

**Lufuluabo v Nord Anglia Educ. Inc.**

2017 NY Slip Op 32175(U)

October 16, 2017

Supreme Court, New York County

Docket Number: 159102/16

Judge: Manuel J. Mendez

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

TSHINGUTA "LILY" LUFULUABO, Plaintiff, -against- NORD ANGLIA EDUCATION INC.; NORD ANGLIA INTERNATIONAL SCHOOL; BRITISH SCHOOLS OF AMERICA GROUP; BSA RESOURCE SOLUTIONS, LLC; WCL ACADEMY OF NEW YORK; NORD ANGLIA INTERNATIONAL SCHOOL NEW YORK; and BRITISH SCHOOLS OF AMERICA, LLC, Defendants.

INDEX NO. 159102/16 MOTION DATE 10-04-2017 MOTION SEQ. NO. 002 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to dismiss pursuant to CPLR 3211[a][1],[7] and [8]:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Answering Affidavits — Exhibits cross motion Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, values: 1 - 4, 5 - 7, 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that defendants' motion pursuant to CPLR § 3211[a] [1],[7] and [8] to dismiss the complaint, is granted as stated herein. The remainder of the relief sought on this motion is denied.

Plaintiff an African-American female, alleges that she was discriminated against because of her race. In August of 2014 she was hired and employed as a receptionist and personal assistant to Alan Wilkinson, the Head of Nord Anglia International School, New York located at 44 East 2nd Street, New York, New York. In October of 2014 plaintiff was promoted to Admissions Marketing Representative. It is alleged that in October of 2015 plaintiff was promised but never received a \$10,000.00 raise as an inducement for increased responsibilities related to her admissions work. In November and December of 2015 plaintiff claims that inquiries were made as to her job description, performance and the reasons she was still employed by the defendants. In December of 2015 plaintiff alleges that she complained to Mrs. Ann McPhee, Regional Managing Director, North America for Nord Anglia Education Inc., about the lack of racial and ethnic diversity in the program. It is alleged that in December of 2015, Sara Padilla, Nord Anglia Education Inc.'s Human Resource Director, North America, falsely insinuated that plaintiff was involved in a sexual relationship with Alan Wilkinson, the Head of School. Plaintiff claims the individual initially retained to provide diversity training complained of problems keeping up with braided hairstyles.

The Amended Complaint alleges that plaintiff's seven year old son was given a full scholarship under Section 5(e) of Nord Anglia Education Inc.'s School Fees Discount Policy, until he left the school after completing eighth grade. Plaintiff claims that in April of 2015 her son, then eight years old, was sexually abused at the school by an older boy (aged eleven) whose mother was a fellow employee. It is alleged that a detailed Incident Report was prepared and the incident was reported to child services, but the defendants took no further actions. It is alleged that in the Fall of 2015 the defendants started questioning the scholarship provided to plaintiff's son, and her role at the school. In December of 2015 plaintiff alleges that she complained to Mrs. Ann McPhee about the way her son was treated following the sexual abuse incident and, that because of their race, appropriate action was not taken.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In an April 6, 2016 e-mail to Sara Padilla, plaintiff alleges she raised concerns about how defendants ignored her repeated requests for action concerning her son and that she believed it was because of the color of their skin. The plaintiff alleges that on June 1, 2016 she submitted a written complaint of discrimination to Sara Padilla. On June 23, 2016 plaintiff was terminated from employment allegedly without notice, and not due to her performance; she was told it was because she had “raised a number of issues.” Plaintiff claims that after termination from employment she was told that her son would only have one more year, the 2016/2017 school year, with a tuition scholarship at the school. After a July 19, 2016 letter sent from plaintiff’s attorney asserting claims of race discrimination and retaliation, it is alleged defendants told plaintiff her son was not going to be allowed to return to the school.

On October 28, 2016 plaintiff commenced this action. The Complaint was subsequently amended on March 21, 2017. The Amended Complaint asserts claims against the defendants for racial discrimination and retaliation under New York City Human Rights Law (NYCHRL), racial discrimination and retaliation under New York State Human Rights Law (NYSHRL), and two claims for breach of contract alleging that her son should not have lost his scholarship, and that she was wrongfully dismissed from employment (Mot. Exh. A).

Defendants, NORD ANGLIA EDUCATION INC. (individually “NAE”), NORD ANGLIA INTERNATIONAL SCHOOL (individually “NAIS”), NORD ANGLIA INTERNATIONAL SCHOOL NEW YORK (individually “NAISNY”), BRITISH SCHOOLS OF AMERICA GROUP (individually “BSAG”), BRITISH SCHOOLS OF AMERICA LLC (individually “BSA”) and BSA RESOURCE SOLUTIONS, LLC (individually “BSARS”), WCL ACADEMY OF NEW YORK (individually “WCL”), pursuant to CPLR § 3211[a][1],[7] and [8], seek to dismiss the complaint.

Plaintiff in opposition to the motion agrees that the claims against NAIS, NAISNY, and BSAG should be dismissed but argues that it should be without prejudice until the completion of discovery to establish that they are not legal entities. Defendants are granted the relief sought in this motion on the claims asserted against NAIS, NAISNY, and BSAG.

Defendants in their reply papers withdrew the relief sought pursuant to CPLR§3211[a][8], for lack of jurisdiction over NAE and BSA, state that there is no longer a jurisdictional issue, and therefore that relief is denied.

A motion to dismiss pursuant to CPLR §3211[a][1] requires that the party seeking dismissal produce documentary evidence that “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (Fortis Fin. Servs. v. Fimat Futures, USA, 290 A.D. 2d 383, 737 N.Y.S. 2d 40 [1<sup>st</sup> Dept., 2002] and Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1] does not require that the plaintiff establish the ultimate success of the allegations (African Diaspora Maritime Corp. v. Golden Gate Yacht Club, 968 N.Y.S. 2d 459 [1<sup>st</sup> Dept., 2013]).

Defendants only annexed a copy of the Amended Summons and Complaint and redacted W-2 forms to this motion. The documentation submitted does not utterly refute plaintiff’s claims of discrimination, retaliation, or breach of contract, and is not sufficient to grant the CPLR §3211[a][1] relief.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings are given liberal construction with the facts alleged accepted as

true (Tap Holdings, LLC v. Orix Finance Corp., 109 A.D. 3d 167, 970 N.Y.S. 2d 178 [1<sup>st</sup> Dept., 2013]).

To support a claim of discrimination the plaintiff must: (1) establish membership in a protected class, (2) that she was qualified to hold the position, (3) that she was actively or constructively discharged or suffered other adverse employment action, and (4) that the discharge gives rise to the inference of discrimination.

Defendant can have plaintiff's claims dismissed by demonstrating that the plaintiff cannot establish every element of intentional discrimination or by introducing evidence of nondiscriminatory, legitimate reasons to support its employment decisions. Plaintiff can prevail upon providing proof that the legitimate reasons were merely a pretext for discrimination (Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 819 N.E. 2d 998, 786 N.Y.S. 2d 382 [2004]).

The New York City Human Rights Law (NYCHRL) has a broader standard and differs from the New York State Human Rights Law (NYSHRL). NYCHRL assigns more weight to the possibility that a pretextual justification may exist. A claim of discrimination under NYCHRL is characterized as having "uniquely broad and remedial purposes" which goes further than those of counterpart State or federal civil rights laws." At issue is whether the plaintiff has been treated less well than others because of her race (see Williams v. New York City Housing Authority, 61 A.D. 3d 62, 872 N.Y.S. 2d 27 [1<sup>st</sup> Dept. 2009] and Cadet-Legros v. New York University Hosp. Center, 135 A.D. 3d 196, 21 N.Y.S. 3d 211 [1<sup>st</sup> Dept., 2015]).

Plaintiff has stated a potentially meritorious claim for discrimination under the NYCHRL. She is a member of a protected class and filed multiple complaints about comments by other employees, lack of diversity, and the negative treatment of her claims of her son's sexual assault. Plaintiff was discharged from her employment and defendants have failed to show that she was not qualified to hold her position. Defendants have not identified any other reason for plaintiff's discharge or provided proof that her work was otherwise deficient. The defendants assertions that there is a lack of severe and pervasive discrimination is not enough for dismissal of the discrimination claims asserted under the NYCHRL.

The standard for recovery under the NYSHRL follows the federal standards under title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.) (Ferrante v. American Lunc Assn., 90 N.Y. 2d 623, 687 N.E.2d 1308, 665 N.Y.S. 2d 25 [1997]). The federal standard applied under NYSHRL require that the hostile environment be more than just mild or isolated incidents that could not be said to permeate the workplace and be severe and pervasive (see Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, supra at page 311).

Plaintiff has sufficiently stated a potential cause of action under the NYSHRL. Plaintiff identified potential racially related comments from other employees. She has alleged that executives on behalf of the defendants were advised of her claims of lack of diversity and discrimination at least as of December of 2015, and that the failure to address her complaints continued until the termination of her employment. Defendants have not shown that plaintiff's complaints were sporadic and only based on petty or trivial inconveniences. Although additional scrutiny alone would not sustain the claim, the other alleged actions by the defendants have not been refuted and are at this stage of the action sufficient to sustain the claim.

A claim of retaliation requires that plaintiff show that she: "(1) participated in a protected activity known to the defendant, (2) defendant took action that disadvantaged [her] and (3) a causal connection exists between the protected activity and the adverse action"(Fletcher v. Dakota, 99 A.D. 43, 948 N.Y.S. 2d 263 [1<sup>st</sup> Dept., 2012]).

Defendant is required to provide proof that the plaintiff has not established every element of her claims of discrimination. Defendant can also prove its case by introducing evidence in the form of affidavit or documentary evidence of nondiscriminatory, legitimate reasons to support its employment decisions and establish the lack of material issues of fact as to pretext. A plaintiff's prima facie case of retaliation requires evidence of a subjective retaliatory motive and that the conduct was reasonably likely to deter an individual from engaging in protected activity (Bendeck v. NYU Hospitals Center, 77 A.D. 3d 552, 909 N.Y.S. 2d 439 [1<sup>st</sup> Dept., 2010], Williams v. City of New York, 38 A.D. 3d 238, 831 N.Y.S. 2d 156 [1<sup>st</sup> Dept., 2007]).

Plaintiff has stated a potential cause of action for retaliation. The loss of her son's scholarship is "temporally close" to the protected activity to support an inference of retaliation, and together with the loss of her job after complaining about discrimination and lack of diversity, is sufficient to maintain the claim (See Emengo v. State, 143 A.D. 3d 508, 40 A.D. 3d 508 [1<sup>st</sup> Dept., 2016]).

Accordingly, it is ORDERED that defendant's motion pursuant to CPLR §3211[a][1],[7] and [8], to dismiss the complaint, is granted to the extent that plaintiff's claims asserted against NORD ANGLIA INTERNATIONAL SCHOOL, NORD ANGLIA INTERNATIONAL SCHOOL NEW YORK, and BRITISH SCHOOLS OF AMERICA GROUP are severed and dismissed without prejudice, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED that within twenty (20) days from the date of entry of this Order that the plaintiff serve a copy of this Order with Notice of Entry pursuant to e-filing protocol on the trial support clerk located in the General Clerk's Office (Room 119) and the County Clerk (Room 141b) who are directed to mark their records accordingly, and it is further,

ORDERED that the remaining defendants are directed to serve an answer to the Amended Complaint within twenty (20) days after service of a copy of this Order with Notice of Entry on them, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

  
\_\_\_\_\_  
MANUEL J. MENDEZ,

Dated: October 16, 2017

J.S.C. MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST             REFERENCE