

Zhou v New York City Hous. Auth.
2017 NY Slip Op 31575(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 155850/13
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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ANDY ZHOU,

Index No.155850/13

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,
Defendant.

-----x

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant The New York City Housing Authority (NYCHA) moves for summary judgment dismissing the complaint. Plaintiff opposes the motion.

The motion is granted.

Background

Plaintiff Andy Zhou (Zhou), is a man in his 50's of Chinese origin (Plaintiff's Affidavit [Pl Aff] at ¶ 2). He commenced this action in 2013. He alleges that he has been subjected to disparate treatment and a hostile work environment because of his age and national origin. Specifically, he maintains, among other things, that:

- he was denied promotion "and the only reason . . . was due to his age and Chinese national origin" (Memorandum of Law in Opposition to Motion at 3);
- he was monitored as to whom he could speak to;
- he was micro-managed;
- he was barraged on a daily basis with emails and calls from managers expecting an immediate response;

- he was harassed in an effort to force him to retire;
- he was excluded from managerial meetings;
- he did not have staff;

- he was subjected to demeaning and discriminatory comments;

- he was given menial tasks outside his normal job duties;

- he was isolated from the managerial workforce; and

- he was given an excessive work load outside his job duties.

(Pl Aff at ¶ 15).

Plaintiff's Employment History

Zhou has been employed by NYCHA since July 1994 (Chaitoff Affidavit [Aff] at ¶ 2). In 2012, as a provisional Associate Staff Analyst, he was transferred to NYCHA's new Department of Management and Planning (DMP) and was supervised by Calcedonio Bruno (*id.*; Bruno Aff at ¶ 4). His duties in the DMP included handling financial responsibilities for the Private Property Management Program (PMP). PMP was administered by, and required him to work with, the Mixed Finance Department (Defendant's Memorandum of Law in Support [Supp Memo] at 3; Pl Aff at ¶ 8). Plaintiff did not have any auditing function, nor did he approve budgets or extraordinary expenses (Bruno Aff at ¶ 7).

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Vacancy Postings 0786 and 0815

NYCHA announced job vacancies through its intranet. Human Resources conducted a review of candidate submissions to ensure that they met the minimum qualifications for the positions (Chaitoff Aff at ¶ 4).

In February 2012, an Administrative Staff Analyst position was announced in Vacancy Posting 0786. Plaintiff applied for the position submitting to Human Resources a "Request for Promotion or Transfer and a Qualified Review Form" (Supp Memo at 4). Days later, Human Resources determined that Zhou was not qualified for the position because he lacked the requisite executive, managerial or supervisory experience. Ultimately, no candidate was chosen for this position (Chaitoff Aff at ¶ 5, Exs D and E).

In April 2012, Vacancy Posting 0815 announced the availability of a managerial Administrative Staff Analyst position with DMP. Plaintiff did not apply for the position and others were selected to fill the vacancy. "Even if Mr. Zhou had applied, he was not qualified for the Administrative Staff Analyst M-2 position as he had just two months prior been found unqualified for a non-managerial Administrative Staff Analyst position due to his lack of executive,

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managerial, or supervisory experience" (Chaitoff Aff at ¶ 6, Exs F and G).

Plaintiff's Reassignment

In August 2012, plaintiff along with other NYCHA employees, was reassigned to his civil service title of "Staff Analyst because a civil service list had been established for the Associate Staff Analyst position he had held provisionally" (Chaitoff Aff at ¶ 3; Bruno Aff at ¶ 5; Memo Supp at 4). Prior to the pending reassignment, out of concern for the decrease in salary, Zhou asked Bruno to change his title to Administrative Staff Analyst (Bruno at ¶ 5; Pl Aff at ¶ 11). Bruno asked Zhou for his resume and stated that he would have Human Resources conduct a Qualification Review to determine which positions Zhou was eligible for (Bruno Aff at ¶ 5; Pl Aff at ¶ 12). Human Resources determined that Zhou did not qualify for the Administrative Staff Analyst position because he lacked 18 months of experience in an executive, managerial, administrative or supervisory capacity (Bruno at ¶ 6, Exs B and C).

Zhou believes that "the only reason he was not given the position was due to his age and Chinese national origin" (Memorandum of Law in Opposition [Opp Memo] at 3; Pl Aff at ¶ 13).

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Proposed Transfer to the Mixed Finance Department

In March 2013, there was a proposal to transfer Zhou to the Mixed Finance Department which was relocating (Bruno Aff at ¶ 9; Memo Supp at 5). After agreeing to the transfer and having an opportunity to visit the site, Zhou requested that the transfer not go forward and asked to be transferred out of the Operations Department, which encompasses the Mixed Finance Department, DMP and Technical Services (Supp Memo at 5; Bruno Aff ¶ ¶ 9-10, Ex E).

The proposal to transfer Zhou to the Mixed Finance Department was abandoned. At an April 2013 meeting, Victor Martinez, the Vice President for Operations, discussed Zhou's job responsibilities and stated that he could have ordered him to be transferred to the Mixed Finance Department but did not because he wanted to address Zhou's concerns. Zhou perceived this statement as a threat and filed a complaint with the Office for Safety and Security (OFSS) stating that he was frightened by Martinez at the meeting and was threatened when Martinez told him "'I could order you to go there, but I did not do that'" (Rahman Aff at ¶ 3, Ex B; Bruno Aff at ¶ 12). OFSS closed the complaint (Rahman Aff at ¶ 4).

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Zhou was advised to monitor internal job postings and apply for the vacancies that he was interested in (Memo Supp at 5; Bruno Aff at ¶ 13, Ex E).

Plaintiff's Work Space

At the time plaintiff was assigned to work at NYCHA's Long Island City facility, he was assigned a cubicle on the fifth floor by secretarial staff based on available cubicles (Bruno Aff, Ex I). NYCHA's Long Island City office is shared by four departments (Schmidt Aff at ¶ 2). The Fire Safety Unit (FSU) of the Technical Service Department is located on the fifth floor. Zhou's cubicle abutted those of the FSU. A FSU staff member was relocating to the Long Island City office and staff were being consolidated, necessitating the use of cubicles close to the FSU cubicles (*id.*). Zhou was asked to move from the fifth floor to the fourth floor but was reluctant (Bruno Aff at ¶ 27).

At his deposition Zhou explained that he was transferred to a small dark cubicle because he was Chinese and old and that this was a form of harassment to make him retire early (Tr at 245-246, 279-280).

In February 2014, Mr. Zhou complained that Joseph Schmidt, Assistant Director at the Technical Service Department, and Charles Pawson, Director of Maintenance,

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Repairs and Skilled Trades Department, spoke harshly to him and scared him when they approached him and asked him to change cubicles (Rahman Aff at ¶ 6, Ex D). Zhou stated that he felt threatened and was being harassed because he had an open lawsuit against NYCHA (this action) and that these actions caused him emotional and psychological stress (*id.*). On the next day, in response to his complaint, NYCHA's Department of Equal Opportunity (DEO) notified Zhou that his allegations did not allege illegal discrimination under applicable law and that therefore it had no jurisdiction (Rahman Aff, Ex D).

Disparate Treatment and Hostile Work Environment

Zhou alleges that he was bypassed for a promotion by a non-Chinese employee, Francesca Palmiero (Pl Aff at ¶ 15[10]). There is no record of a NYCHA employee by the name Francesca Palmiero (Brito Aff at ¶ 3).

Zhou was denied an administrative transfer and believes that he was treated unfairly because he was Chinese and old (Tr at 221, 227).

In April 2013, Zhou filed a Security Incident Report complaining that Maria Lopez from the Mixed Finance Department scolded him over the phone. The complaint was determined not

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to be a security or safety threat (Rahman Aff at ¶¶ 2 and 4, Ex A).

Zhou filed a complaint against Kevin Norman and Tracey Williams with DEO for failing to timely approve payment requests (Rahman Aff, Ex C). Ms. Williams explained that any delay in responding to Zhou was not due to discrimination or harassment but rather was a result of other imperative matters requiring her attention (Williams Aff at ¶ 6). In the same complaint, Zhou explained that he was "under a lot of stress" and experiencing chest pain, difficulty breathing and nervousness as a result of his job and perceived retaliation for his complaints against Mr. Martinez (related to the cubicle incident) and Ms. Lopez (the telephone incident) (Rahman Aff, Ex C). By letter dated July 5, 2013, Zhou was informed that his complaint did not fall under DEO's jurisdiction as there was no allegation of illegal discrimination (*id.*).

In this action, Zhou claims disparate treatment as he would be "monitored as to who he could speak to," would be micro-managed on a daily basis (Tr at 230-235), was excluded from managerial meetings, did not have staff and was subjected to demeaning and discriminatory comments (Pl Aff at ¶ 15).

Zhou testified that Bruno harassed him by not providing him with additional assistance when he was sick (Tr at 247).

The complaint alleges discriminatory comments directed at Zhou. When Zhou was asked at his deposition what comments he was referring to, he responded "I can't answer this question . . . I cannot answer" (Tr at 265-266). When questioned about his allegations of being assigned menial tasks, he stated that he performed Staff Analyst tasks (his job title) because of his national origin and age (Tr at 267, 269).

He also believed that he was doing excess work outside his title because he was Chinese (Tr at 96-97). His beliefs were based on his own comparisons of himself and others as opposed to job title descriptions (Tr at 106-107). Zhou could not provide one example of work that he did that fell outside of his title (Tr at 112).

NYCHA moves for summary judgment. In support of its motion, it relies on, among other things, an affidavit from Bruno who explained that the same out of office procedures were used for all of his direct subordinates (*id.*, Tr 269-270). Bruno pointed out that Zhou was granted all of his 63 requested leaves of absence between November 2011 and June 2014 and that he never requested a reduction in his workload due to ailment (Bruno Aff at ¶¶ 20-21, 26, Ex H, Tr at 264-

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265). Bruno further stated that Zhou worked independently and would seek advice when questions arose (Bruno Aff at ¶ 24).

According to Bruno, staff were instructed to copy him on emails regarding matters that he needed to be aware of but he never instructed any staff to copy him on all emails or that emails had to be responded to immediately (Bruno Aff at ¶ 15).

As to managerial meetings, Bruno asserted that Mr. Zhou had never attended such meetings regularly, was not part of managerial staff, nor did any Staff Analyst attend such meetings (Bruno Aff at ¶ 16, Tr 257-258).

NYCHA emphasizes that when Zhou was asked at his deposition whether the alleged "monitoring" was based on his age or national origin, Zhou stated "I cannot answer you" (Tr at 231, 234, 239). When asked to explain how he was micro-managed, Zhou answered "I can't answer" (Tr at 232). When asked how he knew he had to immediately respond to emails he stated "I [felt] he wanted me to [answer] immediately" (Tr at 238). Zhou testified that because he was "Chinese and old" his manager should have afforded him more time to respond (Tr at 238-239).

Analysis

Under New York State and City law, it is unlawful for an employer to discriminate against an individual in the terms,

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conditions or privileges of employment because of an individual's race or age (Executive Law § 296; Administrative Code § 8-107 [1][a]).

The New York City Human Rights Law (NYCHRL) is more protective than its state and federal counterparts. Accordingly, its provisions must be liberally construed to accomplish "the uniquely broad and remedial purposes" of the law (Administrative Code §§ 8-101, 8-130; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013]; *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *Nelson v HSBC Bank USA*, 87 AD3d 995, 996-997 [2d Dept 2011]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 75 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). To that end, courts must conduct an "independent liberal construction analysis" of claims brought under the NYCHRL (*id.*; see *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv. denied* 18 NY3d 811 [2012]; *Velazco v Columbus Citizens Found.*, 778 F3d 409, 411 [2d Cir 2015]). Interpretations of similar state and federal statutes provide guidance "only to the extent that the counterpart provisions are viewed 'as a floor below which the City's Human Rights law cannot fall'" (*Williams*, 61 AD3d at 66-67 [citation omitted]; see *Bennett*, 92 AD3d at 37 n 6; *Velazco*, 778 F3d at 410).

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Zhou's initial burden is to establish that (1) he is a member of a protected class, (2) he was qualified to hold the position, (3) he suffered adverse employment action and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 at 113).

"The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed . . . the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both the stated reasons were false and that discrimination was the real reason" (*id.* at 113-114 [citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 (2004)]).

Additionally, summary judgment must be denied if plaintiff raises "an issue as to whether the [employer's adverse] action was 'motivated at least in part by discrimination'" (*Melman*, 98 AD3d at 127; ; see also *Bennett*, 92 AD3d at 45 ["some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete"--should in almost every case result in denial of summary

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judgment])). Summary judgment dismissal is mandated, however, if there is no evidence of discrimination beyond a party's own speculation (*Kosarian-Ritter v Mrs. John L. Strong, LLC*, 117 Ad3d 603 [1st Dept 2014]; *Kaiser v Raoul's Rest. Corp.*, 112 Ad3d 426 [1st Dept 2013]; *Melman v Montefiore Med. Ctr.*, 98 Ad3d 107 [1st Dept 2012])).

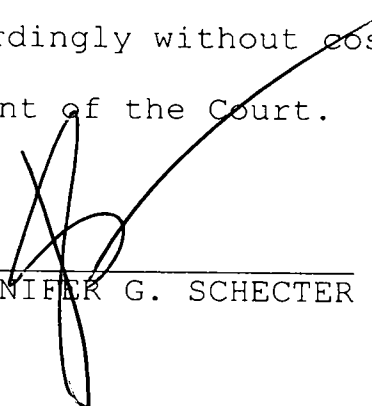
In response to NYCHA's legitimate and nondiscriminatory explanations for its actions, plaintiff has failed to show any pretext or that NYCHA's actions were even motivated in part by discrimination (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011])). The affidavits of Bruno, Williams, Chaitoff, Schmidt and Brito as well as plaintiff's own testimony establish that plaintiff was not treated differently than others with the same qualifications within the same department. NYCHA further demonstrated that plaintiff was not qualified for the positions that he sought and that there were limited openings for positions. Zhou had difficulty pointing to any examples of discrimination (see e.g.s, Tr at 231, 234, 239 [asked whether monitoring was based on his age or national origin, Zhou responded "I cannot answer you"]; Tr at 232 [asked to explain how he was micro-managed, Zhou stated "I

can't answer"))). There is nothing in the record even hinting at NYCHA attempting to force Zhou into early retirement, suggesting that plaintiff suffered an adverse employment action or that NYCHA intentionally created such an intolerable workplace environment that would have compelled a reasonable person to quit because of his age or national origin (*Gaffney v City of New York*, 101 AD3d 410 [1st Dept 2012]). Zhou's unsupported belief that NYCHA's actions were motivated by discriminatory animus is nothing more than speculation and is simply not enough to defeat defendant's motion for summary judgment (see *Melman*, 98 Ad3d 107 [1st Dept 2012]; *Bennett*, 92 AD3d 29; *Ioele v Alden Press, Inc.*, 145 AD2d 29 at 37 [1st Dept 1989]). Lastly, other than a change in cubicles, plaintiff has not pointed to any change in behavior, action or inaction occurring after he filed complaints.

Accordingly, it is ORDERED that defendant's motion for summary judgment is granted and the action is dismissed and the Clerk is to enter judgment accordingly without costs.

This is the Decision and Judgment of the Court.

Dated: July 21, 2017



HON. JENNIFER G. SCHECTER