

Henderson v Olds

2011 NY Slip Op 33915(U)

April 17, 2011

Sup Ct, Bronx County

Docket Number: 304534/09

Judge: Brigantti-Hughes

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

APR 20 2011

Present: Hon. Mary Ann Briganti-Hughes

WILLIAM F. HENDERSON, X

Plaintiff,

-against-

DECISION/ORDER

Index No.: 304534/09

VICTOR OLDS, STEVEN B. TELZAK,
and LEGAL SERVICES NYC,

Defendants.
_____ X

The following papers numbered 1 to read on the below motions noticed on October 14, 2009 and duly submitted on the Part IA15 Motion calendar of _____, 2011:

<u>Papers Submitted</u>	<u>Numbered</u>
Def's. Affirmation in Support of Motion, with Exhibits	1,2
Pl.'s Affirmation in Opposition, with Exhibits	3,4
Def's. Affirmation in Reply	5

This matter arises from a claim brought by William F. Henderson (hereinafter "Plaintiff"), a former Legal Services attorney against his employers, Victor Olds (hereinafter "Olds"), Steven B. Telzak (hereinafter "Telzak") and Legal Services NYC (hereinafter collectively referred to as "Defendants"). The Complaint has five causes of action. The first three are for race and gender discrimination, hostile work environment and retaliation pursuant to New York City Human Rights Law, Administrative Code §8-107, New York State Human Rights Law, N.Y. Exec. L. §290 et seq., and 42 U.S.C. §1981. In his fourth and fifth causes of action, Plaintiff alleges intentional infliction of emotional distress and prima facie tort, respectively.

Defendants now move to dismiss the Complaint for failure to state a claim upon which relief can be granted, pursuant to CPLR 3211(a)(7).

I. Factual and Procedural History

Plaintiff is a former attorney employee of defendant Legal Services, NYC. In 2005, he was awarded the title of "Specialist" and concentrated his work exclusively in the area of Family Law. In March 2007, Olds was hired as the Managing Director and General Counsel of Legal Services. Olds thereafter allegedly subjected Plaintiff to harassment and discrimination due to his race (African-American) and gender. Olds allegedly demoted Plaintiff of his "specialist" title thus decreasing his salary by \$3,000. He then reassigned Plaintiff to work on unemployment, public benefit and welfare cases without providing proper training and support. Olds allegedly subjected Plaintiff to punitive performance reviews, deprived him of access to files, and subjected him to unwarranted scrutiny, control and criticism.

Plaintiff filed a discrimination complaint with the New York State Division of Human Rights in October 2007¹. After filing this complaint, Olds allegedly increased his harassment and discriminatory treatment of Plaintiff. He allegedly unfairly criticized Plaintiff's performance, monitored his activities, gave negative and inaccurate reviews, and threatened termination. In March 2008, Plaintiff applied for one of three attorney vacancies with Legal Services NYC-Bronx, which was headed by Telzak. Plaintiff was allegedly denied these positions for discriminatory reasons, and they were given to non African-American females with lesser qualifications than Plaintiff. On or about February 13, 2009, Plaintiff was terminated.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997)(on a motion for dismissal for failure to state a cause of action, the court

¹Following an investigation, the Division of Human Rights found that Plaintiff had no cause of action for discrimination and dismissed the complaint on October 10, 2008.

must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). The court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory”. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading’s four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Evidentiary material may be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

With regard to Plaintiff’s substantive claims, §290, et seq. of New York State Human Rights Law can be analyzed for purposes of determining sufficiency of the evidence, in a manner virtually identical to Title VII. Thus, in interpreting the statute, the courts have relied on Federal Title VII case law (42 U.S.C. §§2000e et seq.). *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21 (2002).

Under the Human Rights Law, an aggrieved individual must elect one of two procedural options: to file a complaint with the Division of Human Rights or commence an action in court. N.Y. Human Rights Law §297(9). Generally, the filing of a complaint with the Division of Human Rights precludes the claimant from initiating an action in court which encompasses the same allegedly insidious behavior over the same period of time. *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449 (2nd Dept. 1994). Here, the Complaint contains allegations of discrimination and harassment taking place after Plaintiff filed his Division of Human Rights action. Accordingly, he is not precluded from asserting this action.

III. Analysis

(A). Retaliation

Defendants allege that the Complaint does not sufficiently assert a cause of action for retaliation since he asserts no nexus between filing the Division of Human Rights complaint and the alleged adverse employment actions by Tezlak and Olds.

Under Title VII as well as N.Y. State Law, a prima facie claim of retaliation requires evidence of a subjective retaliatory motive for the adverse employment decision. *See Pace Univ. v. New York City Comm'n on Human Rights*, 85 N.Y.2d 125 (1995). To make out a prima facie case of retaliation, plaintiff must show 1) participation in a protected activity; 2) the participation was known to defendant; 3) an adverse employment action against the plaintiff, and 4) a causal connection between the protected activity and the adverse employment action. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). The causality requirement is not met simply because the incidents of which plaintiff complains occurred after grievances were filed. *Id.*, see also *Koester v. New York Blood Center*, 55 A.D.3d 447 (1st Dept. 2008). There must be more than a close temporal connection or other connecting factors between the protected activity and the adverse action. *Id.*

The anti-retaliation provision of the New York City Human Rights Law ("City HRL") proscribes retaliation *in any manner*. Under the City HRL,

The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity. §8-107(7).

Accordingly, the standard to be applied in retaliation claims under the City HRL differ from the standard applied by the Second Circuit in Title VII claims. *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 69 (1st Dept. 2009). Where retaliation claims involve neither ultimate sanctions nor materially adverse changes in terms and conditions of employment, it is

important that the actions are assessed with a keen sense of workplace realities and the “chilling effect” of particular conduct is context-sensitive. *Id.* Therefore, the City HRL does not permit any type of challenged conduct to be deemed non-retaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was reasonably likely to deter a person from engaging in protected activity. *Williams* at 71.

Viewing the facts of this matter in a light most favorable to Plaintiff, the Complaint alleges that 1) he engaged in protected activity by filing a discrimination complaint with the Division of Human Rights in October 2007 against Legal Services NYC; 2) Olds, and by association, Legal Services NYC and its employees, knew about the Complaint, and 3) in response, Olds increased his discriminatory and harassing treatment, as did defendants Tezлак and Legal Services NYC by giving available positions to female, non-minority applicants who were less qualified than plaintiff; Olds gave a negative and inaccurate performance review in November 2008, and Defendants ultimately terminated Plaintiff in 2009. There is no documentary evidence on the record submitted by Defendants which conclusively negates these allegations. Defendant’s motion to dismiss Plaintiff’s retaliation claims is therefore denied in its entirety, as the Complaint adequately states a cause of action pursuant to Title VII, whose pleading requirements are more narrowly construed than its State and City counterparts (N.Y. Exe. L. §296, et seq., N.Y.C. Admin. Code §8-107, et seq., respectively). *See Williams, supra.*

(B). Hostile Work Environment

Defendants allege that Plaintiff failed to state a claim for hostile work environment because the Complaint does not contain specific factual incidents of severe or pervasive discrimination or harassment.

The standard for establishing hostile environment liability pursuant to State Human Rights Law is the same as under Federal law. *Espillat v. Breli Originals, Inc.*, 227 A.D.2d 266 (1st Dept. 1996). A “hostile work environment” exists, for purposes of Federal and State statutes, when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment. *Id.*, citing *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). An employer is liable for discriminatorily abusive work environment created by a supervisor if that

supervisor uses his authority to further harassment. *Id.*, citing *Kariban v. Columbia Univ.*, 14 F.3d 773, 780 (2nd Cir. 1994). The factors to be considered include the frequency and severity of the conduct, whether the conduct was threatening and humiliating as opposed to being merely offensive and whether it unreasonably interfered with the plaintiff's work performance. *Harris, supra*. See also *Forrest v. Jewish Guild for the Blind, supra*. City HRL likewise recognizes these elements to a hostile work environment claim, but the First Department has not adopted the "severe and pervasive" bar. *Williams* at 79-80. Instead, the court recognized an affirmative defense whereby defendants can avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." *Id.* At 80.

Summary disposition of such claims must be denied in close or ambiguous cases because a jury, based upon its cumulative perceptions and backgrounds, is the appropriate institution for assessing whether borderline situations should be characterized as harassment or hostile work environment. See *Williams, supra.*, and *Ackerman v. National Financial Systems*, 81 F.Supp. 2nd 434 (E.D.N.Y. 2000), both citing *Gallagher v. Delaney*, 139 F.3d 338 (2nd Cir. 1998).

In this case, Plaintiff alleges in his Complaint that 1) beginning in March 2007, his employer Olds demoted plaintiff and assigned him to matters with no training or support, and berated Plaintiff when he tried to obtain training; 2) his employer deprived Plaintiff of access to files and gave him punitive criticisms and reviews; 3) Olds subjected Plaintiff's physical movements and activities to unwarranted scrutiny; 4) Defendants improperly denied Plaintiff attorney positions with Legal Services NYC-Bronx, headed by Telzak, and gave these positions to less qualified applicants; 5) after filing a complaint with the Division of Human Rights, Defendants unfairly criticized his work performance, monitored his activities, gave negative, incomplete, or inaccurate performance reviews, and threatened termination, and finally 6) in February 2009, Plaintiff was terminated. Taken as a whole, these actions as alleged appear as more than "petty slights" or "trivial inconveniences", considering that they directly affected Plaintiff's substantive job duties and salary. There has been no documentary evidence submitted which conclusively negates these allegations. Accordingly, Defendants' motion regarding Plaintiff's hostile work environment claims under City, State, and Federal Statute is denied.

(C) Disparate Treatment due to Racial and Gender Discrimination

Defendants argue that the Complaint only contains bald assertions of race and gender discrimination, and thus does not raise a right to relief above the “speculative level.” *ATSI Comme 'ns v. Shaar Fund, Ltd.*, 493 F.3d 87 (2nd Cir. 2007), citing *Bell Ad. Corp. v. Twombly*, 550 U.S. 544 (2007).

To state a prima facie case of employment discrimination based on a disparate treatment theory, a plaintiff must show 1) that he or she is a member of a statutorily protected class; 2) that he or she was qualified for the position held or applied for; and 3) that he or she suffered an adverse employment action, or was refused a job, in circumstances which give rise to an inference of discrimination based upon the plaintiff's membership in the protected class. *Hernandez v. Research Foundation of City University of New York*, 19 Misc. 3d 1110(A) (N.Y. County, 2007), and *Messinger v. Girl Scouts of U.S.A.*, 16 A.D.3d 314 (1st Dept. 2005), citing *Forrest v. Jewish Guild for the Blind, supra.* (internal citations omitted). An “adverse employment action” in this context requires a materially adverse change in the terms and conditions of employment, that is, a change more disruptive than a mere inconvenience or an alteration of job responsibilities. *Forrest, supra*, at 306.

With respect to gender discrimination claims under this theory, the *sine qua non* is that “the discrimination must be *because of sex*.” *Patane v. Clark*, 508 F.3d 106 (2nd Cir. 2007), citing *Leibovitz v. N.Y. City Transit Auth.*, 252 F.3d 179 (2nd Cir. 2001). Essentially, Plaintiff must allege that “but-for” his being male, he would not have been treated in the manner in which he was. *Yukoweic v. Int'l Business Machines, Inc.*, 228 A.D.2d 775 (3rd Dept. 1996), citing *Polly v. Houston Light & Power Co.*, 825 F.Supp 135 (S.D. TX 1993). “Preferential treatment, favoritism, and cronyism, while unjust and unfair, do not constitute sexual discrimination.” *Fella v. County of Rockland*, 297 A.D.2d 813 (2nd Dept. 2002), citing *Burgess v. Gateway Comm., Inc.*, 26 F.Supp. 2d 888 (So. WA 1998).

With respect to racial discrimination claims under this theory, “[i]t is simply not the law that every dispute that arises between people of different races constitutes employment discrimination, or that every wrongful act perpetrated in the course of such a dispute is

committed because of race. Simply put, animosity on the job is not actionable, but unequal treatment based on racial animus is.” *Forrest v. Jewish Guild for the Blind, supra*, at 298.

The court acknowledges that Plaintiff, as a male, belongs to a protected group for purposes of a claim based on gender discrimination (see, Executive Law § 296[1][a]; *Yukoweic v. Int'l Business Machines, Inc.*, 228 A.D.2d 775 (3rd Dept. 1996), (internal citations omitted) *See also State Div. Of Human Rights v. Stoute*, 36 A.D.3d 257 (2nd Dept. 2006). Being an African-American, he likewise belongs to a protected group for purposes of his race discrimination claims.

Plaintiff’s complaint alleges, in part, that in March 2008, he applied for attorney positions within the Department of Legal Services, Bronx Division, for which he was qualified. In an affidavit (which the Court is free to consider on a motion to dismiss under *CPLR* 3211 and *Ackerman, supra*), Plaintiff affirms that after filing his Division of Human Rights Complaint, 1) defendant Olds assigned him to work on new matters without proper training, while he provided the proper training and assistance to two female non-African-American employees working on new assignments; 2) Olds demanded Plaintiff provide an explanation about his leave and sick time, which was not required of other employees; 3) Plaintiff was singled out for an unfair, inaccurate and punitive performance review; 4) Plaintiff applied for open attorney positions within the Bronx Legal Services division, yet was denied those positions by defendant Tezlak, who is Caucasian. The positions went to non-African-American females with less qualifications.

Allowing all favorable inferences in favor of Plaintiff, and assuming all of Plaintiff’s allegations as true, Plaintiff has sufficiently pleaded a cause of action for racial discrimination pursuant to City, State, or Federal Law. Plaintiff has pleaded that he is a member of a protected class, that he was qualified for the available positions, that he was denied those positions, and they went to non African-American females that were allegedly less qualified. On a motion to dismiss pursuant to *CPLR* 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory”. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). None of the allegations are flatly contradicted by documentary evidence. Accordingly, Defendants’ motion is denied as to Plaintiff’s cause of action for racial discrimination.

(D). Intentional Infliction of Emotional Distress and Prima Facie Tort

(i) Intentional Tort and Workers Compensation Issues

Defendants argue that Plaintiff's claim of intentional infliction of emotional distress must be barred pursuant to Workers Compensation Law, as it alleges a tort committed by an employee acting within the scope of his employment. *Hanford v. Plaza Packaging Corp.*, a case cited by both parties, held that an employee who commits an intentional tort due to purely personal motives, not in furtherance of the employer's business and outside of the scope of his employment is not protected under Workers' Compensation Law §29. 2 N.Y.3d 348, 349 (2004).

Even if there was an issue of fact as to whether defendant Olds and Tezlak's conduct fell outside the scope of their employment with Legal Services NYC, Plaintiff's complaint fails to sufficiently allege a cause of action for intentional infliction of emotional distress.

To state a claim for intentional infliction of emotional distress under New York law, an employee must allege that (1) the employer or co-worker engaged in extreme and outrageous conduct, (2) the employer or co-worker intentionally or recklessly caused the employee's emotional distress, and (3) the employee suffered severe emotional distress as a result of the employer's or co-worker's conduct. *Murphy v. American Home Prods.*, 58 N.Y. 2d 293 (1983). The conduct complained of must go beyond all bounds of decency, exceed what is usually tolerated by society, and be of the most egregious nature. *Id. See also Belanoff v. Grayson*, 98 A.D.2d 353 (1st Dept. 1984). The employer's conduct must "consist of more than mere insults, indignities and annoyances and must be so shocking and outrageous as to exceed all reasonable bounds of decency." *See Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169 (2nd Dept. 1989). Given this high threshold, courts have routinely dismissed claims for intentional infliction of emotional distress brought by terminated at-will employees, in cases where the plaintiff failed to allege sufficiently outrageous conduct. *Id.* (allegations that plaintiff's supervisor directed ethnic remarks at her such as "Hebe" and "kike," while deplorable and reprehensible, did not state a claim for intentional infliction of emotional distress). *Belanoff, supra* (employee alleging poor performance reviews, verbal criticizing of work performance and ultimate suspension did not

constitute sufficiently outrageous conduct). The First Department has upheld a claim for intentional infliction of emotional distress where the employee alleged that the employer threatened him and subjected him to questioning and loud, abusive and profane language for three hours, called him a thief, threatened him with criminal conviction and prison, coerced him into signing a statement that he had stolen money when he had not, and forcing him to resign. *Kamisnki v. U.S.P.S.*, 120 A.D.2d 409 (1st Dept. 1986).

Here, although the allegations are actionable, nothing alleged in the Complaint amounts to the necessary egregious and outrageous conduct mandated to sustain an action for intentional infliction of emotional distress. Plaintiff alleges that he was subject to negative performance reviews and questioning regarding sick and leave time. He alleges that defendant Olds kept track of where he was in the office. He alleges that Defendants denied him open positions, and ultimately fired him. These accusations do not amount to such egregious, reckless, or deplorable conduct that goes beyond the bounds of decency. Accordingly, Defendants' motion regarding Plaintiff's intentional infliction of emotional distress claims is granted.

(ii) Prima Facie Tort

Defendants argue that Plaintiff's prima facie tort cause of action is insufficiently pleaded because it does not contain the requisite allegation of malicious intent on the part of Defendants.

The Court of Appeals recognizes the general principle that harm intentionally inflicted is prima facie actionable unless justified. *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). That principle has developed into the specific cause of action of prima facie tort consisting of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332; *ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458). The purpose of prima facie tort is to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy; it is not to provide a "catch-all alternative" for every cause of action that is not independently viable. *Epifani v. Johnson*, 65 A.D.3d 224 (2nd Dept. 2009). While prima facie tort may be pleaded in the alternative with a traditional tort, once a traditional tort is established the cause of action for prima facie tort

disappears (*Board of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 406 (1975)).

In this case, Plaintiff has sufficiently pleaded a cause of action for prima facie tort, alleging that the intentional actions by Defendants ultimately caused the loss of actual and special damages. A generous reading of the Complaint permits the court to conclude that those special damages could be exhibited as harm to professional reputation. *See, e.g., Brandt v. Winchell*, 283 A.D. 338 (1st Dept. 1954). Accordingly, Defendants' motion to dismiss this cause of action will be denied, however the court is mindful that once traditional tort is established by Plaintiff, the allegations under prima facie tort will be "rendered academic." *Board of Education v. Farmingdale, supra*.

IV. Conclusion

Accordingly, it is hereby


ORDERED that Defendants' motion to dismiss Plaintiff's First, Second, and Third Causes of Action pursuant to CPLR 3211(a)(7) is hereby DENIED, and it is further,

ORDERED that Defendants' motion to dismiss Plaintiff's Fourth Cause of Action pursuant to CPLR 3211(a)(7) is hereby GRANTED, and it is further,

ORDERED that Defendants' motion to dismiss Plaintiff's Fifth Cause of Action pursuant to CPLR 3211(a)(7) is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: April 17, 2011



Hon. Mary Ann Brigantti-Hughes, J.S.C.