Young v City of New York
2016 NY Slip Op 33127(U)
September 22, 2016
Supreme Court, Bronx County
Docket Number: 22944/20151
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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LAWRENCE YOUNG,

Index No.: 22944/2015

Plaintiff(s),

-against-

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

THE CITY OF NEW YORK, INSPECTOR SGT. NILDA HOFMANN, SGT. KHANZADA LT. JACOMIE, SGT. GERLOFF, DEPUTY INSPECTOR MULLIN, SGT. GARAY and SGT. ROY SIMMONS,
each being sued individually and in their professional capacities,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Dismiss:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibit and Memorandum of Law in Support	1
Memorandum of Law in Opposition	2
Reply Memorandum of Law in Support	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff commenced this action on May 27, 2105 by filing a summons and complaint seeking redress for the alleged deprivations of his rights in violation of New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"). Specifically, plaintiff alleges discriminatory practice in employment on the part of the defendants in relation to plaintiff's race. Plaintiff also asserts claims for hostile work environment and retaliation. Plaintiff self-styled causes of action are as follows: first, Race Discrimination (NYS Exec. Law §296); second, Retaliation (NYS Exec. Law §296); third, Hostile Work Environment (NYS Exec. Law §296); fourth Race Discrimination (NYC Admin. Code §8-101 *et. seq.*); fifth, Retaliation (NYC Admin. Code §8-101 *et. seq.*); and sixth, Hostile Work Environment (NYC Admin. Code §8-101 *et. seq.*). Instead of answering the complaint, defendants have made this pre-answer motion.

Defendants move to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(7) for failure

to state a cause of action. Particularly, defendants move to dismiss plaintiff's first and fourth causes of action for race discrimination because defendants argue that the complaint fails to allege facts sufficient to show that any actions by defendant were motivated by racial animus. Defendants move to dismiss plaintiff's second and fifth causes of action for retaliation based upon the argument that these causes of action are wholly unsupported by the factual allegations of the complaint. Defendants move to dismiss the third and sixth causes of action because plaintiff has not alleged facts sufficient to show that he was subjected to objectively severe of pervasive mistreatment because of his race.

In considering a motion to dismiss for failure to state a cause of action, 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 N.Y.2d 83, 87-88, [1994]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). It is defendant's burden to demonstrate that, based upon the four corners of the complaint, liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*Martin v. McGraw Hill Companies,* (2010 N.Y. Slip Op. 32867[U] [N.Y. Sup.Ct., 2010]). In cases alleging discrimination in employment, a plaintiff must do more than plead in a conclusory fashion that he experienced a discriminatory or retaliatory adverse employment action in order to sustain his claim (see *Awoshiley v. Beth Israel Med. Ctr.*, 81 A.D. 3d 517 [1st Dept., 2011]; *Brooks v. Overseas Media, Inc.*, 69 A.D.3d 444 [1st Dep't., 2010]; *Cozzani v. County of Suffolk*, 84 A.D.3d 1147 [2d Dep't., 2011]). However, in employment discrimination cases, where an employer's intent is at issue, courts should be even more restrained in granting dispositive motions (*Bennett v. Health Mgt. Sys., Inc.,* 92 A.D. 3d 29, 43-44, [1st Dep't., 2011]). This is due in part to the fact that in employment discrimination cases the discrimination, "is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a 'smoking gun', such as a notation in an employee's personnel file, attesting to discriminatory intent" (*Melman v. Montefiore Med Ctr.*, 98 A.D.3d 107, 137 (1st Dep't., 2012) quoting *Rosen v. Thornburgh*, 928 F.2d 528, 533 [2d Cir. 1991]). Moreover, it has been held that a plaintiff alleging employment discrimination, "need not plead

[specific facts establishing] a prima facie case of discrimination" but need only give "fair notice" of the nature of the claim and its grounds..." (*Vig v. New York Hairspray Co., L.P.*, 67 A.D. 3d 140, 145 [1st Dep't., 2009] citing *Swierkiewicz v. Sorema, N.A.*, 534 U.S.506 [2002]).

Racial Discrimination Claims
(Plaintiff's First and Fourth Causes of Action)

Pursuant to New York State Executive Law §296(1)(a): it shall be unlawful

> "For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Similarly, under the NYC Administrative Code §8-107(1)(a):

> "It shall be an unlawful discriminatory practice [f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation or alienage or citizenship status of any person: (1) To represent that any employment or position is not available when in fact it is available; (2) To refuse to hire or employ or to bar or to discharge from employment such person; or (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment."

In order to state a prima facie case of discrimination, a plaintiff must allege that (1) he is a member of a protected class, (2) he was qualified for the positions held, (3) he suffered adverse employment action, (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (see *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 [2004]; *Bennet v. Health Mgt. Sys. Inc.*, 92 A.D.3d 29, 35 [1st Dep't., 2011]). Defendants argue that plaintiff fails to state a cause of action for discrimination because, based on the allegations in the complaint, he will not be able to establish, as a matter of law, that he suffered any adverse employment action due to discrimination and further, that even if plaintiff did suffer any adverse employment action, he fails

to plead facts from which one could infer a discriminatory intent on behalf of the defendants. The court disagrees.

