SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

Shaniqua Montgomery

Plaintiff

-against-

ELRAC, Enterprise Holdings, Inc., Simon Zais, Milly Zager; Does 1-10

Defendant.

Index No. 25814/2016E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

This is an action alleging gender and race-based discrimination and retaliation pursuant to the New York State Human Rights Law (NYSHRL; Executive Law § 296), and the New York City Human Rights Law (NYCHRL; New York City Administrative Code, § 8–101 *et seq.*), gender-based hostile work environment in violation of the NYSHRL and NYCHRL, defamation and defamation per se. Defendant Simon Zais (Zais) moves to dismiss the Complaint (CPLR 3211 [a] [7]). Plaintiff separately moves to amend the Complaint to add race-based hostile work environment and to remove the defamation cause of action.

The following facts are set forth in the proposed Amended Complaint: Plaintiff identifies herself as a black, gay female, who began to work at Enterprise Holdings, Inc. and ELRAC in February 2015, as a senior customer service representative, where Zais was her supervisor. Defendant Milly Zager worked in the Human Resources Department. Zais was the manager at the Bronx branch of Enterprise Holdings, Inc. where plaintiff worked. Plaintiff's employment was terminated on November 5, 2015, allegedly for theft, which plaintiff denies.

Zais is accused by plaintiff of creating a hostile work environment for minorities during his time as a supervisor at Enterprise Holdings, Inc. Plaintiff contends that she was targeted

because of her race, sexual orientation and national origin, and as a result, was a victim of discrimination that eventually resulted in her termination.

Plaintiff personally heard defendant Zais make many degrading and discriminating comments with regard to race, including:

> (a) Lincoln was the worse president cause he freed slaves.
> (b) The reason the government is so bad because of no confederacy.
> (c) Bmcc is a pre program school for Rikers Island; mainly from the projects of the Bronx.
> (d) Plaintiff cannot come up in the company cause she doesn't have the look or the speech (Amended Complaint ¶ 15)

Zais also made other comments that referenced blacks as porch monkeys, along with derogatory comments about Hasidic Jews and Hispanics, which could not be quoted verbatim in the Complaint. Plaintiff alleges that while she abided by the rules of the company, Enterprise Holdings Inc. created an environment in which the discriminatory comments heard by plaintiff became common.

Coinciding with racially discriminatory comments, management allegedly showed favoritism to the other employees, such as Zais being promoted, even though he lacked the educational requirements for the position. Zais made untrue statements regarding plaintiff, accusing her of being on drugs at work and stealing from the workplace. Plaintiff's gender was a factor in relation to discriminatory behavior as evidenced by Zais's comments about "women's place being in the home and not at work" (Amended Complaint ¶ 21).

Plaintiff complained about Zais's conduct to her managers prior to her termination and they were aware of his conduct. Arguably condoning his behavior, the managers never took any action to terminate him. After complaining to managers Dan and Javier on October 28, 2015, plaintiff was retaliated against, as her employment was terminated. Following her termination, defendants

informed her co-workers that she had been terminated for theft, thus defaming her. Plaintiff asserts that the statement was not true, and that defendants knew it was not true at the time they uttered it. The false information was published to plaintiff's former co-workers to harm her reputation.

On a motion pursuant to CPLR 3211 (a) (7), a Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). Affidavits may be considered freely "to preserve inartfully pleaded, but potentially meritorious, claims" in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are insufficient to maintain a cause of action (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

Pursuant to CPLR 3025 (b), leave to amend a pleading shall be freely given "upon such terms as may be just" and "absent prejudice or surprise directly resulting from the delay" (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *see Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420 [1st Dept 2014]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]). As noted in *MBIA Ins. Corp. v Greystone & Co., Inc.* (74 AD3d 499, 500 [1st Dept 2010]), a plaintiff does

not need to establish the merit of its proposed new allegations, "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit."

Plaintiff has proposed to replace the first cause of action for defamation with a claim for hostile work environment based on race, to add that Zais's comments about a woman's place being in the home and not at work was made numerous times, and undermined plaintiff's position with her co-workers and employer (proposed Amended Complaint ¶ 21), and that plaintiff complained that Zais had made numerous derogatory comments about her race and gender (proposed Amended Complaint ¶ 22).

Although no prejudice has been shown, some of the proposed claims in the Amended Complaint are "palpably insufficient or clearly devoid of merit," thus, plaintiff's motion to amend the Complaint is granted in part. Zais has requested that the court consider his motion to dismiss in relation to the Amended Complaint.

Defamation and Defamation Per Se

In *Stepanov v Dow Jones & Co., Inc.* (120 AD3d 28, 34 [1st Dept 2014]), the Court explained:

> Defamation is 'the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society' (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks omitted]). To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense (*see Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are 'reasonably susceptible of a defamatory connotation,' such that the issue is

> worthy of submission to a jury (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983], *cert denied* 464 US 831 [1983] [internal quotation marks omitted]).

In *Dillon v City of New York* (261 AD2d at 38), the Court added: "CPLR 3016 (a) requires that in a defamation action, 'the particular words complained of ... be set forth in the complaint.' The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (*Arsenault v Forquer*, 197 AD2d 554 [2nd Dept 1993]; *Vardi v Mutual Life Ins. Co.*, 136 AD2d 453 [1st Dept 1988])."

Although the defamation cause of action is not included in plaintiff's proposed Amended Complaint, the defamation per se cause of action remains. However, it fails to set forth the particular words complained of, or to satisfy the publication requirement in support of that claim (CPLR 3016; *see Dillon v City of New York*, 261 AD2d at 38), particularly as to Zais. Further, plaintiff does not negate any of Zais's arguments with respect to defamation or defamation per se. Thus, to the extent this claim is attributable to him, the sixth cause of action for defamation per se is dismissed.

Claims Against Individual Defendants

Generally, under both the NYSHRL and NYCHRL, an individual employee may be held liable for aiding and abetting discriminatory conduct (Executive Law § 296 [6]; Administrative Code § 8–107 [6]; *see Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 707 [2nd Dept 2006]). However, an individual cannot aid and abet his own alleged discriminatory conduct (*Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 [2nd Dept 2010]; *D'Amico v Commodities Exch.*, 235 AD2d 313, 315 [1st Dept 1997]). Plaintiff has not asserted a cause of action or alleged facts sufficient to state a cause of action for aiding and abetting against Zais (Executive Law § 296 [6]; *see Strauss v New York State Dept. of Educ.*, 26 A.D.3d 67, 73 [3rd Dept

2005]). Since Zais's alleged actions gave rise to the discrimination claim, he cannot be held liable for aiding and abetting.

The NYSHRL (Executive Law § 296 [1] [a]) provides for individual liability where a defendant has "an ownership interest," or if the defendant has "the authority to hire and fire employees" (*see Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]; *Krause v Lancer & Loader Group, LLC*, 40 Misc 3d 385, 398 [Sup Ct, NY County 2013]). There are no allegations that Zais, as plaintiff's immediate supervisor, fits within the meaning of "employer" as set forth in Executive Law § 292 (5), and thus cannot be held personally liable for a violation of Executive Law § 296 (1) (a) (*see Patrowich v Chemical Bank*, 63 NY2d at 542; *Kaiser v Raoul's Rest. Corp.*, 72 AD3d 539 [1st Dept 2010]). The NYSHRL prohibits an "employer" from discriminating against individuals on the basis of certain protected characteristics. Corporate employees, even managers and supervisors, cannot be held individually liable for employment discrimination unless they have an "ownership interest [in the company] or power to do more than carry out personnel decisions made by others" (*Patrowich v Chemical Bank*, 63 NY2d at 542, 543-544, (1984); *see Pepler v Coyne*, 33 AD3d 434, 435 [1st Dept 2006]; *Mitchell v TAM Equities, Inc.*, 27 AD3d at 707). There are no allegations in the Complaint that Zais had an ownership interest in plaintiff's employer or that he had the authority to do more than carry out personnel decisions made by others. Thus, Zais cannot be found individually liable under the NYSHRL.

The NYCHRL expressly extends liability to "an employee," and "includes fellow employees under the tent of liability, but only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment'--in other words, in some agency or supervisory capacity." (*Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003].) As revised by the Local Civil Rights Restoration Act of 2005 (the 2005

Restoration Act), the NYCHRL is construed by courts more liberally than its state or federal counterparts (*see Zakrzewska v New School*, 14 NY3d 469, 479 [2010]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). A court must evaluate the claims with regard for the NYCHRL's "uniquely broad and remedial purposes" (*id.* at 68; *Brightman v Prison Health Servs., Inc.*, 62 AD3d 472 [1st Dept 2009]). Since the Complaint alleges that Zais was acting in a supervisory capacity, he could be found individually liable under the liberal construction of the NYCHRL.

Discrimination

The NYSHRL (Executive Law § 296 [1] [a]), makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of, *inter alia,* the individual's race or sex (*see Basso v EarthLink, Inc.*, 157 AD3d 428 [1st Dept 2018]). "The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*)" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *see Espaillat v Breli Originals*, 227 AD2d 266, 268 [1st Dept 1996]).

Generally, employment discrimination cases are reviewed under notice pleading standards, so that a plaintiff alleging employment discrimination need not plead specific facts establishing a *prima facie* case of discrimination "but need only give 'fair notice' of the nature of the claim and its grounds" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). To state a claim for discrimination, a plaintiff must allege that she is a member of a protected class, that plaintiff was discharged from a position for which she was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]).

The NYCHRL (Administrative Code of the City of NY § 8–107 [1]) provides, in pertinent part: "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived … race, … gender … to discharge from employment such person or … to discriminate against such person in compensation or in terms, conditions or privileges of employment." (Administrative Code § 8–107 [1] [a]).

To properly plead a discrimination claim, plaintiff need not plead specific facts; it is sufficient that the plaintiff give notice of the nature of the claim. To establish a gender or race discrimination claim under the City Human Rights Law, a plaintiff need only demonstrate "by a preponderance of the evidence that she has been treated less well than other employees because of her gender [or race]" (*Williams v New York City Hous. Auth.*, 61 AD3d at 78; *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 [1st Dept 2018]). Plaintiff does not allege that she was treated less well than other employees because of her gender or race. To establish a *prima facie* case of discrimination, a plaintiff must plead facts establish that she is in a protected class, that she was qualified for the position; and that she was terminated. Plaintiff states that she is a black, gay female, that "was competent and qualified for [the] position" (Complaint ¶ 12), and that she was terminated. However, as to Zais, plaintiff has not adequately alleged that her discharge occurred under the circumstances giving rise to an inference of discrimination. There is no allegation that Zais had any role in terminating plaintiff, or that after her termination, her position was filled by a person other than female, black, or gay employee. Thus, the second, third, fourth and fifth causes of action alleging discrimination, pursuant to the NYSHRL and NYCHRL, are dismissed.

Hostile Work Environment

To establish a hostile work environment claim under the NYSHRL, as under Title VII, a plaintiff must demonstrate that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]). Merely offensive conduct is not actionable. To be actionable the incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief (*id.* at 311; *see Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 (1st Dept 2011). Accepting that Zais made the statements set forth in the Amended Complaint, the incidents described do not indicate a situation "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The following causes of action are dismissed as to Zais: the first cause of action in the Amended Complaint to the extent it relates to a hostile work environment pursuant to the NYSHRL, and the tenth cause of action alleging a gender-based hostile work environment, pursuant to the NYSHRL.

As noted, the NYCHRL must "be construed more broadly than federal civil rights laws and the State HRL" (*Williams v New York City Hous. Auth.*, 61 AD3d at 74 [1st Dept 2009]; *see Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). Under the NYCHRL a plaintiff need not show that the harassment was "severe and pervasive," but she must show that she was subjected to conduct that amounted to more than "petty slights and trivial inconveniences," because of her membership in a protected category (*Williams v New York City Hous. Auth.*, 61 AD3d at 80). The primary focus under the NYCHRL is on whether the alleged harassment "constitutes inferior terms and conditions based on gender [or race]" (*id.* at 75). Under either the NYSHRL or the NYCHRL, the plaintiff must demonstrate that the abusive conduct was motivated by animus toward a protected class (*see La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918 [2nd Dept 2015];

see also Cadet-Legros v New York Univ. Hosp. Ctr., 135 AD3d 196, 204 n5 [1st Dept 2015]). A plaintiff's claim must be viewed holistically (*see Suri v Grey Global Group, Inc.*, 164 AD3d at 114).

Here, plaintiff predicates her claim that she was subjected to a gender and race-based hostile work environment on the alleged comments made by Zais, which, although not severe and pervasive, could be determined to be more than petty slights and trivial inconveniences. The following causes of action survive as to Zais: the first cause of action in the Amended Complaint to the extent it relates to a hostile work environment, pursuant to the NYCHRL, and the eleventh cause of action alleging a gender-based hostile work environment pursuant to the NYCHRL.

Retaliation

Under both the NYSHRL and the NYCHRL it is unlawful to retaliate or discriminate against an employee for filing a discrimination complaint or otherwise opposing any practice prohibited by the statutes (Executive Law § 296 [7]; Administrative Code § 8-107 [7]).

To establish a claim of unlawful retaliation under the NYSHRL, a plaintiff "must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 312-313; *see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009]). "An adverse employment action requires a materially adverse change in the terms and conditions of employment ... [such as] 'a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities....' " (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 306; *see Messinger*

v Girl Scouts of U.S.A., 16 AD3d 314, 314-315 [1st Dept 2005]). "To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.' " (*id.*; *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 571 [1st Dept 2012]; *Matter of Block v Gatling*, 84 AD3d 445 [1st Dept 2011).

Under the more protective NYCHRL, a retaliation claim does not require "a materially adverse change in the terms and conditions of employment," but, instead, the alleged retaliatory acts need only "be reasonably likely to deter a person from engaging in protected activity" (*Williams v New York City Hous. Auth.*, 61 AD3d at 71; Administrative Code § 8-107 [7]). To establish *prima facie* a claim of retaliation under the NYCHRL, a plaintiff must show that (1) she participated in a protected activity known to defendants; (2) defendants took an employment action that disadvantaged the plaintiff; and, (3) a causal connection existed between the protected activity and the adverse employment action (*see Fletcher v Dakota, Inc.*, 99 AD3d at 51-52).

Although the First Department has cautioned that the NYCHRL "does not permit any type of challenged conduct to be categorically rejected as nonactionable" (*Williams v New York City Hous. Auth.*, 61 AD3d at 71), courts have continued to find that certain conduct is insufficient, as a matter of law, to support a retaliation claim, even under the broad NYCHRL standard (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129-130 [1st Dept 2012]). In this case, there is no allegation that Zais played a role in plaintiff's employer's decision to terminate her. Rather, the protected activity was that plaintiff made a complaint, which allegedly led to action by her employer which disadvantaged plaintiff. Although plaintiff tries to connect Zais to the action, there are no facts asserted that Zais was involved in the decision. Thus, as to Zais, the seventh, eighth, ninth, and twelfth causes of action for retaliation based on gender and race under the NYSHRL and NYCHRL are dismissed.

Accordingly, plaintiff's motion to amend the Complaint is granted in part and denied in part. Plaintiff is granted leave to serve and file an Amended Complaint as to Zais containing only those claims that are not dismissed, on or before thirty days from the date of this Order.

Zais's motion to dismiss is denied with respect to the first cause of action related to a race-based hostile work environment pursuant to the NYCHRL, and the eleventh cause of action relating to a gender-based hostile work environment.

Zais's motion is otherwise granted dismissing the first cause of action relating to a race-based hostile work environment pursuant to the NYSHRL, the sixth cause of action for defamation per se, the second, third, fourth and fifth causes of action alleging discrimination, pursuant to the NYSHRL and NYCHRL, and the seventh, eighth, ninth, and twelfth causes of action for retaliation based on gender and race under the NYSHRL and NYCHRL.

Defendants shall serve and file their Answers, or otherwise move, pursuant to the CPLR.

Upon joinder of issue, the parties are granted leave to pursue discovery with respect to the Amended Complaint.

Plaintiff is directed to serve a copy of this Order with Notice of Entry on defendants within thirty days of the date of this Order.

This constitutes the Decision and Order of the court.

Dated: August 29, 2019

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO