Capers v City of New York
2021 NY Slip Op 33024(U)
November 17, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20607/2017E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---x
GARY CAPERS,

Plaintiffs,

-against-

CITY OF NEW YORK, et. al.,

Defendants,
---x

Index No.: 20607/2017E

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment:	Papers Numbered
Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law and Exhibits..................	1
Affirmation in Opposition to Motion, Plaintiff's Affidavit and Exhibits..	2
Memorandum of Law in Reply..	3

Motion by the defendants for an order pursuant to CPLR §3212 for summary judgment and dismissing plaintiff's complaint in its entirety, is granted.

Plaintiff, Gary Capers ("Capers") was a community coordinator at a New York City Department of Homeless Services ("DHS") Intake Shelter located at 400 East 30th Street from September 9, 2013 to March of 2016. Plaintiff alleges that during the course of his employment, he was subjected to discrimination, a hostile work environment, constructive termination, and retaliation based upon his sexual orientation under the New York State Human Rights Law ("SHRL") and the New York City Human Rights Law ("CHRL"). Plaintiff further alleges he was subjected to intentional infliction of emotional distress by the defendants.

The defendants move for summary judgment arguing: 1) plaintiff's discrimination claims fail because there is no evidence to establish that plaintiff was subject to an adverse employment action; 2) there is no evidence that the conduct of his supervisors and colleagues was sufficiently severe or pervasive to establish a hostile work environment, 3) since there is no evidence of a hostile work environment, plaintiff's constructive termination claim must be dismissed, 4) there

is no evidence of an adverse employment action and so plaintiff's retaliation claims must be dismissed, 5) there are legitimate, non-retaliatory reasons for defendants' actions, 6) plaintiff failed to file a notice of claim with regard to his claims for intentional infliction of emotional distress claims, and 7) DHS is a non-suable entity as it is an agency of the City of New York.

Plaintiff partially opposes defendants' motion. Plaintiff submits that plaintiff's claims of retaliation are trial-worthy, and that the City has not met its' prima facie burden of entitlement to judgment as a matter of law. Plaintiff does not oppose the portions of the City's motion seeking dismissal of plaintiff's claims for intentional infliction of emotional distress or dismissing DHS from the action as it is not a proper party. As such, plaintiff's claim for intentional infliction of emotional distress is dismissed and DHS is dismissed from the action.

As an initial matter, defendants submitted a Statement of Undisputed Material Facts pursuant to New York State Uniform Civil Rule §202.38-g(b). Plaintiff failed to submit a corresponding Statement of Facts disputing any of the facts as submitted by the defendants. As such, for the purposes of this motion, defendants' Statement of Undisputed Material Facts is deemed admitted.

To establish a prima facie case of discrimination under the SHRL, plaintiff must demonstrate: (1) he was a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated or suffered an adverse employment action; and (4) the discharge or adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*McDonnell Douglas Corp. v. Green,* 411 U.S. 792 [1973]).

To establish a claim for retaliation under the SHRL, a plaintiff must allege (1) the plaintiff engaged in a protected activity, (2) the defendants were aware of the plaintiff's protected activity, (3) the plaintiff was subject to an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action. (*Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 51 (N.Y. App. Div. 1st Dept. 2012).

The City submits that plaintiff cannot demonstrate that he suffered an adverse employment action. To establish an adverse employment action, there must be "a materially adverse change in the terms and conditions of employment." (*Weeks v. New York State*, 273 F.3d 76 [2d Cir. 2001]). The materially adverse change much "affect employment in a way that is both detrimental and substantial." (*Id*). Adverse employment actions, for example, are actions such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less

distinguished title, a material loss of benefits, or significantly diminished material responsibilities. (*Messinger v. Girl Scouts of the U.S.A.* 16 A.D.3d 314 [1st Dept. 2005]). No such action took place in this matter. Plaintiff does not allege any complaints that rise to the level of an adverse employment action. At most, plaintiff received warnings for tardiness and a conference memorandum for unplanned absences. Plaintiff was never disciplined, did not receive a reduction in salary, did not have a change in job duties, and was not demoted at any time between October 2014 and his resignation in March of 2016. As such, plaintiff's claims of discrimination and retaliation pursuant to the SHRL are dismissed.

Summary judgment dismissing a discrimination claim under the CHRL should be granted only if no jury could find defendant under any of the evidentiary routes set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the mixed motive framework, direct evidence, or some combination thereof. (*Persaud v. Walgreens Co.,* 2018 N.Y. App. Div. LEXIS 3463 [2d Dept. 2018]). Under the CHRL, a plaintiff need not show that the employment action was materially adverse, rather "a plaintiff must simply show that she was treated differently from others in a way that was more than trivial, insubstantial, or petty." (*Sotomayor v. City of New York*, 862 F. Supp. 2d 226 [E.D.N.Y. 2012], *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 [1st Dept. 2009]). Here, plaintiff does not submit any evidence or point to any facts that show he was treated any differently than anyone else due to his sexual orientation. Plaintiff does not deny he was repeatedly late to work or that he had unplanned absences from work. Plaintiff fails to raise a question of fact regarding defendants' discriminatory animus. As such, plaintiff's claim for discrimination pursuant to CHRL is dismissed.

To establish a claim for retaliation under the CHRL, a plaintiff must demonstrate that he "took an action opposing his employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." (*Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102 [2d Cir. 2013]). If plaintiff meets this burden, the defendant must then set forth a reason for the adverse employment action that is legitimate and non-retaliatory. (*Valentin v. Fox Bus. Network*, 2016 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct. Mar. 3, 2016]). Thereafter, a plaintiff can only prevail if he can show defendant's reason is merely a pretext for retaliation. (*Id.*). First, plaintiff only received warnings for his tardiness and unplanned work absences, which he does not deny. These warnings did not affect his job, duties, or pay. As such, there is a legitimate, non-retaliatory reason for the

warnings issued to plaintiff. Plaintiff does not submit any evidence or facts that show that the warnings were a pretext for a retaliatory motive. As such, plaintiff's claims for retaliation pursuant to CHRL are dismissed.

Under the SHRL, a hostile work environment exists when the workplace is so "permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of [their] employment." *Ferrer v. N.Y.S. Div. of Human Rights*, 82 A.D.3d 431, 431 (App. Div. 1st Dept 2011) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)). Under the CHRL, a plaintiff must allege merely that they have been treated "less well than other employees because of [his] protected status." (*Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 [1st Dept. 2009]. Here, there is no proof that plaintiff co-workers actually knew of his protected status and the affidavits submitted indicate, that all of the alleged commenters were unaware of plaintiff's sexual orientation until plaintiff filed an EEO complaint in July of 2015 or after plaintiff left DHS.

Here, plaintiff alleges a series of comments that he either overheard and presumed were about him or were allegedly said to him. Plaintiff also alleges that a colleague, while standing with two other colleagues, bent over and performed a lewd act, which he interpreted to be directed at him and which he interpreted to reference anal penetration. The majority of the alleged comments made took place on two days in October of 2014. The majority of the comments allegedly made were presumed by plaintiff to be about him, although may not have been. Plaintiff did not make one complaint about any of the comments at the time they were allegedly said.

A few comments said on two days, most of which were not said to plaintiff and were perceived by him to be directed at him, and one alleged lewd act which plaintiff interpreted to be directed at him, does not rise to the level of a workplace permeated with discriminatory intimidation, ridicule, and insult so pervasive as to alter the conditions of plaintiff's employment. (*Ferrer v. New York State Div. of Human Rights,* 82 A.D.3d 431 [1st Dept. 2011]), *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 [1st Dept. 2009]). There is no evidence that plaintiff was treated less well that than other employees because of his protected characteristic. (*Id.*.) Moreover, there is no evidence here that plaintiff's employer "intentionally create[ed] a work atmosphere so intolerable that [he] is forced to quit involuntarily." (*Murphy v. Dept. of Educ. of the City of N.Y.,* 155 A.D.3d 637 [2d Dept. 2017]). As a result of the foregoing, plaintiff's hostile

work environment claims pursuant to SHRL and CHRL and claim for constructive discharge are dismissed.

Based on the foregoing, the defendants' motion is granted in its entirety.

Defendants shall serve a copy of this order with notice of entry upon plaintiff within 30 days of the entry date hereof. This constitutes the decision and judgment of the Court.

Dated: 11/17/21
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.