Alameda v New York City Health & Hosps. Corp.
2018 NY Slip Op 32936(U)
November 9, 2018
Supreme Court, New York County
Docket Number: 155795/2017
Judge: Alexander M. Tisch
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At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 9th day of November 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

NADEGE EUGENE ALAMEDA,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, et al.,

Defendants.

MOTION SEQ. # 1

INDEX NO.: 155795/2017

The following papers read on this motion:	NYSCEF Doc. No.
Notice of Motion and Affirmation	2, 3
Notice of Cross-Motion and Answering Affidavit	11, 13
Memoranda of Law	4, 12, 27

HON. ALEXANDER M. TISCH, J.:

Upon the foregoing papers, defendants New York City Health and Hospitals Corporation ("HHC"), Harlem Hospital Center ("Harlem Hospital") and Leslie J. Gertz ("Gertz") (collectively, "defendants") move this Court for an order dismissing plaintiff's complaint, in part, pursuant to CPLR Rule 3211(a)(5) and (7). Plaintiff Nadege Eugene Alameda cross-moves pursuant to General Municipal Law § 50-e(5) for leave to file a late notice of claim. Plaintiff commenced this action against the defendants asserting claims of age discrimination under the New York State Human Rights Law (N.Y. Exec. L. § 296 [hereinafter "State HRL"]) and New York City Human Rights Law (N.Y.C. Administrative Code § 8-101 *et seq.* [hereinafter "City HRL"]); a hostile work environment under the State HRL and City HRL; retaliation under the State HRL and City HRL; intentional infliction of emotional distress; negligent hiring, training, retention and supervision; and assault.

As an initial matter, the Court grants that portion of defendants' motion seeking dismissal against Harlem Hospital as a non-suable entity because it is a facility owned and operated by HHC. N.Y. Unconsol. Laws § 7385(1); New York City Charter § 396; *see, e.g.*, *Ochei v. Coler/Goldwater Memorial Hosp.*, 450 F. Supp. 2d 275, 287-88 (S.D.N.Y. 2006) (applying New York law); *Ayala v. Bellebue Hosp.*, 1999 WL 637235, at *3

(S.D.N.Y. Aug. 20, 1999) (same). Additionally, the plaintiff did not oppose that branch of defendants' motion seeking dismissal of Harlem Hospital from the instant action. Therefore, that branch of defendants' motion is granted. In so far as defendants move to dismiss plaintiff's State HRL and City HRL claims as time-barred due to the expiration of the three year statute of limitations, that branch of defendants' motion is granted to the extent that plaintiff's claims for retaliation and a hostile work environment must be dismissed, but her cause of action for retaliation post-September 2013 is not time-barred. Further, that branch of defendants' motion seeking to dismiss plaintiff's claims of intentional infliction of emotional distress; negligent hiring, training, retention, and supervision; and assault is granted, and plaintiff's cross-motion for leave to file a late notice of claim with respect to said causes of action is denied. Therefore, those causes of action are dismissed.

"In considering a motion to dismiss for failure to state a cause of action, the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory." *Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140, 144–45 (1st Dep't 2009) (internal citation omitted). The pertinent allegations in the complaint are as follows: Plaintiff alleges that she was employed as a registered nurse at Harlem Hospital since 2005 and is still an employee. Defendant Gertz has been employed by Harlem Hospital as a registered nurse since 2007. Plaintiff and defendant Gertz worked together in Harlem Hospital's psychiatric unit. Plaintiff, a female African American, alleges that beginning in 2008 through March 2011, defendant Gertz made racially insensitive comments about African Americans. Plaintiff also claims that in March 2011, defendant Gertz harassed her after she refused to lie on his behalf. Plaintiff complained about these comments to management when they occurred, but no investigation was conducted. Based upon defendant Gertz's alleged behavior, plaintiff requested a transfer in 2011, which was denied.

Further, on May 24, 2014, plaintiff claims she was injured when a chair, allegedly guided by defendant Gertz, came into contact with her knee. On May 28, 2014, defendants advised plaintiff that she was "relieved from duty without pay" while an investigation was conducted of defendant Gertz's alleged assault on plaintiff.

On May 29, 2014, plaintiff was advised that she could return to work on May 30, 2014. Due to her alleged injuries, plaintiff went on disability leave beginning on June 7, 2014 through October 20, 2014. On October 28, 2014, plaintiff was transferred from the psychiatric unit to a different floor at Harlem Hospital. Plaintiff claims that this transfer was to a unit that she did not wish to be transferred to and said transfer was in retaliation for her having filed a police report on June 3, 2014 regarding the May 24, 2014 incident.

On or about May 28, 2015, plaintiff filed a complaint with the Equal Opportunity Commission ("EEOC"). On or about June 26, 2016, the EEOC issued a right to sue letter following an investigation of plaintiff's allegations. On or about September 26, 2016, plaintiff filed a complaint in the United States District Court of the Southern District of New York, naming the same defendants in the instant action. Plaintiff's Federal complaint alleged a violation of Title VII of the Civil Rights Act of 1964; race discrimination, a hostile work environment, and retaliation in violation of the State HRL and City HRL; intentional infliction of emotional distress; negligent hiring, training, retention, and supervision; and assault. The Federal action was dismissed in an order dated June 6, 2017 due to plaintiff's failure to timely serve defendants. On or about June 26, 2017, plaintiff filed a complaint in Supreme Court, New York County against the same defendants alleging the same causes of action with the exception of any violation of Title VII of the Civil Rights Act of 1964.

I. Statute of Limitations

Plaintiff's claims for discrimination, a hostile work environment, and retaliation brought under the State HRL and City HRL are time-barred to the extent that they accrued prior to September 26, 2013, three years prior to the filing of the federal complaint, as claims brought under the State HRL and City HRL have a three year statute of limitations.[1] N.Y.C. Admin. Code § 8-502(d); *Morrison v. New York City Police Dep't*, 274 A.D.2d 394 (1st Dep't 1995); *Raghavendra v. Bollinger*, 128 A.D.3d 416 (1st Dep't 2015). Even if all of plaintiff's claims prior to June 26, 2014 were time-barred, the Southern District of New York failed to exercise

[1] While June 26, 2014 is three years prior to the commencement of the instant action, here, plaintiff commenced her State HRL and City HRL claims when she filed her Federal complaint on September 26, 2016, thereby changing the cut-off date to September 26, 2013.

supplemental jurisdiction over plaintiff's state law claims and thus the statute of limitations for said claims was tolled for thirty (30) days pursuant to 28 U.S.C. § 1367(d). *CRP/Extell Parcel, L.L.P v. Cuomo*, 2011 N.Y. Slip Op. 30151(U), 2011 WL 273489, at *2 (Sup. Ct. N.Y. County Jan. 19, 2011) (Singh, J.) (noting that CPLR 205(a) would also apply to allow the Supreme Court action to be timely commenced); *cf. Clifford v. County of Rockland*, 140 A.D.3d 1108 (2d Dep't 2016) (dismissing the plaintiff's complaint where the Southern District of New York decided the plaintiff's State HRL claims on the merits).

Irrespective of the foregoing, plaintiff's attempt to allege a continuing violation for the discriminatory actions alleged in her complaint for the time period between 2008 and 2011 must fail. The continuing violation doctrine provides an exception to the three year statute of limitations for State HRL and City HRL claims. *See Hughes v. United Parcel Serv., Inc.*, 4 Misc. 3d 1023 (A), at *5 (Sup. Ct. N.Y. County 2004) (Madden, J.). In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the United States Supreme Court set forth the standard for applying the continuing violation doctrine. "The Court distinguished discriminatory acts based on discrete discriminatory acts from hostile work environment claims based on repeated conduct." 4 Misc. 3d 1023(A), at *5. "[O]nly those discrete acts occurring within the law's statute of limitations [are] actionable; but ... the continuing violation theory could be applied to an employee's claim of hostile work environment, as long as the acts were part of the same hostile work environment and at least one occurred within the statute of limitations period." *Id.* (citing 536 U.S. at 117).

A discrete discriminatory act is an act that occurred on the day it happened. *Id.* (citing 536 U.S. at 110). Accordingly, "'in employment discrimination cases based on discrete acts, the statutory filing period for claims based on those acts begins to run, as to each act, on the day it occurs.'" *Id.* (quoting *O'Dwyer v. Snow*, 2004 WL 44534, at *5 (S.D.N.Y. Mar. 10, 2004)) (citing 536 U.S. at 110). While the Supreme Court did not define the term "discrete act," examples of such an act include "termination, failure to promote, denial of transfer, and refusal to hire." *Id.* (citing 536 U.S. at 114). Here, the only actionable "discrete act" would potentially be plaintiff's transfer to the tenth floor after returning from disability leave.

With respect to a hostile work environment, it "'cannot be said to occur on a particular day.'" *Id.*, at *6 (quoting 536 U.S. at 115). "Instead, '[i]t occurs over a series of days or perhaps years.'" *Id.* (alteration in original) (quoting 536 U.S. at 115). More specifically, "[a] hostile work environment claim involves severe and pervasive conduct so objectively offensive as to alter the conditions of the victim's work environment, which is subjectively perceived as hostile or intimidating." *Id.* "Plaintiffs must allege that the conduct at issue unreasonably interfered with their job performance." *Id.* "In hostile environment actions 'claims based on acts occurring outside of the filing period be treated as timely.'" *Id.* (quoting *O'Dwyer*, 2004 WL 44534, at *5). Further, "[a] claim for hostile work environment, which is subject to the continuing violations doctrine exception, involves a series of separate acts which collectively constitute an unlawful employment practice, and will not be time barred if all of the acts constituting the claim are part of the same unlawful practice and at least one discriminatory act falls within the filing period." *Id.* (quoting *Sculerati v. New York Univ.*, 2003 WL 21262371, at *5 (Sup. Ct. N.Y. County May 16, 2003) (Edmead, J.)) (internal quotation marks omitted).

Here, the allegations that constitute plaintiff's hostile work environment claim are all within the time-barred period of 2008-2011, which consist of actions by defendant Gertz. While defendant Gertz allegedly assaulted plaintiff in May 2014, which is outside of the time-barred period, it is unclear that this act was discriminatory in its intent and is not related to Gertz's prior conduct.[2] Moreover, the cause of action for hostile work environment is only against defendants NYC HHC and Harlem Hospital; defendant Gertz's actions cannot be linked to plaintiff's transfer to the tenth floor when she returned from disability leave. To the extent that plaintiff argues defendants NYC HHC and Harlem Hospital allowed a pattern or practice of discrimination to continue, unremedied by the employer, so as to amount to an adopted policy or practice of discrimination, "the 'practice and pattern' theory 'has been limited to situations where a specific discriminatory policy or mechanism has been alleged.'" *Id.*, at *8 (quoting *Bailey v. Colgate-Palmolive*, 2003 WL 21108325 (S.D.N.Y. May 14,

[2] *See id.* at *7 ("It has also been held that 'the incidents comprising a hostile work environment claim need not make reference to any trait or condition on the basis of which the discrimination has occurred, so long as the incidents can reasonably be interpreted as having taken place on the basis of that trait or condition.'" (quoting *Svenningsen v. The College of Staten Island*, 2003 WL 21143076, at *2 (E.D.N.Y. 2003))).

2003)). Here, no such "discriminatory policy or mechanism" has been alleged by plaintiff. Accordingly, plaintiff's claims for discrimination and a hostile work environment under the State HRL and City HRL must be dismissed.

With respect to retaliation, because the facts alleged by plaintiff to support her cause of action for retaliation are after September 2013, her cause of action for retaliation is not time-barred.

II. Late Notice of Claim

Defendants move to dismiss plaintiff's claims of intentional infliction of emotional distress; negligent hiring, training, retention, and supervision; and assault on the grounds that plaintiff failed to file a timely notice of claim. Simultaneously, plaintiff cross-moves for leave to file a late notice of claim. For the reasons discussed herein, that branch of defendants' motion is granted and plaintiff's cross-motion is denied.

The facts, as relevant, indicate that plaintiff admittedly failed to file a notice of claim for her above state law torts that are based upon personal injuries allegedly sustained when Mr. Gertz slammed a chair into plaintiff's knee on May 24, 2014. This alleged incident that provides the basis for plaintiff's state law claims occurred well before the expiration of the one year and ninety day time period that plaintiff had to file a timely notice of claim. N.Y. Unconsol. Law § 7401(2) (stating that such an action "shall not be commenced more than one year and ninety days after the cause of action thereof shall have accrued"); *see Marabello v. City of New York*, 99 A.D.2d 133, 133–34 (2d Dep't 1984) (applying the notice of claim provisions contained within General Municipal Law § 50-e to the New York City Health and Hospitals Corporation Act, § 2 (L. 1969, ch. 1016)). Moreover, plaintiff filed the instant action on or about June 26, 2017, which is more than two years after plaintiff's cause of action accrued.

Putting aside plaintiff's admitted failure to file a notice of claim, her state law claims are still time-barred due to her failure to timely move for leave to file a late notice of claim. In such instances, the law is clear: plaintiff's "failure to seek a court order excusing such lateness [of filing a notice of claim] within the time limited for commencement of the action, i.e., within one year and 90 days after the happening of the accident,

requires dismissal of the action." *Croce v. City of New York*, 69 A.D.3d 488, 488 (1st Dep't 2010) (citations omitted). Because this Court is confined to extending plaintiff's time to file a late notice of claim to the one year and ninety days statute of limitations period and cannot entertain any request for leave to serve a late notice of claim after the statute of limitations has expired, plaintiff's cross-motion for leave to file a late notice of claim is denied.[3] *See Pierson v. New York*, 56 N.Y.2d 950, 954-56 (1982). Accordingly, plaintiff's state law tort claims for intentional infliction of emotional distress; negligent hiring, training, retention, and supervision; and assault are hereby dismissed.

It is hereby

ORDERED that the branch of defendants' motion seeking to dismiss plaintiff's State HRL and City HRL claims is granted to the extent that plaintiff's claims for retaliation and a hostile work environment are dismissed, but denied as to plaintiff's cause of action for retaliation post-September 2013; and it is further,

ORDERED that the branch of defendants' motion seeking to dismiss plaintiff's claims of intentional infliction of emotional distress; negligent hiring, training, retention, and supervision; and assault is granted; and those claims are hereby dismissed; and it is further,

ORDERED that plaintiff's cross-motion for leave to file a late notice of claim is denied; and it is further,

ORDERED that this constitutes the decision and order of this Court.

ENTER,

HON. ALEXANDER M. TISCH,
A.J.S.C.

HON. ALEXANDER M. TISCH

[3] Had plaintiff filed a motion seeking the relief requested in her cross-motion prior to August 22, 2015, one year and 90 days after May 24, 2014, this Court would have been able to entertain her motion.