Chong v City of New York
2020 NY Slip Op 31827(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 161606/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

JOHN CHONG,

Plaintiff,

- v -

THE CITY OF NEW YORK, ROBERT LINN COMMISSIONER, RENEE CAMPION, DEPUTY COMMISSIONER, BETH KUSHNER DEPUTY DIRECTOR ADMINISTRATION, MICHAEL BORUSHEK, COMPUTER SYSTEMS MANAGER

Defendants.

----------X

INDEX NO. 161606/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, 30, 32

were read on this motion to/for DISMISSAL.

The motion to dismiss the amended complaint on the grounds that it is time-barred in part and fails to state a cause of action is granted.

Background

Plaintiff brings this employment discrimination case relating to his job working as a computer systems manager for New York City's Office of Labor Relations ("OLR"). He claims he suffers from morbid obesity, severe cirrhosis of the liver and has received reasonable accommodations in the past. Plaintiff contends that when he was hired by OLR in 2002, he was the only male Asian employee and alleges that OLR has made a concerted effort to hire "primarily females and specifically those of Russian descent."

He claims that when defendant Borushek took over as supervisor of the IT department in which plaintiff worked, Borushek created a hostile work environment for plaintiff in an effort to

set plaintiff up to be fired. Plaintiff insists he received no complaints about his work for the first 16 years with OLR and yet he was demoted after a disagreement concerning his work schedule. He contends he filed complaints with the U.S. Equal Employment Opportunity Commission and the state Division of Human Rights but OLR did not address the issues raised by plaintiff.

The case was previously removed to federal court (NYSCEF Doc. No. 3) and then remanded back to this Court when plaintiff agreed to voluntarily dismiss all of his federal claims with prejudice (NYSCEF Doc. No. 4).

Defendants now move to dismiss on the ground that the amended complaint only states a single specific incident from a co-worker (who is not a defendant in this case). Defendants contend that plaintiff offers conclusory assertions about hostility. They point out that although plaintiff complains that supervisors tried to change his work schedule from 7 a.m. to 3 p.m. to 9 a.m. to 5 p.m., his schedule has not changed. Defendants also observe that despite plaintiff's complaints that he was demoted, he is still employed in the same title with OLR.

In opposition, plaintiff emphasizes that courts must carefully scrutinize motions to dismiss in employment discrimination cases especially where an employer's intent is at issue. He points out that he only needs to give defendants "fair notice" of the nature of his claims.

Statute of Limitations

"In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the

action was timely or [ ] raise an issue of fact as to whether the action was timely" (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

Defendants claim that because this action was filed on December 1, 2018, any conduct alleged to have occurred before December 1, 2015 should be time barred. Defendants contend that plaintiff states in the amended complaint that he was a manager and key employee until 2015.

Plaintiff argues that there were continuing violations that require the Court to deny this branch of defendants' motion. He points out that after his manager retired in 2018, defendant Borushek (a white male of Russian descent) started a campaign of harassment and discrimination to get rid of plaintiff.

Plaintiff's opposition focuses on actions that happened in 2018 and does not explain what happened prior to 2015 that continued to take place within the limitations period. Therefore, the Court grants this branch of defendant's motion and any claims arising prior to December 1, 2015 are dismissed.

Failure to State a Claim

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

First Cause of Action Executive Law § 296 (NYSHRL)

Plaintiff asserts that he was discriminated against based on his disability, his race, national origin (Trinidad & Tobago) and age, there was a hostile work environment, and retaliation under the NYSHRL.

"A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, 786 NYS2d 382 [2004]).

A "hostile work environment exists when 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. Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (*id*. at 310-11).

To state a claim for retaliation, "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" (*id*. at 313).

Here, plaintiff failed to state a cause of action under the New York State Human Rights Law for discrimination, a hostile work environment or retaliation. As an initial matter, plaintiff did not sufficiently plead that he suffered an adverse action related to his employment. As defendants argue, plaintiff expresses his belief that defendants are setting him up to be fired but he still works for OLR.

The single comment by his co-worker (NYSCEF Doc. No. 8, ¶ 26 [Amended Complaint]) does not, on its own, support a hostile work environment claim. A single reprehensible statement is not enough (*see Forrest*, 3 NY2d at 310-311 [noting that three racial epithets over nine-year period did not state claim for hostile work environment]).

Plaintiff also admitted that although there was an attempt to change his schedule (which he contends accommodates his disability), the fact is that he retains his 7 a.m. to 3 p.m. schedule (NYSCEF Doc. No. 8, ¶ 22). That cannot form the basis of plaintiff's state human rights law claims because he suffered no adverse consequences. While it may have been frustrating that there was, purportedly, an effort to change his work schedule, that cannot save the first cause of action.

Plaintiff's allegations about being denied a vacation request in March 2018 (*id.* ¶ 33) do not state a claim under the NYSHRL. Plaintiff does not allege any connection between this denial and impermissible discrimination, a hostile work environment, or retaliation.

The Court also agrees with defendants that plaintiff's complaints about being demoted are contradictory. He states that he "was, and still is, employed as a computer systems manager level I . . . since his date of appointment in August 2002" (*id.* ¶ 5). A demotion typically involves a change in title and plaintiff did not explain what the alleged demotion actually meant in practice or that, even if there was a demotion, that it was done because based on his race,

disability status, national origin or age. And claiming that his boss (who plaintiff claims is of Russian descent) continued to support a younger, Hispanic coworker (*id*. ¶ 23) instead of plaintiff does not state a discrimination claim.

And plaintiff did not attach any documentation or an affidavit showing that he was a manager or key employee at one point and that he was demoted from that title. Plaintiff works for a city agency; presumably, a demotion would be expressed in writing and possibly reflected in decreased pay (potentially in a paycheck). Instead, plaintiff only points to allegations that he was demoted from a vague "manager" position. Simply put, these allegations are conclusory and are internally inconsistent with other claims in the amended complaint.

Plaintiff also raises allegations with respect to his time records and pay raises. He claims that his time records were scrutinized (*id*. ¶ 30) but does not say what that scrutinizing entailed or what (if any) adverse action was taken. Plaintiff alleges that his co-worker Cortez and "virtually every other employee in City OLR Computer Systems Department who were female and/or white or Hispanic had received significant and substantial raises while Chong had not" (*id*. ¶ 34). Plaintiff does not state that he asked for a raise (or was entitled to one) and was denied, does not state how he found out that Cortez got a fifty percent raise or who "virtually every other employee" constitutes. Even if other employees got a raise, it does not automatically mean that it states a cause of action under the NYSHRL.

NYCHRL

Plaintiff brings claims under the NYCHRL for race and national origin discrimination, disability discrimination, retaliation and hostile work environment.

Claims under the NYCHR are construed more broadly than state and federal statutes involving human rights. "[T]he City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66, 872 NYS2d 27 [1st Dept 2009]).

In discrimination claims, plaintiff must plead (among other elements) "that [he] was either terminated or treated differently under circumstances giving rise to an inference of discrimination" (*Askin v Dept. of Educ. of City of New York*, 110 AD3d, 621, 973 NYS2d 629 [1st Dept 2013]). The Court finds that plaintiff has not stated a cause of action for discrimination (either disability, age, race or national origin). A reading of the amended complaint reveals numerous complaints about plaintiff's coworkers and his supervisor but there aren't any actionable steps taken by defendants that could sustain a cause of action for discrimination.

Plaintiff conclusorily states that he "has been subject to continuous discrimination and harassment based upon his race, age, disability, gender and national origin, and in retaliation for speaking out against Civil Rights abuses and violations of Civil Rights, in that Defendants have treated him differently than similarly situated younger white or Hispanic employees who do not speak out against Civil Rights violations and abuses, in the terms and conditions of his employment" (NYSCEF Doc. No. ¶ 19).

