Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

SUNNEY KEOOLAY x

- against -

TRANSCORE, INC., et al.

x

Index Number 20288 2004

Motion Date November 29, 2006

Motion Cal. Number 37

The following papers numbered 1 to 13 read on this motion by defendants for an order granting summary judgment dismissing the complaint in its entirety. Plaintiff cross-moves in opposition and seeks an order granting summary judgment and setting the matter down for an inquest as to damages.

	Papers Numbered
Notice of Motion -Affirmation - Exhibits(A-VV)...	1-4
Notice of Cross Motion - Affirmation - Exhibits(A-S).....	5-7
Answering Affirmation - Exhibits(A-H).....	8-10
Other Affidavit.....	11
Other Affidavit.....	12
Other Affidavit.....	13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This court in an order dated June 22, 2006 granted the defendants' motion to extend the time in which to file a motion for summary judgment to July 21, 2006. In an order dated September 11, 2006, the court granted defendants' motion and extended the time in which to file a motion for summary judgment from July 21, 2006 to September 18, 2006, and stated that this was the final filing extension. Defendants timely filed the within motion for summary judgment on September 18, 2006, in accordance with the court's order.

The order of September 11, 2006, did not, by its terms,

extend the plaintiff's time in which to move for summary judgment. Moreover, plaintiff at no time sought an extension of the time in which to move for summary judgment, although he was served with the defendants' motion to extend the deadline. Therefore, as no extension of time was sought by, or granted to plaintiff, the within cross motion which was filed on September 18, 2006 and served thereafter, is untimely (see CPLR 3212[a]). Plaintiff has not set forth any excuse whatsoever and therefore has not established good cause for its late motion. The court therefore, will not consider the cross motion for summary judgment, regardless of whether it appears to have merit and the delay has not prejudiced the adversary (see Miceli v State Farm Mut. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004]; Bejarano v City of New York, 18 AD3d 681 [2005]; Thompson v New York City Bd. of Educ., 10 AD3d 650, 651, [2004]; see also Milano v George, 17 AD3d 644 [2005]; Rivera v Toruno, 19 AD3d 473 [2005]). The court, however, will treat the cross motion as opposition papers to the defendants' motion for summary judgment.

In this retaliatory discharge action, plaintiff Sunney Keoolay, an Asian American alleges that he was hired as a Field Technician by Amtech on December 14, 1998. Amtech was responsible for maintaining the E-Z Pass system at various toll plazas in the State of New York. In early 2000, plaintiff was promoted to the position of ETC Administrator, and was designated a "floater" which meant that he rotated among different toll plazas, supervising field technicians, rather than working at a specific site location. At that time plaintiff's managers were Roy Daniel and Sharon Johnson, and plaintiff alleges that he received satisfactory performance evaluations. In the summer of 2001, TransCore Inc. took over Amtech, and assumed its contract with the MTA to monitor the toll plazas and E-Z Pass lanes for numerous bridges in the New York City Area. Plaintiff alleges that all of TransCore personnel decisions were made by defendants Sherman Lee, an Asian American, and Richard Norris, a Caucasian, who had been transferred to Long Island City, as Project Operation Manager and Project Manager, respectively. Mr. Norris was Mr. Lee's supervisor, and Mr. Lee in turn supervised 41 employees, including ETC Administrators and technicians. Although Roy Daniel had been replaced, plaintiff continued reporting to Sharon Johnson. Plaintiff alleges that in November 2002, Rafiu Owolabi a TransCore employee filed a discrimination complaint with the company's Human Resources Department which listed plaintiff as an individual who could verify Owolabi's claim that Lee and Norris favored Asians to the detriment of African Americans. It is alleged that this complaint was forwarded to Norris, who answered it on November 27, 2002. Mr. Owolabi commenced an action for discrimination, against TransCore, Lee and Norris on March 18, 2003, in this court (Index

No. 6658/03) in which he asserted, among other things, that Mr. Lee wanted to replace African American employees with Asians. Mr. Owolabi later added a claim for retaliation, and during the course of discovery he named plaintiff as an individual who would testify as to Lee's alleged discriminatory conduct.

Plaintiff claims that prior to November 2002 he received satisfactory performance reviews, promotions and bonuses. Plaintiff alleges that in 2003 he was overloaded with work, and that in February 2003 he received a poor performance review. He alleges that he complained to Lee and Norris about the review, and that he also complained to the Human Resources Manager and did not receive a response. In his complaint, plaintiff alleges that in May 2003, Norris issued a warning after he questioned the technicians work schedule which he claimed favored Asian employees to the detriment of other employees, although another employee who expressed the same concerns to another supervisor was not disciplined. Plaintiff alleges that on July 14, 2003 Norris verbally threatened him with regard to his employment for assisting Owolabi in his lawsuit. He alleges that he also received a poor performance evaluation in February 2004 in retaliation for his assistance to Mr. Owolabi. Plaintiff, a permanent ETC Administrator, was suspended on July 29, 2004 and was terminated on August 3, 2004. Plaintiff alleges that he was terminated in retaliation for his assisting Mr. Owolabi in his lawsuit, and seeks to recover compensatory and punitive damages, and attorneys' fees.

Defendants have served their answer and interposed three affirmative defenses. Defendants now seek summary judgment dismissing the complaint and assert that plaintiff cannot establish all of the elements of a cause of action for a retaliatory discharge, and that he was terminated due to non-discriminatory reasons based on his job performance and insubordination. Defendants assert that there is no temporal causal connection between plaintiff's protected activity and his termination 20 months later; that plaintiff did not experience a materially adverse action as a result of engaging in protective activity; that plaintiff received raises during this time which constitute intervening occurrences; that plaintiff was terminated primarily due to his insubordination; that defendants are entitled use its business judgment in terminating the plaintiff; and that defendants' evaluation of plaintiff's job performance alone is insufficient to establish an inference of pretext. It is further asserted that neither punitive damages nor attorneys' fees are available here.

Plaintiff, in opposition, asserts that he has established a prima facie case of retaliation based upon the following: discriminatory statements made by Mr. Lee; information and assistance he provided to Mr. Owolabi; the poor performance

evaluations he received in February 2003, and February 2004; a July 14, 2003 meeting with Norris and Lee during which Norris allegedly threatened to take disciplinary action if he continued to raise an issue regarding alleged discriminatory work schedules, and allegedly threatened to terminate him if he persisted in speaking to Owolabi; his chastisement by Norris for the use of profanity in company emails; statements made by Lee during a deposition in the Owolabi action pertaining to the hiring of new employees; and the schedule change and his failure to report to work as a technician at the Henry Hudson Bridge toll plaza on July 28, 2004, which resulted in the suspension on July 29, 2004, and the August 3, 2004 termination. Plaintiff also seeks to rely upon the deposition testimony of his former supervisor Sharon Johnson.

The notes that Mr. Owolabi's action was settled and a stipulation discontinuing the action with prejudice, dated July 18, 2005, was filed with the court on August 8, 2005.

In order "[t]o establish its entitlement to summary judgment in [a] ... discrimination case, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual" (DelPapa v Queensborough Community Coll., 27 AD3d 614 [2006]; Cesar v Highland Care Ctr., Inc., 2007 NY Slip Op 1063, 2007 App Div LEXIS 1482 [2007]; see Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004]; Ferrante v American Lung Assn., 90 NY2d 623, 632 [1997]; Romney v New York City Tr, Auth, 8 AD3d 254 [2004]).

Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296[7]; Administrative Code of City of NY § 8-107[7]). These statutes are based upon the provisions of Title VII of the Civil Rights Act of 1964 which forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin" (Pub. L. 88-352, § 704, 78 Stat. 257, as amended, 42 USC § 2000e-2[a]). A separate section of the Act --its anti-retaliation provision-forbids an employer from " discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation (42 USC § 2000e-3[a]). In order to make out a retaliatory discharge claim, plaintiff must demonstrate "(1) engagement in a protected activity; (2) the employer's awareness of participation in that activity; (3) an

adverse employment action based on that activity; and (4) a causal connection between the protected activity and the adverse action taken by the employer" (Hernandez v Bankers Trust Co., 5 AD3d at 148 [2004]; see Forrest v Jewish Guild for the Blind, supra; Cesar v Highland Care Ctr., Inc., supra; Pace v Ogden Servs. Corp., supra). Once plaintiff has met this initial burden, the burden then shifts to defendants to present legitimate, independent and nondiscriminatory reasons to support their actions. Then, if defendants meet this burden, plaintiff has the obligation to show that the reasons put forth by defendants were merely a pretext (see Matter of Milonas v Rosa, supra).

The parties do not dispute that in November 2002, plaintiff provided assistance to Mr. Olowabi, a co-worker who filed an internal discrimination complaint based upon race. In addition, plaintiff was later named as a non-party witness in the Olowabi action. The defendants thus were aware of plaintiff's participation in a protected activity. It is defendants' contention, however, that plaintiff has failed to tender evidence sufficient to satisfy the third and fourth elements of a retaliation cause of action. With respect to the third element, to constitute an adverse action for a retaliation claim, the allegedly retaliatory action must be "materially adverse"; in other words, it must be the type of action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (Burlington Northern & Santa Fe Ry. Co. v White, ___ US __ , 126 S. Ct. 2405, 2415 [2006]). The Supreme Court also held that an employer's actions need not affect the actual terms and conditions of employment in order to constitute unlawful retaliation (Id., at 2411-1, 4; Messer v Bd. of Educ., 2007 US Dist. LEXIS 3055 [2007]; Benson v N.Y. City Bd. Of Educ., No. 2006 US Dist. LEXIS 73295 [2006]). With respect to the fourth element, plaintiff is required to establish a causal connection between the adverse action and the protected activity (see Ruhling v Tribune Co., 2007 US Dist. LEXIS 116 [2007]). In evaluating whether a causal connection exists between the adverse action and the protected activity, courts have considered their temporal proximity (see e.g. Cunningham, 2006 US Dist. LEXIS 22482, 2006 WL 842914 [2006], citing Cifra v GE, 252 F3d 205, at 216 [2001]; quoting Reed v A.W. Lawrence & Co., 95 F3d 1170, 1178 [1996]; Davis v State University of New York, 802 F2d 638, 642 [1986]). The cases "uniformly hold that the temporal proximity must be 'very close'" (Cunningham, 2006 US Dist. LEXIS 22482, 2006 WL 842914 [2006], quoting Clark County Sch. Dist. v Breeden, 532 US 268, 273-74 [2001]; see also Ruhling v Tribune Co., 2007 US Dist. LEXIS 116 [2007]). The District Courts in the Second Circuit have consistently held that a passage of two months between the protected activity and the adverse employment action to be the dividing line (Ashok v Barnhart, 289 F Supp. 2d 305,

315 [2003] ["a period of only two months between a protected activity and an adverse action may permit a reasonable jury to find the acts to be temporally proximate and causally related"]; Hussein v Hotel Employees & Restaurant Union, Local 6, 108 F Supp 2d 360, 367 [2000] ["the passage of more than two months defeats any retaliatory nexus"]; Ponticelli v Zurich American Ins. Group, 16 F Supp. 2d 414, 436 [1998] ["causal connection" element of retaliation claim "not established where two-and-a-half months lapsed between complaint and adverse action]). The court knows of no reported New York State case which extended the causal connection between the protected activity and the retaliatory conduct beyond this two month limit. Plaintiff does not deny that he was suspended on July 29, 2004 and terminated on August 3, 2004, for insubordination following his failure to report to the Henry Hudson Plaza and perform the duties of a technician, in addition to his regular duties, for the 5:00 A.M. to 2:00 P.M. shift, despite receiving verbal instructions from Mr. Norris on three occasions. Plaintiff testified that he objected to being asked to change his shift and work as a technician, in addition to his regular duties, in the absence of an email or other written directive. It is undisputed that the work plaintiff was asked to perform was within his job description and that it was within Mr. Norris' authority to direct his work. The fact that plaintiff was directed to perform this work is insufficient to establish the existence of an adverse employment action or a retaliatory discharge.

Plaintiff, however, alleges that he was terminated due to the following adverse actions: (1) overloading him with work by assigning him to cover and prepare daily reports for five toll plazas a day and then criticizing him for not submitting his daily reports on time; (2) the poor evaluation he received in February 2003 following the overload of work; (3) Lee's refusal to change his evaluation after plaintiff complained about it; (4) Norris' threats of disciplinary action following an email sent by plaintiff on May 26, 2003 to a co-worker and Lee and Norris, and an email sent to plaintiff on May 28, 2003, regarding alleged racially discriminatory work schedules; (5) a meeting on July 14, 2003 with plaintiff, Lee and Norris at which time plaintiff was told by Norris that his job was in jeopardy if he ever spoke again to Owolabi about the job;(6) plaintiff's chastisement at said meeting for using profanity in the company email system, and for violating company policy for the same, although the use of profanity by others had been tolerated, and (7) the poor evaluation he received in February 2004. Plaintiff alleges that after the July 14, 2003 meeting he did not make any complaints to Human Resources about Lee and Norris, as he was afraid of losing his job.

As regards the alleged work overload, plaintiff testified

that when other ETC Administrators were on vacation or otherwise not at work he was required to monitor additional sites and file daily reports. Plaintiff stated that this assignment occurred shortly after he helped Mr. Olowabi in November 2002, and that he was overloaded with work for a continuous period for about a month. However, there is no evidence that such extra work was assigned to plaintiff on a regular or permanent basis beyond the end of 2002 or the beginning of 2003. The court finds that all of the alleged adverse actions, including the additional work, the negative performance evaluations of February 2003, the alleged threats following the May 2003 emails, the July 14, 2003 meeting, and the February 2004 performance evaluation, are too remote in time to be causally related to the August 3, 2004 termination. Therefore, as plaintiff cannot establish all of the elements of a claim for retaliatory discharge, defendants are entitled to the dismissal of the complaint.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint in its entirety is granted, and plaintiff's motion for summary judgment is denied, as untimely.

Dated: February 23, 2007

_____
J.S.C.