SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GERARD DETOIA,

Plaintiff,

-against-

YELLOW TRANSPORTATION, INC., KENNETH DORE and PAUL DOOLEY,

Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.: 14311/05
Motion Seq. No.: 02

DECISION AND ORDER

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The defendants move by Notice of Motion for an Order pursuant to CPLR §3212 granting them Summary Judgement on the ground that there is no issue of material fact that remains to be tried with respect to all of the Plaintiff's causes of action. Plaintiff, Gerard Detoia, commenced this action against the defendants alleging racial, age and national origin discrimination. Plaintiff is a white male of Italian descent in his forties. He was a driver of commercial vehicles for Yellow Transportation, Inc., hereinafter referred to as "Transport." Defendant Paul Dooley was the service manager at Transport. Defendant Kenneth Dore was the general operations manager. Plaintiff began working at Transport in 1998. He is currently collecting Workers' Compensation benefits. Plaintiff contends he was subjected to all sorts of comments such as when Dooley had stated plaintiff was at a "Sons of Italy" meeting whenever plaintiff was talking to other Italian American workers on the job. Detoia further claims that Mr. Dooley also said plaintiffs' truck was a permanent fixture at Umberto's (presumably an Italian Restaurant) and an unnamed dispatcher referred to plaintiff as "John Gotti." Plaintiff contends a supervisor had stated that

"Blacks and Hispanics are easier to mold than the Italian Guy [plaintiff]" and the "Italian Guy [plaintiff] is going to give you trouble." Plaintiff also states that co-workers and customers referred to plaintiffs' Italian-American heritage.

Defendants allege plaintiffs' lateness, many absences, failure to follow instructions, and poor work performance caused plaintiffs' problems–including surveillance by Transport and suspensions (see Exhibits 1-12, 17 annexed to defendants' motion). They argue that any and all discipline-given plaintiffs were neutral in its application. To the contrary, Plaintiff notes his awards (see Exhibit C annexed to plaintiffs' affirmation in opposition) and an affidavit of John Verni, a co-worker (see Exhibit D annexed to plaintiffs' affirmation in opposition) wherein Mr. Verni states plaintiff had a superb reputation at Transport, and that he suffered harsh treatment at the hands of Dooley and Dore. Plaintiff has also presented four letters, an affidavit, and deposition testimony (see Exhibits F, G, H, I, and K annexed to plaintiffs' affirmation in opposition) which established how defendants unjustifiably blocked/obstructed plaintiffs' Workers' Compensation claim.

Defendants allege any comments allegedly made prior to September 8, 2002 are time barred. They allege claims brought pursuant to the New York State Human Rights Law must be brought within three years of the alleged discriminatory conduct (plaintiff filed his complaint on September 8, 2005) citing (*Van Zant v KLM Royal Dutch Airlines*, 80 F3d 708 [2d Cir.1996]). The Court disagrees that the comments render the complaint time barred. Plaintiff does not contend only comments occurred. He states his route was changed in the Summer of 2004 (see ¶ 26, affidavit of plaintiff), and that he allegedly received inferior equipment in February of 2003 (see ¶ 28 of plaintiffs' affidavit). Thus, plaintiffs' claim incorporates "comments" plus "conduct"

by defendants–a continuous violation or course of conduct–that continued along with plaintiffs' employment at Transport. Also, based on the record, plaintiff has set forth the offending person and the approximate terms of the comments to pass muster. Here, plaintiff has alleged the incidents were sufficiently continuous and concerted and could very well be found to be pervasive by the trier of fact (*Alfano v Costello*, 294 F3d 365 [2d Cir. 2002]).

As noted, plaintiff does not contend the comments/remarks are the sole offensive acts at issue. While defendants seek to justify conduct toward plaintiff as justifiable and totally nondiscriminatory, part of the fabric of plaintiffs' complaint is the alleged conduct by defendants and plaintiffs' co-workers weaved to include comments, not just "comments" alone.

Plaintiff alleges in 2003-2004 Mr. Dooley sought to physically fight plaintiff and that the incident was witnessed by a co-worker, Joe Campisi (see plaintiffs' affidavit, ¶ 41-44 annexed to the plaintiff's affidavit in opposition).

Plaintiff alleges that during the period of 2001-2005 he was given less desirable assignments and routes, that defendants raised unreasonable issues as to his vacation time, dispatched and scheduled plaintiffs' runs to make it difficult for plaintiff to do a good job, that he was singled out and received many letters of violation, and that he received more random drug testing than the other employees without justification (see plaintiffs' affidavit annexed to plaintiffs' affirmation in opposition).

Plaintiff states he was injured on the job in 2005. Plaintiff alleges that Mr. Dooley refused to properly process plaintiffs' accident/disability form, dragged out plaintiffs' request for physical therapy and, allegedly, aggressively fought plaintiffs' apparently valid Workers' Compensation claim (see Exhibits G, H and J annexed to plaintiffs' affirmation in opposition).

Thus, as to any alleged "comments" by defendants prior to September, 2002, there are at least issues of fact as to whether or not the comments are barred because the continuing nature of the offensive conduct by the defendants.

The Court must consider whether the individual defendants may be liable. Clearly, under the New York Human Rights Law and under Executive Law § 292(1), (6), defendant Dore could have individual liability under § 296(1) since he, Mr. Dore, stated he has authority to hire and fire employees (see Exhibit A, pg. 42 annexed to plaintiffs' affirmation in opposition) (*see Gentile v Town of Huntington*, 288 F.Supp.2d 316[E.D.N.Y. 2003]). As to Mr. Dooley, he stated that he removed plaintiff from the seniority list (see Exhibit B, pg. 96). Thus, Mr. Dooley admitted he does more than carry out the personnel decisions made by others (*Perks v Town of Huntington*, 251 F.Supp.2d 1143[E.D.N.Y. 2003]). Thus, there is at least an issue of fact as to the individual liability of Mr. Dooley.

A trial court must exert caution before considering summary judgment against an employee when the employer's intent is at issue since direct evidence of an employer's discriminatory intent will rarely be found (*Gallo v Prudential Residential Services, Ltd. Partnership*, 22 F3d 1219 [2d Cir.1994]).

Determining whether the workplace harassment was severe or pervasive enough to be actionable depends on the totality of the circumstances (*Cruz v Coach Stores, Inc.*, 202 F3d 560 [2d Cir. 2000]).

Incidents that are facially neutral may, at times, be used to demonstrate a course of discrimination (*Alfano v Costello*, 294 F3d 365 [2d Cir. 2002]).

Adverse employment actions include negative evaluation letters, express accusations of

lying, lesser assignments, failure to process insurance forms or transfers of duty (*Morris v Lindauer*, 196 F3d 102 [2d Cir. 1999]). Thus, a combination of seemingly minor incidents may constitute an adverse employment action (*Phillips v Bowen*, 278 F.3d 103 [2d Cir. 2002]).

Adverse reaction caused by discrimination can be defined as a materially significant disadvantage (*Galabya v New York City Board of Education,* 202 F3d 636 [2d Cir. 2000]).

An employee is not required to show interference with work performance to prove that discriminatory conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; interference with work performance is but one of many relevant factors to be considered (*Leopold v Baccarat, Inc.*, 174 F.3d 261 [2d Cir. 1999]).

To meet his or her ultimate burden, a plaintiff may rely on the cumulative weight of circumstantial evidence to establish his or her case (*Tarshis v Riese Organization*, 211 F3d 30 [2d Cir. 2000]). Here, in opposing defendants' summary judgment motion, plaintiff need only raise triable issues of fact.

Discrimination cases generally involving issues of intent are often left to the fact-finder to resolve (*Payami v City of New York*, ___ F.Supp.2d ___, 2007 WL 945529).

Usually, the issue of whether a hostile work environment existed may not be properly decided as a matter of law (*Patterson v County of Oneida, N.Y.*, 375 F.3d 206 [2d Cir. 2004]).

Defendants contend the plaintiff must first successfully raise a question of fact as to the underlying claim of discrimination by the employer and failed to do so. The cases defendants cite in their Memorandum of Law relate to disability discrimination. (*see Thide v New York State Department of Transportation*, 27 AD3d 452, 2d Dept 2006) and involved different burdens of proof and are not applicable to this case.

In opposing a motion for summary judgment on the issue of discrimination, the plaintiff's evidence must be sufficient to support a rational finding that the legitimate, nondiscriminatory reason offered by the defendant was false, and that more likely than not, discrimination was the real reason for the action taken (*Van Zant v KLM Royal Dutch Airlines, supra*). From the record herein, the plaintiff has met his burden.

Determining the credibility of witnesses, the truthfulness and accuracy of testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all for the trier of fact (*Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]). Thus, the various sworn conflicting accounts must be evaluated by the trier of the facts.

In plaintiffs' third cause of action, he alleges defendants retaliated against him for filing a Workers' Compensation claim and they are therefore in violation of § 120 of the Workers' Compensation Law. As noted by defendants, such a cause of action is within the exclusive jurisdiction (at least initially) of the Workers' Compensation Board (*see Williams v Brooklyn Union Gas Co.*, 819 F.Supp. 214 [E.D.N.Y. 1993]). There is no proof that Plaintiff filed a complaint with the WC Bd on ___ of retaliation. As such, plaintiffs' third cause of action must be dismissed.

The plaintiff's fourth cause of action is for the intentional infliction of emotional distress, and it must be dismissed.

To establish a claim for intentional infliction of emotional distress under New York Law, a plaintiff must show that defendant's conduct exceeded all bounds usually tolerated by decent society. To survive a motion to dismiss a plaintiff's claim, plaintiff must set forth the extreme and outrageous conduct intentionally causing the extreme emotional distress (*Kirwin v New York State*

Office of Mental Health, 665 F.Supp. 1034 [E.D.N.Y. 1987]). It is a strict standard (*Murphy v American Home Products Corp.*, 58 NY2d 293, 303 [1983]). The Court must agree with the defendants that plaintiff's alleged facts do not support a claim of conduct so extreme and outrageous in degree and character to be regarded as atrocious and utterly intolerable in a civilized community (*Caballero v First Albany Corp.*, 237 AD2d 800 [3d Dept 1997]).

As to plaintiffs' fifth cause of action against defendants sounding in negligence and based on the alleged faulty track assignments, is barred by the Workers' Compensation Law's exclusivity where plaintiff alleges that the alleged injury occurred while he was performing his job duties (*See Sormani v Orange County Community College*, 240 AD2d 724 [2d Dept 1997]). Thus, plaintiffs' fifth cause of action must be dismissed.

Plaintiffs' sixth cause of action alleges defendants' retaliated against plaintiff for exposing defective and faulty equipment (whistleblower statute).

Proof of an actual violation as defined by Labor Law §140 is required to support a cause of action predicated on the whistleblowers' statute, which provides that an employer shall not take any retaliatory personal action against an employee because such employee discloses or threatens to disclose to a public body an activity or practice of the employer that is in violation of a law, a rule or regulation which violation creates and represents danger to the public health or safety (Labor Law § 740, subd. 2[a]; *Bordell v General Electric Co.*, 88 NY2d 869 [1996]).

Labor Law § 740 requires a plaintiff to allege an actual violation of a law, rule or regulation and an employee's good faith, reasonable belief that a violation occurred is insufficient (*Nadkarni v North Shore-Long Island Jewish Health System*, 21 AD3d 354 [2d Dept 2005]). The above must be met to bring a cause of action under the whistleblower law (*Khan v State*

University of New York Health Science Center at Brooklyn, 288 AD2d 350 [2d Dept 2001]). Here, plaintiff cites no specific violation, rule or regulation. Hence, the sixth cause of action must be dismissed.

Accordingly, defendants' motion to dismiss is **Granted** as to the third, fourth, fifth and sixth causes of action. It is **Denied** in all other respects. The Complaint shall be deemed amended upon service of a copy of this order. It is further

ORDERED, that the parties are directed to appear for Trial on November 13, 2007 at 9:30 a.m. in DCM.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: November 9, 2007
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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