That does not state a claim for discrimination. As stated above, plaintiff's work schedule was not changed. The Court recognizes that the NYCHRL must be liberally construed and a cause of action can be stated by alleging an employee was treated less well due to his or her race,

national origin, or disability. But this is not a case where an employee claims he was fired, docked pay or suffered any actual consequences because of his membership in a protected class. Plaintiff mentions he didn't get a pay raise but does not offer details that would support this claim: plaintiff does not claim he was passed over for a promotion, that he asked for a raise or was entitled to a raise or any details (other than speculation) why others were purportedly given raises but not plaintiff.

Nor does plaintiff state a cause of action for retaliation under the NYCHRL. "In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities. Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable" (*Williams*, 61 AD3d at 71).

Here, the workplace realities lead to a sense that plaintiff does not like his coworkers or supervisors but he does not state what steps were taken against him that support a retaliation claim. He certainly believes his superiors were upset that he advocated for his "civil rights" but a disagreement is not retaliation. And workplace disharmony is not synonymous with a claim for retaliation under the NYCHRL despite the requirement that it be liberally interpreted.

Plaintiff's claim that OLR assessed "unfounded charges of dereliction of duty and violations of CITITIME" (NYSCEF Doc. No. 8, ¶ 36) does not support a claim for retaliation because it is conclusory and not enough detail is provided about what this paragraph means. It is not enough to simply state some act is retaliation without providing any context. And for some

reason, plaintiff did not offer his affidavit or any documentation showing that charges were filed and explaining why this constitutes retaliation under the NYCHRL.

Plaintiff also failed to state a hostile work environment claim under the NYCHRL because he failed to show that he was treated less well than other employees because of his protected status (*Chin v. New York City Hous. Auth.*, 106 AD3d 443, 444-45, 965 NYS2d 42 [dismissing plaintiff's hostile work environment claims]). "The City Human Rights Law speaks to unequal treatment and does not distinguish between . . . harassment and hostile work environment" (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 113, 83 NYS3d 9 [1st Dept 2018]).

Summary

A close reading of plaintiff's amended complaint reveals that plaintiff seems to have many grievances towards his co-workers and supervisors, including a complaint that OLR's employees are primarily women of Russian descent. But missing from his pleading are adverse actions and unlawful treatment motivated by his status in a protected class. Rather, it lists many allegations about things that almost happened (a change in schedule, scrutiny of time records), acts that don't contain enough detail to state a cause of action (pay raises for other employees, demotion from a "manager" position and false accusations by a supervisor) and isolated incidents (a nasty comment from a co-worker and a denial of a vacation request). In fact, plaintiff admits that supervisors had meetings with plaintiff about several of his complaints (NYSCEF Doc. No. 8, ¶¶ 29, 30, 32).

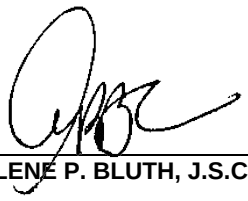
Assuming all the allegations are true, as the Court must on a motion to dismiss, it appears that plaintiff's co-worker (Cortez) did not get along with plaintiff and made an insensitive

comment about plaintiff's weight on one occasion. That does not support the causes of action asserted by plaintiff. And while plaintiff is upset with how defendants handled his EEO complaints, mere disagreement with their process or conclusions do not state a cause of action under the NYSHRL or the NYCHRL.

The Court recognizes that the standard under the NYCHRL to state a cause of action—to be treated less well—is quite broad. But the overwhelming theme of the amended complaint is that plaintiff did not like how he was treated, not that he was necessarily treated less well because of his status in a protected class. Plaintiff was not fired, he didn't have his pay reduced, his title was not changed, his schedule was not changed and no action was taken on his time records. Surely, even the broadest reading of the NYCHRL cannot support a cause of action based on every perceived slight from an employer, especially where those slights are devoid of sufficient factual allegations. And plaintiff did not submit his affidavit in opposition to the motion in an attempt to cure the defects in his pleading.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is granted, the Clerk is directed to enter judgment when practicable and award costs and disbursements upon presentation of the proper papers therefor.



6/11/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE