SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **05RCP**

Justice

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JEFFREY EUSTACHE,

Plaintiff,

- v -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, SHARON LAFIA

Defendant.

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INDEX NO. 153619/2019

MOTION DATE N/A

MOTION SEQ. NO. 004

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiff Jeffrey Eustache commenced this action against defendants the New York City Board of Education and Sharon Lafia in April 2019, asserting causes of action under New York State and New York City Human Rights Laws (respectively, "NYSHRL" and "NYCHRL") for gender and racial discrimination, hostile work environment, and retaliation. In motion sequence 002, the Court granted the City Board of Education's motion to dismiss each of plaintiff's claims that were based on direct liability, including for sexual discrimination and retaliation, but denied the motion as to the Board's vicarious liability. In motion sequence 003 (which the Court consolidated with mot. seq. 002), the Court granted Lafia's motion to dismiss the complaint in its entirety. Now, in motion sequence 004, plaintiff moves under CPLR 2221 (d) for leave to reargue the above motions; alternatively, failing there, plaintiff moves under CPLR 3025 to amend the First Amended Complaint. For the following reasons, plaintiff's motion under CPLR 2221 is granted to the extent that the Court erred in dismissing plaintiff's retaliation cause of action against both defendants.

BACKGROUND[1]

In 2017, plaintiff was employed by the New York City Board of Education (otherwise known as the New York City Department of Education, or "DOE") as a teaching assistant or paraprofessional assigned to Middle School 171, Abraham Lincoln Intermediate School. Plaintiff specialized in working with students with special needs, including those with physical, intellectual, and emotional disabilities. From late 2017 through May 2018, Lafia—a teacher at the middle school—allegedly made repeated unwanted sexual advances toward plaintiff. These

[1] For a more comprehensive detailing of plaintiff's factual allegations, see the Court's decision and order om motion sequences 002 and 003. (NYSCEF doc. no. 36.) For purposes of this motion, the Court will only recite the factual allegations relevant to the motion to renew.

advances included, but were not limited to, calls and text messages to plaintiff wherein Lafia wrote "You hung up on us, or were you hiding under a pillow to speak to us" (NYSCEF doc. no. 12 at ¶12, amended complaint), "OMG. We are hot. U got nervous and distracted. We love u. We are hot white girls. You can't handle us" (*id.* at ¶25), "We can have sex too" in response to the school's principal, Indira Mota, assigning plaintiff to work in Lafia's classroom, and referring to plaintiff as "my black lover" (*id.* at ¶26). According to the amended complaint, Lafia made physical advances as well, including an attempt to sit on plaintiff's lap in the classroom (*id.* at ¶43) and repeatedly rubbing his shoulders in a sexual manner (*id.* at ¶97).

On May 10, 2018, plaintiff reported Lafia's conduct to Principal Mota, who allegedly did not credit his accusations but did inform him he could file a claim with the Department of Education's Office of Equal Employment. (*Id.* at ¶103.) Plaintiff filed an OEO claim (the "OEO Claim") against Lafia that same day. The next morning, Principal Mota informed plaintiff that he would be working that day in "In-House Suspension" room. (*Id.* at ¶108). Shortly thereafter, Principal Mota informed plaintiff that he was being suspended without pay pending an "investigation." (*Id.* at ¶109.) When plaintiff contacted the DOE's Human Resources department regarding the nature and reason for his suspension, the HR associate, Christopher Rodriguez, explained that he had no idea why but that he would find out. (*Id.* at ¶111.)

According to the amended complaint, plaintiff was not informed of the reason for his suspension until May 21, 2018, when Assistant Principal Kristen Conlon and Union Representative Mercedes Perez explained that he had been suspended for looking at a picture of a woman in a bathing suit on Instagram in the classroom and in front of students back on May 8. (*Id.* at ¶119.) Plaintiff denied the incident occurred, explaining that he was on a field trip with students that day so he was not in the classroom and that his phone has a privacy protector installed that prevents others from seeing the content of the phone. (*Id.* at ¶ 120-121.) Moreover, Conlon allegedly stated at this time "in [her] twenty years of being an assistant principal, [she had] never seen someone be suspended without pay for something that had nothing to do with endangering a child, or an arrest." (*Id.* at ¶122.)

Through September 2018, plaintiff remained suspended while Lafia continued to work for the DOE. According to plaintiff, neither the DOE nor Mota provided him with information about the investigation or whether the suspension would carry on to the next school year. (*Id.* at ¶¶129-130.) On September 25, 2018, plaintiff was asked to attend a conference with Perez and Conlon. There, they informed plaintiff that he had been found guilty of viewing inappropriate content, but the date of the occurrence had been changed to May 9, 2018 (when plaintiff was teaching in the class)—not, as he was previously informed, on May 8. (*Id.* at ¶142.) They also informed plaintiff that his previous months of suspension would be his punishment and that he could return to work the next day.

Upon returning, plaintiff alleges that Conlon, Assistant Principal Griffith, and Lafia created a hostile and harassing work environment in retaliation for the OEO claim. He alleges they treated him differently from, and worse than, his co-workers—including by watching him "intimidatingly" in the classroom (*id.* at ¶153), failing to address aggressive student behavior that referred to plaintiff as a "faggot" and the "N-word" (*id.* at ¶160-161) and by demeaning and mocking plaintiff in front of his co-workers (*id.* at ¶159). After taking a temporary leave,

plaintiff returned in the for the fall 2019 semester, only to be informed that he would be scheduled to work in Lafia's classroom. At this time, one teacher told plaintiff that she went to their union representative and told him or her that "If Mr. E [plaintiff] ever comes to you saying that he is being mistreated by AP Griffith, you should believe him, because I see it." (*Id.* at ¶171.) Plaintiff further reported this retaliatory hostile environment to Mota, who allegedly did nothing to investigate or discipline those involved. (*Id.* at ¶183.)

PROCEDURAL HISTORY

As described *supra*, defendants DOE and Lafia, respectively, moved to dismiss certain causes of action in the amended complaint pursuant to CPLR 3211 (a) (7). By Decision and Order dated September 16, 2021, the Court resolved these motions in sequences 002 and 003. Because plaintiff now seeks leave to reargue certain branches of the Court's decision and order, a description of the pertinent holdings is warranted.

As against the DOE, the Court dismissed all of "plaintiff's claims for direct liability against the DOE for discrimination." (NYSCEF doc. no. 36 at 6, September 16 Decision and Order.) The Court reasoned that Lafia, having no ability to affect the terms or conditions of plaintiff's employment, was not plaintiff's supervisor. Because of this, and the fact that plaintiff did not allege any discriminatory conduct on the part of plaintiff's actual supervisors—Mota, Conlon, and Griffith, the Court determined plaintiff had not pled a claim of direct liability against the DOE as to gender discrimination. (*Id.*) In citing to *Zakrzewska v New School* (14 NY3d 469 [2010]), however, the Court found that the DOE could be held liable for gender discrimination on a vicarious theory of liability, as it knew of Lafia's discriminatory conduct but failed to take immediate and appropriate corrective action.

For plaintiff's retaliation claim, the Court recognized that plaintiff properly asserted the protected-activity prong of the cause of action (i.e. that he complained to Mota and filed the OEO claim). However, it also found he had not pled facts that indicated a causal connection between the protected activity and his suspension. (*Id.* at 7.) In the Court's words, plaintiff's allegation that he was suspended as a result of a "bogus charge against him" "irreparably diminish[ed] plaintiff's claim that he was suspended because of the protected activity." (*Id.*) As such, the Court dismissed the retaliation claim.

As for Lafia's motion to dismiss, the Court granted it in full. In dismissing plaintiff's gender discrimination claim, the Court noted that both the NYSHRL and NYCHRL preclude causes of action from accruing against co-employees. Again, the Court found that Lafia was not plaintiff's supervisor, as she had not "acted with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions, or privileges of [plaintiff's] employment." (*Id.* at 7-8, citing *Piore v N.Y. Yankees*, 307 AD2d 67 [1st Dept 2003].) Having already dismissed the retaliation claim against the DOE, the Court found that plaintiff could not plead liability against Lafia for aiding and abetting retaliatory conduct.

The Instant Motion

On this motion for leave to reargue, plaintiff suggests that the Court overlooked and misapprehended the facts and law as to its determination that (1) Lafia was not, or did not act as, plaintiff's supervisor, and (2) plaintiff did not plead facts alleging a causal connection between his protected behavior and his suspension. As will be discussed *infra*, the Court grants plaintiff's motion and modifies its previous holding to the extent that plaintiff has plead facts alleging the causal connection between his complaint to Mota/OEO and his suspension. However, the Court reaffirms its prior determination that Lafia was not acting in any supervisory capacity over plaintiff's employment.

DISCUSSION

CPLR 2221 (d) provides that a party may seek leave to reargue a prior motion based upon matters of fact or law the Court overlooked or misapprehended. A motion to reargue is not intended to provide the unsuccessful party a second opportunity to reargue issues previously decided. (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992].) Nor is a motion to reargue designed to afford unsuccessful parties the opportunity to present alternative positions, new theories of the case, or arguments different from those originally asserted. (*Foley v Roche*, 68 AD2d 558, 547 [1st Dept 1979], *Matter of Settlers v AI Props & Devs (USA) Corp*, 139 Ad3d 492, 492 [1st Dept 2016].) At its sound discretion, the court that decided the prior motion retains the authority to grant or deny reargument motions and the moving party bears the burden of demonstrating to the Court that it misapprehended or overlooked matters of fact or law. (*Loland v City of New York*, 212 AD2d 674, 674 [2d Dept 1995].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

Plaintiff's Retaliation Cause of Action

For retaliation claims under the NYSHRL to survive a CPLR 3211 (a) (7) motion to dismiss, a plaintiff must allege that: (1) he has engaged in protected activity, (2) his employer was aware that he participated in such activity, (3) he suffered an adverse employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004].) Under the NYCHRL, the plaintiff need not plead that he suffered an adverse employment action, only that his employer "took an action that disadvantaged" him or that the retaliation was "reasonably likely to deter a person from engaging in protected activity." (*Harrington v City of New York*, 157 AD3d 582, 684 [1st Dept 2018].) With employment discrimination claims, courts use the lenient notice pleading standard. (*Thomas v Mintz*, 182 AD3d 490, 490 [1st Dept 2020], citing *Petit v Department of Educ of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019].) Moreover, on this motion, plaintiff only challenges the Court's holding as to element number four.

After reviewing plaintiff's moving papers, the Court is persuaded that he has sufficiently pled a retaliation cause of action under both the NYSHRL and the NYCHRL against the DOE. The facts, as pled, indicate that (1) plaintiff complained to Principal Mota of Lafia's ongoing sexual harassment and simultaneously filed a complaint against her with OEO, (2) the very next day, plaintiff was informed he was being suspended for unexplained reasons, reasons that were not made clear for approximately ten more days; (3) the DOE affirmed his suspension even after the timing of his alleged misconduct had been inexplicably changed to a date that placed him in the classroom, as opposed to on a field to tripe, to match the allegations against him; (4) Lafia was never reprimanded and the OEO has not, as of when plaintiff moved herein, investigated her for her misconduct, and (5) employees of the DOE—specifically, the school's Assistant Principals Conlon and Griffith—demeaned and mocked plaintiff, and generally treated him worse than his co-workers upon his return after the suspension.

Based on these facts, it can readily be inferred that the "bogus claim" against plaintiff, as the Court previously put it, was in fact made in retaliation for the complaint to Mota and the OEO. The temporal proximity alone supports the inference of retaliation. (*See Russell v New York Univ.*, 204 AD3d 577, 588 [1st Dept 2022] [holding the five weeks between the protected activity and plaintiff's termination were sufficient to support retaliation claim]; *Cook v EmblemHealth Servs. Co., LLC*, 167 AD3d 459, 460 [1st Dept 2018] [temporal proximity by itself may support inference of causal nexus]; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528-529 ["The temporal proximity of plaintiff's complaint and the termination of his employment one month later indirectly shows the requisite causal connection].) Here, the protected activity was almost immediately followed by the suspension. Such a short intervening period of time, a mere day, between the two events supports an inference of retaliation.

From the Court's perspective, the degree to which there is a causal connection between plaintiff's complaint to Mota and his suspension is perhaps greater than the causal connection in similar cases where the First Department has held that a plaintiff has stated a cause of action for retaliation. In *Thomas v Mintz*, the First Department held that the plaintiff sufficiently pled a retaliation cause of action where defendant charged him with departmental misconduct (for actions that allegedly occurred more than a year earlier) six months after plaintiff complained of defendant's discriminatory conduct. (182 AD3d at 490.) In *Petit v Department of Educ. of the City of N.Y.*, the Court determined that the plaintiff sufficiently pled a retaliation cause of action where he alleged the defendant—another school principal—falsely accused him of misconduct, then assigned him to a worse office and demoted him. (17 AD3d at 403.) And in *Cook v EmblemHealth Servs.*, the First Department affirmed the lower court's denial of defendant's motion to dismiss. According to the court, the fact that the "defendants never investigated, or even acknowledged" plaintiff's complaint—similar to how the OEO has not invested plaintiff's allegations against Lafia— "provides additional support for an inference of retaliation." (*Id.*) Lastly, the inference of retaliation is only strengthened by the fact that plaintiff suffered what appears to be unduly harsh punishment relative to the inconsequential misconduct charge. As Conlon stated, in her experience, she had never witnessed a suspension for misconduct that did not endanger students or result from an arrest. (*See Russell v New York Univ.*, 204 AD3d at 588 ["This inference [of retaliation] is only buttressed by the arbitrator's finding that her termination was an unduly harsh remedy for her conduct"].)

As the Court's recitation of the facts indicates, the complaint has pled (1) a temporal proximity as in *Krebaum*, (2) an arbitrary disciplinary proceeding as in *Mintz* and *Petit*, (3) the defendant's failure to investigate the discriminatory conduct as in *EmblemHealth*, and (4) an unduly harsh punishment as in *Russell*. Defendant merely argues, without citation, that plaintiff cannot plead a claim for retaliation through implication. (NYSCEF doc. no. 56 at 4, def. memo of law.) However, the foregoing discussion demonstrates that a plaintiff can plead a cause of action through indirect evidence. (*See Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 204 [1st Dept 2015].) Accordingly, plaintiff's motion for leave to reargue is granted and his cause of action for retaliation is reinstated against the DOE.

Because the Court has granted plaintiff's motion as to his retaliation claim against the DOE, it also grants plaintiff's motion as to his retaliation claim against Lafia. In its September 2021 Decision and Order, the Court found that an aiding-and-abetting theory of liability against an employee cannot stand 'where no violation of the Human Rights Law by another party has been established.' This is because individuals cannot be held liable for aiding and abetting their own violations of the HRL. (NYSCEF doc. no. 36 at 7, citing *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 474 [Sup. Ct. NY County 2011], *affd in part, mod in part*, 94 AD3d 563 [1st Dept 2012].) Since Lafia can no longer demonstrate that the DOE did not retaliate against plaintiff, she is no longer entitled to the dismissal of plaintiff's retaliation claim either. Lafia does not cite to any case law that suggests otherwise. Accordingly, plaintiff's retaliation claim against defendant Lafia is reinstated.

Whether Lafia was Plaintiff's Supervisor

Plaintiff argues that the Court misapprehended the factual pleadings as to whether Lafia acted as a supervisor. He contends that there were multiple ways that Lafia affected the "terms and conditions" of plaintiff's employment and as such should be considered a supervisor for purposes of this litigation. The Court is not persuaded. While the Court acknowledges that Lafia may have influenced the decisionmaker to indefinitely suspend plaintiff, plaintiff has not cited any cases that suggest that the levying of allegations against a co-worker transforms such a person into a supervisor, even if those allegations turn out to be false and which has the effect of altering the conditions of employment. For that matter, the Court is not aware of any cases that treat informal methods of affecting the terms of employment similarly to those traditional methods such as hiring, firing, paying, and more directly administering the terms and conditions of employment. Accordingly, because plaintiff bears the burden of demonstrating that the Court misapprehended the facts and case, and has not done so on this issue, the Court is not compelled to deviate from its original holding.

Lastly, the Court denies plaintiff's motion to amend the complaint as to this issue. As the DOE argues, the proposed amended complaint does not rectify the above-described issue with plaintiff's pleadings, i.e., that Lafia was not a supervisor to plaintiff.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff Jeffrey Eustache's motion for leave to reargue the Court's September 16 2021 Decision and Order pursuant to CPLR 2221 (d) is granted to the extent that his claims for retaliation against both defendants—the City Board of Education and Sharon Lafia—are reinstated as viable causes of action; and it is further

ORDERED that plaintiff's motion for leave to reargue the branch of the Court's Decision and Order that determined that defendant Lafia was not plaintiff's supervisor is denied; and it is further

ORDERED that parties shall appear at 60 Centre Street, Courtroom 341 on March 28, 2023, at 10 a.m. for a status conference with the Court; and it is further

ORDERED that counsel for plaintiff shall service a notice of entry along with a copy of this Decision and Order, on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court

3/1/2023
DATE

DAKOTA D. RAMSEUR, 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