

Weir v Montefiore Med. Ctr.
2020 NY Slip Op 35325(U)
June 10, 2020
Supreme Court, Bronx County
Docket Number: Index No. 42000/2020E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

NICHOLAS WEIR

Index No. 42000/2020E

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**MONTEFIORE MEDICAL CENTER,
ALBERT EINSTEIN COLLEGE OF
MEDICINE, AND YESHIVA UNIVERSITYDefendants.

Rubén Franco, J.

This is an action for, *inter alia*, discrimination, retaliation, equal pay, and hostile work environment. Defendant Yeshiva University (Yeshiva) moves to dismiss the Amended Complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). Plaintiff, a *pro se* litigant, cross-moves to amend the previously Amended Complaint.

Plaintiff identifies himself as a male with a dark complexion from Jamaica, who was employed by defendant Albert Einstein College of Medicine (Einstein) as a research technician from December 28, 2015, through March 4, 2016. On September 9, 2015, prior to plaintiff's employment with Einstein, Yeshiva and defendant Montefiore Medical Center (Montefiore) entered into an agreement to transfer financial and operational responsibility of Einstein from Yeshiva University to Montefiore.

On December 20, 2016, plaintiff commenced an action against defendants in the United States District Court for the Southern District of New York and filed an Amended Complaint on July 6, 2017. Defendants' motion to dismiss the Amended Complaint was granted. The Court determined that plaintiff had "not plausibly alleged a violation of Title VII." However, the Court declined to determine the state and local law claims, allowing plaintiff to proceed in State court.

Plaintiff's appeal to the United States Court of Appeals for the Second Circuit was denied, and he commenced an action to pursue his State claims in New York State Supreme Court, Queens County, which was transferred to Bronx County on July 26, 2019.

On a motion to dismiss, 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]).

In *511 W. 232nd Owners Corp. v Jennifer Realty Co.* (98 NY2d 144, 151-152 [2002]), the Court explained that it is the court's task "to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law' (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977])." (*See Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013].)

To prevail in an employment action against a defendant is who not plaintiff's direct employer, the plaintiff must establish that the defendant is part of an "integrated enterprise" with the hiring employer (*see Brightman v Prison Health Serv., Inc.*, 33 Misc 3d 1201(A), *5 [Sup Ct, Queens County 2011]; *Lambert v Macy's E., Inc.* 34 Misc 3d 1228 [A], *18 [Sup Ct, Kings County 2010]). The court looks at several factors to hold an employer liable under the New York State

Human Rights Law (NYSHRL), including whether the alleged employer had the power of the selection and engagement of the employee; paid the salary or wages to the employee; had the authority to dismiss the employee; and, had the power to control the employee's conduct. The most important consideration is whether the alleged employer exercised control over the employee's conduct and the incidents of employment (*see Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]).

Here, plaintiff alleges in the Amended Complaint that defendants retaliated and discriminated against him, and facilitated a hostile work environment, and terminated his employment untimely and unreasonably during his probationary period; that he experienced retaliation because he filed a Notice of Intention to file a claim in the Court of Claims against the Attorney General of New York and the City University of New York; that his pay rate was abruptly reduced after he began working in the lab; that he had missing hours from his pay stubs; that he was not given a stable workstation that other lab members had; and, that he observed government agents maliciously targeting and stalking him within the institution during his probationary period.

Plaintiff asserts that he worked in the lab late at nights and on occasionally on weekends, and in the early weeks, he regularly received positive reviews from Dr. Gavathiotis, who praised him for his work motivation.

With respect to the acts of discrimination, plaintiff alleges that on March 2, 2016, his supervisor, Dr. Gavathiotis, informed him that his job would be terminated effective March 4, 2016, instead of March 31, 2016, which marked the end of his 90-day probationary period. Dr. Gavathiotis informed him that he wanted someone who had experience working with mice despite having hired plaintiff knowing that he did not have such experience. He also alleges that Dr. Gavathiotis informed him that two of the other lab members did not trust him, and that he did not "fit in". Plaintiff further claims that on March 4, 2016, Robert Cancellieri, the Director of

Employee Relations, informed him that he was terminated because he did not pass the probationary period, and that plaintiff could not visit the lab even though Dr. Gavathiotis had allowed him to volunteer in the lab until he found a job.

In opposition to the motion, plaintiff speculates that Yeshiva maintains certain financial ties with Montefiore and Einstein; and alleges that Yeshiva was involved in acts of retaliation and discrimination; and that Yeshiva failed to discourage Einstein's unlawful behavior and did not prevent plaintiff's wrongful termination.

Yeshiva's basis for dismissal is that plaintiff only makes claims about his employment with Einstein, which, as stated above, commenced in December 2015, more than two months after Yeshiva transferred financial and operational responsibility of Einstein to Montefiore. Yeshiva argues that plaintiff's Amended Complaint fails to state a cause of action against it because he does not make any allegations against it. Indeed, plaintiff does not refer to Yeshiva anywhere in the Amended Complaint, except in the case caption.

It is undisputed that Montefiore assumed financial and operational responsibility for Einstein. In the Amended Complaint, there are no allegations that Yeshiva engaged in any acts of discrimination against plaintiff, nor that Yeshiva had the power to hire or dismiss plaintiff, or pay his wages, or had control over his conduct (*see Griffin v Sirva, Inc.*, 29 NY3d at 186).

With respect to the plaintiff's cross motion pursuant to CPLR 3025 (b), plaintiff must submit a proposed amended pleading. In *Pollak v Moore* (85 AD3d 578, 579 [1st Dept 2011]), the Court stated: "Insofar as plaintiff requested leave to serve a second amended complaint, denial of such relief was a proper exercise of discretion as plaintiff failed to annex a copy of a proposed second amended pleading to his motion papers, and he did not otherwise offer an affidavit of merit or any "new" facts as would overcome the legal defects in his prior two complaints (*see generally Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424 [(1st Dept) 2006]; *Gonik v Israel Discount Bank*

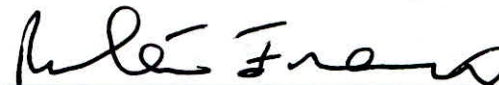
of N.Y., 80 AD3d 437, 438-439 [(1st Dept) 2011]).” Here, plaintiff has failed to submit a copy of his proposed Second Amended Complaint

Accordingly, Yeshiva’s motion to dismiss is granted. The claims against the remaining defendants are severed and shall continue.

Plaintiff’s cross motion to amend his Amended Complaint is denied.

This constitutes the Decision and Order of the court.

Dated: June 10, 2020



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO