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

PRESENT: HON. LELAND DEGRASSE Justice PART 25

Mascoll J

- v -

The City U. of NY

INDEX NO. 106800-02

MOTION DATE 7/21/03

MOTION SEQ. NO. 02

MOTION CAL. NO. 6

The following papers, numbered 1 to _____ were read on this motion tolfor _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

SCANNED OCT 22 2003

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

OCT 15 2003

OCT 15 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: _____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

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JOHN MASCOLA, : Index No.: 106800/02

Plaintiff, Cal. No.: 6 of 7/21/03

-against-

THE CITY UNIVERSITY OF NEW YORK, BRENDA RICHARDSON MALONE, in her individual and official capacity, and GLORIA WATERS, in her individual and official capacity,

Defendants.

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DeGRASSE, J.:

In this action arising from alleged gender discrimination in the workplace, defendants move to dismiss the complaint based on the grounds that a defense is founded upon documentary evidence, the action is time-barred, and plaintiff fails to state a cause of action (CPLR 3211 [a] [1], [5] and [7]).

FACTS

In 1982, plaintiff John Mascola was hired by defendant City University of New York ("CUNY") as a Higher Education Assistant ("HEA")/Assistant Personnel Director. In 1984, plaintiff was promoted to Higher Education Associate ("HEA")/Associate Personnel Director in the University Human Resource Management Services ("UHRMS") office and served in that position until his retirement on January 28, 2003. The gravamen of the amended complaint is that (1) plaintiff was denied the opportunity to advance to the higher title of Higher Education Officer ("HEO") like

his female co-workers, (2) plaintiff never received a discretionary merit salary increase like his female co-workers, and (3) plaintiffs supervisors, defendants Brenda Richardson Malone, Vice Chancellor of CUNY, and Gloriana Waters, Dean of CUNY, have subjected him to a hostile work environment because of his gender. Plaintiff also claims that the aforementioned work conditions were so intolerable that he was forced to involuntary retire on January 28, 2003. Plaintiff further claims that prior to his retirement, he was one of three professional male staff members employed by SUNY's UHRMS office. Plaintiff commenced the underlying action on April 2, 2002, alleging causes of action under 42 U.S.C. §§ 1983, 1985, and § 1986, and the New York State and New York City Human Rights Law (N.Y. Exec. Law § 290 *et seq.*, N.Y.C. Admin. Code Title 8 *et seq.).* By order and decision dated January 14, 2003, this court dismissed the complaint, with leave to replead, based on plaintiffs failure to provide dates for the alleged discriminatory acts. Plaintiff timely served an amended complaint dated February 20, 2003, alleging that he was initially deprived of a promotion and was thereafter constructively discharged from his position with CUNY as a result of gender based discrimination in violation of the New York State Human Rights Law (N.Y. Exec. Law § 290, *et seq.).* The amended complaint asserts three causes of action based on hostile work environment, constructive discharge and failure to promote.

DISCUSSION

On a motion to dismiss the complaint "the sole criterion is whether the pleading states a cause of action, and if from its four comers factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" *(Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *see also Wiener v Lazard Freres &* Co., 241 AD2d 114, 120). All of the factual

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allegations of the complaint are assumed to be true ***(see Tobin v Grossman,*** 24 NY2d 609), and the complaint is to be interpreted in a fair and reasonable manner ***(see Williams v Williams,*** 23 NY2d 592).

Statute of Limitations

Defendants contend that the amended complaint should be dismissed because by failing to provide specific dates for the alleged discriminatory incidents, the complaint merely repleads the same time-barred allegations plead in the original complaint.

It is uncontested that the claims alleged in the amended complaint are governed by a three-year statute of limitations ***(see*** CPLR § 214 [2]; ***Koerner v State,*** 62 NY2d 442, 447). Discrete discriminatory acts such as constructive discharge and failure to promote are not actionable if time-barred, even when they are related to acts alleged in a timely manner ***(Elmenayer v ABF Freight Sys., Inc.,*** 318 F3d 130). On the other hand, a claim for hostile work environment, which is subject to the continuing violation doctrine exception, involves a series of separate acts which "collectively constitute" an unlawful employment practice, and will not be time-barred if all of the acts constituting the claim are part of the same unlawful practice and at least one discriminatory act falls within the filing period ***(Elmenayer v ABF Freight Sys., Inc.,*** 318 F3d at 134). In this regard, the court must examine whether acts about which plaintiff complains are part of the same actionable hostile work environment practice, and if so, whether any acts fall within the statutory period ***(National*** R.R. ***Passenger Corp. v Morgan***, 536 **US** 101). Events which fall outside the limitations period for the purposes of the hostile work environment claims, "maybe considered as evidence of discriminatory atmosphere to the extent that they amount to intolerable working conditions" ***(see Parker v Chrysler***

Carp., **929** FSupp **162, 164,** citing *United Air Lines Inc. v Evans,* **431** *US* **553, 558;** *Malarkey v Texaco,* **983** *F2d* **1204, 1210-1211).**

Human Rights Law

A. Hostile Work Environment

The first cause of action of the amended complaint alleges a claim for hostile work environment. Plaintiff contends that prior to and continually after April **2, 1999,** through plaintiffs retirement on January **28, 2003,** he was subjected to the following conditions based on **his** gender: **(1)** plaintiffs work station was isolated and segregated from his similarly situated female colleagues; (2) plaintiff was forced to share an office with another male, while **his** similarly situated female colleagues each had larger, private workstations or offices; **(3)** when the department decided to relocate, a floor plan was posted for new office space indicating that plaintiff would be kept segregated from his female colleagues; and **(4)** defendants repeatedly failed to promote plaintiff. Plaintiff further alleges that unlike **his** female counterparts, he was **(1)** given less favorable work assignments; **(2)** not permitted to participate in certain prestigious work such as search committees; **(3)** denied the ability to select support staff to assist in his duties; and **(4)** in November **2001,** plaintiff was asked to assume an additional workload, including the majority of the duties and responsibilities previously performed by co-worker Doretha Custis, who had recently retired. Plaintiff further claims that these conditions constituted a hostile work environment. Here, plaintiffs allegation that the discriminatory acts occurred prior to April **2,1999** and continued through January **28,2003** renders his hostile work environment claim timely.

New York State Human Rights Law provides in relevant part that "[i]t shall be unlawful for

an employer * * * because of * * * sex * * * of any individual, * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (N.Y. Exec. Law § 296 [13 [a]). When determining claims under the New York Human Rights Law, New York courts generally rely on federal law (*McIntyre v Manhattan* Ford, ***Lincoln-Mercury, Inc.***, 175 Misc2d 795, 802 n 3, ***lv to appeal denied,*** 94 NY2d 753; ***see also, Miller Brewing*** *Co.* ***v State Div. of Human Rights,*** 66 NY2d 937). In order to state a claim for hostile work environment, the complaint must allege: (1) that the plaintiff is a member of a protected class; (2) that the conduct or words upon which the alleged harassment is predicated were unwelcome; (3) that the conduct or words were prompted simply because of the plaintiffs gender; (4) that such conduct or words created a hostile work environment which affected a term, condition or privilege of the plaintiffs employment; and (5) that the defendant is liable for such conduct ***(see Trotta v Mobil Oil Corp.,*** 788 FSupp 1336; ***Danna v New York Telephone*** Co., 752 FSupp. 594; ***Kotcher v*** Rosa ***and Sullivan Appliance Ctr., Inc.,*** 957 F2d 59; ***McIntyre*** v ***Manhattan Ford, Lincoln-Mercury, Inc.,*** 175 Misc2d at 802). A plaintiff must either demonstrate that "a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." (*Cruz v* Coach ***Stores,*** 202 F3d 560,570 quoting ***Perry v Ethan Allen, Inc.,*** 115 F3d 143, 149). Moreover, a hostile work environment exists when, as judged by a reasonable person, the workplace "is permeated with 'discriminatory intimidation, ridicule, and insult' that is sufficiently severe or pervasive to alter the conditions of the [plaintiffs] employment' " ***(see Harris v*** *Forklift* ***Systems, Inc.***, 510 US 17, 21, quoting, ***Meritor Sav. Bank v Vinson,*** 477 US 57, 65; ***Tomka v Seiler Corp.,*** 66 F3d 1295, 1304). Here, assuming the truth of the facts pleaded, and giving plaintiff the benefit of every favorable inference, the court finds that the allegations regarding defendants do not

rise to the level of being "severe or pervasive" so as to constitute a hostile work environment based on gender *(see Meritor Sav. Bank v Vinson,* 477 *US* at 65). Accordingly, plaintiffs hostile work environment claim against defendants must fail.

B. Constructive Discharge

In the second cause of action plaintiff contends that the defendants' actions "made [his] working conditions so intolerable that he was forced to involuntary retire [on] January 28, 2003." To state a cause of action for constructive termination, plaintiff must allege facts that support an inference that the employer deliberately created working conditions that were so intolerable, difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign (*Stetson v NYNEX Serv.* Co., 995 F2d 355,361; *see also Vorel v NBA Prop., Inc.* 285 AD2d 641, 642; *Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200,203). "Deliberate" is something more than lack of concern, and beyond "mere negligence or ineffectiveness" (*Whidbee v Garzarelli Food Specialists, Inc.*, 223 F3d 62, 74). The court finds that the offensive incidents alleged by plaintiff cannot, as a matter of law, form the basis for a constructive discharge claim.

C. Failure to Promote

In the third cause of action plaintiff alleges a claim for failure to promote on the basis of gender. To establish a prima facie claim for failure to promote plaintiff must show that he "applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination" *(Texas Dept. of Community Affairs v Burdine,* 450 *US* 248, 253). Here, the amended complaint alleges that from April 2, 1999 through his

retirement on January 28,2003, plaintiff was continually denied a promotion to the position of HEO; that since April 2, 1999, plaintiff has informed his supervisors that he wished to be promoted to the position of HEO; that plaintiff was qualified for a promotion to said position; that in May 2001, plaintiffs direct supervisor, Sam Phillips, informed plaintiff that he was a valued employee; that Phillips recommended that plaintiff be promoted, but Malone and Waters refused to authorize a promotion; that promotions were not made through a post and apply system; that Malone and Waters repeatedly promoted the female employees; that just prior to his retirement on January 28, 2003, plaintiff was one of three male professional staff members, out of approximately eight to ten similarly situated employees; that one male employee, Mark Smolensky, was hired in 2000; that another male employee, Ron Knight, was hired in November 2002, after this lawsuit was filed; that Linda Dunn whose job functions were similar to plaintiffs, was appointed to the position of HEO; that plaintiff who has a masters degree in Industrial and Labor Relations in Human Resources, had more experience and seniority than Dunn; that Prem Agarwal whose job functions were also similar to plaintiffs, was appointed to the position of HEO; that plaintiff who trained Agarwal was equally if not more qualified for said position; that after Agarwal retired, another female, Maureen Kast, was hired to replace her; that although plaintiff received salary increases, he never received a discretionary merit salary increase like his female co-workers; that plaintiff has suffered a loss of monetary benefits, in addition to suffering physical and emotion pain.

In reply defendants contend that of the five discriminatory HEO appointments alleged in the amended complaint, three are time-barred, and the remaining two appointments were issued to

individuals who happen to be male. In support of its contentions defendants submit the uncontroverted affidavit of its Director of Central Office Human Resources, Sonia S. Pearson, who affirms that the individuals named in the amended complaint were either hired or appointed to the position of HEO on the following dates: (1) Linda Dunn, appointed November 1, 1992; (2) Prem Agarwal, appointed July 1, 1994 (retired January 31, 1998); (3) Maureen Kast, appointed May 11, 1998; (4) Mark Smolensky, hired December 10, 1999; (5) Ron Knight, hired November 1, 2002. Pearons further affirms that she obtained the foregoing information from her personnel records and said information is available to the public upon request.

Here, plaintiff has failed to show that during the period April 2, 1999 to January 28, 2003, defendants discriminated against him by refusing to promote him to the position of HEO because of his gender. The discriminatory acts complained of, that plaintiff was denied a promotion to the position of HEO while three females in his office who did not have his seniority or experience were appointed to said position, occurred more than three years prior to the filing of the original complaint. As such, plaintiffs allegations concerning Dunn, Agarwal and Kast cannot serve as a basis for plaintiffs failure to promote claim and are therefore time-barred (*see Hoffman v J.P. Morgan Sec., Inc.*, 288 AD2d 6). Although plaintiff alleges that just prior to his retirement on January 28, 2003, SUNY's UHRMS office employed only three males in a department of approximately eight to ten employees, this without more, is insufficient to support a claim for failure to promote based on gender. In order to be legally sufficient, a pleading must contain factual allegations, which indicate the existence of a cause of action, and conclusory statements unsupported by such factual allegations

will not be deemed sufficient (*see Spallina v Giannoccaro,* 98 AD2d 103, *appeal dismissed* 68 NY2d 646; *Melito v Interboro-Mutual Ind. Ins.* Co., 73 AD2d 819). Accordingly, the third cause of action does not set forth an actionable claim.

With respect to plaintiffs claim that Malone and Waters are liable under Executive Law § 296 (6) for aiding and abetting CUNY's discriminatory conduct, as plaintiffs cause of action for failure to promote fails, so does his claim against Malone and Waters (*see Stallings v* US *Electronics Inc.,* 270 AD2d 188; *Murphy v Era United Realty,* 251 AD2d 469,472).

With respect to plaintiffs contention that he should be allowed to conduct discovery in an effort to uncover further evidence to support his claims, plaintiff has failed to demonstrate that facts "may exist" to defeat the motion (*see Peterson v Spartan Ind.,* 33 NY2d 463,467).

Accordingly, defendants' motion to dismiss is granted. The Clerk shall enter judgment dismissing the complaint. This constitutes the decision and order of the court.

DATED: OCT 15 2003

J.S.C.