Hernandez v City of New York
2016 NY Slip Op 30641(U)
April 4, 2016
Supreme Court, Kings County
Docket Number: 504044/2013
Judge: Lara J. Genovesi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2016.

P R E S E N T:

HON. LARA J. GENOVESI,
Justice.

----------X

DANIEL HERNANDEZ,

Plaintiff,

Index No. 504044/2013

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, RAYMOND KELLY, Commissioner of the New York City Police Department, CAPTAIN TIMOTHY TRAINOR, Commanding Officer, Patrol Borough Brooklyn Investigations Unit, and INSPECTOR THOMAS MORAN, Commanding Officer of Patrol Borough Brooklyn North, all individuals are being sued in their individual and professional capacity,

DECISION & ORDER

Defendants.

----------X

The following papers numbered 1 to 2 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,2
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Other Defendant's Memorandum, Plaintiff's Memorandum in Opposition and Defendant's Reply Memorandum	3, 4 & 5

Introduction

Upon the foregoing papers, defendants City of New York (City), the New York City Police Department (NYPD), Raymond Kelly, former Commissioner of the New York City Police Department, Captain Timothy Trainor, Commanding Officer, Patrol Borough Brooklyn North Investigations Unit, and Inspector Thomas Moran, Commanding Officer of Patrol Borough Brooklyn North, move for an order, pursuant to CPLR section 3211 (a) (7), dismissing the complaint on the grounds that it is barred by the doctrine of collateral estoppel and fails to state a cause of action.[1]

Background

Plaintiff, who identifies himself as an Hispanic male and who is a New York City Police Officer, alleges that defendants discriminated against him based on his race, ethnicity and color. He alleges that the defendant's improperly restricted, among other things, his ability to obtain overtime and "paid detail" work assignments pending a hearing relating to a shooting incident. Furthermore, following the hearing, the defendant's continued these same limitations, in addition to placing plaintiff on "Level III dismissal probation" and "Level II performance monitoring." As alleged in the amended complaint, on July 21, 2008, plaintiff shot a suspect who was involved in a violation of an order of protection. Following this shooting incident, plaintiff was placed on

---

[1] The court notes that the records displayed on the New York State Courts Electronic Filing System for Kings County show that plaintiff commenced this action on July 17, 2013, that defendants moved to dismiss plaintiff's initial complaint in May 2015, and that, after plaintiff served the instant amended complaint in July 2015, defendants withdrew their motion as against the original complaint and thereafter made the instant motion to dismiss the amended complaint.

telephone switchboard/desk duty at the 79th precinct. In August 2008, plaintiff was transferred to the "Borough Office" and given an assignment with limited responsibility and a total loss of overtime. In addition, as an administrative worker, plaintiff asserts that he was unable to obtain the same level of evaluations that an officer working "outdoors" can receive and thus, his ability to advance and receive promotions was limited. Thereafter, the suspect shot during the incident commenced an action against plaintiff in December 2009. On January 6, 2010, plaintiff was served with formal disciplinary charges in which it was alleged that, during the July 21, 2008 incident, plaintiff discharged his weapon in violation of department guidelines.

On July 13, 2011, plaintiff filed an internal complaint of race discrimination with the NYPD Office of Equal Employment Opportunity, and, on July 20, 2011, he commenced an action against the same defendants as are before the court here in the United States District Court for the Eastern District (EDNY). After filing his internal complaint with the NYPD and commencing the federal action, he was placed on "modified duty," which resulted in him losing his gun and his ID.[2] In discussions with the NYPD legal advocate on October 11, 2011, plaintiff was informed that he could not work out a plea deal with respect to the departmental charges, and that the legal advocate would seek to terminate plaintiff's employment with the NYPD.

---

[2] A copy of the NYPD's personnel history for plaintiff, attached as an exhibit to defendants' motion and the accuracy or admissibility of which is not challenged by plaintiff in opposition, lists the date plaintiff was first placed on "modified assign" as September 13, 2011.

Plaintiff commenced the instant action on July 17, 2013. "Shortly" after commencing the instant action, plaintiff states that he was stripped of his gun and shield,[3] was required to serve a 30 day suspension.[4] Upon finishing his suspension, plaintiff was placed on Level III dismissal probation and was initially notified that he would be assigned to the property clerk's office, a position where he was "guaranteed" training and approximately 30 hours of overtime per month. When he reported to the property clerk's office, however, he overheard the lieutenant at the property clerk's office mention "pending lawsuit," and was directed to report instead to the Viper 8 unit, a unit that persons on "full duty" like plaintiff are not assigned. At Viper 8, plaintiff is ineligible for overtime and paid details, and required to work day tours, which precludes him from earning nighttime differential pay that he had earned prior to his assignment to Viper 8. When plaintiff completed his one year of Level III dismissal probation, he was placed on Level II performance monitoring for 18 months, his assignment to Viper 8 continued, and he was informed that he would be assigned to Viper 8 for the duration of his career. With respect to these actions, both before and after the disciplinary hearing, plaintiff asserts

---

[3] Plaintiff does not explain how he was stripped of his gun and shield at some point in September 2013 in view of his previous assertion that he was stripped of his gun and ID at some point in 2011 after he commenced the federal action and he filed his internal complaint with the NYPD Office of Equal Opportunity.

[4] The court notes that the defendants have attached to their papers copy of a October 24, 2013 Memorandum signed by defendant NYPD Police Commissioner Raymond W. Kelly in which he documents his review of plaintiff's departmental trial (which took place on various dates between March 7, 2012 and May 23, 2013) and in which he states that he approved of the finding that plaintiff discharged his weapon outside of department guidelines, but that he disapproved of the penalty of dismissal. Instead of the penalty of dismissal, in view of plaintiff's otherwise good disciplinary history, Commissioner Kelly placed plaintiff on dismissal probation for one year and required that he forfeit thirty vacation days.

that similarly situated Caucasian or African American officers subject to departmental discipline did not suffer restrictions on their service preventing them from, among other things, earning overtime or transfer to paid detail assignments.[5]

Based on these factual allegations, plaintiff alleges that he was the victim of discrimination based on his race, color, and ethnicity (Amended Complaint counts I-III and VI-VIII), subjected to a hostile work environment (Amended Complaint counts V and X), and subjected to retaliation for making complaints of discrimination (Amended Complaint Counts IV and IX), all in violation of the New York State Human Rights Law (State HRL) (Executive Law § 296) and the New York City Human Rights Law (City HRL) (Administrative Code of the City of New York § 8-107). Defendants now move to dismiss the amended complaint pursuant to CPLR section 3211 (a) (7) on the ground that it is barred by the doctrine of collateral estoppel based on the order, dated February 13, 2013, dismissing the federal action commenced by plaintiff (*see Hernandez v. City of New York*, 2013 WL 593450 [E.D.N.Y. 2013]) and on that ground that the complaint fails to state a cause of action.[6]

---

[5] The court notes that all of the factual allegations relating to defendants' treatment of plaintiff occurring after this action was commenced in July 2013 that are contained in the amended complaint should have been alleged in a supplemental complaint that can only be obtained by leave of court (CPLR § 3025 [a] & [b]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:9). Defendants, however, by apparently failing to reject service of the amended complaint made without leave of court and by failing to object to the addition of these post-commencement allegations in the instant motion, would appear to have waived any procedural defect in adding the post-commencement claims (*see Moran v. Hurst*, 32 A.D.3d 909, 910, 822 N.Y.S.2d 564 [2 Dept., 2006]; *Jordan v. Aviles*, 289 A.D.2d 532, 533, 735 N.Y.S.2d 623 [2 Dept., 2001]).

[6] Although a motion to dismiss on collateral estoppel grounds should be denominated a CPLR § 3211 (a) (5) motion, plaintiff did not object to the motion on this basis, and, in any event, has responded to the merits of defendants' collateral estoppel arguments in opposing the motion (CPLR § 2001).

The factual allegations contained in the amended complaint in the federal action are essentially identical to the factual allegations contained in paragraphs 1 through 31 of the instant amended complaint that detail the alleged discriminatory actions of defendants through October 2011. In light of those factual allegations, plaintiff alleged causes of action based on 42 USC §§ 1981 and 1983 asserting that defendants discriminated against him based on disparate treatment and retaliated against him in violation of the parties collective bargaining agreement, the United States Constitution and the New York State Constitution. In addition to the federal claims, plaintiff also alleged claims premised on the State HRL and City HRL.

In deciding defendants' motion to dismiss made pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, the District Court, after noting that the parties agreed that plaintiff was part of a protected class and qualified for the position in question, went on to find that the restrictions placed on plaintiff's job duties pending the hearing, including the assignment to desk duty, the loss of overtime hours and paid detail assignments, did not constitute a material adverse change in the terms or conditions of employment. As such, the court found that plaintiff failed to allege facts supporting a plausible claim of adverse employment action (*Hernandez v. City of New York*, 2013 WL 593450, *3).[7] The court also found that plaintiff's complaint contained insufficient detail

[7] With respect to the 42 USC 1981 claim, the court analyzed the prima facie pleading requirements laid out in *McDonnell Douglas Corp. v. Green* (411 U.S. 792 [1972]), which framework is used in considering a State HRL claim (*see Clarson v. City of Long Beach*, 132 A.D.3d 799, 800, 18 N.Y.S.3d 397 [2015]).

regarding the rank, the facts of the disciplinary complaints, and the post-shooting treatment of the alleged similarly situated comparators and thus, that the factual allegations of the complaint failed to support a plausible inference of discrimination (*id.* at 4-5). The court thus dismissed the section 1981 claim based on discrimination (*id.*). The court also dismissed the 42 USC 1983 claim because it found that the allegations of the complaint did not allow an inference of intentional discrimination in violation of the equal protection clause (*id.* at 5-6). Finally, the court the found that plaintiff failed to plead a retaliation claim under 1981 because the alleged protected activity of filing the NYPD Equal Employment Opportunity complaint occurred in July 2011, nearly three years after the only possible adverse employment action of placing plaintiff on desk duty in August 2008 (*id.* at 6). Having dismissed the federal causes of action, the court declined to exercise jurisdiction over plaintiff's claims under the State HRL and City HRL, and, as such, did not address their merits (*id.*).

Defendants' contend that the federal court's findings require dismissal of plaintiff's current amended complaint based on the doctrine of collateral estoppel.

Discussion

Collateral estoppel, or issue preclusion, prevents a party from "relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party" (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 712 N.E.2d 647 [1990] [internal quotation marks omitted]). The doctrine applies when, "(1) the issues in both proceedings are identical, (2) the issue in the prior

proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17, 29 N.E.3d 215 [2015] [internal quotation marks omitted]).

As a dismissal under CPLR section 3211 (a) (7) is not a final determination on the merits under New York law, an order dismissing a complaint under that section for failing to state a cause of action may not bar a subsequent claim based on the doctrine of collateral estoppel (*see Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 41 A.D.3d 584, 585, 837 N.Y.S.2d 333 [2 Dept., 2007]). Under federal law, however, a dismissal under Rule 12 (b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted is a dismissal on the merits for purposes of res judicata and collateral estoppel (*Cobbs v. Katona*, 8 F. App'x 437, 438 [6th Cir. 2001]; *see McLearn v. Cowen & Cowen & Co.*, 48 N.Y.2d 696, 699, 397 N.E.2d 750 [1979]; *see also Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n3, 101 S. Ct. 2424 [1981]). Indeed, the Court of Appeals has found a federal dismissal of a federal claim on a Rule 12(b) (6) motion can bar a state cause of action based on the doctrine of collateral estoppel (*see Pinnacle Consultants v. Leucadia Natl. Corp.*, 94 N.Y.2d 426, 432-433, 727 N.E.2d 543 [2000]; *see also Pinnacle Consultants, Ltd. v. Leucadia Nat. Corp.*, 101 F.3d 900, 906 [2d Cir. 1996]; *Sanders v. Grenadier Realty, Inc.*, 102 A.D.3d 460, 461, 958 N.Y.S.2d 120 [1 Dept., 2013]; *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263, 266, 615 N.Y.S.2d 360 [1 Dept., 1994], *lv denied* 85 N.Y.2d 804, 650 N.E.2d 415

[1995]).

The Appellate Division, Second Department, however, has held that a federal dismissal premised solely on the adequacy of the pleadings is not entitled to collateral estoppel effect (*see Lexjac, LLC v. Beckerman*, 72 A.D.3d 748, 750, 898 N.Y.S.2d 245 [2 Dept., 2010], *lv dismissed* 15 N.Y.3d 799, 934 N.E.2d 319 [2010]). This holding in *Lexjec, LLC* is not necessarily inconsistent with the Court of Appeals holding in *Pinnacle*, given that the Second Department holding appears to be limited to federal determinations in which the federal court has found that a complaint's allegations are conclusory or fail to provide sufficient factual detail to make out a claim (*id.*; *but see Sanders v. Grenadier Realty, Inc.*, 102 A.D.3d 460, 461, *supra*; *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263, 266, *supra*). In contrast, in *Pinnacle*, the federal finding that the plaintiff did not establish a claim of fraud for purposes of a federal RICO that the Court of Appeals found to warrant dismissal of the New York common-law fraud claim was primarily based on issues of law arising in the context of a detailed pleading (*see Pinnacle Consultants v. Leucadia Natl. Corp.*, 94 N.Y.2d 426, 432-433, *supra*; *Pinnacle Consultants, Ltd. v. Leucadia Nat. Corp.*,101 F.3d 900, 903-906, *supra*).

In reviewing the federal court's decision and order at issue here, this Court finds that the federal dismissal is primarily based on pleading inadequacies contained in federal complaint, and, as such, the federal decision does not bar the instant action based on the doctrine of collateral estoppel (*see Lexjac, LLC v. Beckerman,* 72 A.D.3d 748, 750,

supra).[8]

This Court will thus consider whether plaintiff's amended complaint states a cause of action. In considering a motion to dismiss for failing to state a cause of action under CPLR section 3211 (a) (7), the pleading is to be afforded a liberal construction (*see* CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20, 930 N.E.2d 217 [2010]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511 [1995]). Although evidentiary material may be considered in determining the viability of a complaint, the complaint should not be dismissed unless defendant has established "that a material fact alleged by the plaintiff is not a fact at all and that no significant dispute exists regarding it" (*Stewart v. New York City Tr. Auth.*, 50 A.D.3d 1013, 1014, 856 N.Y.S.2d 638 [2 Dept., 2008] [internal quotation marks and citations omitted]; *see also Lawrence v. Miller*, 11 N.Y.3d 588, 595,

---

[8] Even assuming that this Court was required to give the federal determination at issue preclusive effect, the ruling could not be considered binding with respect to the factual allegations of discriminatory actions occurring after October 2011, as they were not pled or otherwise at issue in the federal amended complaint, and as such, there was no determination made with respect to the adequacy of those allegations in the federal decision (*see Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 23, 987 N.Y.S.2d 338 [1 Dept., 2014]). In addition, while the State HRL is essentially determined in the same manner as a federal employment discrimination claim, the City HRL requires that its provisions, even to the extent that they contain comparable language as the federal and state laws, be given a more liberal construction (*see Singh v. Covenant Aviation Sec., LLC*, 131 A.D.3d 1158, 1160, 16 N.Y.S.3d 611 [2 Dept., 2015]; *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 66-69, 872 N.y.S.2d 27 [1 Dept., 2009], *lv denied* 13 N.Y.3d 702, 914 N.E.2d 365 [2009]). As such, the federal court's finding that plaintiff failed to make out a federal employment discrimination claim does not necessarily mandate a finding that his claim under the City HRL is likewise insufficient.

901 N.E.2d 1268 [2008]; *Nunez v. Mohamed*, 104 A.D.3d 921, 922, 962 N.Y.S.2d 338 [2 Dept., 2013]).

Discrimination

Under Executive Law section 296, plaintiffs state a prima facie cause of action for employment discrimination by pleading that (1) they are members of a protected class, (2) they are qualified to hold the position, (3) they suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 N.Y.3d 265, 270, 844 N.E.2d 1155 [2006]; *see also Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 819 N.E.2d 998 [2004]; *Askin v. Department of Educ. of the City of N.Y.*, 110 A.D.3d 621, 622, 973 N.Y.S.2d 629 [1 Dept., 2013]). While the analysis of pleading a discrimination claim under the City HRL follows these same four basic requirements, the more liberal intent of the City HRL must be considered in evaluating the adequacy of a plaintiff's claim (*see Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 36-37, 936 N.Y.S.2d 112 [1 Dept., 2011], *lv denied* 18 N.Y.3d 811, 968 N.E.2d 1001 [2012]; *see also Singh v. Covenant Aviation Sec., LLC*, 131 A.D.3d 1158, 1160, 16 N.Y.S.3d 611 [2 Dept., 2015]; *Gorman v. Covidien, LLC*, --- F.Supp.3d ---, 2015 WL 7308659, *12-13 [S.D.N.Y. 2015]).

The Court finds it appropriate to analyze plaintiff's claim of discrimination that predate his department hearing separately from his post-hearing claims. As noted in the federal decision, the parties essentially agree that plaintiff is a member of a protected

class and qualified for his position. The parties' dispute centers on whether he has adequately pled that he suffered an adverse employment action and that such adverse action occurred under circumstances allowing an inference of discrimination. Plaintiff primarily alleges that he suffered an adverse employment action based on his August 2008 transfer to a desk job at which he could not get overtime and "paid detail" assignments, and received lower evaluations. As is apparent from the allegations of the amended complaint, these work restrictions all flowed from employment actions taken in response to the July 2008 shooting incident. As a matter of policy, the Court of Appeals for the Second Circuit has held that similar employment actions, such as placing an employee on administrative leave with pay, that are taken as part of a reasonable employee disciplinary procedures pending an investigation and hearing do not constitute an adverse employment action (*see Brayboy v. O'Dwyer*, ___ F.App'x ___, 2016 WL 305617 *2 [2d Cir. 2016]; *see also Brown v. City of Syracuse*, 673 F.3d 141, 150-151 [2d Cir. 2012]; *Joseph v. Leavitt*, 465 F.3d 87, 91 [2d Cir. 2006], *cert denied* 549 U.S. 1282, 127 S.Ct. 1855 [2007]). Plaintiff's loss of overtime and ability to obtain paid detail assignments all appear to be a direct result of the reasonable disciplinary action pending the investigation and hearing, and are thus also not adverse job actions under both the State HRL and the City HRL (*see Brown v. City of Syracuse*, 673 F.3d 141, 150-151, *supra*).

Even if the allegations of the complaint sufficiently suggest that plaintiff's inability to obtain overtime and "paid detail" assignments was not a direct result of his

transfer to a desk position pending the investigation and hearing regarding the propriety of the shooting, plaintiff has failed to plead facts suggesting that the adverse actions occurred under circumstances allowing an inference of discrimination. Plaintiff, in conclusory terms, states that the actions taken against him were inconsistent with the treatment of similarly situated non-minority officers (Amended Complaint ¶ 25). While plaintiff provides an extensive list of non-Hispanic comparators, he makes no allegation that, during the investigation and hearing process, these comparators were able to work in positions that allowed them to incur overtime or apply for and obtain "paid detail" assignments (Amended Complaint ¶¶ 26 and 48). Plaintiff only states, in conclusory fashion, that the comparator officers were interviewed in a timely manner, were "not told by defendants that their shooting was good and then disciplined one year later and were not terminated from employment" (Amended Complaint ¶ 26). Absent allegations that would allow an inference that the adverse job actions were discriminatory, plaintiff's complaint fails to state a cause of action with respect to his employment discrimination claims under the State HRL and City HRL during the investigation and hearing process related to the shooting incident (*see Whitfield-Ortiz v. Department of Educ. of City of N.Y.*, 116 A.D.3d 580, 581, 984 N.Y.S.2d 327 [1 Dept., 2014]; *see also Matias v. New York & Presbyterian Hosp.*, --- A.D.3d ---, 2016 NY Slip. Op 02163 [1 Dept., 2016]; *Massaro v. Deptment of Educ. of the City of N.Y.*, 121 A.D.3d 569, 570, 993 N.Y.S.2d 905 [1 Dept., 2014], *lv denied* 26 N.Y.3d 903, 38 N.E.3d 829 [2015]; *Herrington v. Metro-North Commuter R.R. Co.*, 118 A.D.3d 544, 545, 988 N.Y.S.2d 581 [1 Dept.,

2014]; *Askin v. Department of Educ. of the City of N.Y.*, 110 A.D.3d 621, 622, *supra*; *Ortiz v. City of New York*, 105 A.D.3d 674, 674, 96 N.Y.S.2d 710 [1 Dept., 2013]). Particularly relevant in this regard is the First Department's decision in *Whitfield-Ortiz*, in which the court found a proposed amended complaint insufficient wherein it contained a list of named comparators who were alleged to have been treated more favorably (*Whitfield-Ortiz v. Department of Educ. of City of N.Y.*, 116 A.D.3d 580, 581-582, *supra*).[9]

On the other hand, for the period following the department trial, the factual allegations are sufficient to make a prima facie showing of discrimination under both the State HRL and City HRL. Outside of the context of a job action taken during an investigation and pending a hearing on a disciplinary matter, courts have generally found that a loss or restriction on the ability of an employee to obtain overtime can be a material adverse job action (*see Santiago-Medez v. City of New York*, 136 A.D.3d 428, 429, --- N.Y.S.3d --- [1 Dept., 2016]; *Perez v. City of New York*, 2012 NY Slip Op 31838 [U] [Sup Ct, New York County 2012]; *Lewis v. City of Chicago*, 496 F3d 645, 653-654 [7th Cir 2007]; *McKinen v. City of New York*, 53 F. Supp.3d 676, 692 [S.D.N.Y. 2014]; *Payne v. New York City Police Dept.*, 863 F.Supp.2d 169, 180-181 [E.D.N.Y. 2012]; *see also Brightman v. Prison Health Servs., Inc.*, 62 A.D.3d 472, 472, 878 N.Y.S.2d 357 [1 Dept., 2009]). Even assuming (without deciding) that the penalties of the suspension and one

[9] While the decision does not mention that the comparators where specifically identified in the proposed amended complaint, this fact is mentioned in plaintiff's reply brief on appeal (Plaintiff-Appellant's Reply Brief, 2014 WL 5410796).

year dismissal probation imposed by Commissioner Kelly following the department trial were appropriate,[10] and that plaintiff would have been unable to accrue overtime, tour of duty pay or night time differential pay while subject to dismissal probation, plaintiff has alleged that his inability to obtain such job benefits has continued after completing the one year dismissal probation. As such, plaintiff has sufficiently pled that he has been subject to an adverse job action.

In addition, plaintiff has identified a comparator, a white NYPD officer who plaintiff asserts faced department charges based on his shooting and killing an unarmed black teen, and who, after the losing his department trial, was transferred to a position at the property clerk's office, but was given the tour of his choice, was permitted to accrue overtime and was permitted to do training (Amended Complaint ¶ 48). The court concludes that these factual allegations regarding the comparator are sufficient, at the pleading stage, to suggest that the comparator is similarly situated to plaintiff (*see Regan v. City of Geneva*, 136 A.D.3d 1423, 1425, 25 N.Y.S.3d 515 [4 Dept., 2016]). The fact that plaintiff has only identified a single comparator[11] does not, in and of itself, render the pleading insufficient (*see Chernobai v. Hydraulax Products, Inc.*, 2015 WL 710464 [ED Pa 2015]; *see also Height v. Georgia Dept. of Human Servs.*, 2014 WL 1247766 [SD

---

[10] As noted in Footnote 4, Commissioner Kelly, in the October 24, 2013 memorandum submitted by defendants, imposed a sanction of forfeiture of 30 vacation days and one year of dismissal probation instead of termination.

[11] While, elsewhere in the amended complaint, plaintiff identifies other officers subject to discipline who were not terminated as a result of their department trial (Amended Complaint ¶ 26), he makes no factual assertion regarding whether, after the department trial, those officers retained the right to request a tour of their choice, accrue overtime or receive training.

Georgia 2014]; *Smith v. Walgreen Co.*, 964 F.Supp.3d 338, 352 n11 [D Del 2013]). Accordingly, defendants' motion must be denied with respect plaintiff's State HRL and City HRL discrimination claims to the extent that they are based on conduct occurring after the determination of his department trial (Amended Complaint counts I-III and VI-VIII).

Retaliation

Turning to plaintiff's retaliation claims, under "both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices" (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313, *supra*; Executive Law § 296[7]; Administrative Code § 8-107[7]). To make out a retaliation claim, a plaintiff must show that (1) he or she engaged in protected activity, (2) his or her employer was aware that he or she participated in such activity, (3) he or she suffered an adverse employment action based upon the protected activity, and (4) there is a causal connection between the protected activity and the adverse action (*see Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312-313, *supra*).

Plaintiff's complaint sufficiently alleges the first two elements of a retaliation claim for purposes of the State and City Human Rights Law in view of the allegations relating to his filing of the internal NYPD equal employment opportunity claim and the commencement of the federal action in July 2011 and with the commencement of the instant action in July 2013. Under both the State and City Human Rights laws, however, much of the claimed adverse actions cannot be related to the protected activity. Namely,

the transfer of plaintiff to the desk job and his loss of overtime opportunities and other such benefits occurred before his internal complaint and the commencement of the federal action and the instant action (*see Nettles v. LSG Sky Chefs*, 94 A.D.3d 726, 731, 941 N.Y.S.2d 643 [2 Dept., 2012]). Further, under the State HRL, plaintiff's placement on modified assignment and the taking of his gun and ID shortly after the filing of the internal complaint and the commencement of the federal action, in the absence of allegations that these actions involved any change in his posting, duties or compensation, in and of itself, do not constitute a material adverse action (*see Matter of Block v. Gatling*, 84 A.D.3d 445, 445, 922 N.Y.S.2d 327 [1 Dept., 2011] [concession stand employee's transfer from beer stand to food stand with loss of tips not adverse]; *see also Messinger v. Girl Scouts of U.S.A.*, 16 A.D.3d 314, 315, 792 N.Y.S.2d 56 [1 Dept., 2005]).

Given the more liberal standards of the City HRL, however, the taking of plaintiff's gun and ID may constitute an adverse employment action for purposes of the City HRL (*see Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 70-71, 872 N.Y.S.2d 27 [1 Dept., 2009], *lv denied* 13 N.Y.3d 702, 914 N.E.2d 365 [2009]; *see also Gorman v. Covidien, LLC*, --- F.Supp.3d at ---, 2015 WL 7308659 *12-13; *see also Cadet-Legros v. New York Univ. Hosp. Ctr.*, 135 A.D.3d 196, 202 n4, 21 N.Y.S.3d 221 [1 Dept., 2015]). As plaintiff's personnel history submitted by defendants shows that he was placed on modified assignment on September 13, 2011 – a date within two months of his filing of the internal complaint and the commencement of the federal action – an

inference can be drawn from this temporal proximity that the placement on modified duty was done in retaliation for his complaints (*see Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 23, 987 N.Y.S.2d 338 [1 Dept., 2014] [adverse action taken two months after protected activity allowed inference of retaliation]).

The apparent withdrawal of plaintiff's assignment to the property clerk's office following his return to active duty following his suspension and his assignment to Viper 8, where plaintiff could not accrue overtime or receive night differential pay, may also constitute an adverse employment action for purposes of the State and City Human Rights Laws (*see Brightman v. Prison Health Servs., Inc.*, 62 A.D.3d 472, *supra*). As these actions occurred approximately three months after the commencement of this action,[12] and in view of plaintiff's overhearing the lieutenant mention "pending lawsuit" at the time of the reassignment, there is a basis to infer a retaliatory motive (*see Brightman v. Prison Health Servs., Inc.*, 62 A.D.3d 472, *supra*). Accordingly, defendants are not entitled to dismissal of plaintiffs' retaliation claims.

Hostile Work Environment

Plaintiff has failed to state a hostile work environment claim under the State and City Human Rights Laws. In his amended complaint plaintiff identifies no hostile, harassing, derogatory, or demeaning comments or actions taken against him because of his race, ethnicity or color (*see Massaro v. Deptment of Educ. of the City of N.Y.*, 121

---

[12] Plaintiff's personnel history provided by defendants shows the assignment and reassignment as occurring on October 28th and 29th of 2013.

