

Herrera v City of New York

2023 NY Slip Op 33098(U)

September 7, 2023

Supreme Court, New York County

Docket Number: Index No. 152586/2022

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

Justice

-----X

FAUSTO HERRERA,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT,

Defendants.

-----X

INDEX NO. 152586/2022

MOTION DATE 08/19/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion for

DISMISSAL

Upon the foregoing documents, the motion by defendants the New York City Police Department (“NYPD”) and the City of New York (collectively, the “City”) to dismiss plaintiff’s complaint is granted, in part, for the reasons set forth below.

Plaintiff alleges that before he turned thirty-five years old he applied for a position as an NYPD police officer (NYSCEF Doc. No. 1 [Compl. at ¶5]). At some point during this application process, plaintiff received an adverse psychological determination which resulted in the NYPD disqualifying him from service (Id. at ¶¶20, 25). Plaintiff successfully challenged this psychological determination, however, and successfully completed the required written, medical, and physical agility examinations (NYSCEF Doc. No. 1 [Compl. at ¶¶5, 9-13, 16, 25]).

Subsequently, on February 10, 2021, the NYPD informed plaintiff that his application had been considered but that he had not been selected for a position in the NYPD (Id. at ¶¶6-7). By the

time plaintiff received this decision he was over thirty-five years old and therefore precluded from re-applying for this position (Id. at ¶¶18, 61).

Plaintiff alleges that he was placed “on psychological review for the sole purpose of preventing [him] from joining the force” and that his application was denied in “retaliation for [plaintiff] overturning earlier decisions disqualifying him from joining the force” (Id. at ¶¶21-22). He further alleges that that others similarly situated to him were employed in the class which he would have joined, if hired, and that he has been discriminated against based on his age (Id. at ¶¶24, 27).

Plaintiff now asserts claims against the City for age-based discrimination and retaliation under Executive Law §296 (also known as the New York State Human Rights Law or “NYSHRL”) and Administrative Code §8-107 (also known as the New York City Human Rights Law or “NYCHRL”)¹.

The City moves for an order: (i) pursuant to CPLR § 3211(a)(5), dismissing plaintiff’s complaint on the grounds that this action seeks relief properly sought in an Article 78 proceeding; and (ii) pursuant to CPLR §3211(a)(7), dismissing plaintiff’s claims for age-based discrimination and retaliation. The City argues that plaintiff’s discrimination claims must be dismissed because he has not alleged that he is a member of a protected class or that he was not selected to be an NYPD police officer under circumstances raising an inference of discrimination. The City further argues that plaintiff’s retaliation claim must be dismissed because he has failed to allege that he engaged in any protected activity.

In opposition, plaintiff responds that the complaint’s allegation that “other applicants, similarly situated to [p]laintiff have completed the application process and were employed in the

¹ While plaintiff’s complaint includes claims under the NYSHRL and NYCHRL for race-based discrimination, plaintiff has withdrawn these claims (See NYSCEF Doc. No. 17 [Skor Affirm. at ¶3]).

next class,” read in conjunction with his allegation that “[p]laintiff was discriminated against because of his age,” is sufficient, for pleading purposes, to place defendants on notice as to the nature of his discrimination claims, i.e., that “as a result of being over the age of thirty-five at the time he was considered for appointment, he was a member of a protected class who was discriminated against because of his age in not being appointed” (NYSCEF Doc. No. 18 [Memo. of Law. in Partial Opp. at p. 10]). He also asserts that he has sufficiently stated a retaliation claim through allegations that the NYPD’s initial adverse psychological determination was made in a discriminatory manner for the purpose of eliminating plaintiff as a candidate for appointment to the NYPD and that he successfully challenged same.

DISCUSSION

That branch of defendants’ motion to dismiss pursuant to CPLR §3211(a)(5) is denied. The Court rejects the City’s argument that an Article 78 proceeding is the exclusive avenue to bring this claim (See e.g., O’Sullivan v City of New York, 2006 WL 5110951 [Sup Ct, NY County 2006] rev’d on other grounds 38 AD3d 467 [1st Dept 2007] citing Ramos v New York City Police Dep’t, 127 Misc 2d 872 [Sup Ct, NY County 1985]). Accordingly, the Court turns to that branch of the City’s motion to dismiss the complaint pursuant CPLR §3211(a)(7).

As an initial matter, that branch of defendants’ motion to dismiss all claims against the NYPD as well as plaintiff’s claims against the City for intentional infliction of emotional distress and specific performance is granted without opposition (See NYSCEF Doc. No. 17 [Skor Affirm. at ¶3]). Accordingly, only plaintiff’s claims for age-based discrimination and retaliation under the NYCHRL and NYSHRL remain. For the reasons set forth below, the City’s motion is denied as to plaintiff’s age discrimination claims but granted as to his retaliation claims.

On a motion to dismiss under CPLR §3211(a)(7), the pleading is afforded a liberal construction and the court must accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]). Employment discrimination claims under the NYSHRL and NYCHRL, in particular, are reviewed under a notice pleading standards—”a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds” (Juillet v City of New York, 77 Misc 3d 1002, 1005 [Sup Ct, NY County 2022] citing Vig v New York Hairspray Co., L.P., 67 AD3d 140 [1st Dept 2009]).

To state a claim for employment dissemination under the NYSHRL, plaintiff must allege that: (i) he is a member of a protected class; (ii) he was qualified to hold the position; (iii) he suffered an adverse employment action; and (iv) the adverse action occurred under circumstances giving rise to an inference of discrimination (Ayers v Bloomberg, L.P., 203 AD3d 872, 874 [2d Dept 2022]). The elements of a discrimination claim under the NYCHRL largely mirror the foregoing, except that a plaintiff need not plead that he suffered an “adverse employment action,” but only that he was “treated differently” because of his age (Askin v Dept. of Educ. of the City of New York, 110 AD3d 621, 622 [1st Dept 2013]). Although the complaint could be more artfully drafted, in light of the generous standard under which such claims are reviewed on a motion to dismiss, it sufficiently states a discrimination claim under the NYSHRL and NYCHRL through allegations that plaintiff was over thirty-five years old at the time he was considered for the subject position but was not selected for the position because of his age, while other similarly situated candidates who were under thirty-five were selected (See e.g., Pustilnik v Battery Park City Auth., 71 Misc 3d 1058, 1071 [Sup Ct, NY County 2021]).

The City's argument in opposition that plaintiff must be over the age of forty to be a member of a protected class, is incorrect—this requirement applies to discrimination claims brought under the Federal Age Discrimination in Employment Act of 1967 (See 29 USC §631[a]). By contrast, the NYSHRL provides that it is an unlawful discriminatory practice for an employer to refuse to hire an individual eighteen years of age or older because of such individual's age (See Executive Law §296[3-a][a]). The NYCHRL, in turn, provides that it is an unlawful discriminatory practice for employers to refuse to hire a job applicant because of that applicant's "actual or perceived age" (Administrative Code §8-107[1][a][2]) and contains no language limiting its applicability to job applicants over eighteen years old. In light of the foregoing, and mindful of the fact that the NYSHRL represents "a floor below which the City's Human Rights law cannot fall" (Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009]), the Court concludes that plaintiff's age does not present a bar to his age discrimination claim under the NYSHRL or NYCHRL. Accordingly, that branch of defendant's motion to dismiss plaintiff's age discrimination claims under the NYSHRL and NYCHRL is denied.

The City's motion to dismiss plaintiff's retaliation claims is granted, however. To make out a prima facie claim of retaliation under the NYSHRL, plaintiff must allege that (1) he engaged in a protected activity, (2) his employer was aware of this protected activity, (3) he suffered an adverse employment action as a result of the protected activity, and (4) a causal connection exists between the protected activity and the adverse action (Harrington v City of New York, 157 AD3d 582, 585 [1st Dept 2018]) [internal citations and quotations omitted]. Under the NYCHRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant took an action that disadvantaged him (Id.). In this context, "protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination" (Thomas v Mintz, 60 Misc 3d

1218(A) [Sup Ct, NY County 2018] [internal citations omitted], affd as mod., 182 AD3d 490 [1st Dept 2020]).

Plaintiff's complaint fails to allege that he engaged in any protected activity. Plaintiff's challenge of the NYPD's initial adverse psychological determination is, on its face, not an act taken to protest or oppose statutorily prohibited discrimination (Cf. Fletcher v Dakota, Inc., 99 AD3d 43, 44 [1st Dept 2012] [plaintiff's complaints of antisemitic comments constituted protected activity] and McGuinness v Concentric Health Care LLC, 116 AD3d 527, 528-29 [1st Dept 2014] [plaintiff's letter to employer's human resources that she was being "scrutinized and held to a higher standard" because she was not "20 or 30 years of age" and did not like to drink alcohol raised issues of fact as to whether it constituted protected activity]) and the complaint does not set forth any facts suggesting that the basis for the adverse psychological determination or plaintiff's subsequent challenge to that determination were based on his age (See Herrington v Metro-N. Commuter R. Co., 118 AD3d 544, 545 [1st Dept 2014] [plaintiff's request for salary review and increase failed to allege that she engaged in protected activity absent allegation that "she informed defendant that she was being underpaid because of her gender"]; see also McCabe v Consulate Gen. of Can., 170 AD3d 449 [1st Dept 2019] [retaliation claim dismissed under CPLR §3211 where plaintiff "failed to elaborate on the nature of any complaints he made to establish that those complaints were 'protected activity'"]). Accordingly, the City's motion to dismiss plaintiff's retaliation claims is granted and they are hereby dismissed.

In light of the foregoing, it is

ORDERED that the motion by defendants the City of New York and the New York City Police Department to dismiss plaintiff's complaint is granted in part; and it is further

ORDERED that this action is dismissed as against defendant the New York City Police Department; and it is further

ORDERED that the action is severed and continued under this index number with respect to the remaining defendant, the City of New York; and it is further

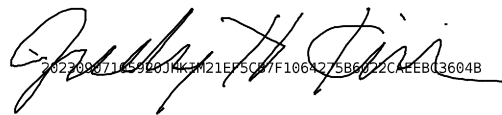
ORDERED that the caption is to be amended to reflect the dismissal and all future papers filed with the court bear the amended caption; and it is further

ORDERED that plaintiff’s first, fourth, fifth, and sixth causes of action are hereby dismissed; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on defendants as well as the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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9/7/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE