

Preston v Memorial Sloan Kettering Cancer Ctr.

2019 NY Slip Op 31493(U)

May 29, 2019

Supreme Court, New York County

Docket Number: 160325/2018

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

-----X

INDEX NO. 160325/2018

RUSSELL PRESTON, MICHAEL ROMERO AND, RICHARD TUTEIN,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 001

- v -

MEMORIAL SLOAN KETTERING CANCER CENTER, NEAL MCGANN, DOMINICK ESPOSITO, VITO SALAMONE AND, JOHN LETSON

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

were read on this motion to/for

DISMISSAL

Defendants' motion to dismiss portions of certain causes of action as time-barred is granted.

Background

Plaintiffs are former employees of defendant Memorial Sloan Kettering Cancer Center ("MSKCC") and they bring this action against MSKCC and individual defendants McGann, Esposito, Letson, and Salamone, employees of MSKCC (collectively "defendants"). Plaintiffs allege that defendants engaged in racially discriminatory behavior aimed at them and other employees of color. They filed this case on November 6, 2018, claiming unlawful employment practices, including unlawful discrimination, retaliation, and termination.

Plaintiff Preston is an African American male who began working at MSKCC in 2006 and eventually became a plumber. Preston alleges that he was denied career opportunities that his

similarly-situated Caucasian peers were given. Specifically, he alleges that he was denied a promotion to Level I plumber despite having solid performance reviews (Compl. ¶ 20). He claims that it took him eight years to receive this promotion, whereas it took his white counterparts five years. Preston also claims that he was assigned to work overnight shifts over his objections (Compl. ¶ 24). He also alleges that his pay was unequal to that of his similarly-situated Caucasian colleagues (Compl. ¶ 27).

Plaintiff Tutein is a Native American male who was hired by defendants as a mechanic in November 2008. Tutein alleges that although he was hired as a mechanic, his title changed to plumber once he was hired and he was required to perform both the role of mechanic and plumber without receiving extra compensation (Compl. ¶ 35). Tutein also insists that his pay was unequal to that of his similarly-situated Caucasian colleagues (Compl. ¶ 39). Both Preston and Tutein also allege that defendants pulled them off overtime assignments and gave those assignments to Caucasian colleagues (Compl. ¶ 26).

Plaintiff Romero is a Hispanic male who joined MSKCC in 2000 as a Level I plumber. Romero alleges that he was held back from promotions his Caucasian counterparts received (Compl. ¶ 29). He also claims that he was not offered accommodations, such as favorable work schedules that his white counterparts were allegedly given (Compl. ¶31). Romero also insists that he was paid less than half of what his Caucasian counterparts made (Compl. ¶ 34).

In addition to the claims mentioned, plaintiffs also bring an array of other discrimination claims. All the claims are brought pursuant to the New York State Human Rights Law (“NYSHRL”) and the New York City Human Rights Law (“NYCHRL”).

Defendants move to dismiss certain claims made in the complaint relating to adverse employment actions with respect to promotions, titles, job and shift assignments, work scheduling,

and compensation received (Compl. ¶¶ 20, 24, 26, 27, 29, 31, 34, 35, 39).¹ Defendants move to dismiss these claims as time-barred pursuant to the three-year statute of limitations of the NYSHRL and NYCHRL.

Defendants argue that because plaintiffs brought their case on November 6, 2018, claims that relate to conduct prior to November 6, 2015 are time-barred. In response, plaintiffs allege that the continuing violation doctrine applies to these claims, which are ongoing, and the three-year statute of limitations is inapplicable. In reply, defendants state that the cited claims each constitute a discrete and singular act and therefore the continuing violation doctrine does not apply to those claims and they are time-barred.

Discussion

“On a CPLR 3211 motion to dismiss, the court will 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 within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

“Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act” (*Palmeri v Willkie Farr & Gallagher LLP*, 156 AD3d 564, 568, 69 NYS3d 267 [1st Dept 2017]).