A.D.3d 569, 570, *supra*; *see also Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 26, *supra*; *cf. Gonzalez v. EVG, Inc.*, 123 A.D.3d 486, 487-488, 999 N.Y.S.2d 16 [1 Dept., 2014];. *Hernandez v. Kaisman*, 103 A.D.3d 106, 114-115, 957 N.Y.S.2d 53 [1 Dept., 2012]). Rather, he bases his hostile work environment claim on the same factual basis as his discrimination claims. Even assuming those factual allegations, involving work assignments that, among other things, did not allow for overtime or nighttime differential pay could form a basis for a hostile work environment claim (*see Newell v. Atlantic Express Trans. Corp.*, 35 Misc.3d 1240 [A], 2012 NY Slip Op 51054 *2-3 [Sup Ct, Bronx County 2012]), the hostile work environment claims here must be dismissed as duplicative of the discrimination claims given that liability under the hostile work environment claims is premised on the same factual allegations and theory of liability as the discrimination claims (*see Board of Mgrs. of Beacon Tower Condominium v. 85 Adams St. LLC*, 136 A.D.3d 680, 684, 25 N.Y.S.3d 233 [2 Dept., 2016]).

Individual Defendants

The individual claims against the individual defendants must also be dismissed. Under Executive Law section 296 (1) (a), a fellow employee in a corporate entity may be found liable where the fellow employee has an ownership interest in, or the power to make personnel decisions for the organization (*see Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 543-544, 473 N.E.2d 11 [1984]; *see also Boyce v. Gumley-Haft, Inc.*, 82 A.D.3d 491, 492, 918 N.Y.S.2d 111 [1 Dept., 2011]; *Murphy v. ERA United Realty*, 251 A.D.2d 469, 471, 674 N.Y.S.2d 415 [2 Dept., 1998]) and is found to have encouraged,

condoned or approved the discriminatory conduct (*see Boyce v. Gumley-Haft, Inc.*, 82 A.D.3d 491, 492, *supra*; *see also Pepler v. Coyne*, 33 A.D.3d 434, 435, 822 N.Y.S.2d 516 [1 Dept., 2006]). A fellow employee may also be held liable where the employee has aided, abetted or incited the conduct at issue (*see Croci v. Town of Haverstraw*, 116 A.D.3d 993, 994, 983 N.Y.S.2d 886 [2 Dept., 2014]). Here, while plaintiff provided factual allegations indicating the supervisory capacity of the individual defendants, he did not provide factual allegations showing that they encouraged, condoned or approved the discriminatory conduct or that they aided or abetted such conduct (*see Croci v. Town of Haverstraw*, 116 A.D.3d 993, 994, *supra*]). While a co-employee may be held directly liable for discriminatory employment practices under the City HRL (Administrative Code § 8-107 [1] [a]; *Murphy v. ERA United Realty*, 251 A.D.2d 469, 471, *supra*), plaintiff has likewise failed to provide any factual allegations detailing the individual defendants' participation in the discriminatory conduct.

Conclusion

Defendants' motion is granted to the extent that: (1) the amended complaint is dismissed as against the individual defendants to the extent that it alleges that they are liable in their individual capacity; (2) the hostile work environment causes of action are dismissed (amended complaint counts V and X); and (3) the discrimination causes of action are dismissed with respect to any alleged discriminatory conduct occurring prior to

October 2011 (Amended Complaint counts I-III and VI-VIII). Defendants' motion is otherwise denied.

This constitutes the decision, order and judgment of the court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

NANCY T. SUNSHINE
Clerk

To:

Moshe C. Bobker, Esq.
Revellino & Byczek, LLP
Attorney for Plaintiff
3000 Marcus Avenue, Suite 3E7
Lake Success, New York 11042

Zachary W. Carter, Esq.
By: Tanya N. Blocker, Esq.
The City of New York Law Department
Attorney for Defendants
100 Church Street, Room 2-173
New York, New York 10007

KINGS COUNTY CLERK
FILED
2016 APR 13 AM 9:34