Weir v Montefiore Med. Ctr.
2021 NY Slip Op 33072(U)
November 5, 2021
Supreme Court, Bronx County
Docket Number: Index No. 42000/2020E
Judge: Rubén Franco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

NICHOLAS WEIR

Plaintiff,

-against-

MONTEFIORE MEDICAL CENTER, ALBERT EINSTEIN COLLEGE OF MEDICINE, AND YESHIVA UNIVERSITY

Defendants.

Index No. 42000/2020E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

This is an action for, *inter alia*, discrimination, retaliation, equal pay, and hostile work environment. Defendants Montefiore Medical Center (Montefiore), and Albert Einstein College of Medicine (AECOM) (collectively, "defendants") move for summary judgment (CPLR 3212) and to enjoin plaintiff from filing any other actions or motions against defendants without prior leave of the court. Plaintiff, an unrepresented litigant, cross-moves to "strike Defendants' summary judgment and portion of transcript from the Deposition of Nicholas Weir," to hold defendants' attorney in contempt for not producing Dr. Evripidis Gavathiotis for a deposition, to sanction defendants' attorneys, and to compel the production of documents requested.

Plaintiff identifies himself as a male with a dark complexion from Jamaica, who was employed by AECOM as a research technician from December 28, 2015, through March 4, 2016. He was interviewed and hired by Dr. Gavathiotis. The terms of plaintiff's employment were governed by a collective bargaining agreement between AECOM and the Union, 1199 SEIU, giving AECOM authority to terminate plaintiff at any time during his 90-day probationary period, and plaintiff's salary was determined by a memorandum agreement with the Union.

On December 15, 2015, two weeks before commencing his employment at AECOM, plaintiff mailed a Notice of Intention to File a Claim against CUNY and New York State to the Court of Claims and the Attorney General's Office alleging retaliation against him by CUNY and government agents, including the military, because of complaints plaintiff made about CUNY employees while plaintiff was a student at York College from 2013 to 2015 (CUNY lawsuit).

At AECOM, plaintiff's work was considered unsatisfactory, and in late February 2016, Dr. Gavathiotis advised plaintiff he did not pass his probationary period but could stay until March 31, 2016. Plaintiff complained to Employee Relations Specialist Anna Gartner (Gartner) on March 2, 2016, claiming that the CUNY lawsuit had influenced the decision to terminate his employment. Gartner consulted with Leslie Jefferson, the Department Administrator for Dr. Gavathiotis' laboratory, who was informed by Gartner that if plaintiff was terminated, he should not be working in the lab, whereupon Dr. Gavathiotis informed plaintiff that his last day would be March 4, 2016. On March 3, 2016, plaintiff appeared at Gartner's office and told her that the military recruited him at CUNY, and that he was being followed. Concerned about plaintiff's erratic comments, Gartner advised Dr. Gavathiotis to remove plaintiff, who was escorted out of the building by security.

At his deposition, plaintiff testified that he was terminated by AECOM in retaliation for his dispute with CUNY, not due to any discrimination because of race or national origin.

Plaintiff has commenced nine lawsuits, including one against instant defendants in federal court, which was dismissed, and this action. The other lawsuits involve other defendants.

A party moving for summary judgment must show *prima facie* an entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]; *Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; *Pokoik v Pokoik*, 115

AD3d 428 [1st Dept 2014]; CPLR 3212 [b]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006]). To defeat summary judgment, the party opposing the motion must show, also by producing evidentiary proof in admissible form, that there is a material question of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014])]). Admissible evidence includes affidavits by persons having knowledge of the facts (*see Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508 [2015]). The movant has the initial burden on the motion (*see Gammons v City of New York*, 24 NY3d 562, 569 [2014]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]; *Jaroslawicz v Prestige Caterers*, 292 AD2d 232, 233 [1st Dept 2002]).

A motion for summary judgment is not premature due to lack of discovery where the opponent does not demonstrate that discovery is necessary to obtain facts within the sole possession of the proponent (*see Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014]). It is not enough that discovery has not been completed or that further depositions are outstanding (*see Boyle v Caledonia-Mumford Cent. Sch.*, 140 AD3d 1619, 1621 [4th Dept 2016]). The summary judgment opponent must establish that the motion is premature because discovery may lead to relevant evidence, must specify the facts that are essential to justify their opposition, set forth some evidentiary basis to suggest that discovery may lead to relevant evidence, and demonstrate how further discovery may reveal material facts in the movant's exclusive knowledge (CPLR 3212 [f]; *see Vikram Constr., Inc. v Everest Natl. Ins. Co.*, 139 AD3d 720, 721 [2nd Dept 2016]). "The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion (*see Erkan v McDonald's Corp.*,

146 AD3d 466 [1st Dept 2017]; *DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480 [1st Dept 2015])." (*Singh v New York City Hous. Auth.*, 177 AD3d 475, 476 [1st Dept 2019].)

In *Forrest v Jewish Guild for the Blind* (3 NY3d 295, 305, 317 [2004]), the Court refined the standard in relation to discrimination claims: "To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual." To defeat summary judgment, the three-step framework provides that an employee must make a prima facie showing of racial discrimination, the employer must articulate a clear nondiscriminatory reason for the termination or other action, then the employee must show that the proffered reasons are pretextual. (*see Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 328 [1st Dept 2005].)

In order to state a claim of discrimination under Executive Law § 296 (NYSHRL) and Administrative Code of the City of New York § 8-107 (NYCHRL), a plaintiff must show "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination." (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018].)

To make out a claim for retaliation "under the State HRL, a plaintiff must show that (1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*,

3 NY3d 295, 312-313 [2004]; Executive Law § 296 [7]). Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant 'took an action that disadvantaged' him or her (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]; *see also Albunio v City of New York*, 67 AD3d 407, 413 [1st Dept 2009], *affd* 16 NY3d 472 [2011])." (*id.* at 585.)

With respect to termination, a "same actor inference" exists that discrimination is not a determining factor for adverse action taken when the hirer and the firer are the same person and the termination of employment occurs within a relatively short time span after the hiring (*see Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d at 329).

Defendants rely on plaintiff's deposition statements including that "the race thing is fuzzy" and "let me just leave it at retaliation" (plaintiff's deposition pages 279 – 280). With respect to the pay equity claim, plaintiff testified that his complaint was not based on his race or national origin (plaintiff's deposition pages 254 – 257). He also testified that the hostile work environment claim was also not based on race, but due to plaintiff's inability to work with Ms. Uchime, who is also Black (plaintiff's deposition pages 257 – 258). With respect to retaliation, plaintiff admitted that he did not know if anyone at AECOM was aware that government agents were stalking him (plaintiff's deposition pages 248 – 249).

Dr. Gavathiotis submitted an affirmation wherein he states that he hired plaintiff after interviewing him and was not happy with his performance as a Research Technician. He also states that he received complaints from co-workers, including that plaintiff engaged in a loud verbal conflict with Ms. Uchime; that he never heard of plaintiff being followed by the military or that plaintiff had filed a lawsuit against CUNY; that plaintiff never complained about discrimination; and denies plaintiff's claim that he was bribed by unidentified government agents, or anyone, to end plaintiff's employment.

Plaintiff contends that defendants refused to engage in discovery, however, he does not show that discovery may lead to relevant evidence and does not specify the facts that are essential to justify his opposition. Plaintiff restates the facts in a conclusory manner in an attempt to create a question of fact. However, there is no showing that defendants' actions were based on discrimination. With respect retaliation, plaintiff proposes speculative theories regarding which employees at AECOM were aware of or were influenced by his dispute with CUNY.

The court finds that defendants make a prima facie showing of entitlement to judgment as a matter of law, and that plaintiff does not demonstrate that defendants engaged in discrimination or retaliation, or that their explanation for termination was pretextual. Plaintiff does not establish the existence of questions of material fact for a jury to consider.

Public policy requires free access to the courts. However, the judicial system should not be used as a "vehicle for harassment, ill will and spite" (*Matter of Sud v Sud*, 227 AD2d 319 [1st Dept 1996]). To be vexatious, a claim must be shown to have been instituted "maliciously or without probable cause" (*see Paramount Pictures, Inc. v Blumenthal*, 256 App Div 756, 760 [1st Dept 1939]). Continuous and vexatious litigation against a person may result in a court Order barring that person from initiating further litigation or motion practice without prior court approval, unless the person is represented by counsel (*see Banushi v Law Off. of Scott W. Epstein*, 110 AD3d 558 [1st Dept 2013]).

Here, plaintiff has initiated nine lawsuits over the past five years. However, except for this action and the 2016 federal action, the other seven lawsuits involve other parties. The court finds that defendants have not shown that this action was commenced maliciously or without probable cause sufficient to enjoin plaintiff at this time.

The court has considered the parties' other arguments and found them unavailing.

Accordingly, defendants' motion for summary judgment is granted, and their motion to enjoin plaintiff from filing any other actions or motions against defendants, without prior leave of the court, is denied.

Plaintiff's cross motion, to "strike Defendants' summary judgment and portion of transcript from the Deposition of Nicholas Weir," to hold defendants' attorney in contempt for not producing Dr. Gavathiotis for a deposition, to sanction defendants' attorneys, and to compel the production of documents requested in the June 29, 2021 document request and other outstanding discovery requests, is denied.

This constitutes the Decision and Order of the court.

Dated: November 5, 2021

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO