-day suspension . . . arguably does fall within the Second Circuit's definition of

'materially adverse' action since plaintiff presumably was forced to forego one day's worth of wages."); Page v. Conn. Dep't of Pub. Safety, Div. of State Police, 185 F. Supp. 2d 149, 157 (D. Conn. 2002) ("In this Circuit, suspension without pay constitutes adverse employment action."). Because Plaintiff has plausibly alleged at least one adverse employment action, the Court finds on de novo review that parsing Plaintiff's Complaint to determine which of the other alleged employment actions are "adverse" is best suited for later stages of the litigation.

2. Inference of Discrimination

Defendant next objects that the discussion of comparators in Plaintiff's pleadings is insufficient to establish an inference of discrimination. (Def. Obj. at 4-6.)

Plaintiff, an African-American man, alleges that four employees were similarly situated to him but treated more favorably: three men who are not African-American and one African-American woman. Defendant's first Objection, reviewed de novo here, is that because each person Plaintiff names is either the same race or same gender as Plaintiff, each comparator is a member of Plaintiff's protected class, and thus, no inference of discrimination can arise. (Id. at 4-5.) Defendant cites no authority for the proposition that to raise an inference of

discrimination, Plaintiff must, as a matter of law, find a non-African-American, female comparator.

The Second Circuit has recognized that "a plaintiff's discrimination claims may not be defeated . . . based merely on the fact that certain members of a protected class are not subject to discrimination, while another subset is discriminated against based on a protected characteristic shared by both subsets." Gorzynski v. Jetblue Airways Co., 596 F.3d 93, 109 (2d Cir. 2010); see also Wolf v. Time Warner, Inc., No. 09 Civ. 6549(RJS), 2011 WL 856264, at *7 (S.D.N.Y. Mar. 3, 2011) (holding that Plaintiff sufficiently pleaded an inference of discrimination on the bases of sex and sex-plus-age where comparators were men and younger women). Thus, this Court will not dismiss Plaintiff's claim that he was discriminated against as an African-American man merely because his employer may not have discriminated against African-American women or against men who are not African-American.

The Court next reviews Defendant's Objection that Plaintiff fails to allege any facts indicating that he was similarly situated in all material respects to his comparators. (Def. Obj. at 5-6.) This Objection repeats the same argument Defendant made in its Motion to Dismiss. (Mot. to Dismiss at 12.) Arguments that relitigate issues are entitled to review only for "clear

error." See IndyMac Bank, F.S.B. v. Nat'l Settlement Agency, Inc., 07 Civ. 6865(LTS), 2008 WL 4810043, at *1 (S.D.N.Y. Nov. 3, 2008). The Court, having found none, adopts Judge Yanthis's finding that Plaintiff's allegations give Defendant fair notice of his discrimination claim, which is facially plausible.

Defendant next argues that Plaintiff and his comparators are, in fact, not similarly situated. When deciding whether a comparator is similarly situated, courts consider, inter alia, "whether the conduct [engaged in by Plaintiff and his comparator] for which the employer imposed discipline was of comparable seriousness." Jenkins v. St. Lukes-Roosevelt Hosp. Ctr., No. 09 Civ. 12(RMB), 2009 WL 3682458, at *7 (S.D.N.Y. Oct. 29, 2009) (internal quotation marks omitted). The cases Defendant cites to show that Plaintiff's conduct was not of comparable seriousness to that of his comparators are inapposite. In Jenkins, the comparator had not committed the same violation as the Plaintiff. Id. at *8. Here, Plaintiff alleges and Defendant concedes that Plaintiff and his comparators violated the same workplace policy - failing to make phone calls at the proper times. (See Def. Obj. at 6.) In Anderson, the "plaintiff ha[d] failed to allege in even conclusory fashion that he and [the comparator] were similarly-situated employees." 850 F. Supp. 2d at 407. In contrast, Plaintiff names four people not in his protected class

who he alleges were "in the same situation" and committed the same violation, but were "treated more favorably." (See Pl. Compl. at 13.) "[O]n a motion to dismiss, these allegations satisfy the fourth prong of the prima facie case, i.e., that the action taken against [Plaintiff] may be construed as having occurred under circumstances giving rise to an inference of discrimination." Morales v. Long Island R.R. Co., No. 09 Civ. 8714(HB), 2010 WL 1948606, at *4 (S.D.N.Y. May 14, 2010) (internal quotation marks omitted) (holding that Plaintiff was similarly situated to comparators who had also allegedly been caught sleeping on the job). Therefore, the Court adopts all of Judge Yanthis's findings as to Plaintiff's use of comparators.

C. Defendant's Objections to Plaintiff's Retaliation Claim

Defendant objects to Judge Yanthis's finding that Plaintiff's retaliation claim is facially plausible, arguing that Plaintiff fails to raise an inference of retaliation because (1) four months elapsed between Plaintiff's protected activity and the alleged retaliation, and (2) Plaintiff was subject to disciplinary action before, during, and after engaging in protected activity. (Def. Obj. at 10-12.) These Objections, however, merely repeat the arguments Defendant made in its Motion

to Dismiss (see Mot. to Dismiss at 16-18), and therefore are entitled only to "clear error" review. See IndyMac Bank, 2008 WL 4810043, at *1. Having found no clear error, the Court adopts Judge Yanthis's finding that Plaintiff's pleadings allege a plausible retaliation claim.

IV. Portions of the Report to Which Neither Party Has Objected

The Court may apply a "clear error" standard of review to those portions of the Report to which neither Party has objected. DiPilato, 662 F. Supp. 2d at 339. Having found no clear error, the Court adopts Judge Yanthis's findings as to those parts of the Report to which no timely Objections have been made.

V. Conclusion

Having conducted the appropriate levels of review of the Report and Recommendation of United States Magistrate Judge George A. Yanthis dated March 23, 2012, this Court MODIFIES the Report's legal findings pertaining to the proper pleading standard for pro se plaintiffs. (See Report at 11.) The Court APPROVES, ADOPTS, and RATIFIES the Report's factual recitations (see id. at 1-8) and all remaining legal findings and recommendations (see id. at 8-17). Accordingly, Defendant's

Motion to Dismiss is GRANTED in part and DENIED in part.

SO ORDERED.

Dated: New York, New York
November 5, 2012

Deborah A. Batts

Deborah A. Batts
United States District Judge