¹ Defendants do not indicate which causes of action they seek to partially dismiss. Rather, they move to dismiss certain allegations as they appear in the complaint and presumably these allegations fall under a cause of action. In opposition, plaintiffs did not object to the organization of defendants' moving papers. For the sake of clarity, the Court organized the claims in the same manner as defendants presented them.

Pay Discrimination Claims (¶¶27, 39, 34)

“[P]laintiffs’ discriminatory wage claims under the Executive Law and the Administrative Code are each governed by a three-year statute of limitations” (*Kent v Papert Companies, Inc.*, 309 AD2d 234, 240, 764 NYS2d 675 [1st Dept 2003]). The Court in *Kent* held that discriminatory wage claims are discrete, individual wrongs (citing *Pollis v New Sch. for Soc. Research*, 132 F3d 115, 119 [2d Cir 1997] [holding that “[A] claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action...a cause of action based on receipt of a paycheck prior to the limitations period is untimely and recovery for pay differentials prior to the limitations period is barred irrespective of subsequent, similar timely violations”]). Because pay discrimination claims are individual wrongs, the continuing violation doctrine does not apply to them. Accordingly, plaintiffs’ pay discrimination claims are time-barred for all compensation plaintiffs received before November 6, 2015. Because the pay discrimination claims as described in ¶¶ 27, 39, and 34 pertain to pay discrimination prior to this date, they are time-barred.

Promotion Claims (¶¶ 20, 29)

New York courts routinely dismiss failure to promote claims as time-barred (*Armstrong v Sensormatic/ADT*, 100 AD3d 492, 493, 954 NYS2d 53 [1st Dept 2012] [holding that “Plaintiff’s failure to promote claim was properly dismissed as time-barred. The continuing violations doctrine does not apply to toll the running of the statute of limitations on this claim, as plaintiff has failed to submit sufficient evidence of a pattern or practice of discrimination”]). In ¶ 20, Preston claims that he started working with MSKCC in 2006 and that it took him eight years to be promoted. Therefore, Preston was promoted some time in 2014 and any of the allegedly discriminatory acts

defendants engaged in relating to his promotion must have occurred prior to 2014. Thus, this claim is time-barred because it relates to events prior to November 6, 2015. In ¶¶ 28 and 29, Romero states that he was promoted in 2008 and that his Caucasian counterparts were promoted at a faster rate than he was. This claim relates to actions taken in 2008 and is therefore time-barred.

Job and Shift Assignment/Work Scheduling Claims (¶¶ 24, 26, 31)

Plaintiffs assert a variety of claims regarding defendants' discriminatory actions regarding overnight shifts, job assignments, and work schedule accommodations. All claims relating to overnight shifts, job assignments, and work schedule accommodations prior to November 6, 2015 are time-barred because they each constitute a discrete act. Plaintiffs failed to demonstrate in their complaint that these actions went on for an extended period of time so as to create a pattern and policy of discrimination. For example, plaintiffs could have provided a range of examples of discriminatory actions relating to overnight shifts, job assignments, and work schedule accommodations that spanned the course of several years. This would have helped to establish a policy of discrimination. However, no such information was provided in the complaint. Thus, these claims as described in ¶¶ 24, 26, 31 are time-barred.

Job Title Claim (¶ 35)

In ¶ 35, Tutein alleges that he was hired in 2008 to be a mechanic but once he was hired his title changed to plumber. This claim is also time-barred because it relates to actions taken in 2008.

Summary

The continuing violation doctrine cannot save plaintiffs' claims that constitute discrete, singular acts from being time-barred. Because the claims as described in ¶¶ 20, 24, 26, 27, 29, 31,


34, 35, 39 constitute distinct actions allegedly undertaken by defendants, the continuing violation doctrine cannot apply to those claims. Defendants' motion is not premature because discovery cannot alter the calendar; discrete acts taken before November 6, 2015 are simply time-barred.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the claims relating to pay discrimination, promotion, job and shift assignment/work scheduling, and job title as set forth in ¶¶ 20, 24, 26, 27, 29, 31, 34, 35, 39 of the complaint is granted as time-barred.

The parties are directed to appear for a preliminary conference on September 10, 2019 at 2:15 p.m.

5/29/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL ORDER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE