

Ramos v City of New York

2017 NY Slip Op 31336(U)

May 8, 2017

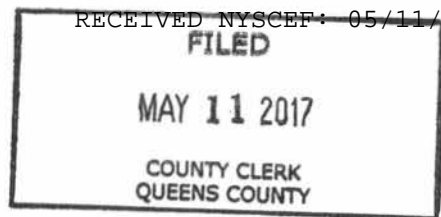
Supreme Court, Queens County

Docket Number: 708792/15

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.



Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Justice Part 10

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Eugenio Ramos,

Index Number: 708792/15

Plaintiff,

- against -

Motion Date: 4/5/17

City of New York, Commissioner Dora Schriro, Commissioner Joseph Ponte, Warden Dario Hill, Chief of Security Brian Superknot, Assistant Deputy Warden Dario Emans, and Assistant Deputy Warden Edwin Bennett, each being sued in their individual and Professional capacities,

Motion Cal. Number: 143

Motion Seq. No.: 4

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendant, The City of New York, to dismiss; and cross-motion by plaintiff for leave to amend the complaint.

Table with 2 columns: Document Name, Papers Numbered. Includes Notice of Motion-Affirmation-Exhibits (1-3), Memorandum of Law (4), Second Notice of Cross-Motion-Affirmation-'Untabbed' Exh. (5-7), etc.

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

That branch of the motion by defendants to dismiss all causes of action based upon occurrences that transpired prior to August 20, 2012 as barred by the statute of limitations, pursuant to CPLR 3211(a)(5), is granted to the extent that plaintiff's causes of action for discrimination and retaliation based upon the action of defendants on March 19, 2012 are dismissed as time-barred and

denied with respect to his cause of action for hostile work environment based upon said action. However, that branch of the motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted. Cross-motion by plaintiff to amend the complaint is denied as moot.

Plaintiff, an employee of the New York City Department of Corrections, commenced the present action on August 20, 2015 alleging discrimination on the basis of race, national origin and military status, retaliation and hostile work environment in violation of the New York State Human Rights Law (Executive Law §290, te. seq.) and the New York City Human Rights Law (Administrative Code §8-101 et. seq.) alleged to have occurred on March 19, 2012, October 10, 2012, November 2012, December 2012, January 2013, August 5, 2013, September 2013, October 30 and 31, 2013, November 1, 2013, December 26, 2013 and multiple dates in 2014.

Since the alleged act of discrimination and retaliation that transpired on March 19, 2012 when plaintiff was ordered to submit to a drug test, three years and five months prior to commencement of this action, plaintiff's causes of action based upon that alleged occurrence is barred by the applicable three-year statute of limitations. Contrary to plaintiff's counsel's argument that it is not time-barred under the so-called "continuing violation" doctrine, there is no allegation or showing that this alleged act was anything but a discrete act. "[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" (National R.R. Passenger Corp. v Morgan, 536 U.S. 101, 113-14 [2002]). Even if the March 19, 2012 action to order plaintiff to submit to a drug test constituted an allegation sufficient to constitute a discriminatory adverse employment action, which it does not, it was a discrete and separate action and, thus, plaintiff's cause of action alleging discrimination on the basis of his race, national origin and military status based upon the March 19, 2012 action is time-barred. With respect to his cause of action alleging that said action was retaliatory, the continuing violation doctrine also does not apply to claims of retaliation. "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.).

However, the continuing violation doctrine is applicable to hostile work environment claims. "Hostile environment claims are

different in kind from discrete acts. Their very nature involves repeated conduct" (*id.* at 101, 115). Therefore, plaintiff's cause of action for hostile work environment based upon the March 19, 2012 action is not time-barred since it is a part of the alleged pattern of conduct spanning time periods within the statute of limitations.

Nevertheless, the complaint fails to state a cause of action for hostile work environment based upon the March 19, 2012 action and the subsequent alleged acts, and fails to state a cause of action for discrimination and retaliation based upon the subsequent acts alleged, which consist of more drug testing, denials of leave requests, marking plaintiff as AWOL when he failed to show up to work on dates that he was denied leave, and assigning him to unwanted overtime duty on several occasions, including Christmas Eve 2013. Indeed, even if the action had been commenced within three years of March 19, 2012, the ordering of plaintiff on that date to submit to a drug test still would not set forth a cause of action for discrimination or retaliation.

The complaint contains no factual allegations linking the actions complained of to prejudice or animus against plaintiff on the basis of his Hispanic race, Puerto Rican origin or his status as a member of the U.S. Army Reserves who had served in Iraq. Moreover, these alleged actions are not sufficiently severe or pervasive so as to raise any issue of fact as to whether there was a violation of plaintiff's rights under either the New York State Human Rights Law or the New York City Human Rights Law (see Harris v Forklift Sys., Inc., 510 U.S. 17 [1993]; Schwapp v Town of Avon, 118 F 3d 106 [2nd Cir 1997]; Hernandez v Kaisman, 103 AD 3d 106 [1st Dept 2012]; Barnum v New York City Transit Auth., 62 AD 3d 736 [2nd Dept 2009]), and no facts are alleged that plaintiff suffered any material adverse change in the terms or conditions of his employment (see Forrest v Jewish Guild for the Blind, 3 NY 3d 295 [2004]). In this regard, plaintiff's allegation in his proposed amended complaint that he seeks to interpose, that he did suffer an adverse employment action because he resigned on July 18, 2016 after taking medical leave necessitated by the toll on his health of the acts of defendants, does not state a cause of action for discrimination, since plaintiff resigned from his employment and was not terminated or demoted and, thus, did not suffer an adverse employment action by defendants. In addition, with respect to plaintiff's cause of action for retaliation, his actions that he alleges prompted defendants to retaliate against him, to wit, his service as president of the Department of Corrections Hispanic Society from 2001-2007 and his complaints to OSHA regarding unsafe conditions at Rikers Island, are not protected activities subject to a retaliation claim under the State and City Human Rights Laws

(see id. at 313, concurring opinion at footnote 11).

Accordingly, the action is dismissed.

Dated: May 8, 2017



KEVIN J. KERRIGAN, J.S.C.

FILED
MAY 11 2017
COUNTY CLERK
QUEENS COUNTY