SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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KERRIANNE ALKINS, KANIKA ASHTERMAN, EDWARD KELLY, SARAH RICHARDS, ROSSNEY SOLJOUR, ERIC TAYLOR, ARTHUR WHITE, RALPH JOSEPH, MICHAEL NITKA, DOMINIQUE WITSELL

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, SALVATORE AGOSTINO, JERRY A WIGGINS,

Defendant.

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INDEX NO. 160778/2021

MOTION DATE 08/01/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35
were read on this motion to/for DISMISS.

In this action alleging violations of the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"), intentional infliction of emotional distress, and violations of the Family and Medical Leave Act ("FMLA"), defendants the City of New York ("City"), New York City Department of Buildings ("DOB"), Salvatore Agostino, and Jerry A Wiggins (collectively "Defendants") move for an order pursuant to CPLR 3211 dismissing the Amended Complaint in its entirety. Plaintiffs oppose the motion.

BACKGROUND

This action arises out of alleged discrimination experienced by Plaintiffs during their employment with the DOB. Plaintiffs are current and former DOB employees who are all African American, except for Plaintiff Nitka, who is "a person of Caucasian ancestry" (NYSCEF Doc. No. 26, Amended Complaint ¶¶ 14-23). According to the Amended Complaint, Defendant

Agostino is employed by the DOB as a Marshal (*id*. ¶ 28). In this position, Agostino allegedly was the supervisor of, or held supervisory authority over, Plaintiffs and possessed the authority to hire, fire, or "effect [*sic*] the terms and conditions of Plaintiffs' employment" (*id*. ¶ 29). Plaintiffs state that Defendant Wiggins is employed by the DOB as an Assistant Chief Inspector and that he was a supervisor "with the authority to hire, fire or affect the terms and conditions of Plaintiffs' employment" (*id*. ¶¶ 30-31). Agostino and Wiggins are both white.

Plaintiffs allege that they have been "subjected to both overt, and thinly cloaked and systematic, racism" (*id*. ¶ 2). The systematic discrimination allegedly experienced by Plaintiffs included "disparate treatment in discipline, perquisites, promotions, opportunities for training, automobiles and advancement, overtime and working conditions" based on race and disability (*id*. ¶ 3). Specifically, Plaintiffs allege that unqualified white employees who failed civil service examinations were given preference for promotion over Black employees with superior qualifications (*id*. ¶¶ 3-4).

Plaintiffs further maintain that Black employees were routinely denied what they state as basic work means such as access to vehicles that were provided to white employees. Black employees seeking medical accommodations were allegedly subject to greater scrutiny than white employees and denied requests for accommodations, whereas white employees were generally granted accommodations. Additionally, the Complaint asserts that Black employees were terminated or constructively discharged without merit based on pretextual bases (*id*. ¶ 6).

Plaintiffs further allege that they routinely observed the bullying of Black employees by Defendants and that Black employees were subject to unwarranted writeups and disciplinary actions by their supervisors (*id*. ¶ 11). Finally, Plaintiffs allege that there was a climate of fear

that sought to deter the reporting of racism in their division and that Black employees were subject to surveillance (*id*. ¶ 13).

Plaintiffs allege that Agostino and Wiggins caused, contributed to, or failed to remediate the generally discriminatory environment. Plaintiffs allege that Agostino's long tenure, the fact that he came up through the ranks of the DOB Office of Internal Audits and Discipline, and his "close working relationships with" various DOB offices allowed him to create an impression that he was not vulnerable to discipline in order to discourage employee complaints and to create a fear of retaliation (*id*. ¶ 34). This behavior purportedly discouraged employees from making complaints about discriminatory behavior in which Agostino's subordinates engaged (*id*. ¶ 35). Plaintiffs further allege that Agostino ignored Plaintiffs' concerns about discriminatory treatment and fostered a hostile work environment (*id*. ¶ 46).

With respect to Wiggins, Plaintiffs aver that he was particularly blatant in expressing his racist sentiments (*id*. ¶ 7). Plaintiffs allege that Wiggins repeatedly made a racist gesture to symbolize individuals' skin color, that he expressed a desire to conduct a disciplinary purge of Black employees, and that he stated that "various black persons should not be in positions of authority or power at the DOB" (*id.*). Plaintiffs further allege that when Wiggins would complain about the attitudes, work ethic, and productivity of Black employees when they were not in the room with him and that he displayed physical disgust when he complained about the use of cars by Black employees (*id*.).

In addition to alleging that Plaintiffs experienced the foregoing behavior, the Amended Complaint pleads incidents when Plaintiffs were specifically affected in this environment. As set forth in the Amended Complaint, three Plaintiffs were required to come into the office in 2020 while white employees were granted work from home privileges, and one was forced to share a

vehicle with other coworkers who had been exposed to COVID (Complaint ¶¶ 41, 43). That Plaintiff was also purportedly denied FMLA leave to work from home in August 2021 while her children attended remote school (*id.*). Other Plaintiffs had their driving and company car privileges revoked without cause despite, in some cases, having physical conditions that made walking difficult (*id.* ¶ 43, 48, 49). Plaintiffs assert they were terminated or otherwise retaliated against for complaining about these acts to their union or elsewhere (*id.* ¶ 22, 37, 39, 47, 49, 52).

The Amended Complaint pleads twelve causes of action. Plaintiffs assert racial discrimination, disability discrimination, retaliation, wrongful termination, and constructive discharge under the NYSHRL and NYCHRL. They further assert a tort claim for intentional infliction of emotional distress and allege Defendants violated the FMLA. Defendants move pursuant to CPLR 3211(a)(7) to dismiss all claims for failure to state a cause of action.

DISCUSSION

"In considering a motion to dismiss for failure to state a cause of action, the court is required to accept as true the facts as alleged in the complaint, afford the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]).

Claims Asserted as to Plaintiffs Alkins Ashterman, Kelly, Richards, Soljuor, and Witsell

Defendants seek dismissal of all claims alleged by these Plaintiffs, arguing the complaint is insufficiently plead. They contend Plaintiffs do not include dates for certain acts or occurrences alleged, thereby preventing a court from determining whether the statute of limitations has expired for claims based on these incidents (NYSCEF Doc. No. 29). CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and

parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (*see also Travelers Ins. Co. v Ferco, Inc.*, 122 AD2d 718, 719 [1st Dept 1986]). "Pleadings which are so devoid of factual substance require dismissal pursuant to CPLR 3211(a)(7)" (*id.*).

The Court finds that the claims of Kelly and Witsell are not pled with sufficient specificity. The Amended Complaint contains a one-sentence allegation that Kelly's car privileges were removed, without alleging a date when this action occurred or the circumstances surrounding the purported revocation (Complaint ¶ 48). As to Witsell, the Amended Complaint contains only the allegation that Agostino told Witsell to refer to him as "sir" after Witsell approached him with "concerns" without stating when this allegedly occurred (*id*. ¶ 46). These allegations are bereft of the specificity and substance necessary to provide the Court and Defendants with notice of the transactions or occurrences that Plaintiffs seek to prove.

However, the Court finds that the Amended Complaint's allegations with respect to Alkins, Ashterman, Richards, and Soljour are pled with sufficient particularity to put the Court on notice of the purported transactions or occurrences. The Amended Complaint alleges, *inter alia*, that certain Plaintiffs were denied work from home privileges while white employees were granted. It further alleges that in 2018 Defendants denied a promotion to two different Plaintiffs and that the promotion was then given to a less-qualified person of a different race. When read together, the specific allegations related to each of these individuals are particular enough to discern the elements of the causes of action that Plaintiffs seek to prove.

Election of Remedies – Taylor's NYSHRL and NYCHRL Claims

Defendants seek dismissal of Taylor's claims because he previously filed a complaint with the New York State Division of Human Rights ("NYSDHR") on October 17, 2019 alleging

race, sex, and national origin discrimination and retaliation. Both the NYSHRL and NYCHRL bar plaintiffs from asserting discrimination claims in a civil action where they have already pursued an administrative remedy (NY Exec. L. § 297[9]; NYC Admin. Code 8-502[a]; *see, e.g., Matter of Hollander v City of New York Commn. on Human Rights*, 118 AD3d 418 [1st Dept 2014]). Plaintiffs assert that Taylor only brought claims for race, sex, national origin discrimination and retaliation before the NYSDHR and not claims based on his alleged disability (Complaint ¶ 37), however the Determination After Investigation and Final Investigative Report for Taylor's administrative complaint states that he accused the City and DOB of "an unlawful discriminatory practice related to employment because of . . . disability" (NYSCEF Doc. No. 28). Having first availed himself of an administrative remedy with respect to his discrimination allegations, Taylor's claims under the NYSHRL and NYCHRL in this action must be dismissed.

Race Discrimination Claims

Defendants seek dismissal of the Plaintiffs' first and second causes of action alleging race discrimination claims under the NYSHRL and NYCHRL. A plaintiff states a claim for race-based employment discrimination under the NYSHRL and NYCHRL by pleading facts sufficient to support a prima facie case that the plaintiff (1) is a member of a protected class, (2) was qualified to hold their position, (3) suffered an adverse employment consequence (NYSHRL) or was treated differently than other employees (NYCHRL), and (4) that the employer's adverse action or differential treatment occurred in circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). An adverse employment action under the NYSHRL "requires a materially adverse change in the terms and conditions of employment"

(*Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]), i.e., "more disruptive than a mere inconvenience or alteration of job responsibilities" (*id.*).

The Amended Complaint alleges Defendants denied Alkins, Soljour, and Joseph work from home privileges in 2020 but allowed white employees to work from home in the same period (Complaint ¶ 43). Plaintiffs further allege that Defendants forced Alkins to share a vehicle with COVID-exposed coworkers in August and September 2020 (*id.*). Additionally, Ashterman was allegedly denied a promotion to Supervisor of Investigation in 2018 and Defendants instead promoted a "white Hispanic woman with fewer qualifications" (*id.* ¶ 41). Defendants assert Plaintiffs have failed to plead facts sufficient to allege that they suffered adverse employment actions or facts that lead to an inference of discrimination.

The Court finds that Plaintiffs state a cause of action for racial discrimination under the NYSHRL. It is undisputed that Plaintiffs are members of a protected class, and Plaintiffs sufficiently plead that they are qualified for their current and former positions and the positions to which they allegedly applied for promotions. Defendants' denial of requests to work from home during the COVID-19 pandemic as set forth in the Complaint is a materially adverse change to conditions of their employment because the risk to their health and safety amounted to more than a "mere inconvenience" (*Messinger*, 16 AD3d at 314-315). The allegation that white employees were granted work from home privileges during the same period is sufficient to give rise to an inference of discrimination. Defendant's denial of a promotion in 2018 is also a materially adverse change from which an inference of discrimination can be drawn (*see, e.g., Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016]). Because Plaintiffs have stated a cause of action for racial discrimination under the NYSHRL, the Court finds that they have stated a claim under the broader NYCHRL.

Disability Discrimination Claims

Defendants next seek dismissal of Plaintiffs' third and fourth causes of action alleging disability discrimination under the NYSHRL and NYCHRL. A plaintiff pleads a prima facie case of disability discrimination under the NYSHRL and NYCHRL by alleging that the plaintiff has a disability, was qualified to hold the position at issue, suffered from an adverse employment action (NYSHRL) or an action that disadvantaged them (NYCHRL) (*Cuccia v Martinez & Ritorto, PC*, 61 AD3d 609, 610 [1st Dept 2009]).

The Amended Complaint asserts that Defendants discriminated against White because of his diabetic neuropathy; specifically, that he was denied a reasonable accommodation to alter his working hours in order to attend therapy appointments and had his car privileges revoked by Defendants, forcing him to walk for the entirety of his shifts (Complaint ¶ 49). Defendants argue that these allegations are too vague, and that Plaintiffs fail to allege facts that establish a nexus between the revocation of White's driving privileges to his diabetic neuropathy such that an inference of discrimination could be made. They further argue that revocation of driving privileges did not constitute an adverse employment action in this context.

The Court finds that Plaintiffs state a cause of action for disability discrimination under the NYSHRL and NYCHRL. Plaintiffs sufficiently plead that White suffers from a disability in the form of diabetic neuropathy under the NYSHRL and NYCHRL (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 883-884 [2013]), and the alleged revocation of his driving privileges and denial of subsequent requests for this accommodation constitute adverse or disadvantageous employment actions that give rise to an inference of discrimination. Given that White's diabetic neuropathy allegedly caused him severe bodily pain due to nerve damage, these actions are sufficient to state a claim for disability discrimination.

Retaliation Claims

The next branch of the motion seeks to dismiss the fifth and sixth causes of action for retaliation under the NYSHRL and NYCHRL. A plaintiff makes a prima facie case for retaliation by showing that (1) the plaintiff engaged in a protected activity, (2) the employer was aware of the protected activity, (3) the plaintiff suffered an adverse employment action (NYSHRL) or the employer took an action that disadvantaged the plaintiff (NYCHRL), and (4) there was a causal connection between the protected activity and the adverse or disadvantageous action (*Harrington*, 157 AD3d at 585; *Forrest*, 3 NY3d at 312-313). Complaints to an employer about disparate treatment based on a protected characteristic is protected activity (*Forrest*, 308 AD2d at 558). A causal connection between a plaintiff's protected activity and an employer's adverse or disadvantageous action can by shown by the temporal proximity between these actions (*Harrington*, 157 AD3d at 586; *see also Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 [1st Dept 2010]).

Under the NYCHRL's more liberal pleading standard, an action that disadvantages a plaintiff "must be reasonably likely to deter a person from engaging in protected activity" even if such action does not result in a materially adverse change in employment conditions (N.Y.C. Admin. Code § 8-107[7]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *Harrington*, 157 AD3d at 584). However, an employment action is not disadvantageous where the plaintiff is "written up for insubordination, threatened with discipline [for failure] to meet expectations," or denied perquisites to which they are not entitled (*Sims v Trustees of Columbia Univ. in the City of N.Y.*, 168 AD3d 622, 623 [1st Dept 2019]).

With respect to these claims, Plaintiffs specifically allege that certain Plaintiffs suffered adverse employment actions after making complaints about their employers (Complaint ¶¶ 37, 39, 47, 49, 51). Defendants assert that the Amended Complaint fails to show that Defendants were aware of the protected activity, and that there was no temporal proximity or causal connection between a protected activity and adverse employment action.

Plaintiffs fail to allege that Defendants were aware of any of the protected activities in which certain Plaintiffs, specifically Ashterman and Joseph, engaged. Additionally, Defendants' alleged retaliatory acts against White lack temporal proximity to his protected activities. Schedule changes and revocation of car privilege revocations do not constitute adverse employment actions or actions that disadvantaged Plaintiffs in these circumstances. Finally, Defendants' alleged discipline of Nitka is not actionable because he continued to engage in protected activity after his writeups. Therefore, the fifth and sixth causes of action for retaliation are dismissed.

Wrongful Termination Claims

The seventh and eighth causes of action for wrongful termination must be dismissed. As Defendants argue, the Amended Complaint asserts this action as to Taylor only, and his claims are barred by the election of remedies. Although Plaintiffs contend in their papers that Ashterman, Richards, and Soljour were wrongfully terminated by being passed over for promotions, non-promotions do not support a claim for wrongful termination.

Constructive Discharge Claims

Defendants seek to dismiss Plaintiffs' ninth and tenth causes of action for constructive discharge. A plaintiff states a claim for constructive discharge under the NYCHRL where they allege that the "defendant deliberately created working conditions so intolerable, difficult or

unpleasant that a reasonable person would have felt compelled to resign" (*Crookendale v New York City Health & Hosps. Corp.*, 175 AD3d 1132 [1st Dept 2019], quoting *Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504 [1st Dept 2010] [internal quotation marks omitted]). An employee's mere dissatisfaction with changes in his or her job assignments is not enough to create an intolerable workplace environment (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 622 [2006]).

The Court finds that Plaintiffs fail to state a cause of action for constructive discharge. The conditions pled in the Amended Complaint, even when read in the light most favorable to Plaintiffs, are not so intolerable as to compel Plaintiffs to resign and thus cannot form the basis of a constructive discharge claim. Furthermore, although Plaintiffs levy numerous allegations about the racially hostile work environment at DOB, they fail to allege a nexus between these alleged conditions and the decisions of Plaintiffs to resign.

Intentional Infliction of Emotional Distress

Defendants next move to dismiss the tenth cause of action for intentional infliction of emotional distress ("IIED"). The Court dismisses this claim as against the City and DOB. Plaintiffs do not show that a notice of claim was filed upon the City or DOB as required by General Municipal Law § 50-e(1)(b). As to Agostino and Wiggins, Plaintiffs must allege "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115 [1993]; *see also Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010]). Plaintiffs do not allege a causal connection between these Defendants' conduct and specific injuries caused to any individual Plaintiffs. The Amended Complaint does not indicate which Plaintiffs, if any, were subject to outrageous or

extreme conduct. It likewise does not allege that any Plaintiff aside from Richards experienced severe emotional distress, and it fails to allege that Richards directly experienced any of the allegedly outrageous or extreme conduct carried out by Agostino and Wiggins.

Family and Medical Leave Act

Plaintiffs allege that White is an eligible employee, and that Defendants are a covered employer under the statute. Plaintiffs further allege that White suffers from a health condition that makes him unable to perform the everyday functions of his job and that his request for leave under the FMLA was denied by Defendant. The Court finds that Plaintiffs sufficiently state their eleventh cause of action under the FMLA (29 USC § 2611[2][A]).

Accordingly, it is hereby:

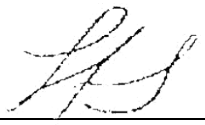
ORDERED that the motion is granted in part and denied in part; and it is further

ORDERED that the fifth through eleventh causes of action are dismissed; and it is further

ORDERED that the Amended Complaint is dismissed in its entirety with respect to plaintiffs Edward Kelly, Eric Taylor, and Dominique Witsell; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein.



12/19/2022
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

160778/2021 ALKINS, KERRIANNE ET AL vs. CITY OF NEW YORK ET AL
Motion No. 002