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

**PRESENT:** **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

***Justice***

----------X

KEVIN CRUMP,

Plaintiff,

- v -

THE NEW YORK CITY HOUSING AUTHORITY, KEVIN GERMAN

Defendant.

----------X

**INDEX NO.** 163138/2015

**MOTION DATE** 09/16/2020

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97

were read on this motion for SUMMARY JUDGMENT.

*Phillips & Associates, PLLC*, New York, NY (Alfredo J. Pelicci of counsel), for plaintiff.
*Jane E. Lippman, Esq.*, New York, NY, for defendants.

Gerald Lebovits, J.:

This motion relates to multiple causes of action for discrimination, assault and battery, and retaliation brought by plaintiff Kevin Crump against defendants New York City Housing Authority (NYCHA) and Kevin German.

Plaintiff began working for NYCHA in or about July 2008. In July 2012, plaintiff was assigned as a caretaker at Ocean Bay Apartments ("OBA") in Queens, New York. According to plaintiff, he first became acquainted with German in 2012, while German was employed by NYCHA at another location. Plaintiff alleges that he told German about his sexual orientation and that German responded immediately with homophobic slurs. (NYSCEF No. 1.)

In August 2013, NYCHA appointed German as a superintendent at OBA. German supervised plaintiff in this position. Plaintiff alleges that as soon as German became a superintendent, German resumed his hostile and discriminatory treatment toward plaintiff. German would give plaintiff extra assignments and make plaintiff perform tasks with less support. Plaintiff further alleges that he was also targeted by another supervisor, Sandy Sonera.

According to plaintiff, he first complained of the disparate treatment to his union representative. (NYSCEF No. 83.) Plaintiff was present when German was informed of plaintiff's complaint. (NYSCEF No. 84.) Shortly after, plaintiff alleges, he requested a safety transfer due to the alleged hostile work environment. NYCHA later denied plaintiff's request.

Plaintiff further claims that he complained to the NYCHA Department of Equal Opportunity in October 2013. In early 2014, plaintiff emailed NYCHA's Inspector General Office to complain about German and Sonera's supposed retaliation. Plaintiff alleged that German and Sonera would retaliate against him by giving him extra tasks because of his complaint. On April 25, 2014, plaintiff's complaints generated a security incident report.

Throughout this period, plaintiff was issued disciplinary memos from NYCHA's human-resources department. Plaintiff argues that these memos were retaliatory and discriminatory. The memos led to internal disciplinary charges by NYCHA against plaintiff for misconduct, and a general trial was held on August 25, 2014. The hearing officer found plaintiff guilty of five of the nine charges and recommended a 15-day suspension without pay. The hearing officer determined that plaintiff's behavior showed he had a problem complying with orders and directives from his supervisors. (NYSCEF No. 71.) On March 19, 2015, NYCHA approved the hearing officer's recommendation and suspended plaintiff for 15 days without pay.

On August 17, 2015, plaintiff got into a physical altercation with German and Devon Wilson, another one of plaintiff's supervisors. Plaintiff accused German and Wilson of physically attacking him. As a result, a second general trial was held on November 25, 2015. NYCHA charged plaintiff with incompetency and misconduct. NYCHA alleged that plaintiff used physical and verbal expressions of hostility directed at his supervisors. NYCHA also alleged that after the first general trial, plaintiff continued to ignore directives from his supervisors. The hearing officer found that plaintiff "initiated a physical confrontation with Wilson by punching him." (NYSCEF No. 72.) The hearing officer found plaintiff's accusations that German and Wilson physically attacked him not credible. (*Id.*) The hearing officer found plaintiff guilty on all four disciplinary charges. The hearing officer recommended termination of employment, and the recommendation was later affirmed by NYCHA. Plaintiff appealed the decision to the Civil Service Commission, which affirmed NYCHA's decision.

After the termination, NYCHA alleges, it found out that while plaintiff was working for NYCHA, he also held another job at a company called PSCH, Inc. ("PSCH"), and that plaintiff submitted false leave documentation to NYCHA on occasions he worked for PSCH.

In December 2015, plaintiff brought claims against NYCHA and German for discrimination and retaliation; and he brought claims against German for assault and battery arising from the August 2015 altercation with German and Wilson.

