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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 108357/2007
AKIBA, DAISUKE
VS.
QUEENS COLLEGE OF CITY
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 108357/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for supplement complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2
Replying Affidavits	3, 3A

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined as per decision/order dated 10-30-09.

FILED
NOV 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-30-09

J.S.C.
MARCY S. FRIEDMAN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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DAISUKE AKIBA, Ph.D.,

Plaintiff(s),

Index No.: 108357/07

- against -

QUEENS COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendant(s).

DECISION/ORDER

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In this action, plaintiff Daisuke Akiba, a professor of Japanese descent, alleges that he was discriminated against based on race and national origin discrimination, and subjected to retaliation while employed as a professor at Queens College, a college of defendant City University of New York ("CUNY"). Plaintiff moves to supplement his complaint.

Leave to amend or supplement a pleading "'shall be freely given' absent prejudice or surprise resulting directly from the delay." (See McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]. See CPLR 3025[b].) It is settled that "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (Non-Linear Trading Co. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998] [internal quotation marks and citations omitted]), and leave will be denied when the proposed pleading "is palpably insufficient as a matter of law." (Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [1st Dept 2001]; Bankers Trust Co. v Cusumano, 177 AD2d 450 [1st Dept 1991], lv dismissed 81 NY2d 1067 [1993].) It has been held that a motion to amend must "be supported by an affidavit of merits and evidentiary proof that could be considered upon a

motion for summary judgment." (Non-Linear Trading Co., 243 AD2d at 116 [internal quotation marks and citations omitted].)

In moving to supplement the complaint, plaintiff seeks to allege acts of retaliation against him that occurred subsequent to the commencement of the action, as well as discriminatory or retaliatory acts taken against non-party professors Lisa Scott and Kim Alkins. Plaintiff alleges that "Defendants terminated Lisa Scott, an African-American instructor, after she objected to Defendants' retaliatory harassment and discriminatory conduct toward Dr. Akiba." ("Second Proposed Supplemented Complaint" [Supplemental Complaint], ¶ 83 [Ex. A to P.'s Reply].) In addition, plaintiff seeks to add allegations that Kim Alkins, who is also an African-American, was denied tenure based on her race and association with plaintiff. (P.'s Reply, ¶ 11.)

As a threshold matter, CUNY devotes a significant part of its opposition to the argument that plaintiff lacks standing to assert claims on behalf of non-party professors. (See Ds.' Memo. in Opp. at 5-7.) In reply, plaintiff clarifies that he is not asserting a claim on behalf of Dr. Scott or other professors. (See Kaiser Reply Aff., ¶ 4.)[1] Rather, plaintiff claims the allegations regarding the other professors are "facts relevant to the discriminatory and retaliatory environment to which Dr. Akiba has been exposed * * * and the discriminatory and retaliatory intent and mind set of the defendants." (Id.,¶ 5.) CUNY argues that plaintiff may not include allegations of retaliatory conduct by CUNY against professors Scott and Alkins because they are African-Americans and are therefore not in the same "protected class" as plaintiff. (See Defs.' Supp. Memo. Of Law at 3.)

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[1]Plaintiff also submits an affidavit of merit for the first time on the reply. As the court required supplemental papers, and thereby afforded defendants an opportunity to respond to the affidavit, the affidavit will be considered.

Plaintiff's complaint alleges both disparate treatment and retaliation claims under the New York Human Rights Law (Executive Law § 296 et seq.), and the New York City Human Rights Law (NYC Admin Code § 8-107.)

The standards for proof of a disparate treatment claim are well settled:

> A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was 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. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.

(Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004] [internal quotation marks and citations omitted]; McDonnell Douglas Corp. v Green, 411 US 792 [1973]; Cruz v Coach Stores, Inc., 202 F3d 560, 567 [2d Cir 2000].)[2]

As to plaintiff's disparate treatment claim, it is settled that circumstantial evidence showing alleged discriminatory treatment of co-workers is relevant and therefore discoverable. (See Abbott v Memorial Sloan-Kettering Cancer Ctr., 276 AD2d 432 [1st Dept 2000]; Chan v NYU Downtown Hosp., 2004 WL 1886009 [SD NY 2004]; Flanagan v Travelers Ins. Co., 111

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[2] It is settled that the analytical framework under § 296 is the same as that for Title VII (42 USC § 2000e et seq.). (See Forrest, 3 NY3d at 305 n3.) Moreover, until the enactment of the Local Civil Rights Restoration Act (Local Law 85), the NYC Human Rights Law was analyzed under the same framework. (See Williams v New York City Hous. Auth., 61 AD3d 62 [1st Dept 2009], lv denied 13 NY3d 702.) However, for the purposes of this motion, the parties have not addressed the impact of the Restoration Act on plaintiff's request for leave to amend.

FRD 42 [WD NY 1986].) Indeed, "[e]vidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive." (Hollander v American Cyanamid Co., 895 F2d 80, 84 [2d Cir 1990].)

CUNY's contention that the Scott and Alkins allegations are irrelevant because they, as African-Americans, are not members of the same protected class as plaintiff, who is of Japanese descent, is unsupported by legal authority. CUNY cites authority that claims of discrimination "are discoverable [only] if limited to the same form of discrimination." (Ahroner v Israel Discount Bank of New York, 14 Misc 3d 1205[A] [Sup Ct, New York County 2005] [internal quotation marks and citation omitted, brackets in original].) In addition, CUNY relies on authority that holds, with respect to a hostile work environment claim, that evidence of harassment of a plaintiff's co-workers is limited to employees "in the same protected class." (Smith v AVSC Intl., Inc., 148 F Supp 2d 302, 310 [SD NY 2001].) However, CUNY does not cite any case law holding that members of different racial minority or ethnic groups will not be considered to be "in the same protected class" for purposes of a disparate treatment claim. Nor has the court's own research located any such authority. On the contrary, there is case law suggesting that a disparate treatment claim may be established by evidence that the plaintiff's employer discriminated against other members of plaintiff's protected class "or other protected categories of persons." (See Fuentes v Perskie, 32 F3d 759, 765 [3d Cir 1994].) CUNY thus fails on this record to demonstrate that plaintiff's proposed supplemental pleading, alleging discrimination against African-American professors based on race, is palpably lacking in merit.

The Scott and Alkins allegations are also relevant to plaintiff's claim of retaliation. "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices. In order to make out the claim, plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action. (Forrest, 3 NY3d at 312-313. See also Johnson v Palma, 931 F2d 203, 207 [2d Cir 1991] [standard under Title VII]; DeCintio v Westchester County Med. Ctr., 821 F2d 111 [2d Cir 1987] [same], cert denied 484 US 965.) The causal connection between the protected activity and the adverse employment action may be shown "indirectly . . . through other evidence such as disparate treatment of fellow employees who engaged in similar conduct." (Johnson, 931 F2d at 207 [emphasis, quotation marks, and citations omitted].) CUNY fails to meet its burden to show that plaintiff's allegations regarding Scott and Alkins are irrelevant to his retaliation claims.

The court has considered defendant's remaining contentions and finds them without merit.

Accordingly, plaintiff's motion is granted to the extent that it is

ORDERED that plaintiff is granted leave to serve a supplemental complaint including the allegations set forth in the second proposed supplemental complaint, and the allegations in plaintiff's affidavit on this motion with regard to Alkins, provided that: Plaintiff shall serve the supplemental complaint, together with a copy of this order, upon defendants within 20 days of the date of entry of this order; and it is further

ORDERED that defendants shall serve an answer to the supplemental complaint within

20 days from the date of said service; and it is further

ORDERED that the parties are directed to appear for a status conference in Part 57 (Room 328, 80 Centre Street) on Thursday, December 10, 2009, at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
October 30, 2009

MARCY FRIEDMAN, J.S.C.