

**DeKenipp v State of New York**

2009 NY Slip Op 33497(U)

January 26, 2009

Court of Claims

Docket Number: Claim No. 115399

Judge: Francis T. Collins

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# DeKenipp v. THE STATE OF NEW YORK, #2009-015-114, Claim No. 115399, Motion Nos. M-75313, CM-75624

## Synopsis

Defendant's motion to dismiss age discrimination claim as untimely was granted in part and denied in part. Additionally, Court of Claims has jurisdiction to decide ADEA claim. Cross-motion for late claim relief was granted in part.

## Case Information

**UID:** 2009-015-114

**Claimant(s):** KENNETH C. DeKENIPP  
1 1.The caption is amended *sua sponte* to reflect the only properly named defendant.

**Claimant short name:** DeKenipp

**Footnote (claimant name) :**

**Defendant(s):** THE STATE OF NEW YORK

**Footnote (defendant name) :** The caption is amended *sua sponte* to reflect the only properly named defendant.

**Third-party claimant(s):**

**Third-party defendant(s):**

**Claim number(s):** 115399

**Motion number(s):** M-75313

**Cross-motion number(s):** CM-75624

**Judge:** FRANCIS T. COLLINS

**Claimant's attorney:** The Law Office of Steven A. Morelli, P.C.By: Jaime Lynn Eckl, Esquire

**Defendant's attorney:** Honorable Andrew M. Cuomo, Attorney General  
By: Michele M. Walls, EsquireAssistant Attorney General

**Third-party defendant's attorney:**

**Signature date:** January 26, 2009

**City:** Saratoga Springs

**Comments:**

**Official citation:**

**Appellate results:**

**See also (multcaptioned case)**

## Decision

Defendant moves for dismissal of the claim pursuant to CPLR 3211 (a) (2) (5) and (8) on the grounds of untimeliness and failure to state a cause of action. Claimant opposes the motion and cross-moves for late claim relief pursuant to Court of Claims Act § 10 (6). Claimant, a 53-year-old male employee of the New York State Department of Transportation (NYSDOT), brings this action for damages alleging three discrete acts of employment-related discrimination based upon age. The claim was filed on June 18, 2008 and served on the Attorney General on June 27, 2008.

The first incident complained of allegedly occurred in October 2001 when claimant was removed from the environmental group of the NYSDOT and placed in the design group in retaliation for filing a grievance related to the performance of work outside his job title. Claimant allegedly believed that he was performing the responsibilities of an Environmental Specialist II (ES2) without receiving the compensation commensurate with that job title.

The second incident allegedly occurred on December 6, 2006 when the claimant received a "candidate non-select letter" for the position of ES2 in the NYSDOT Region 10 Highway Maintenance Group (Claim, defendant's Exhibit A, ¶¶ 17, 27). The claim alleges that the claimant was well qualified for the position both because of his educational experience, which includes a Master's Degree in Environmental Engineering Technology, and his 28 years of experience with the NYSDOT, eight and one-half years of which was spent as a Civil Engineer within the Region 10 Environmental Group. Claimant additionally alleges that during the three year period in which he held the position of Assistant Resident Engineer in the Region 10 Transportation Maintenance Group, his duties "directly interacted" with those performed by the ES2, making him more qualified for the position than the individual who was ultimately chosen (Claim, defendant's Exhibit A, ¶ 24). In that regard, the claimant alleges that Richard Gass, the individual promoted to the Region 10 ES2 position, had only been employed by NYSDOT for six years, had little experience with environmental functions in his former position as a Landscape Architect and that "the only difference between the two candidates other than [claimant's] superior qualifications is that Gass is between ten and fifteen years younger than [claimant]" (Claim, defendant's Exhibit A, ¶ 32). Claimant alleges the defendant's contention that Mr. Gass was selected based on the civil service eligibility list is pretextual because it "failed and refused" to place claimant on the list notwithstanding the fact that he received a passing score on the qualifying civil service examination (Claim, defendant's Exhibit A, ¶ 36). He also alleges the defendant improperly ranked candidates based solely on their Supervisor's Promotional Test Battery score and failed to administer the more relevant examination for the ES2 position, as provided by the New York Civil Service Law (Claim, defendant's Exhibit A, ¶ 35).

The third act of discrimination allegedly occurred on December 31, 2007 when the claimant was notified that he was not selected to fill a provisional ES2 position in the DOT Construction Division for which he had applied.