Initially, the court notes that defendants' motion does not attack the sufficiency of plaintiff's pleading in regards to the first two elements of a discrimination claim. Therefore, the court only addresses the last two elements. In doing so, the court finds that the complaint sufficiently alleges plaintiff suffered adverse employment action. The complaint alleges that plaintiff was prevented from working overtime and that he was repeatedly passed over for promotions despite the fact that he allegedly met all the necessary requirements for said promotion. The aforementioned conduct, liberally construed and reading the complaint in its totality, exhibits that plaintiff believes he was hindered from earning overtime and from being promoted to detective because of his race. Additionally, the complaint alleges that plaintiff was assigned to "rookie" details despite his twenty-five years on the police force. Conduct that is accompanied by a reduction in pay or privileges, or diminution in responsibility, can be deemed adverse (*Meija v. Roosevelt Is. Med.Assoc.*, 95 A.D.3d 570, 572 [1st Dep't., 2012]). Therefore the complaint sufficiently alleges prong three of a racial discrimination claim.

As for the fourth prong, that the adverse employment action occurred under circumstances giving rise to an inference of discrimination, the court finds that the complaint sufficiently alleges that this element can be established. Plaintiff alleges that he was required to give up three vacation days for failing to wear a gas mask on his belt, while his partner, a white male, only lost one vacation day for the same offense. Plaintiff further alleges that he was the only officer repeatedly yelled at because he was the only black member of a squad. Plaintiff's complaint alleges that he was made to stand while on a certain detail, while his white colleagues were permitted to sit during the same detail. Plaintiff's complaint also alleges that he received lower performance evaluations than his white colleagues despite the fact that plaintiff had made more arrests than those white colleagues. These allegations, construed liberally, paint a picture of plaintiff being treated differently than his white colleagues on the basis of his race. While it remains to be determined if that was actually the case, the inference of racial discrimination can be made from the allegations set forth in the complaint and therefore, the court finds that dismissing the first and fourth causes of action as for racial discrimination as insufficiently pled is inappropriate. Consequently, the motion seeking to

dismiss plaintiff's first and fourth causes of action for racial discrimination is denied.

Retaliation Claims
(Plaintiff's Second and Fifth Causes of Action)

Pursuant to NY Exec. Law §296(1)(e):

> "It shall be unlawful discriminatory practice [f]or any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

Pursuant to NYC Admin. Code §8-807(7):

> "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."

In order to make a prima facie claim for retaliation, plaintiff must allege that (1) he has engaged in a protective activity, (2) his employer was aware that he participated in such activity, (3) he suffered an adverse employment action based upon his activity, and (4)there is a casual connection between the protected activity and the adverse action (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 312 [2004]). After reviewing the complaint, and affording the same nost liberal construction, the court finds that plaintiff has failed to sufficiently plead causes of action for retaliation. Protected activity includes protesting harassment to one's supervisors (*Mitchell v. TAM Equities, Inc.*, 27 A.D.

3d 703, 706 [2d Dep't., 2006]). In opposition to the motion, plaintiff's counsel indicates that the complaint alleges that plaintiff, "complained all the way up the line, including to his Union" and that plaintiff "routinely took issue with Gerloff's treatment of him and that Hoffman retaliated against [plaintiff] in direct response." However, the complaint makes no such allegations and plainitff fails to allege that he complained, in any way, to defendants that he thought he was being treated differently due to his race. Additionally, the complaint, other than reciting bare legal conclusions, does not allege that he was treated different *as a result* of him protesting his treatment. Again, even under the most liberal reading of the complaint, the essential elements of cause of action for retaliation have not been pled. Based on the foregoing, plaintiff's second and fifth causes of action are dismissed against all defendants.

Hostile Work Environment
(Plaintiff's Third and Sixth Causes of Action)

Under the standard applicable to claims under federal and state law, a "hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment..." (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 310 [2004] citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 [1993]). New York City Human Rights Law permits liability for harassment that does not rise to the level of "severe" or "pervasive" conduct but instead only amounts to "unwanted gender-based conduct" (*Williams v. N.Y.C.Hous. Auth.* 61 A.D.3d 62, 76 [1st Dep't., 2009]). This standard applies equally to gender based claims and race-based claims (see *Barounis v. New York City Police Dep't.*, No. 10 Civ.2631 [SAA][S.D.N.Y. December 12, 2012]).

As described *supra,* the complaint sets forth various allegations that on numerous occasions the plaintiff was treated differently than his white colleagues by defendants. Again, affording the complaint the liberal interpretation as is required on motions to dismiss pursuant to CPLR§3211(a)(7), the court finds that the complaint sufficiently pleads causes action for hostile work environment in violation of state and city Human Rights Laws. Consequently, the portion of the motion seeking dismissal of plaintiff's third and sixth causes of action for hostile work

environment is denied.

In sum, defendants' motion is granted to the extent that plaintiff's second and fifth causes of action for retaliation are dismissed as insufficiently pled. Notwithstanding the above, the court also finds that the complaint must be dismissed as against defendant Sergeant Garay in its entirety. Other than naming Sergeant Garay as a defendant, the complaint sets forth no allegations of wrongdoing against that defendant. Therefore, the remaining causes of action are dismissed against defendant Garay.

The remaining defendants are hereby directed to serve their answer to the complaint within thirty (30) days of the entry date of this order.

The above constitutes the decision and order of the court.

Dated: 9/22/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.