Lum v Consolidated Edison
2021 NY Slip Op 32318(U)
November 16, 2021
Supreme Court, New York County
Docket Number: Index No. 160027/2020
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

Henry Lum

INDEX NO. 160027/2020

MOT. DATE

- v -

Consolidated Edison et al

MOT. SEQ. NO. 002 and 003

The following papers were read on this motion to/for dismiss and x/m amend

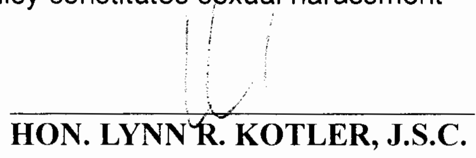
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s).__________
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s).__________
Replying Affidavits	NYSCEF DOC No(s).__________

This is an action for discrimination based upon disability, gender, and harassment. In motion sequence 002, Defendant Clarity Testing Services Inc. (Clarity) now moves to dismiss the Third, Sixth and Seventh causes of action as pled in the amended complaint for failing to state a cause of action. Plaintiff opposes the motion and cross-moves to amend his verified complaint a second time. In motion sequence 003, defendant Consolidated Edison (ConEd) moves to dismiss the amended complaint for failure to state a cause of action for national origin and disability discrimination, harassment, and hostile work environment. The court's decision follows.

In his complaint, plaintiff alleges he began his employment as a utility worker with ConEd in 2004 and in 2006 was promoted to distribution splicer position. Plaintiff alleges that on January 3, 2013, he was involved in a car accident and hurt his back. He visited his doctor three times a year for treatment and was prescribed Percocet and then suboxone. Plaintiff claims that he never used illegal drugs. Plaintiff alleges that on January 4, 2013, he was summoned to the ConEd in-house medical facility for a medical evaluation that included a urine test. A few weeks later, plaintiff was informed that the urine test was positive for amphetamine. Plaintiff further alleges that he provided ConEd with copies of his prescriptions for Adderall and Percocet, but that ConEd disregarded these prescriptions, issued his first violation of ConEd's drug policy and placed him on the "On-Call" monthly drug monitoring program in 2013.

Beginning in 2013 until his termination in 2020, plaintiff claims that he was required to participate in monthly drug monitoring which required him to expose his genitalia. Plaintiff contends that in or around 2017, he was "called in allegedly due to test results coming in positive for oxycodone, amphetamines and alprazolam" and was told his prescriptions did not match the drug results". In 2017 and until his termination, plaintiff alleges that the collector from the medical facility "systematically inspected plaintiff's genitalia every time plaintiff provided a urine sample". Plaintiff contends he was diagnosed with depression and anxiety and that he was provided with various psychiatric medications for these diagnoses. In sum, plaintiff alleges that defendants drug testing policy constitutes sexual harassment

Dated: 11/16/21



HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒GRANTED (MOT. SEQ 2) ☐ DENIED ☐ GRANTED IN PART ☒ OTHER (MOT SEQ 3)

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

and is invasive, humiliating and degrading, and that defendants discriminated and retaliated against him.

Plaintiff asserts the following causes of action against defendants ConEd and/or Clarity in his amended complaint: [1] violation of the New York State Human Rights Law § 296[d] based upon disability, national origin, and sex discrimination; [2] violation of the New York City Human Rights Law § 8-107 based upon gender, national origin, and disability discrimination; [3] negligent infliction of emotional distress; and [4] negligent supervision/retention.

Cross-Motion to Amend

The court will first consider plaintiff's cross-motion to amend, since its disposition necessarily impacts the defendants' motions. Generally, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *Murray v City of New York*, 51 AD3d 502, 858 N.Y.S.2d 131 [1st Dept 2008] (internal quotation marks and citations omitted). "[P]laintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit . . . ." *MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499, 901 NYS2d 522 [1st Dept 2010] (internal citations omitted).

Defendant Clarity opposes plaintiff's cross-motion to amend on the grounds that the proposed amendments are futile. Clarity contends that the allegations in the proposed amended complaint are substantially like the original complaint and are as insufficient. ConEd argues that plaintiff's proposed amendment regarding opioid dependence is meritless and that any confidentiality violations are not directed at Con Ed, but only toward Clarity.

Plaintiff argues that the amendment is to clarify allegations and that "there is no prejudice to defendants due to the fact that no discovery took place in this case". The Court agrees with plaintiff. There is no prejudice nor surprise to either defendant. Moreover, this case is at the early stages of litigation and no discovery has taken place. Therefore, plaintiff's cross-motion is granted. The court will consider the defendants' arguments as to plaintiff's second amended complaint.

MOTION SEQUENCE 002

As an initial matter, plaintiff agues that defendant Clarity's motion should be dismissed because CPLR 3217(a)(7) does not exist under the CPLR. Clarity contends that it was a ministerial error and that the correct provision is 3211(a)(7). Clearly, this was a typographical error on the part of Clarity and did not impact or prejudice plaintiff in submitting his opposition. Therefore, plaintiff's procedural argument is rejected.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

NYCHRL

Defendant Clarity argues that plaintiff's third cause of action should be dismissed because the amended complaint does not contain any facts that Hector Oyasia, its urine specimen collector, exercised any managerial or supervisory control over anyone at Clarity or ConEd, that there are no facts in the amended verified complaint indicating that any manager or officer at Clarity was aware of any issues between Oyasia or plaintiff and that there was no way that defendant Clarity "could (or should)" have known about any alleged impropriety by Oyasia. Defendant Clarity further argues that plaintiff's gender discrimination claim, and hostile work environment claims should also be dismissed because Con Edison's agreement with Clarity required Clarity to "be in full compliance with the DOT regulations

in 49 C.F.R. Part 40" which used the "direct observation" collection method for testing employees in Con Edison's "On Call" drug monitoring program. Clarity further argues that it utilized the "direct observation" collection method for all Con Edison employees in the "On Call" monitoring program, including Lum, and that its use of this method in a gender-neutral manner wholly refutes any claim of gender discrimination under the NYCHRL. Finally, Clarity argues that plaintiff's claim that Oyasia "supposedly stared at Plaintiff while Lum was naked and licked his lips and grinned when Lum urinated." is insufficient and does not support a claim for hostile work environment under the NYCHRL.

In opposition, plaintiff argues that whether Clarity was an agent of Con Ed is a legal question which can only be answered after discovery, that plaintiff's amended complaint contains sufficient facts to allege that Clarity was an agent of Con Ed and that he has alleged sufficient facts to support his claim for sexual harassment because plaintiff was subjected to direct observation 25 times while Oyasia licked his lips and leered at him and stared at his naked buttocks, that he was subjected to degrading comments about peeing into a cup, that he had to "show his pee-pee again", and that he complained to ConEd about Oyasia's conduct. Plaintiff further argues that Clarity's use of the "direct observation" collection method violated the NYCHRL because the "conditions under DOT Rule 49 CFR Part 40, Section 40.67 were not formed"

In Reply, Clarity contends that plaintiff's gender discrimination claim, should be dismissed because plaintiff has not identified any facts to establish that Clarity's use of the "direct observation" collection method was unlawful, or that Clarity is vicariously liable for Oyasia's conduct or that the collection method was not conducted in a gender-neutral manner.

Administrative Code § 8-107 [1] provides that "It shall be an unlawful discriminatory practice: (a) for an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

Section 8-107 (1) (a) of the Administrative Code prohibits discrimination based on gender, and section 8-107 (13) (b) states that

> [a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:
>
> > (1) the employee or agent exercised managerial or supervisory responsibility; or
> >
> > (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
> >
> > (3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

Defendant Clarity's motion to dismiss the third cause of action is granted. Here, plaintiff has failed to allege sufficient facts to survive a pre-answer motion to dismiss including his failure to identify any adverse action taken by Clarity that was based on his gender. The complaint merely states that Clarity collected plaintiff's urine specimen using the "direct observation method promulgated by the DOT and

in accordance with instructions by ConEd. There is nothing in the second amended complaint that the direct observation method was applied to only male donors.

Further, for an agent to be vicariously liable for its employee's discriminatory conduct toward an employee of the principal, Section 8-107(13) of the NYCHRL requires the aggrieved plaintiff to demonstrate that (1) the offending employee of the agent exercised "managerial or supervisory responsibility", (2) the agent knew of the offending employee's discriminatory conduct, and acquiesced in it or failed to take "immediate and appropriate corrective action", or (3) the agent "should have known" of the offending employee's unlawful discriminatory conduct yet "failed to exercise reasonable diligence to prevent it." *Zakrzewska v. New School*, 14 NY3d 469 [2010]. The second amended complaint is devoid of any factual allegations that Oyasia possessed or exercised managerial or supervisory responsibility over plaintiff or anyone else. Relatedly, plaintiff has failed to allege any facts to show that Clarity knew or should have known about Oyasia's alleged misconduct or that plaintiff complained to anyone about Oyasia's alleged misconduct.

Finally, the second amended complaint does not contain any facts that Clarity functioned as ConEd's agent and only contains barebones statement that Clarity was an agent of ConEd and had authority to monitor plaintiff. This alone is insufficient to establish that Clarity was an agent of ConEd. By merely stating that Clarity was an agent of ConEd without additional factual support is insufficient to survive this motion.

Based on the foregoing, defendant Clarity's motion to dismiss the third cause of action is granted and is severed and dismissed.

Negligent Infliction of Emotional Distress

Next, Clarity argues that plaintiff's sixth cause of action, negligent infliction emotional distress, should be dismissed because plaintiff's amended verified complaint does not contain or identify any facts showing that Clarity owed him a duty, breached any duty to him or engaged in extreme or outrageous conduct. Clarity further argues that it "was simply a vendor that collected and analyzed urine, and it performed these services in full compliance with the standards sanctioned by the DOT.", that "Plaintiff cannot demonstrate that Clarity's use of the 'direct observation' collection method unreasonably endangered his physical safety, or caused him to fear for his own safety..." and that plaintiff completed the same drug test, in the same manner as thousands of other employees in the United States who are subject to the DOT testing procedures.

Plaintiff argues in opposition that his "complaint is sufficient to claim that defendant CLARITY owed a duty to Plaintiff. The defendant CLARITY breached that duty by failing to properly supervise his employees and by failing to coordinate with CONEDSION as well as failing to keep the Plaintiff's drug tests confidential causing Plaintiff's co-workers to sexually harass him", and "that inspecting Plaintiff's penis and buttocks on a monthly basis for a period of 7 (seven) years (approximately 84 times) and then causing the confidential information to be leaked to Plaintiff's co-workers only to have Plaintiff's co-workers sexually harass, belittle, degrade Plaintiff for many years constitutes outrageous conduct".

In reply, Clarity argues that plaintiff failed to show that Clarity owed him a duty or that Clarity in fact breached that duty and that plaintiff also fails to satisfy three "extreme" and "outrageous" elements of this cause of action.

Generally, a cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers plaintiff's physical safety or causes plaintiff to fear for his or her own safety (*Bernstein v. East 51st Street Development Co., LLC,* 78 AD3d 590 [1st Dept 2010] quoting *Sheila C. v. Povich, supra* at 130). A person "to whom a duty of care is owed ... may recover for harm sustained solely as a result of an initial, negligently caused psychological trauma, but with ensuing psychic harm with residual physical manifestations" (*Ornstein v. New York City Health and Hospitals Corp.,* 10 NY3d 1 [2008]).

In the First Department, a cause of action for negligent infliction of emotional distress must arise from "extreme and outrageous conduct" (see *Melendez v. City of New York*, 171 AD3d 566 [1st Dept April 18, 2019]; compare *Taggart v. Costabile*, 131 AD3d 243 [2d Dept 2015]; see also *Lau v. S & M Enterprises*, 72 AD3d 49 [1st Dept 2010]). "Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide" (*Wolkstein v. Morgenstern,* 275 AD2d 635 [1st Dept 2000] quoting *Rocco v. Town of Smithtown*, 229 AD2d 1034, appeal dismissed 88 NY2d 1065).

The court agrees with Clarity. While plaintiff's amended complaint is afforded liberal construction, plaintiff's allegation that Clarity failed to supervise Oyasia and that his alleged misconduct "regularly licked his lips with a grin on his face" while naked performing a drug test is insufficient to rise to the level of outrageous and extreme conduct or that he feared for his own safety. Moreover, the second amended complaint is also devoid of any support that Clarity breached a duty of care to plaintiff. Here, the allegations for negligent infliction of emotional distress contained in the second amended complaint do not rise to the level of conduct to sustain this cause of action.

Based on the foregoing, defendant Clarity's motion to discuss the sixth cause of action for negligent infliction of emotional distress is granted.

<u>Negligent Retention/Supervision</u>

Finally, Clarity argues that plaintiff's seventh cause of action, negligent hiring/retention, should be dismissed because Clarity was not aware of Oyasia having any propensity to engage in any unlawful conduct and the amended complaint fails to identity any facts to support the theory that Clarity acted negligently toward plaintiff.

Plaintiff disagrees and argues that that he complained to 3 Con Ed's supervisors and Oyasia himself and that his complaints fell on deaf ears.

In reply, Clarity argues that plaintiff failed to identify any "propensity" on the part of any Clarity employee to engage in unlawful conduct and therefore renders this claim defective as the law provides that training is required after an employer learns of an employee's propensity.

Again, the court agrees with Clarity. To hold a defendant liable under theories of negligent hiring/retention, a plaintiff must establish that the defendant knew or should have known of the employee's propensity for the conduct which caused the injury. *Weinfeld v. HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2nd Dep't 2017].

A review of plaintiff's second amended complaint is devoid of any allegations that would support this cause of action that Clarity knew or should have known that Oyasia was engaging in the alleged unlawful conduct. In fact, plaintiff's only allegation is that Oyasia inspected plaintiff's genitalia, that Oyasia stared at and licked his lips and that Oyasia was employed by Clarity as agent of Con Ed. Here, there is nothing in the record to suggest or infer that Clarity knew or should have known of these alleged acts by Oyasia. Therefore, the Seventh Cause of Action against defendant Clarity for negligent retention/supervision is severed and dismissed.

Accordingly, defendant Clarity's motion to dismiss the 3rd, 6th and 7th causes of action is granted and those causes of action are severed and dismissed.

<u>MOTION SEQUENCE 003</u>

In motion sequence 3, defendant ConEd moves to dismiss plaintiff's causes of action for disability and national origin discrimination and for hostile work environment/sexual harassment.

National Origin

Defendant argues that while plaintiff belongs to a protected class (Chinese) and suffered an adverse employment decision (termination), plaintiff failed to support his allegation that ConEd was motivated by discrimination and mentions his national origin four times in the complaint.

Plaintiff opposes the motion and argues that his cause of action survives because he has alleged sufficient facts such as that he was qualified for the position, that he suffered an adverse employment action and that that adverse action occurred under circumstances giving rise to discrimination. Plaintiff further argues that his amended complaint and proposed amended complaint indicates as follows:

"Starting from 2018 until Plaintiff's termination in January of 2020 Bob Scheib, Plaintiff's co-worker continuously harassed Plaintiff few times a week about peeing in a cup and often told Plaintiff to use wipes to keep his little asshole clean. Bob Scheib, approximately three times a week, spoke to Plaintiff in Chinese accent to degrade him. More specifically, Bob Scheib would pretend to be a Chinese American speaking in broken English. Bob Scheib would frequently say to Plaintiff "open your eyes." Whenever Plaintiff needed to take a bathroom break during the day, Bob Scheib would say "Do not worry. No one is going to see your little pee-pee." Whenever Plaintiff was notified by the management to report to medical appointment "Bob Scheib regularly commented "Owwhh you must show them your pee-pee again"!!" Plaintiff's co-workers, supervisors, managers would hear the comments, but they would not take any action to stop the harassment."

In reply, Con Ed argues that even if plaintiff's description of Robert Scheib's conduct is true, plaintiff failed to plead that Schreib took or was capable of taking an adverse employment action against him.

For national origin discrimination claims under the NYSHRL, plaintiff must "plausibly allege that (1) the employer took adverse action against him and (2) his national origin was a motivating factor in the employment decision." *Farmer v. Shake Shack Enterprises, LLC*, 473 F.Supp.3d 309 [SDNY July 21, 2020]. To meet this burden, "the complaint must plead facts that provide at least minimal support for the proposition that the employer was motivated by discriminatory intent." *Id.*

The NYCHRL makes it "unlawful for an employer or an employee or agent thereof" to discharge an employee based on, inter alia, the employee's race, religion, or national origin. N.Y.C. Admin. Code § 8–107(1)(a). Courts must construe the NYCHRL's provisions "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible[.]" *Id.* (quoting *Albunio v. City of New York*, 16 NY3d 472, 477-78 (2011)).

The court agrees with defendant ConEd. It is undisputed that plaintiff was Chinese and that he suffered an adverse employment decision, his termination. However, there is nothing in the amended complaint or second amended complaint to support a claim for discrimination on the basis of national origin. In the second amended complaint, plaintiff alleges that Robert Moran asked plaintiff "Are you chinese" in 2015, that a ConEd drug counselor made a derogatory comment about "Asian girls" in plaintiff's presence three years prior to plaintiff's termination, that plaintiff's shop steward made a derogatory comment about plaintiff's penis size in 2012, Scheib's derogatory comments and that "defendants discriminated against plaintiff because Plaintiff is originally from China". While these statements or comments may support a claim for hostile work environment, these statements/comments were made years prior plaintiff's termination from ConEd and cannot be linked to the adverse employment decision, termination, which occurred in 2020. Further, the second amend complaint is devoid of any factual allegations that plaintiff was terminated because he was Chinese. The only facts that plaintiff alleges in support of his claim is that he is Chinese and was terminated in 2020, which is insufficient to support a cause of action for national origin discrimination.

Based on the foregoing, plaintiff's cause of action for discrimination based on national origin is dismissed.

Disability

Next, defendant ConEd argues that plaintiff's cause of action for disability discrimination should be dismissed because he was placed in the on-call program in 2013 and cannot now claim that placement was an act of disability discrimination, that plaintiff fails to plead any discriminatory intent on the part of the unknown person who placed him in the program and that his conclusory statement that "[D]efendants treated Plaintiff differently because of his disability." fails short of the pleading standard necessary to survive amotion to dismiss.

In turn, plaintiff opposes the motion and argues that he has sufficiently pled a claim for disability discrimination because plaintiff suffered from injuries to his back and that he was prescribed various prescription medications and that "the alleged positive test results of Plaintiff was due to his legally prescribed medicine to treat his disabilities as follows: 1) Major Depressive Disorder, 2) "Psychotic Disorder" 3) "Attention Deficit Disorder 4) Lower Back pain due bulging discs he sustained 5) Opioid Addiction caused by the legally prescribed medicine provided to Plaintiff to cure his disabilities." and that his drug addiction may qualify as a disability under the Americans with Disabilities Act (ADA). Plaintiff further argues that the defendant ConEd's motion is premature and that the parties should proceed with discovery.

In reply, ConEd argues that plaintiff's vague pleadings make it difficult to determine the precise disability that he believes serves as the basis for his alleged discriminatory treatment, that the court should not have to speculate about plaintiff's claimed disability and that plaintiff's failure to adequately identify his disability and connect it with an adverse employment action justifies dismissal of this cause of action.

Under the NYCHRL, in the case of drug addiction, "the term 'disability' only applies to a person who (i) is recovering or has recovered and (ii) currently is free of such abuse and does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such abuse." N.Y.C. Admin. Code § 8–102 (under definition of "disability") (emphasis added); see also N.Y.C. Admin. Code § 8–107(15)(c) (giving employers the right to prohibit the illegal use of drugs).

The court agrees with plaintiff. While the second amended complaint is not artfully drafted, plaintiff has alleged sufficient facts to survive a pre-answer motion to dismiss. At the infancy stage, it is unknown whether plaintiff engaged in illegal use of drugs or if he had valid prescriptions for all the medications, if he is recovering or has recovered from his alleged opioid addiction and that his termination was a result of his disability. Based on the foregoing, defendant ConEd's motion to dismiss the disability discrimination cause of action is denied.

Harassment

Next, ConEd argues that that plaintiff has failed to allege any conduct that states a cause of action for harassment and more specifically, that plaintiff's allegation that "defendants drug testing policy constitutes sexual harassment and is invasive, humiliating, and degrading." ignores the fact that direct observation drug testing does not establish a hostile work environment.

In opposition, plaintiff argues "there is no evidence on record which specifically explains that the conditions were formed under DOT Rule 49 CFR Part 40 Section 40.67, which would allow any of the defendants to conduct a direct observation test inspecting Plaintiff's penis as well as Plaintiff's buttocks for a period of seven years or an employee or agent of defendant's licking his lips with a grin on his face for a period of two years". Plaintiff further argues that there are less invasive methods to conduct workplace drug testing scenarios which ConEd did not use.

In Reply, Con Ed contends that plaintiff's opposition focuses on red herrings and that "while plaintiff notes that 49 CFR 40.69 prohibits direct observation testing, he fails to mention that the prior section –

49 CFR 40.67(b) – is directly applicable to Plaintiff because he was part of an on-call, follow-up program."

Plaintiff's cause of action/allegation that ConEd's drug testing program constitutes sexual harassment is dismissed. Section 49 CFR 40.67(b) provides "[A]s an employer, you must direct collection under direct observation of any employee if the drug test is...a follow-up test.". It is undisputed that in 2013 plaintiff was required to participate in the on-call program and that direct observation method in accordance with federal mandate was conducted for this drug test.

Plaintiff alleges that "in or around 2015" a colleague asked Plaintiff, "Are you Chinese?" and that "in or around 2012" a union shop steward said to him, "I will go buy some condoms to have sex with my girlfriend. You probably buy small condoms because you must have a small penis." "meet the standard for the 'Continuing Violation rule." The court disagrees. Here, plaintiff has failed to connect these alleged events that occurred in 2012 and 2015 to any conduct within the applicable statute of limitations time that would be considered the basis of a continuing violation. These two events are not only too attenuated in time to be connected to any actionable conduct within the limitations period, but also unrelated to his claims of harassment due to monthly drug testing which started in 2013.

Retaliation

To make a *prima facie* showing of retaliation under either the NYCHRL or the NYSHRL, plaintiff must show that (1) he engaged in a protected activity, (2) defendants were aware that plaintiff participated in such activity, (3) plaintiff suffered an adverse employment action based upon that activity, and (4) there is a causal connection between the protected activity and the adverse action (see *Forrest*, 3 NY3d at 313). An employee engages in a "protected activity" by "opposing or complaining about unlawful discrimination". (*Id.*)

Plaintiff alleges in his second amended complaint that ConEd "engaged in an unlawful discriminatory practice by terminating, suspending Plaintiff, and otherwise discriminating against the Plaintiff because of Plaintiff's opposition to the unlawful employment practices of defendant CONED" and that his "retaliation claim gives inference to retaliation due to the fact that he was terminated within 2 months of his last complaint". Plaintiff further contends that ConEd "knew how Plaintiff was being treated and how degrading and invasive the employees and the procedure was."

Here, the court is unable to ascertain from plaintiff's second amended complaint the alleged protected activity plaintiff claims he was engaged in at the time he made complaints to various ConEd supervisors prior to his termination in January 2020. Based on the foregoing, the court will dismiss the claim and grant plaintiff an opportunity to replead his cause of action for retaliation within 30 days from the date of this decision/order.

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence 002, defendant Clarity's motion to dismiss plaintiff's 3rd, 6th and 7th causes of action are granted and the complaint is dismissed as to defendant Clarity only, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence 003, defendant Consolidated Edison's motion to dismiss is granted to the extent that causes of action for national origin discrimination, sexual harassment and retaliations claims are severed and dismissed; and it is further

ORDERED that plaintiff is granted leave to replead his cause of action for retaliation within 30 days from the date of this decision/order; and it is further

ORDERED that plaintiff's cross-motion to amend his complaint is granted. Defendant Consolidated Edison is directed to file and serve its second verified answer within sixty days and/or move to dismiss plaintiff's retaliation claim in the event plaintiff repleads.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 11/16/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.