The claim alleges that Richard Gass received a second promotion in November 2007 to the

position of Senior Landscape Architect in the Landscape/Environmental Division. Upon Mr. Gass' promotion the defendant posted two vacancies for the position of ES2 - one in the Construction Division and one in the Transportation Maintenance Division. The position in the Construction Division was provisional while the position in the Transportation Maintenance Division was both provisional and contingent upon Mr. Gass successfully completing a probationary period in his new position. If Mr. Gass did not pass probation, the individual assuming the ES2 position in the Transportation Maintenance Division would lose that position. According to the claim, "while both ES2 positions had the same salary grade, the Construction Division position was a provisional position and provided more job security and stability to the person whom [sic] received it" (Claim, defendant's Exhibit A, ¶ 42). Claimant applied for both positions. On December 31, 2007 he was notified that he did not receive the ES2 position in the Construction Division. Instead, claimant was selected to fill the less desirable position as ES2 in the Transportation Maintenance Division. The claim alleges that the ES2 position in the Construction Division was given to Raji Matthew who was less qualified and 12 years claimant's junior. It is alleged that the claimant was held to a higher standard than Mr. Matthew and, although he did receive the promotion to the ES2 position in Transportation, this position is provisional/contingent and therefore his status remains uncertain.

The claim is brought under the Age Discrimination in Employment Act (ADEA) (29 USC § 621, *et seq.*), the New York State Human Rights Law (Executive Law § 290, *et seq.*), and the Federal and New York State Constitutions.

Defendant's motion for dismissal is premised on the contentions that the claim is untimely as to the incidents allegedly occurring in October 2001 and December 6, 2006 and fails to state a cause of action with respect to the third incident which allegedly occurred on December 31, 2007. In Clauberg v State of New York (19 Misc 3d 942 [Ct Cl, 2008]) this Court held that a cause of action arising under the Human Rights Law was controlled by the six-month limitations period set forth in Court of Claims Act § 10 (4), applicable to causes of action "not otherwise provided for by this section". In so holding, reliance was placed upon those cases which held that a cause of action brought under the Human Rights Law is a statutory one (*see e.g. Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]) and not a traditional tort cause of action governed by the ninety day limitations period set forth in Court of Claims Act §§10 (3) and 10 (3-b). Here, however, the distinction is of no significance as the claim filed on June 18, 2008 and served on June 27, 2008 is untimely with respect to the incidents which accrued in October 2001 and December 6, 2006 regardless of whether section 10 (3), 10 (3-b) or 10 (4) is applied.<sup>[2]</sup> The causes of action arising under the Human Rights Law, the Age Discrimination in Employment Act (ADEA) (29 USC §§ 621, *et seq.*), and the New York State Constitution are therefore time barred.

Defendant asserts the claimant's remaining causes of action stemming from the incident which occurred on December 31, 2007 when the claimant was notified that he did not receive the ES2 position in the Construction Division fail to state a cause of action. First, because the claimant received the promotion to the ES2 position in the Transportation Maintenance Division thereby suffering no damages and, second, because the individual who received the promotion to the ES2 position in the Construction Division was in the same protected class as the claimant.

On a motion to dismiss a claim pursuant to CPLR 3211 (a) (7) the court is required to "accept the facts as alleged in the [claim] as true, accord [claimant] 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]; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Thus, the determination is made by reference to whether "the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* at 88).

Both the Human Rights Law and the ADEA prohibit employers from taking adverse employment action against an employee based upon his or her age and the same standards for analyzing age discrimination cases are applied in both the New York and Federal courts (Brannigan v Board of Educ. of Levittown Union Free School Dist., 18 AD3d 787 [2005], *lv denied* 6 NY3d 701 [2005]; Hardy v General Elec. Co., 270 AD2d 700, 701 [2000], *lv denied* 95 NY2d 765 [2000]). "A prima facie case of age discrimination requires that [claimant] demonstrate membership in a protected class, qualification for their position, an adverse employment action, and circumstances that support an inference of age discrimination" (Kassner v 2nd Ave. Delicatessen Inc., 496 F3d 229, 238 [2d Cir 2007]). The defendant's first argument, that because claimant received the promotion to the ES2 position in the Transportation Maintenance Division no adverse employment action occurred, lacks merit. As stated by the Second Circuit Court of Appeals in Galabya v New York City Bd of Educ. (202 F3d 636, 640 [2d Cir 2000]):

" A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment (*see Richardson v New York State Dep't of Correctional Serv.*, 180 F3d 426, 446 (2d Cir 1999) (relying on Crady v Liberty Nat'l Bank and Trust Co., 993 F2d 132, 136 [7th Cir 1993]). To be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities' (Crady, 993 F2d at 136). 'A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation' (*Id.*; [citation omitted]) .

In Galabya, the Court addressed the issue of whether or not an adverse employment action existed where the plaintiff, a teacher, was involuntarily transferred from one position to another in which he was forced to teach keyboarding to special education students rather than the mainstream students to whom he had previously been assigned. The Court held that the plaintiff failed to show a materially significant disadvantage because, in opposition to a motion for summary judgment, he failed to produce evidence that the transfer was to an assignment that was "materially less prestigious, materially less suited to his skills and expertise, or materially

less conducive to career advancement" (*Id.* at 641). Subsequently, in Beyer v County of Nassau (524 F3d 160, 165 [2d Cir 2008]) the Court held that a denial of a transfer may constitute an adverse employment action when a claimant "adduces sufficient evidence to permit a reasonable factfinder to conclude that the sought for position is materially more advantageous than the employee's current position, whether because of prestige, modernity, training opportunity, job security, or some other objective indicator of desirability". Applying this standard and accepting the facts alleged in the claim as true, the Court finds that the allegation in the claim that the ES2 position in the Transportation Maintenance Division affords the claimant less job security than the ES2 position in the Construction Division sufficiently sets forth an adverse employment action so as to avoid dismissal for failure to state a cause of action.

The defendant also argues that because the individual who received the promotion to the ES2 position in the Construction Division was also a member of the protected class, no inference of discrimination may be drawn.<sup>[3]</sup> However, it is well-settled that "[b]ecause the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class" (O'Connor v Consolidated Coin Caterers Corp., 517 US 308, 313 [1996]; *see also* Terry v Ashcroft (336 F3d 128, 140 [2d Cir 2003] ). Thus, the alleged 12-year age difference between the claimant and the individual who received the promotion to the ES2 position in the Construction Division adequately supports an inference of age discrimination (*see* Tarshis v Riese Organization, 211 F3d 30, 38 [2d Cir 2000], *abrogated on other grounds by* Swierkiewicz v Sorema N.A., 534 US 506 [2002] [eight-year age difference between 67 year-old plaintiff and his 59 year-old replacement satisfied the fourth element of the prima facie case]). Accordingly, the claim sets forth sufficient facts from which age-related discrimination may be inferred relative to the defendant's failure to promote the claimant to the ES2 position in the Construction Division on December 31, 2007.

However, to the extent the claim alleges causes of action under the Federal and New York State Constitutions, a contrary decision is reached. With respect to the cause of action predicated upon the Federal Constitution, the claim must be dismissed as no claim for a violation of the claimant's federal constitutional rights is cognizable against the State in the Court of Claims (Brown v State of New York, 89 NY2d 172, 184-185 [1996]; *see also* Monell v New York City Dept. of Social Services, 436 US 658 [1978]; Matter of Gable Transp., Inc. v State of New York, 29 AD3d 1125 [2006]; Welch v State of New York, 286 AD2d 496 [2001]).

Likewise, a cause of action for a violation of the State Constitution may give rise to a tort cause of action only where it is necessary to ensure the full realization of the claimant's constitutional rights (Brown v State of New York, 89 NY2d 172 (1996); Martinez v City of Schenectady, 97 NY2d 78, 83 [2003]). The right is a narrow one, however, and may not be invoked where the claimant has an alternate "avenue of redress" (Martinez v City of Schenectady, 97 NY2d at 83 ; Waxter v State of New York, 33 AD3d 1180 [2006]; Bullard v State of New York, 307 AD2d 676 [2003]). Here, invocation of a constitutional tort cause of action is unnecessary as the claimant clearly has alternative avenues of redress available.

Lastly, defendant contends in only the most conclusory fashion that this Court lacks jurisdiction with respect to the ADEA cause of action. A claim under the ADEA may be brought in any court of competent jurisdiction (29 USC § 626 [c] [1]). As pertinent here, the Act makes it unlawful for any "employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Although "employer" is defined to include the State (29 USC § 630 [b]), the Supreme Court held in Kimel v Florida Bd. of Regents (528 US 62, 91 [2000]) that Congress did not validly abrogate the State's Eleventh Amendment sovereign immunity with the enactment of the ADEA, which the Court concluded was enacted in the exercise of Congress' power to regulate commerce amongst the states under Article I of the United States Constitution. Consistent with its prior holdings (*see* Seminole Tribe of Florida v Florida, 517 US 44 [1996]) the Court held in Kimel (*supra*) that Congress could not subject an unconsenting state to federal court jurisdiction under the ADEA as Congress may not abrogate a state's sovereign immunity when acting under authority of Article I. However, the Supreme Court has stated that "sovereign immunity bars suits only in the absence of consent" (Alden v Maine, 527 US 706 [1999]). Alden concerned the immunity of a state from suit in its own courts under the federal Fair Labor Standards Act (FLSA) (29 USC § 201, *et seq.*), a statute also enacted pursuant to Article I of the U.S. Constitution. The Supreme Court concluded that the State of Maine had not waived its sovereign immunity so as to permit a suit for money damages brought pursuant to the FLSA. As to the state of the decisional law in this state, the Court of Appeals found in Alston v State of New York (97 NY2d 159 [2001]) that although the State had waived its immunity from suit on a cause of action brought under the FLSA<sup>[4]</sup>, the waiver "was conditioned

upon a claimant's compliance with the limitations on the waiver including the relevant filing deadlines" (Alston, *supra* at 163).

The defendant does not assert the claimant's failure to comply with the time limitations contained in article II, section 10 of the Court of Claims Act with respect to the incident which allegedly occurred on December 31, 2007. As both the ADEA and FLSA are enacted pursuant to Congress' Article I powers, the Court is bound under Alston to conclude that the State has waived its immunity from suit under the ADEA, except relative to certain conditions to suit not relevant here. Accordingly, the Court finds that it has jurisdiction over the claim brought pursuant to the ADEA and the defendant's argument to the contrary is without merit.

Based on the foregoing, the defendant's motion to dismiss the claim is granted with respect to the alleged discriminatory conduct which occurred in October 2001 and on December 6, 2006 and to the extent the claim alleges causes of action under the Federal and New York State Constitutions. The defendant's motion is denied with respect to the causes of action brought pursuant to the Human Rights Law and the ADEA which stem from the alleged discriminatory conduct on December 31, 2007.

The Court now turns to claimant's cross-motion for late claim relief with respect to the causes of action predicated on the incidents of October 2001 and December 6, 2006. Subdivision 6 of section 10 of the Court of Claims Act permits this Court, if the applicable Statute of Limitations set forth in article 2 of the CPLR has not expired, to allow the filing of a late claim upon consideration of the following factors: "whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy."

The first issue for determination upon a late claim motion is whether the application is timely. Subdivision 6 of section 10 requires that a motion to file a late claim be made "before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules." A cause of action brought pursuant to the Human Rights Law is subject to the three year statute of limitations set forth in CPLR 214 (2) (Murphy v American Home Prods. Corp., (58 NY2d 293 [1983]; Koerner v State of New York, Pilgrim Psychiatric Ctr., 62 NY2d 442 [1984]). Accordingly, to the extent the claim alleges causes of action under the Human Rights Law, claimant's application for late claim relief is timely with respect to the alleged December 6, 2006 incident but untimely with respect to the conduct occurring in October of 2001.

While the proposed claim asserts a cause of action under the ADEA, claimant's counsel makes no argument that late claim relief is warranted with respect to the federal statutory cause of action. Additionally, it appears that late claim relief with respect to this cause of action is time-barred. A claimant seeking to recover under the ADEA must file a discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the allegedly unlawful employment practice (29 USC § 626 [d] [1]; Kassner v 2nd Avenue Delicatessen Inc., 496 F3d 229, 237-238 [2d Cir 2007]; Cohen v Federal Exp. Corp., 544 F Supp 2d 334 [SD NY 2008]). Thereafter, a person aggrieved by the EEOC determination may bring a civil action within 90 days of the date of receipt of the notice of right to sue (29 USC § 626 [e]; Sherlock v Montefiore Medical Ctr., 84 F3d 522 [2d Cir 1996]). Here, the discrimination charge was filed with the EEOC in December 2006, well within the 300 day time frame for the December 6, 2006 incident but outside the time frame prescribed in the federal statute relative to the October 2001 incident. However, claimant provides no evidence indicating that an action was commenced within 90 days of the date of receipt of the notice of right to sue. Accordingly, it appears the causes of action under the ADEA stemming from both the 2001 and the 2006 incidents are barred by the applicable statute of limitations.

Turning to the statutory factors, this Court has broad discretion in deciding a motion to permit the late filing of a claim (Ledet v State of New York, 207 AD2d 965 [1994]). The statutory factors are not exhaustive nor is any one factor controlling (Matter of Gavigan v State of New York, 176 AD2d 1117 [1991]). The most important factor is whether the potential claim has merit, as it would be a futile exercise to permit litigation of a clearly baseless lawsuit (Savino v State of New York, 199 AD2d 254 [1993]).

Claimant proffered no excuse for the failure to timely file a claim and this fact weighs against the claimant in determining the instant motion.

The intertwined issues of notice, opportunity to investigate and prejudice to the State will be considered together. Claimant argues in support of his cross-motion that the complaint which was filed with the Equal Employment Opportunity Commission on an unspecified date in December 2006 (Claimant's Exhibits E) was forwarded to the defendant which investigated the matter and responded on March 28, 2007 (Claimant's Exhibit F). Consequently, claimant argues that the defendant had timely notice of the essential facts constituting the claim, an opportunity to investigate and suffered no prejudice as the result of his failure to file a timely claim. Defendant does not argue otherwise and the Court concludes therefore that these factors weigh in favor of granting late claim relief with respect to the discriminatory conduct allegedly occurring on December 6, 2006.

With respect to the required showing of merit, the claim is sufficiently established if the movant demonstrates that the proposed claim is not "patently groundless, frivolous, or legally defective" and there is reasonable cause to believe a valid cause of action exists (Matter of Santana v New York State Thruway Auth., 92 Misc 2d, 1, 11 [1977]). As set forth above, the Human Rights Law prohibits employers from taking adverse employment action against an employee based upon his or her age (Brannigan v Board of Educ. of Levittown Union Free School Dist., *supra*; Hardy v General Elec. Co., *supra*). With respect to the alleged discriminatory conduct on December 6, 2006, it does not appear that the proposed cause of action under the Human Rights Law is patently groundless, frivolous, or legally defective. Accordingly, claimant has sufficiently demonstrated the potential merit of this cause of action. As set forth above, however, there is no merit to the claimant's proposed causes of action under the Federal and New York State Constitutions and the ADEA cause of action is time-barred.

As to the final factor to be considered, it appears that the claimant is pursuing an action in the federal court against individually named defendants.

Consideration of the totality of factors set forth above leads this Court to conclude that it would be an appropriate exercise of discretion to afford the claimant late claim relief with respect to the cause of action brought under the Human Rights Law relative to the alleged discriminatory conduct occurring on December 6, 2006.

Based on the foregoing, the defendant's motion to dismiss the claim is granted with

respect to the alleged discriminatory conduct which occurred in October 2001 and December 6, 2006 and to the extent the claim alleges causes of action under the Federal and New York State Constitutions and is otherwise denied. Claimant's cross-motion for late claim relief is granted with respect to the alleged discriminatory conduct which occurred on December 6, 2006 and he is directed to file and serve his claim in compliance with Court of Claims Act §§ 11 and 11-a within 45 days of the date this Decision and Order is filed.

January 26, 2009  
Saratoga Springs, New York

HON. FRANCIS T. COLLINS  
Judge of the Court of Claims

The Court considered the following papers:

1. Notice of motion dated July 28, 2008;
2. Affirmation of Michele M. Walls dated July 28, 2008 with exhibit;
3. Notice of cross-motion dated October 2, 2008;
4. Affirmation of Jaime Lynn Eckl dated October 2, 2008 with exhibits.
5. Reply affirmation of Michele M. Walls dated October 10, 2008 with exhibit;
6. Reply affirmation of Jaime Lynn Eckl dated October 14, 2008 with attachments.

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[2]. Notably in this regard causes of action for discriminatory conduct based upon discrete acts of discrimination accrue on the date they occur (National R.R. Passenger Corp. v Morgan, 536 US 101, 114 [2002]).

[3]. Under the ADEA the protected class consists of individuals who are at least 40 years of age (29 USC 631 [a]) whereas under the Human Rights Law the protected class includes all workers aged 18 and over (Executive Law § 296 [3-a] [a]).

[4].*See* Court of Claims Act § 8: “The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.”

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