

Seemungal v New York State Dept. of Fin. Servs.

2022 NY Slip Op 31912(U)

June 17, 2022

Supreme Court, New York County

Docket Number: Index No. 151495/2021

Judge: Lisa Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA HEADLEY PART 28M

Justice

-----X

RICHARD SEEMUNGAL,

Plaintiff,

- v -

NEW YORK STATE DEPARTMENT OF FINANCIAL
SERVICES, RHOLDA RICKETTS

Defendant.

-----X

INDEX NO. 151495/2021

MOTION DATE 03/31/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

DISMISSAL

Before the Court is defendant New York State Department of Financial Services, and Rholda Ricketts, Deputy Superintendent of the Mortgage Banking Division of DFS's (hereinafter, "Defendants") motion for an order pursuant to CPLR §3211 (a)(5) and (a)(7) dismissing plaintiff's complaint for failure to state a cause of action for sex discrimination and retaliation. Additionally, defendants argue that plaintiff's sex discrimination claim is barred by the statute of limitations. Plaintiff filed opposition. Defendants filed a reply.

Defendants allege that plaintiff's claim under the New York State Human Rights Law ("NYSHRL") in which he alleges he was subjected to a hostile work environment due to his sex is merely speculative. Defendants state any disciplinary actions taken against plaintiff were based on plaintiff's time and attendance issues, not his sex. Likewise, defendants allege that plaintiff's retaliation claim is conclusory, and plaintiff fails to allege that defendant Ricketts had any involvement with the supposed retaliation against him. Lastly, defendants argue the majority of the underlying events that make up the sex discrimination claim occurred outside of the three-year statute of limitations applicable to NYSHRL claims. While there were a few alleged actions that occurred within the three-year statute of limitations, defendants argue that there is no indication these actions were motivated by the plaintiff's sex.

In opposition, plaintiff argues, that the allegations support a cause of action for sex discrimination under both the NYSHRL and the amended version of the NYSHRL. Plaintiff states there was a hostile work environment because he was not assigned work that was consistent with his level of experience, he was subjected to different policies than his female co-workers, and he was the subject of rants made by Defendant Ricketts. Plaintiff also claims that after he filed a complaint with the NYS Governor's Office of Employee Relations ("GOER") in August 2019, he was approached by a supervisor who stated that plaintiff would need to be

counseled for his time and attendance issues. Additionally, plaintiff claims that after he filed a complaint against defendants with the United States Equal Employment Opportunity Commission (“EEOC”) on December 2, 2019, defendants filed disciplinary charges against him for taking minimal time in the morning to monitor the arrivals of other employees. Plaintiff argues that defendants were fully aware plaintiff was monitoring employee arrivals in the mornings, but only after defendants discovered an EEOC complaint was filed against them, did they choose to retaliate. Lastly, plaintiff argues that the prejudicial actions that took place before February 11, 2018, which violate the statute of limitations, are similar to the actions that occurred after February 11, 2018, and all actions should be treated as timely according to the continuing violation doctrine.

Defendants reply by explaining that in both pre- and post-amendment of the NYSHRL, plaintiff still needs to present evidence that the actions taken against him by defendants were because of his sex, and not his past time and attendance issues. Likewise, defendants reiterate the fact that Plaintiff had a history of time theft and failing to report to work, and that any alleged “retaliation” by defendants was nothing more than an ongoing internal investigation into the inability of plaintiff to work for the hours expected of him. Lastly, defendants argue that the continuing violation doctrine does not apply because plaintiff did not submit sufficient evidence to illustrate a pattern of *ongoing* discrimination, and there is a significant time gap between plaintiff’s pre-February 2018 claims and the claims arising in 2019.

The Court notes that “on a pre-answer motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction and the plaintiff’s allegations are accepted as true and accorded the benefit of every possible favorable inference” (*Barker v Amorini*, 121 A.D. 3d 823, 824 [2d Dept 2014]). However, “bare legal conclusions are not presumed to be true.” *Id.* When evaluating a CPLR §3211 (a)(7) motion, the court must “[l]ook to the substance rather than to the form. Such a motion is solely directed to the inquiry of whether or not the pleading, considered as a whole, ‘fails to state a cause of action’. Looseness, verbosity and excursiveness, must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading” (*Foley v D’Agostino*, 21 A.D. 2d 60, 64 [1st Dept 1964]).

As an initial matter, plaintiff failed to state a cause of action for sex discrimination under the New York State Human Rights Law. Plaintiff’s allegations are conclusory in nature, and fail to explain how defendants’ actions were based on plaintiff’s sex, and not his lengthy history of poor time keeping and low attendance at work. While plaintiff’s pleading is to be afforded a liberal construction under the CPLR, Plaintiff does not explain how any actions by defendants, occurring within the statute of limitations period, were motivated by plaintiff’s sex. For instance, plaintiff states that he was instructed to speak with a supervisor in order to call in sick, he was monitored by a supervisor when he was at his desk, and he witnessed female employees arriving late who were not directed to charge late arrivals. Plaintiff indicates these examples show disparate treatment between male and female employees, however, plaintiff fails to recognize that these actions could just as well be based on plaintiff’s extensive history of missing work, and not accurately reporting his time-sheet. Plaintiff does not set forth any sufficient evidence to prove that defendants’ actions were rooted in discrimination, rather than, defendants following protocol to ensure that plaintiff fulfilled his employment obligations. Likewise, plaintiff does not set forth any factual evidence to prove that female employees were not penalized for late arrivals, nor does he compare the female employees’ history of absences or time related issues to his own.

Plaintiff has taken sixty-two unscheduled full or partial day absences, totaling 368.5 hours between January 8, 2019, and August 5, 2019. Plaintiff merely concludes that defendants' actions were motivated by his sex, but offers no evidence to rebut the idea that defendants were acting in regards to plaintiff's lengthy record of absences and false time-keeping. This Court must not regard plaintiff's bare legal conclusions as true; therefore, plaintiff has failed to state a cause of action for sex discrimination.

Secondly, plaintiff did not set forth sufficient evidence to show that there was a causal connection between Plaintiff's complaint with the GOER and EEOC, and defendants' decision to discipline plaintiff for a work-related infraction. Pursuant to the NYSHRL, a plaintiff may establish a causal connection "indirectly by 'showing that the protected activity was followed by discriminatory treatment ... or directly through evidence of retaliatory animus'" (*Cosgrove v Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 [2d Cir 1993]). In regards to the GOER complaint, plaintiff does not present any evidence to show defendant Ricketts had knowledge of the complaint, and was involved in any supposed retaliatory action against plaintiff. Additionally, the disciplinary action taken by defendants after the GOER complaint, but before the EEOC complaint, was based on repeated absences from months prior in which plaintiff was aware of. As for the EEOC complaint, plaintiff argues that the disciplinary actions, the suspension without pay in 2020, and resignation were a result of defendants' knowledge of the complaint filed by plaintiff. However, these actions occurred months after the EEOC complaint on December 2, 2019, and were related to plaintiff's repeated time and attendance infractions. Likewise, plaintiff has no direct evidence to show that defendant Ricketts knew of the EEOC complaint filed, or acted in a retaliatory manner as a result of the EEOC complaint. Plaintiff suggests that his filing of the GOER and EEOC complaint led to defendants' disciplinary actions, but plaintiff has been given warnings and faced disciplinary actions prior to and long after each of the complaints were filed. Plaintiff merely presents a timeline of events, and fails to show a connection between the complaints being filed, and defendants' actions resulting from the complaint being filed.

Lastly, plaintiff's claim that the continuing violation doctrine would apply in this case is erroneous. The continuing violation doctrine is inapplicable if one failed to show proof that the time-barred allegations constituted a pattern of ongoing discriminatory conduct or a continuing hostile work environment (*Mira v Harder (Evans)*, 177 A.D. 3d 426 [1st Dept 2019]). Plaintiff did not present sufficient evidence to show that there was a pattern of ongoing discrimination against him, and failed to adequately show how the 2019 allegations were a continuance of the pre-2018 claims about a hostile work environment. Plaintiff's last allegation before the statute of limitations ran was based on a 2017 notice that plaintiff would need to charge leave time for time he spent away from his desk, and the next dated allegation was a notification he received on August 12, 2019, regarding his time and attendance in January 2019. There is a significant gap in time between allegations, and plaintiff does not reconcile how the actions that occurred in 2019 were the result of a continued practice of discrimination. Plaintiff merely presents enough evidence to show that these actions had similar subject matter, but does not prove that these actions were a result of an ongoing pattern of discriminatory behavior by defendants. This Court does not find that the pre-2018 claims and the 2019 claims warrant the use of the continuing violation doctrine, as there is a significant gap in time, and the actions do not show an ongoing pattern of discrimination.

Here, based upon the above, Plaintiff has failed to establish a cause of action for sex

discrimination and retaliation. In addition, plaintiff's argument that the continuing violation doctrine should apply in this case is erroneous.

Accordingly, it is

ORDERED that the Defendants' Motion to Dismiss is GRANTED on the basis that this Court finds plaintiff failed to state a cause of action for sex discrimination and retaliation; and it is further

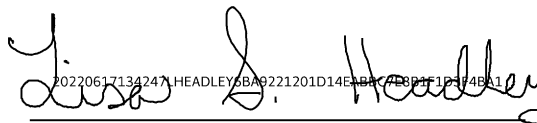
ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered and is denied; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

6/17/2022

DATE



LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE