SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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MOHAMED ALSHAMI,

Plaintiff,

- v -

THE CITY UNIVERSITY OF NEW YORK, JOSEPH FOELSCH,

Defendants.

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INDEX NO. 160183/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29-101 were read on this motion to/for dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(1), (2) and (7) for an order dismissing the amended complaint based on documentary evidence, for lack of subject matter jurisdiction, and/or for failure to state a claim. Plaintiff opposes.

I. PLEADINGS

A. Amended complaint (NYSCEF 25)

Plaintiff sues defendants for their pattern and practice of unlawful discriminatory employment practices on the basis of national origin, a hostile work environment on the basis of national origin (Yemeni) and religion (Muslim) (protected classes), and retaliation, all in violation of the New York State and City Human Rights Laws (HRL).

Self-represented, plaintiff asserts the following causes of action in his amended complaint: (1) national origin discrimination; (2) a hostile work environment; (3) retaliation; and (4) aiding and abetting discrimination; all are alleged to be in violation of the state and city HRLs.

In support of his hostile work environment claim, plaintiff alleges that his co-worker made numerous offensive and derogatory comments about plaintiff's religion and ethnicity between 2012 and 2019, and he remembers that the following comments were made to him:

1) In September 2016, following media reports about bomb incidents allegedly perpetrated by a Muslim Afghani national in New Jersey and Manhattan, the co-worker told plaintiff that he should avoid those areas to avoid the police arresting plaintiff because he is Muslim;

2) In November 2016, the co-worker told plaintiff that "fucking Yemeni people carry AK-47's in the bodegas";

3) In May 2018, the co-worker said "I know the people in Yemen killed their own president" and "I know you guys go crazy with ya guns";

4) In July 2018, the co-worker stated to plaintiff, "They might send your ass back to Yemen because you're not a real Muslim" and "you might not come back to America because Yemen is part of the travel ban";

5) In March 2019, plaintiff's co-worker told him that "I know you people hate American now after the Saudis bombed Yemen," and that "you need to put your AK-47 away before the government finds it";

6) In April 2019, as female college students were entering a campus building, the co-worker asked plaintiff if he had found a Syrian girl to date, and told him that "you should marry a beautiful Syrian girl so you guys can join ISIS since you already have an AK-47 from Yemen"; and

7) In September 2019, the co-worker asked plaintiff "What's up with your country, we going to have to see what you do," and "you guys are on the most watch list and you're the next one on the list." He also commented to another officer that "in [plaintiff's] country they have rifles in their bodegas."

B. Original complaint (NYSCEF 32)

In his original complaint, filed by plaintiff's then-counsel, plaintiff set forth the following causes of action based on the same expansive factual allegations asserted in his amended complaint: (1) a judgment declaring that defendants violated the New York State Constitution by denial of due process, monetary damages therefor, and a permanent injunction; (2) a violation of Labor Law § 740 (whistleblower law); (3) a violation of Labor Law § 741; (4) a violation of

Civil Rights Law § 40-c; (5) slander; (6) gross negligence; (7) a violation of the state Human Rights Law; (8) negligent hiring and supervision; and (9) punitive damages. In support of his whistleblower claim, plaintiff alleged that he had reported to defendants the existence of faulty and non-functional safety equipment and problems with campus safety, for which defendants retaliated against him.

II. MOTION TO DISMISS

As the issue of subject matter jurisdiction is dispositive, it is addressed first.

A. Labor Law § 740

1. Defendants' contentions (NYSCEF 45)

Defendants observe that in plaintiff's original complaint, filed by the attorney who was then representing him, he asserted a claim for retaliation pursuant to Labor Law § 740, a whistleblower claim. (NYSCEF 32). Having done so, and pursuant to the statute's plain language, plaintiff is barred from asserting any other claims. And, as plaintiff withdrew that claim in his amended complaint, the amended complaint must be dismissed, as the causes of action set forth therein are not revived by the withdrawal.

2. Plaintiff's opposition (NYSCEF 99)

Plaintiff asserts that his original complaint was filed by an attorney who had, unbeknownst to him, been disbarred and that he did not elect to waive his HRL claims. He also observes that his whistleblower claim arises from facts distinct from those underlying his HRL claims.

3. Analysis

Pursuant to Labor Law § 740(7), "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract,

collective bargaining agreement, law, rule or regulation or under the common law." In *Reddington v Staten Is. Univ. Hosp.*, the plaintiff filed a complaint in which she asserted a time-barred Labor Law § 740 claim which she then withdrew in her amended complaint in favor of asserting a Labor Law § 741 claim. The Court observed that:

> [t]he plain text of [Labor Law 740(7)] indicates that "institut[ing]" an action—without anything more—triggers waiver. And in New York, an action is instituted with the filing of a complaint and service upon opposing parties. Moreover, documents in the Bill Jacket repeatedly refer to section 740 (7) as an election-of-remedies provision, thus contemplating that a plaintiff will choose whether to file a section 740 whistleblower claim or some other claim (see e.g. Mem of Pub Empl Relations Bd, Bill Jacket, L 1984, ch 660, at 16).
>
> Although [plaintiff] argues that either filing a time-barred section 740 claim (as she did), or amending a complaint to omit a section 740 claim (as she also did), precludes waiver, section 740 (7)'s language and legislative history do not support her position. A "cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability" (Abrams v Maryland Cas. Co., 300 NY 80, 86 [1949] [citations omitted]). In short, [plaintiff] clearly "institut[ed] . . . an action in accordance with [section 740].

(11 NY3d 80, 87-88 [2008]).

It has been held that the assertion of a whistleblower claim bars other claims only if they relate to or depend on the facts underlying the whistleblower claim. (*Lee v Bank*, 131 AD3d 273 [1st Dept 2015]; *Charite v Duane Reade, Inc.*, 120 AD3d 1378 [2d Dept 2014], *lv granted* 25 NY3d 913 [2016]).

Here, the allegations related to plaintiff's whistleblower claim about various alleged safety violations on the campus are distinct from those forming the basis of his discrimination, hostile work environment, and retaliations causes of action under the state and city HRLs. Consequently, those causes of action are not waived notwithstanding his earlier assertion of a Labor Law § 740 violation. (*See Demir v Sandoz Inc.*, 155 AD3d 464 [1st Dept 2017] [assertion of whistleblower claim did not waive plaintiff's state HRL discrimination claim as "in alleging

discrimination on account of plaintiff's gender, national origin, and religion, plaintiff does not seek same rights and remedies as she does in connection with whistleblower claim]; *Lee*, 131 AD3d at 277-278 [sexual harassment claims under state and city HRLs and negligent training and supervision claim not waived as legitimately independent of asserted whistleblower retaliation claim]; *cf Charite*, 120 AD3d at 1378-1379 [as city HRL retaliation claim arose from and related to asserted whistleblower claim, it was barred and could not be restored by amending complaint to remove whistleblower claim]).

B. Sovereign immunity

1. Defendants' contentions (NYSCEF 45)

Defendants allege that CUNY and its senior colleges, as well as its officers, are immune from suit by sovereign immunity and that, therefore, plaintiff is barred from asserting city HRL claims against them.

2. Plaintiff's opposition (NYSCEF 99)

Plaintiff denies that defendants are immune from liability.

3. Analysis

Tort claims brought against CUNY's senior colleges must be brought in the Court of Claims, which has exclusive jurisdiction over them. (*Apollon v Giuliani*, 246 AD2d 130 [1st Dept 1998], *lv dismissed* 92 NY2d 1046 [1999]). Therefore, plaintiff's city HRL claims may not be adjudicated here. (*Jattan v Queens College of City Univ. of New York*, 64 AD3d 540 [2d Dept 2009] [dismissing city HRL discrimination claim against CUNY college based on sovereign immunity]; *Khalil v State*, 17 Misc 3d 777 [Sup Ct, New York County 2007] [CUNY not subject to city HRL]).

As defendant Foelsch is sued here in his capacity as a state employee, plaintiff's

NYCHRL claims against him are likewise barred. (*Ajoku v New York State Off. of Temporarily Disability Assistance*, 2020 WL 886160 [Sup Ct, New York County 2020]).

C. Sufficiency of state HRL claims

"In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference.'" (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] quoting *AG Capital Funding Partners LP v State St Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). "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.'" (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]).

Moreover, a court may consider affidavits and other evidentiary material submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotations and citations omitted]).

"In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards. It has been held 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] [internal quotations and citations omitted]).

1. National origin discrimination

a. Defendants' contentions (NYSCEF 45)

According to defendants, plaintiff identifies four discrete instances by which defendants

treated him differently due to discrimination based on his national origin: (1) unfavorable work assignments; (2) two disciplinary write-ups; (3) his 2016 performance evaluation; and (4) the failure to hire him in 2017 as a sergeant by Hostos College or Hunter College.

Defendants assert that plaintiff does not state a claim arising from his work assignments as they were within the scope of his duties. And, absent disciplinary actions resulting from his write-ups, a discriminatory animus cannot be inferred therefrom. Moreover, having receiving a satisfactory overall rating, plaintiff fails to state a claim arising from his 2016 performance evaluation and he alleges no negative consequences. Nor does plaintiff's claim that he was subject to discrimination by not being hired as a sergeant by Hostos College or Hunter College sufficiently state a claim under the NYSHRL, according to defendants, as he alleges no facts from which a discriminatory animus may be inferred on the part of the people in charge of hiring for those positions. Plaintiff also fails to allege that other people who were hired as sergeants were not qualified for the position. That plaintiff believes that he was the most qualified does not constitute evidence of discrimination.

b. Plaintiff's opposition (NYSCEF 99)

Plaintiff maintains that he states a claim for discriminatory work assignments based on the allegations set forth in his amended complaint, that the write-ups issued to him have no merit, and that other employees outside his protected class received no write-ups, thereby raising an inference of discrimination. Moreover, the write-ups prevented him from transferring to another CUNY college.

According to plaintiff, although he was qualified for promotion, others outside his protected class were promoted instead of him, and he alleges that a co-worker directed at him at least seven discriminatory comments with a three-year period which, he asserts, is sufficiently

pervasive to warrant relief. Other comments were directed at him but he does not recall the exact words used. While he complained to management and human resources about the co-worker's comments, no action was taken. Rather, he alleges, defendants retaliated against him by failing to promote him within a few months after he had complained to them about the discriminatory treatment he endured and by issuing him a negative performance evaluation and two write-ups.

c. Analysis

To state a cause of action for employment discrimination under the NYSHRL, a plaintiff must plead that he suffered an adverse or disadvantageous employment action that was made under circumstances supporting an inference of discrimination. (*Pelepelin v City of New York*, 189 AD3d 450 [1st Dept 2020]). A cause of action for discrimination is not stated where work is assigned that is within the scope of one's duties, notwithstanding the employee's belief that the assignment is unfavorable. Rather, an adverse employment action must involve a materially adverse change in the terms and conditions of employment and more than an alteration of job responsibilities. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

Here, although plaintiff alleges that he was given unfavorable tasks, he does not claim that any were outside his job description. Consequently, the tasks do not constitute materially adverse changes in his employment. (*See Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314 [1st Dept 2005] [no discrimination claim stated as plaintiff's responsibilities altered but remained within job description]). And, absent any discipline or other adverse action taken against plaintiff resulting from the two disciplinary write-ups, he states no cause of action for discrimination. (*Carter v New York City Dept. of Transportation*, 7 Fed Appx 99 [2d Cir 2001]; *Cristofaro v Lake Shore Cent. School Dist.*, 2011 WL 635263 [WD NY 2011], *affd* 473 Fed Appx 28 [2d Cir 2012] [disciplinary write-ups, unaccompanied by adverse change in terms and conditions of

employment, do not constitute adverse employment action]; *Gaffney v City of New York*, 101 AD3d 410 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013] [no adverse employment action taken as disciplinary memos and reprimands resulted in no reduction in pay or privilege]). Similarly, plaintiff's assertion that he was prevented from transferring to another college because of the write-ups is fatally conclusory absent an allegation that he had sought and was denied a transfer.

Nor does plaintiff plead facts showing that the write-ups were made under circumstances supporting an inference of discrimination. Plaintiff admits having disobeyed an order, which led to the first write-up, and the second write-up arose from another person's complaint about plaintiff's behavior at a hiring event. Plaintiff does not allege that the person engaged in any discriminatory conduct toward him. Moreover, plaintiff offers no example of a person outside his protected class who engaged in the conduct in which he had engaged and for which no write-up or other discipline followed.

As plaintiff received a satisfactory rating on his 2016 evaluation, it does not constitute an adverse employment action. (*Gaffney*, 101 AD3d at 410 [no adverse employment action shown by threats of unsatisfactory rating as plaintiff ultimately received satisfactory rating]).

Plaintiff's claim based on the failure to hire him as a sergeant is not supported by any allegation from which it may be inferred that those who decided not to hire him did so out of a discriminatory animus. Nor does plaintiff allege that he was more qualified than those hired. (*See e.g., Okocha v City of New York*, 122 AD3d 550 [1st Dept 2014], *lv denied* 25 NY3d 910 [2015] [plaintiff failed to establish discriminatory reason for not being promoted as two people promoted more qualified than him]).

A summary of plaintiff's interview for the position of sergeant, drafted by one of the interviewers, reflects a non-discriminatory reason for the decision not to hire him as he is

described therein as having told the interviewers that they would not want to hire him because he had received negative performance evaluations, and when asked if he would accept the position if offered, plaintiff responded that he would not. Such responses constitute sufficient evidence of a non-discriminatory reason for defendant not to hire him. (NYSCEF 83).

2. Hostile work environment

a. Defendants' contentions (NYSCEF 45)

Defendants contend that plaintiff's cause of action for hostile work environment is premised on several incidents whereby a co-worker leveled discriminatory remarks at him and an instance whereby supervisor yelled at him and was rude to him in December 2016. Both incidents, defendants allege, are insufficient to state a hostile work environment claim, arguing that the co-worker's seven remarks over a three-year period does not constitute a basis for a hostile work environment cause of action, and that in any event, an employer may not be held liable for an employee's discriminatory behavior unless it had notice of it and condoned it, neither of which is alleged by plaintiff. Defendants also maintain that single instances of rudeness and stridency do not state a cause of action for hostile work environment.

b. Plaintiff's opposition (NYSCEF 99)

Plaintiff alleges that his exposure to at least seven discriminatory comments within a three-year period is sufficiently pervasive to state a claim and that there were other comments, although he cannot recall the exact words used.

c. Analysis

In alleging a hostile work environment claim under the NYSHRL, a plaintiff must allege that she or he has been subjected to inferior terms, conditions, or privileges of employment because of his or her protected status under the statute, or that she or he has been treated less well

than other employees because of her or his protected status. (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]; *Springs v City of New York*, 2020 WL 3488893, at *7 [SD NY 2020]). "[T]he claim will not succeed if the offending actions are no more than petty slights or trivial inconveniences." (*Franco v Hyatt Corp.*, 189 AD3d 569 [1st Dept 2020] [internal citations omitted]). The pleadings must give rise to an inference of some discriminatory or retaliatory motives. (*Sutter v Dibello*, 2019 WL 4195303, at *23 [ED NY 2019], *report and recommendation adopted*, 2019 WL 4193431 [ED NY 2019]).

Seven discriminatory or offensive remarks over a three-year period do not constitute a hostile work environment. (*See Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 311 [2004] [racial epithets did not permeate plaintiff's work environment as they occurred three times over nine years; hostile work environment requires more than a few isolated incidents and instead of sporadic slurs, there "must be a steady barrage of opprobrious racial comments"]; *Kim v Goldberg, Weprin, Frankel, Goldstein LLP.*, 120 AD3d 18 [1st Dept 2014] [dismissal of hostile work environment warranted as plaintiff cited only isolated remarks or incidents]).

One instance each of being yelled at and rudely treated by a supervisor also do not constitute a sufficient basis for stating a cause of action for a hostile work environment. (*See Forrest*, 3 NY3d at 312 [rude behavior by supervisor insufficient to create hostile work environment]).

3. Retaliation

a. Defendants' contentions (NYSCEF 45)

Defendants argue that plaintiff fails to state a cause of action for retaliation as he began complaining of discriminatory treatment after his receipt of his first disciplinary write-up. Moreover, they claim, where adverse job actions occur before a complaint is lodged about

discrimination, no inference of retaliation arises. In any event, absent disciplinary action, no retaliation resulted. That plaintiff was not hired as a sergeant thus, defendants maintain, could not have been based on a retaliatory motive as plaintiff does not allege that those responsible for hiring knew of his prior complaints, and the passage of six months from the complaint to Foelsch's decision not to hire him is too long a period of time to support an inference of retaliation.

b. Plaintiff's opposition (NYSCEF 99)

Plaintiff alleges although he complained to management and human resources about the co-worker's discriminatory comments, defendants took no action and, within a few months of his complaints, retaliated against him by failing to promote him and issuing him a negative performance evaluation and two write-ups.

c. Analysis

To state a retaliation claim under the NYSHRL, a plaintiff must allege: (1) participation in a protected activity; (2) that the defendant was aware of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *Gad-Tadros v Bessemer Venture Partners*, 326 F Supp 2d 417, 425 [ED NY 2004]).

An employee engages in a "protected activity" by "opposing or complaining about unlawful discrimination." (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *see also Davis-Bell v Columbia Univ*, 851 F Supp 2d 650, 6820 [SD NY 2012]). "The requisite causal connection between adverse employment action and a protected activity may be demonstrated by showing evidence of retaliatory animus." (*Mucciarone v Initative, Inc.*, 2020 WL 1821116, at *13 [SD NY 2020]).

As discussed above, plaintiff demonstrates no causal connection between his complaints and the alleged adverse action. In any event, he suffered no adverse employment action.

4. Aiding and abetting discrimination

a. Defendants' contentions (NYSCEF 45)

Defendants maintain that Foelsch may not be held liable for aiding and abetting his own behavior, and that there is no aiding and abetting claim if there is no predicate discrimination claim alleged against an employer.

b. Plaintiff's opposition (NYSCEF 99)

Plaintiff does not address this aspect of defendants' motion.

c. Analysis

Pursuant to the NYSHRL, suits may be maintained against an employee for direct or aider-and-abettor liability. (NY Exec Law § 296[6]; *see also Vera v Donado Law Firm*, 2019 WL 3306117, at *7 [SD NY 2019], *report and recommendation adopted*, 2019 WL 3302607 [SD NY 2019]). "A direct claim is possible against a firm's employee, if he or she was a supervisor with direct operational control over the plaintiff's work conditions *and* the power to make relevant hiring and firing decisions." (*Vera*, 2019 WL 3306117, at *7 [emphasis added]). On an aider-and-abettor claim, "[i]t is the employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting" (*Id.* at *8 [internal quotations and citations omitted]). "Moreover, in order for aider-and-abettor liability to be established, the defendant must be found to have actually participated in the conduct giving rise to the claim of discrimination." (*Id.* [internal quotations and citations omitted]). However, an aiding and abetting claim cannot be based on a defendant's own alleged conduct. (*Tirschwell v TCW Group, Inc.*, AD3d , 2021 NY Slip Op 03397 [1st Dept 2021]).

Here, plaintiff fails to set forth a sufficient discrimination or retaliation claim against CUNY and it is self-evident that a person cannot aid and abet her own conduct.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

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6/2/2021
DATE

BARBARA JAFFE, 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