Defendants move for summary judgment to dismiss plaintiff's retaliation and assault-and-battery causes of action. They also move for partial summary judgment on the discrimination causes of action. Further, defendants move for summary judgment in their favor on their after-acquired-evidence affirmative defense.

## DISCUSSION

### I. Whether Defendants are Entitled to Judgment as a Matter of Law on Crump's Discrimination and Retaliation Claims on Collateral-Estoppel Grounds

Defendants argue first that the hearing officer's ruling at the first general trial collaterally estops Crump from maintaining his discrimination and retaliation claims. This court disagrees.

Two requirements must be satisfied before collateral estoppel will bar relitigating an issue. First, the identical issue must necessarily have been decided in the prior legal proceeding and be decisive of the current action; and second, the party against whom collateral estoppel is invoked must have had a full and fair opportunity to litigate the issue in the prior proceeding. (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985].) Collateral estoppel gives conclusive effect to the quasi-judicial determinations of administrative agencies, as well as the determinations of courts. (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 499 [1984].)

Here, the question is whether the administrative hearing officer's determinations at Crump's first general trial (as affirmed on administrative appeal) necessarily resolve Crump's discrimination and retaliation claims. This court concludes that they do not.

Defendants emphasize that the hearing officer's factual finding that Crump had committed certain charged acts of misconduct is conclusive here. Defendants' contention, though correct, does not end the estoppel inquiry. That factual finding was not intended to and did not address whether the disciplinary charges themselves (or the counseling memorandums underlying the charges) were brought in part out of discriminatory or retaliatory motives. It does not estop Crump from arguing that he was subject to discrimination and retaliation. Indeed, even the decision of the U.S. Court of Appeals for the Second Circuit in *Matusick v. Erie County Water Authority*, on which defendants rely, carefully distinguishes between the estoppel effect of a hearing officer's factual findings and the potential legal implications of those findings for a subsequent discrimination claim. (*See* 757 F.3d 31, 47-49 [2d Cir 2014].)

This court must therefore evaluate defendants' motion for summary judgment on Crump's discrimination and retaliation claims on the motion's own merits, bearing in mind the hearing officer's factual finding that Crump committed some of the acts of misconduct with which defendants charged him.

### II. Whether Defendants Have Established as a Matter of Law that They Did Not Discriminate or Retaliate Against Crump

On a motion for summary judgment, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The moving party's "failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) In deciding the motion, the court must view the facts "in the light most favorable to the non-moving party." (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].)

Summary judgment dismissing a claim under the NYCHRL, in particular, should be granted only if no jury could find either that (i) defendant committed discrimination or retaliation under the *McDonnell Douglas* evidentiary framework, or (ii) defendant acted in part out of discriminatory or retaliatory motives. (*See Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 39-41 [1st Dept 2011].)

**A. Discrimination**

To establish a discrimination claim under the NYCHRL, plaintiffs must prove by a preponderance of the evidence that they have been treated less well than other employees based on a characteristic protected under the statute, such as sexual orientation. (*Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 [1st Dept 2009].)

Here, plaintiff has introduced evidence that one of his supervisors, German, persistently harassed him on the basis of his sexual orientation (including the use of homophobic slurs), that German constantly changed his work assignments to make plaintiff's job harder, and that German, acting out of discriminatory motivations, caused plaintiff to receive disciplinary write-ups that were either unwarranted or could properly have been resolved less formally. That is sufficient to create a fact issue warranting trial.

To be sure, defendants forcefully deny acting out of discriminatory motives and have introduced evidence that, if credited, would suggest that plaintiff was a poorly performing employee who took well-merited disciplinary action as harassment. But the choice between these two interpretations of the evidence is for a jury, not this court.

Defendants' motion for partial summary judgment on the first and fourth causes of action for discrimination and vicarious liability for discrimination is denied. Defendants' motion for summary judgement on the third cause of action for aiding and abetting discrimination also is denied.

**B. Retaliation**

To prevail on a retaliation claim under the NYCHRL, plaintiffs must show that (1) they have engaged in protected activity, (2) their employer was aware that they participated in such activity, (3) they suffered an adverse employment action based upon their 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 295, 313 [2004].) A causal connection between a protected activity and an adverse employment action can be inferred from evidence that the protected activity was followed closely by discriminatory treatment. (*Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 [1st Dept 2010].)

Plaintiff has introduced evidence that he repeatedly complained to his superiors about German's assertedly harassing conduct, including complaints made at a meeting with several superiors in late April 2014. And it is undisputed that after the April 2014 meeting plaintiff received multiple counseling memorandums within a two-month span—some of which led to

disciplinary charges at plaintiff's first general trial that the hearing officer did not sustain. This court concludes that this evidence is sufficient to raise issues of fact on plaintiff's retaliation claim.

There is no merit to defendants' contention that plaintiff's retaliation claim fails because he has not introduced evidence of *written* complaints of discrimination made to others at NYCHA. A plaintiff need not have opposed discrimination in writing for a retaliation claim to survive, as long as the employer was aware of the plaintiff's protected activity. (*See Albunio v. City of N.Y.*, 16 NY3d 472, 479 [2011].) This court is also not persuaded by defendants' argument that plaintiff failed to show a causal relationship between his complaints of discrimination and subsequent mistreatment by superiors at NYCHA—particularly in light of the close temporal proximity between the April 2014 meeting and a string of disciplinary write-ups.

As with plaintiff's discrimination claim, defendants have provided a substantial body of testimony and other evidence that—if credited by the jury—might indicate that plaintiff did not, in fact, complain of orientation-based harassment and discrimination against him; and that the various counseling memorandums received by plaintiff were entirely motivated by nondiscriminatory considerations. But that evidence, measured against plaintiff's conflicting testimony, raises a credibility question for the jury to answer.

Therefore, summary judgment is denied on the second, third, and fourth causes of action for retaliation, aiding and abetting retaliation, and vicarious liability for retaliation.

## III. Whether Defendant German is Entitled to Judgment as a Matter of Law on Plaintiff's Assault and Battery Claims

German argues that plaintiff's assault and battery claims against him are barred by collateral estoppel given the hearing officer's findings at plaintiff's second general trial. This court agrees. The hearing officer found that plaintiff instigated the physical altercation with Wilson on which plaintiff bases his assault and battery claims. Plaintiff argues that there is ample evidence that German assaulted him, but the hearing officer's findings do not support this argument. Defendants' motion for summary judgment on the fifth and sixth causes of action for assault and battery is granted.

## IV. Whether Defendants are Entitled to Judgment as a Matter of Law on Their After-Acquired-Evidence Defense

Where an employer seeks to rely on after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. (*McKennon v Nashville Banner Pub. Co.*, 513 US 352, 362-363 [1995].) After-acquired evidence does not bar litigation or warrant summary judgment on liability, but only affects the plaintiff's damages if and when the employer is found liable. (*See Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009].)

Defendants' proffered basis for concluding that plaintiff would have been fired based on the after-acquired evidence of misconduct is Marla Edmonson's affidavit. This affidavit states that Edmonson is "aware of cases where NYCHA employees were prosecuted and terminated after a General Trial" for less serious misconduct than NYCHA claims occurred here, and that she is "confident" that the after-acquired evidence would have caused NYCHA to bring disciplinary charges against plaintiff, hold a general trial, and terminate him. (NYSCEF No. 49 at ¶ 10.) Edmonson's affidavit does not, however, describe the less-serious acts of misconduct that led to termination in other cases. And this court declines to hold that defendants have established their after-acquired-evidence defense as a matter of law based merely on Edmonson's "confiden[ce]" that the evidence would have led to plaintiff's termination—especially because plaintiff would first need to have been found guilty of the claimed misconduct at a general trial, at which he could mount a defense.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment on the first and fourth causes of action for discrimination and vicarious liability for discrimination, and third cause of action for aiding and abetting discrimination, is denied; and it is further

ORDERED that defendants' motion for summary judgment on the second, third, and fourth causes of action for retaliation, aiding and abetting retaliation, and vicarious liability for retaliation is denied; and is further

ORDERED that defendants' motion for summary judgment on the fifth and sixth causes of action against German for battery and assault is granted; and it is further

ORDERED that defendants' motion for summary judgment on the after-acquired-evidence affirmative defense is denied.

10/2/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

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