SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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STEVEN BERNSTEIN,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, ROBERT MERCEDES

Defendant.

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INDEX NO. 159772/2021

MOTION DATE 10/26/2022

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 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendants move, pursuant to CPLR § 3211(a)(7), to dismiss the complaint for failure to state a cause of action.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Background

The plaintiff, Steven Bernstein (plaintiff or "Bernstein"), is a former physical education teacher. Defendant Robert Mercedes ("Mercedes") was the principal of Middle School 390 ("MS 390") in the Bronx, the school where Mr. Bernstein was employed. Plaintiff seeks damages for alleged violation of the New York State Human Rights Law (State HRL), Executive Law § 296, *et seq.*, and the New York City Human

Rights Law ("City HRL"), NYC Admin. Code § 8-101, *et seq.*, contending that he was subject to age and race discrimination – which subjected him to a hostile work environment and led to his constructive discharge. The plaintiff also seeks damages for breach of contract with regard to the teachers' collective bargaining agreement. Plaintiff previously brought an action in Federal District Court, in which all of his claims under Federal discrimination statutes, and his claims against the New York City Department of Education ("City" or "DOE") under the State HRL and City HRL were dismissed on defendants' summary judgment motion, and the pendant claims against Mercedes were dismissed without prejudice.

Mr. Bernstein complains of a litany of allegedly wrongful acts by Principal Mercedes, which he attributes to age and race discrimination. Bernstein argues that Mercedes favored younger Hispanic teachers at the expense of older white or black teachers.

The plaintiff contends that Principal Mercedes began targeting him during the summer of 2011 when personal items belonging to plaintiff were removed from the gym office and discarded. Mr. Bernstein further contends that, in 2011, Mercedes substantiated a false complaint against Bernstein to the DOE Office of Special Investigation, which caused Bernstein to be removed from a volunteer softball coaching job at another school. Plaintiff also contends that starting in the fall of 2011, Mercedes began harassing him with unwarranted disciplinary letters and almost all ineffective ratings, whereas prior to fall of 2011 Bernstein had received no disciplinary letters and all effective or satisfactory ratings. In December of 2011, Mercedes changed Bernstein's position from physical education teacher to health teacher mid-year, which

plaintiff contends was a violation of contractual rights. In September 2012, Mercedes withheld plaintiff's sabbatical application so that it never reached the Superintendent for approval and signature. Beginning Fall of 2013, Mercedes gave plaintiff several disciplinary letters for wearing shorts at work. Beginning November 2015, on at least three occasions in the 2015-2016 school year, Mercedes asked Bernstein when he was going to retire. In fall of 2015, Mercedes allegedly tailored a per session after school CHAMPS sports position so that Bernstein was not eligible. In November 2015, the plaintiff was removed from all of his physical education classes, which were given to a substitute teacher, and plaintiff was given a substitute schedule, which included math classes outside his license area. Plaintiff was injured while working and was out for some time, returning March 1, 2016. In fall of 2018, Bernstein discovered that Mercedes hadn't approved Bernstein's Line of Duty disability time between November 2015 and March 2016 – causing the loss of 72 days of sick time worth $24,000 at the time of retirement, with a loss of $1,500 to his annual pension. In March 2016, Bernstein was assigned away from physical education classes and only given health classes and a curriculum called Adaptive PE for students with mental and physical disabilities – even though Bernstein was not assigned any students with said disabilities. On March 1, 2016, and June 27, 2016, allegedly false disciplinary letters were placed in plaintiff's file.

At the end of the 2015-2016 school year, Mercedes rated Bernstein ineffective overall on his evaluations for the first time in Bernstein's career, thereby subjecting him to a Teacher Improvement Plan for the 2016-2017 year. During the 2016-2017 school year Mercedes added allegedly false negative observations to Bernstein's employment

file and put in disciplinary letters dated February 12, 2017, and March 17, 2017. In the 2017-2018 school year, Mercedes repeatedly refused to sign a medical form that would have allowed Bernstein to receive $28,000 in retroactive payments – allegedly in breach of contractual obligations. Bernstein was summarily removed from a softball coaching position at Dewitt Clinton High School after signing a contract to coach the 2017 season – costing him $10,000 in wages and $2,200 in annual pension payments. In June 2018, Mercedes tried to dock Bernstein for a day from his sick bank when he was actually in attendance at school. In November 2018, Mercedes gave Bernstein two disciplinary letters accusing and substantiating an allegation of corporal punishment and verbal abuse, for an allegation from the prior school year. These disciplinary letters in his file prevented Bernstein from working post-retirement, including substitute teaching and coaching softball. Mercedes threatened Bernstein with an unsatisfactory end of year rating based on the allegations from the 2017-2018 school year. Mr. Bernstein retired November 26, 2018, he maintains that this was due to the hostile work environment he faced and that he was, in fact, constructively discharged. In February 2019, Bernstein was told he could not be placed on the payroll as a softball coach at Theodore Roosevelt High School because of the adverse problem codes placed on his employment record. Plaintiff also alleges that in March 2019, he was denied coaching and teaching positions, due to the allegedly false and pending charges against him substantiated by Principal Mercedes.

Res Judicata requires dismissal of the State HRL and City HRL claims against the New York City Department of Education

The plaintiff previously brought the claims under the New York State Human Rights Law and New York City Human Rights Law in the United States District Court Southern District of New York. That court dismissed the State HRL and City HRL claims against the DOE *with prejudice* and dismissed the state law claims against Defendant Mercedes without prejudice (*see Bernstein v New York City Dept. of Educ.*, 19-CV-11816 (LJL), 2021 WL 4429318, at *13 [SDNY Sept. 27, 2021], *affd,* 21-2670, 2022 WL 1739609 [2d Cir May 31, 2022]). The District Court explicitly found that the plaintiff "did not file a timely notice of claim pursuant to the New York Education Law and that the STATE HRL and CITY HRL claims against DOE accordingly are barred" (*Id.* at 13). The decision was upheld by the Second Circuit on appeal (*Bernstein v New York City Dept. of Educ.*, 21-2670, 2022 WL 1739609, [2d Cir May 31, 2022]). This dismissal on the merits is binding on this court as res judicata (*see Wilkins v Am. Export Isbrandtsen Lines, Inc.*, 46 AD2d 244, 245 [1st Dept 1974], *affd,* 38 NY2d 758 [1975]; *see also McKinney v City of New York*, 78 AD2d 884, 885 [2d Dept 1980] ["it is clear that in those instances where the Federal court proceeding is predicated on the same basis as is the State court proceeding, Federal court determinations must be given res judicata effect in New York State courts"]). Accordingly, the plaintiff's causes of action alleging violations of the State HRL and the City HRL must be dismissed as to the DOE.

Breach of contract

The plaintiff alleges that the defendants breached the teachers' Collective Bargaining Agreements ("CBA") with the DOE by converting plaintiff's 19-day 2012 approved medical leave to unauthorized leave; due to defendant Mercedes refusal to

sign off on plaintiff's OP-198 medical form; and by denying LODI leave in the 2015-2016 school year.

Although the plaintiff frames this as breach of contract, it is actually a challenge to the DOE's administrative determinations that plaintiff was not eligible for medical leave pay or line of duty injury leave. "The appropriate vehicle for such a challenge is an article 78 proceeding, which is barred by the four-month statute of limitations" (*Purcell v City of New York*, 110 AD3d 535, 535-36 [1st Dept 2013]). While the breach of contract claim can be converted to a proceeding pursuant to CPLR Article 78 (*Wander v St. John's Univ.*, 99 AD3d 891, 894 [2d Dept 2012]), that would be unavailing in the instant matter because Article 78 proceedings are subject to a four-month statute of limitations (*see Purcell, supra*).

Furthermore, the CBA contains grievance procedures for resolving complaints by an employee (Exh. B, CBA Art. 22). Plaintiff does not allege that he utilized the grievance procedures contained in the CBA or otherwise exhausted his administrative avenues to challenge the alleged contractual violations. "A union member has no individual rights under a collective bargaining agreement which he can enforce against his employer except through the union" (*Berlyn v Bd. of Ed. of E. Meadow Union Free School Dist.*, 80 AD2d 572, 573 [2d Dept 1981], *affd sub nom. Berlyn v Bd. of Educ. of E. Meadow Union Free School Dist.*, 55 NY2d 912 [1982]; *see also Matter of Bd. of Educ. Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987]). Therefore, the plaintiff "may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract" (*Matter of Bd. of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987]).

Accordingly, the plaintiff's cause of action for breach of contract is dismissed in its entirety.

Claims under the STATE HRL and CITY HRL against Robert Mercedes

Statute of Limitations

The statute of limitations for claims under both the State HRL and City HRL is three years (*see* CPLR 214 [2]; Administrative Code of City of NY § 8-502 [d]; *Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). Plaintiff originally filed his case in District Court on December 26, 2019. Following the dismissal by the District Court, plaintiff filed the instant action on or October 27, 2021, one month after the decision dismissing the Federal case. Accordingly, for statute of limitations purposes, the claims in the instant action relate back to the filing of the federal action (*see* CPLR § 205[a]; *S.A.R.L. Galerie Enrico Navarra v Marlborough Gallery Inc.*, 194 AD3d 452, 454 [1st Dept 2021]). Therefore, to the extent that plaintiff's claims regard discrete acts occurring before December 26, 2016, they are time-barred (*Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). However, it cannot be said, as a matter of law, that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the period after December 26, 2016 (*see Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-98 [1st Dept 2014]). Furthermore, the plaintiff is not precluded from using the prior acts as background evidence in support of his timely claims (*see Petit v Dept. of Educ. of City of New York*, 177 AD3d 402, 404 [1st Dept 2019]; *Natl. R.R. Passenger Corp. v Morgan*, 536 US 101, 113, 122 S Ct 2061, 2072, 153 L Ed 2d 106 [2002]).

Claims under the New York State Human Rights Law

A plaintiff alleging discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) they are a member of a protected class; (2) they were qualified to hold the position; (3) they were terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also McDonnell Douglas Corp. v Green*, 411 US 792, 793, 93 S Ct 1817, 1820, 36 L Ed 2d 668 [1973], *holding mod by Hazen Paper Co. v Biggins*, 507 US 604, 113 S Ct 1701, 123 L Ed 2d 338 [1993]). New York courts look to federal law when determining claims under the New York Human Rights Law (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795, 802 [Sup Ct New York County 1997]). However, the provisions of the State HRL must be "construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300).

The plaintiff sufficiently alleges that he is a member of a protected class. He alleges that he was discriminated against on the basis of his age and race, both of which are protected classes (*see* NYC Admin. Code § 8-107[1][a]; Exec. Law § 296[1][a]).

Plaintiff also sufficiently alleges that he was qualified to hold the position – during his first 15 years as a teacher he never received a disciplinary letter, and all of his

ratings were either effective or satisfactory. It was only from 2011 onward, and under Principal Mercedes, that he received disciplinary letters and ineffective ratings.

Furthermore, as the District Court found, the November 2018 disciplinary letters, which prevented Mr. Bernstein from working post-retirement, are sufficient to make such disciplinary letters adverse employment actions (*Bernstein v New York City Dept. of Educ.*, 19-CV-11816 (LJL), 2021 WL 4429318, at *6 [SDNY Sept. 27, 2021], *affd,* 21-2670, 2022 WL 1739609 [2d Cir May 31, 2022]). Likewise, plaintiff's allegations that Mercedes erroneously docking Mr. Bernstein a day of sick leave, refusal to approve a retroactive medical leave, and refusing to sign a form making Mr. Bernstein eligible for $28,000 in contractual retroactive payments are sufficient to support a plausible inference that these decisions constitute an adverse employment action (*Id.*).

There remains the question of whether the adverse employment action occurred under circumstances giving rise to an inference of discrimination. "The circumstances that give rise to an inference of discriminatory motive include actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus, preferential treatment given to employees outside the protected class, and, in a corporate downsizing, the systematic transfer of a discharged employee's duties to other employees, or a pattern of recommending the plaintiff for positions for which he or she is not qualified and failure to surface plaintiff's name for positions for which he or she is well-qualified, and failure to surface plaintiff's name for positions for which he or she is well-qualified" (*Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 91 [2d Cir 1996] [citations omitted]).

The plaintiff alleges that in March of 2013, Principal Mercedes received notice from the DOE that he needed to reduce staff because of budget cuts and that, in order to do so, he targeted older, non-hispanic, teachers (Exh. A, Complaint ¶ 18). Plaintiff also alleges that Principal Mercedes changed plaintiff's position several times. First, from physical education teacher to health teacher (*Id.* at ¶ 23), then by removing all physical education classes from plaintiff's schedule and assigning him to a substitute schedule which included math classes outside of his license area (*Id.* at ¶ 28). Furthermore, Mr. Bernstein was replaced by a younger (although he does not give even an approximate age), Hispanic teacher (*Id.* at ¶ 43). Additionally, plaintiff alleges that a younger colleague, Mr. Reid, was given different, better treatment such as higher ratings for similar performance and was not taken away from gym assignments (*Id.* at ¶ 48). The plaintiff also alleges that other older white and black teachers were pushed out of the school by being consistently given negative ratings while their younger Hispanic counterparts received positive ratings (*Id.* at ¶ 16). The factual allegations, taken together, and giving the plaintiff every possible favorable inference, suffice at this early stage of litigation to create a plausible inference that plaintiff was discriminated against based on his age and/or race. Accordingly, the plaintiff's State HRL claims against Mr. Mercedes for discrimination, constructive discharge, and hostile work environment should not be dismissed.

However, the claim for retaliation must be dismissed. A prima facie case of retaliation requires evidence of a subjective retaliatory motive for the termination (*Matter of Pace Univ. v New York City Com'n on Human Rights*, 85 NY2d 125, 128 [1995]). "To establish a prima facie case of retaliation under the NYSHRL, a plaintiff must show that

(1) the plaintiff has engaged in protected activity, (2) the employer was aware that the plaintiff participated in such activity, (3) the plaintiff suffered an adverse employment action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 667 [2d Dept 2019]). The plaintiff herein fails to allege that he engaged in protected activity.

Claims under the New York City Human Rights Law

Claims under the New York City Human Rights Law must be analyzed separately and independently from claims under the federal and New York State Human Rights Laws (*Russell v New York Univ.*, 204 AD3d 577, 578 [1st Dept 2022]). "Federal and City Human Rights Law discrimination issues are not necessarily identical for collateral estoppel purposes, because the purposes of the City Human Rights Law go beyond those of counterpart federal civil rights laws" (*Russell, supra at* 579). The City Human Rights Law explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's uniquely broad and remedial purposes, which go beyond those of counterpart State or federal civil rights laws (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011]). The City HRL must be construed broadly in favor of discrimination plaintiffs (*see Albunio v City of New York*, 16 NY3d 472, 477 [2011]). It is proper to dismiss a claim under the City HRL only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* and mixed motive frameworks (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]).

The plaintiff has made sufficient factual allegations to support his City HRL claims for discrimination, constructive discharge, and hostile work environment. "The allegations that there was disparate treatment of older employees, including the plaintiff, and that the plaintiff's disciplinary charges were based, in part, on age discrimination, sufficiently stated a cause of action to recover for age discrimination pursuant to the NYCHRL" (*Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018]). Likewise, the plaintiff has sufficiently plead discrimination based on race under the City HRL. The City HRL claim for retaliation must fail because plaintiff fails to allege that he engaged in any protected activity (*see* NYC Admin. Code § 8-107[7]).

Conclusion

For the reasons set forth hereinabove, it is hereby

ORDERED that the motion by defendant New York City Department of Education to dismiss the complaint against it is GRANTED in its entirety; and it is further

ORDERED that the complaint is DISMISSED against the New York City Department of Education; and it is further

ORDERED that the motion of defendant Robert Mercedes is GRANTED to the extent that the causes of action for breach of contract and retaliation are DISMISSED and is otherwise DENIED.

This constitutes the decision and order of the Court.

2/27/2023
DATE

NICHOLAS W. MOYNE, 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