| **Marquart v Department of Educ. of the City of N.Y.** |
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| 2017 NY Slip Op 31363(U) |
| June 27, 2017 |
| Supreme Court, New York County |
| Docket Number: 150327/16 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
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DANIEL MARQUART,

Plaintiff,

-against-

Index No. 150327/16

Motion Seq. 002

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, AND THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.
------------------------------------------------------------------------X
**CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**

In this action alleging hostile work environment, and disparate treatment based on disability and age, defendant Department of Education of the New York City/Board of Education of the City School District of the City of New York ("DOE" or "defendant"), now moves to dismiss the complaint pursuant to CPLR 3211(1)(7) for failure to state a cause of action.

*Factual Background*

According to the Amended Complaint, plaintiff Daniel Marquart ("plaintiff") a 51-year-old Guidance Counselor who suffers from sleep apnea, has been employed by the DOE as a Guidance Counselor for 18 years. Plaintiff brought in a Doctor's note in January 2015, and advised Assistant Principal Mariola Kolodziej ("AP Kolodziej"), and Principal Rosa Nieves ("Principal Nieves") of his condition.

Although plaintiff performed his responsibilities in an exemplary manner, plaintiff received "biased letters" dated February 10, 2015, April 14, 2014, and April 20, 2015.

The February 10, 2015 letter referenced a meeting he had on January15, 2015 with

Principal Nieves and AP Kolodziej as to his helping two students with their college applications. DOE's failure to provide plaintiff with an office made it difficult to counsel people due to the lack of privacy, and caused plaintiff to seek permission from teachers to use their classrooms.

The April 14, 2015 letter referenced a meeting with Principal Nieves, AP Kolodziej and the union representative, Sybil Smith (the "Union Representative") concerning plaintiff's absences and lateness from September of 2014 to March 2015. Plaintiff explained that he was late in January and February due to snow storms which blocked his driveway and that seven of his absences were excused due to illness substantiated with medical documentation.

A March 24, 2015 letter from Principal Nieves to HR Connect Medical Administration requesting a medical evaluation of plaintiff falsely stated that plaintiff was sleeping during counseling sessions which "prevents him from meeting IEP mandates," parent meetings, during professional development activities. Plaintiff claims that on April 27, 2015, HR Connect Medical, Leaves & Records Administration & School Medical Inspector found him fit for duty.

Plaintiff claims that these letters were an attempt to tarnish his professional reputation and "paper" his file.

By letter dated April 30, 2015, plaintiff was informed that he was derelict of his duties as a counselor for arriving late and leaving early and not seeing one of his students with the correct mandate on the IEP. Plaintiff explained that the student has an individual mandate but prefers to be in a group. Plaintiff was also accused that he was only seeing four students for 30 minutes instead of 40 minutes, even though plaintiff conducted 40-minute session counseling sessions from 8:20-9:00, and on occasion, had to wait for a student who was running late.

Plaintiff alleges that Debrah Rosenhaus (early/ mid 30s) ("Ms. Rosenhaus") and Robert

Sanchez (mid-40s) ("Mr. Sanchez") were guidance counselors in the main building and had almost identical responsibilities to plaintiff but had caseloads of about 45 to 50 cases, while plaintiff had case load of about 65 cases. Plaintiff was allegedly given a substantially greater caseload than those similarly-situated younger guidance counselors in order to increase the stress and compel him to retire.

In addition, plaintiff received an unsatisfactory annual performance review for the 2014-2015 school year in June 2015. The consequences of a U rating which can be considered adverse employment actions are: (a) being removed from "per session" (i.e. extracurricular) paid positions; (b) being barred from applying for per session positions for five years; (c)inability to work in summer school; (d) lost income, including inability to move up a salary step; (e) reduced pension benefits; (f) inability to transfer within the school district; and (g) damaged professional reputations and stymied careers. The performance evaluation was substantially untrue and biased due to plaintiff's age, disability and perceived disability. Plaintiff had previously worked per session but could no longer work per session. This caused him to lose income and negatively impacted his pension.

Plaintiff requested an assignment for the upcoming 2015-2016 school year to return to the main site but despite his seniority was deliberately assigned to Lehman College, to force plaintiff to retire due to transportation issues. In contrast, younger and non-disabled individuals, such as Ms. Rosenhaus and Mr. Sanchez with less seniority was assigned to the main site. And, the U rating directly impacted plaintiff because he wanted to transfer out of the school and could no longer do it.

Plaintiff alleges that DOE's discriminatory actions were based on his disability and age in

violation of New York City Human Rights Law, NYC Admin. Code § 8-107.

In support of dismissal, the DOE argues that plaintiff failed to allege any facts indicating that he suffered or experienced an adverse employment action at any time, or that the complained-of acts were improperly motivated by his age, disability, or perceived disability. And, plaintiff cannot establish that he was subjected to a hostile work environment. Specifically, plaintiff failed to allege any fact connecting any alleged actions taken against him with a protected characteristic. Nor has plaintiff alleged any facts in support of his claims of discriminatory animus.

In opposition, plaintiff maintains that under a liberal interpretation of the City Human Rights Law, and a liberal reading of his complaint, he suffered an adverse employment action under circumstances from which a discriminatory intent may be inferred. As a result of the various adverse employment actions alleged, plaintiff lost income and his pension benefits have been reduced. Plaintiff also alleged sufficient facts indicating hostile work environment under circumstances from which a discriminatory intent may be inferred. Plaintiff did not have any significant employment issues until he submitted his doctor's note regarding his sleep apnea.

In reply, the DOE maintains that none of the facts alleged constitute adverse actions. Further, plaintiff failed to cite any facts showing that any actions was motivated by discriminatory animus. Plaintiff also failed to allege facts regarding his alleged comparators, such as the complexity of cases assigned him and the purported younger employees, or the training and experience of the purported younger employees. Plaintiff did not request any reasonable accommodation or that any such request was denied. The out-out-state caselaw plaintiff cites to support his hostile work environment claim are inapplicable.

***Discussion***

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court's role is deciding "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" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]).

NYCHRL § 8–107(1)(a)(3) provides, in pertinent part, that:

> "[i]t shall be an unlawful discriminatory practice:(a) For an employer or an employee or agent thereof, because of the actual or perceived age . . . disability . . . of any person: . . . (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

This statute, as revised by the Local Civil Rights Restoration Act of 2005, is construed by courts more liberally than its state or federal counterparts (*Zakrzewska v New School*, 14 NY3d 469 [2010]; *Williams v. N.Y.C. Housing Auth.*, 61 AD3d 62, 872 NYS2d 27 [1st Dept 2009]). Though the NYCHRL is to be interpreted independently, interpretations of similarly-worded State or federal provisions may be used as aids in interpretation only as "a floor below which the

City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise", and only to the extent that those state or federal decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law (*Williams*, 61 AD3d at 66-67).

The NYCHRL is not, however, a "general civility code" (*Williams*, 61 AD3d at 79, *citing Oncale v Sundowner Offshore Services, Inc.*, 523 US 75 [1998]).

Yet, it is uncontested that to state a claim under the NYCHRL, plaintiff must allege "(1) [he] is a member of a protected class; (2) [he] was qualified to hold the position; (3) [he] 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" (*Melman v. Montefiore Medical Center*, 98 A.D.3d 107, 946 N.Y.S.2d 27 [1st Dept 2012]).

Here, there is no dispute that plaintiff sufficiently alleged his membership in protected classes based on his age and disability. Nor is there a dispute as to his initial qualifications for the position. The remaining two factors are, however, disputed.

"An adverse employment action is a materially adverse change in the terms and conditions of employment" (*Mathirampuzha v. Potter*, 548 F3d 70, 78 [2d Cir 2008]). Such action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities" (*Brown v City of Syracuse*, 673 F3d 141, 150 [2d Cir 2012] *quoting Joseph v. Leavitt*, 465 F3d 87, 90 [2d Cir 2006]). "Examples of materially adverse employment actions include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, *or other indices unique to a particular situation*" (*Feingold v N.Y.*, 366 F3d 138, 152 [2d Cir

2004]; *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295819 N.E.2d 998786 N.Y.S.2d 382 [2004] (emphasis added)).

Assuming the truth of plaintiff's allegations at this juncture, as this Court must, the court finds that plaintiffs allegations that he received "U" Rating on his performance review, was given a larger caseload (than two other, younger employees), and was denied a transfer request, in total, sufficiently plead an adverse action in light of plaintiff's additional claims that such rating resulted in the consequence of (1) lost income and pension benefits from being barred from apply for "per session" work; and (2) lost income and pension benefits from due to being barred from a promotion (*see Shapiro v. New York City Dep't of Educ.*, 561 F. Supp. 2d 413, 423 [SDNY 2008] ("teachers who received end-of-year 'U' ratings demonstrated a genuine issue of fact as to the existence of an adverse employment consequence, in part because the consequences of a 'U' rating included 'being removed from 'per session' (i.e. extracurricular) paid positions."); *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 [1st Dept 2012] ["reprimands and excessive scrutiny do not constitute adverse employment actions *in the absence of other negative results such as a decrease in pay or being placed on probation*" [emphasis added] *citing Hall v. N.Y.C. Dept. of Transp.*, 701 F Supp 2d 318, 336 [EDNY 2010]).

Further, plaintiff's complaint sufficiently alleges circumstances giving rise to the inference of discrimination based on his disability or perceived disability, sleep apnea. Circumstances giving rise to the inference of discrimination include "actions or remarks made by decision makers that could be viewed as reflecting a discriminatory animus" and "preferential treatment given to employees outside the protected class" (*Mejia v. Roosevelt Island Medical Associates*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) [Supreme Court, New York County

2011] *citing Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81 [2d Cir.1996]( see also, where under the less liberal standard applicable to the New York State Human Rights Law, Executive Law § 296(1)(a) "the complaint must allege that the plaintiff suffers a disability and that the disability caused the behavior for which the individual was terminated")). Here, plaintiff alleges that he suffered from sleep apnea, and that he experienced no issues at work *until after* informing Principal Nieves and AP Kolodziej of his sleep apnea condition. Further, plaintiff alleges that unlike his non-disabled counterparts, he was given a greater number of assignments to force him to retire; his non-disabled counterparts were also permitted to work at the "main" site.

The caselaw cited by defendant is distinguishable (*cf. Akhtab v. BCBG Max Azria Group Inc.*, 2012 WL 1440393, 2012 N.Y. Slip Op. 31041(U) (Trial Order) [Supreme Court, New York County] (dismissing discrimination claim based on race and national origin where complaint consisted of bare conclusory statements, failed to identify plaintiff's national origin, and only *incidentally* refers to plaintiff as African-American); *Lacourt v. Shenanigans Knits, Ltd.*, 2011 N.Y. Misc. LEXIS 4831, *18; 2011 NY Slip Op 32662U, **16, [Supreme Court, New York County 2011] (dismissing claim for discrimination based on race or national origin where the complaint alleged that plaintiff "lost her job because of cancer" and thus, sets forth "no facts from which the court can infer that plaintiff was terminated, or subjected to any other adverse employment action, based upon her race or national origin"); *Santiago v. The Dept. of Educ. of the City of New York*, 2014 WL 978314 (N.Y.Sup.), 2014 N.Y. Slip Op. 30624(U) (Trial Order) [Supreme Court, Kings County] (dismissing discrimination claim where plaintiff's complaints "seem to center on being denied advancement and extra income opportunities as a result of the unsatisfactory rating. This does not constitute a "materially adverse change in the terms and

conditions of an individual's employment," *especially considering that, in the following school year of 2012-2013, Plaintiff received a satisfactory rating*"); *DuBois v. Brookdale Univ. Hosp. & Med. Ctr.*, 2004 N.Y. Misc. LEXIS 2981 [Supreme Court, New York County 2004] ("[d]isciplinary notices, *threats* of disciplinary action and excessive *scrutiny* do not constitute adverse employment actions *in the absence of other negative results such as a decrease in pay or being placed on probation*'"); *Peterson v City of New York*, 120 A.D.3d 1328, 993 N.Y.S.2d 88 [2d Dept 2014] (finding that "the New York City Human Rights Law does not proscribe discrimination based upon a predisposing genetic characteristic"); *Pierson v. New York City Department of Education*, 2011 WL 6297955 (N.Y.Sup.), 2011 N.Y. Slip Op. 33161(U) (Trial Order) (applying *summary judgment* standard and finding that statements did not reference plaintiff's age or anything derogatory); *Brook v Overseas Media, Inc.*, 69 A.D.3d 444, 893 N.Y.S.2d 37 [1st Dept 2010] (retaliatory discharge claim fails since "mere filing of a claim for workers' compensation is not a 'protected activity' within the meaning of that provision, because it does not constitute "opposing or complaining about unlawful discrimination")).

Further, contrary to defendant's contention, plaintiff relies on all of the allegations of his complaint, and cannot be said to have abandoned any claims at this juncture.

And, at this pleading stage, plaintiff need not establish his claims at this juncture.

However, plaintiff's mere reference to "younger" guidance counselors is insufficient to support his claim for age discrimination (*see Whitfield-Ortiz v Department of Educ. of City of N.Y.*; 116 A.D.3d 580, 984 N.Y.S.2d 327 [1st Dept 2014] (dismissing complaint as it "contains no allegations of any comments or references to plaintiff's age . . . made by any employee of defendants. Nor does it contain any factual allegations demonstrating that similarly situated

individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff); *Askin v Department of Educ. of the City of N.Y.*, 110 A.D.3d 621, 973 N.Y.S.2d 629 [1st Dept 2013] (dismissing age discrimination claim where complaint "does not make any concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or less well under the City HRL")).

Thus, dismissal pursuant to CPLR 3211(a)(7) of plaintiff's discrimination claim based on disability is unwarranted, and warranted only as to plaintiff's discrimination claim based on age.

As to plaintiff's hostile work environment claim, to state a hostile work environment claim, plaintiff must allege that "the workplace was 'permeated with 'discriminatory intimidation, ridicule and insult' that [was] 'sufficiently severe or pervasive to alter the conditions of [her] employment'" (*Ferrer v. New York State Div. of Human Rights*, 82 A.D.3d 431, 918 N.Y.S.2d 405 [1st Dept 2011] *citing Harris v. Forklift Sys.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 [1993] [citation omitted]). While "[I]solated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment," (Ferrer, at 431), "a single act can meet the threshold if, by itself, it can and does work a transformation of the plaintiff's workplace" (*Camarda v City of New York*, 2015 WL 5458000 [EDNY 2015] *citing Howley v. Town of Stratford*, 217 F3d 141, 154 [2d Cir 2000]).

Notably, the NYCHRL "does not impose a 'severe or pervasive' bar"; however, "a plaintiff must still link an adverse employment action to discriminatory motivation'" (*Camarda*, 2015 WL 5458000, *supra*). It has been held that under the NYCHRL, liability for a hostile work environment claim is proven where a plaintiff shows that he or she was treated less well than other employees because of the relevant characteristic" (61 A.D.3d 62, 872 N.Y.S.2d 27 [1st Dept

2009]). Dismissal is appropriate only in a "truly insubstantial case" where a defendant's behavior cannot be said to fall within the "broad range of conduct that falls between 'severe and pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other" (*Hernandez*, 103 AD3d at 114-15, *citing Williams*, 61 AD3d at 80, fn 30 ["one can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable"]).

Recognizing that "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability" (*Hernandez v. Kaisman*, 103 A.D.3d 106, 957 N.Y.S.2d 53 [1st Dept 2012]; *Farrugia v. North Shore University Hosp.*, 13 Misc.3d 740, 820 N.Y.S.2d 718 [Supreme Court, New York County 2006] ("liability should be determined by the existence of unequal treatment and questions of severity and frequency reserved for consideration of damages")).

Here, plaintiff alleged facts sufficient to state a claim for hostile work environment based on his disability or perceived disability. Thus, dismissal of this claim premised on his disability or perceived disability is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the branch of defendant's motion to dismiss plaintiff's discrimination claims premised on his disability or perceived disability is denied; and it is further

ORDERED that the branch of defendant's motion to dismiss plaintiff's discrimination claims premised on his age is granted, and such claim is severed and dismissed; and it is further

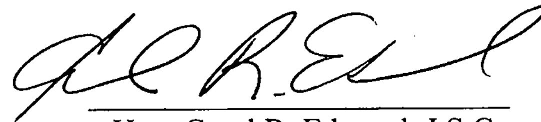
ORDERED that defendant shall serve its answer within 20 days of service of a copy of

this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 28, 2017, 2:15 p.m.; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: June 27, 2017



Hon. Carol R. Edmead, J.S.C.