At a Special Term Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, at 360 Adams St, Brooklyn, New York, on the 14th day of February, 2014

PRESENT:

HON. JOHNNY L. BAYNES
Justice

503275/13

----------x **Index No. ~~23319/12~~**

DAVID HERNANDEZ,

Plaintiff,

DECISION AND ORDER

-against-

CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

Defendants.
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Defendants City of New York and New York City Police Department (Collectively "Defendants") move by Notice of Motion dated September 19, 2013, for an Order pursuant to CPLR 3211(a)(7) dismissing the Complaint for failure to state a cause of action.

Plaintiff, David Hernandez (hereinafter "Plaintiff") a Hispanic male police officer employed by the New York City Police Department (hereinafter "NYPD) commenced the instant action alleging that he was subjected to disparate treatment and a hostile work environment due to his race in violation of the New York State Human Rights Law, New York Executive Law §§ 290, *et seq*. (hereinafter "NYSHRL"), and the New York City Administrative Code §§ 8-101, *et seq*. Plaintiff further asserts causes of action for common law negligence, intentional infliction of emotional distress and claims that defendants violated Municipal Law § 205-e when they assigned him "limited duty" work following his line of duty injury.

On or about February 16, 2012, plaintiff injured his wrist while attempting to arrest a

suspect who was driving with a suspended license. Thereafter, and on or about March 18, 2012, plaintiff returned to work as a telephone switchboard operator (hereinafter "TS Operator") based on the conclusion of the NYPD's district surgeon that plaintiff was fit for "limited duty", despite the recommendation of plaintiff's own private physician that he not return to work until April 4, 2012,approximately three weeks after his actual return date. During his shift on March 18, 2013, plaintiff attempted to assist with an arrest on a violation of an order of protection. Plaintiff claims he was injured when the arrestee grabbed and twisted his wrist. Plaintiff also claims he sustained bruised ribs and two herniated discs during the incident.

CPLR § 3013 requires that a complaint be "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrence, intended to be proved and the material elements of each cause of action or defense". In order for defendants to prevail in a pre-answer motion to dismiss, they must show that the pleading states no legally cognizable cause of action. Bare conclusory allegations do not rise to a level that would prevent dismissal of the Complaint. DuBois v Brookdale Univ. Hosp. & Med. Ctr., 29 AD3d 731, 732 [2d Dept 2006]. In Dubois, the Second Department affirmed the dismissal of a complaint alleging race and national origin discrimination claims which were merely conclusory.

In his instant action, plaintiff alleges employment discrimination. In order for such a complaint to stand he must allege a prima facie stating he is a member of a protected class; was qualified to hold the position in question; that he was terminated from his employment or suffered other adverse employment action or his discharge gave rise to an inference of discrimination. Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004].

Plaintiff sets forth no facts in his complaint which would lead this Court to believe that any discriminatory action occurred. He was directed to return to work based upon the medical

opinion of defendants' expert. That opinion differed from plaintiff's own doctor's opinion by only a few weeks. Moreover, defendants assigned plaintiff to light duty after his return because he had been previously injured. No allegation is made that they knew or should have known that even this light duty would result in plaintiff's injury. There are also no facts alleged which set forth a claim of discrimination or indicating plaintiff was either forced to return to work or take on light duty as a result of him being discriminated against as a member of a protected class. While plaintiff states he is Hispanic, he gives no indication of a relationship between his ethnicity and any action taken.

Finally, plaintiff alleges common law negligence claims against the defendants as a result of his reassignment to a limited duty post and that this reassignment was the "sole and proximate cause" of his injury. However, at common law, a police officer is barred from recovering for negligence for damages sustained during the course of his employment where the action was "taken in furtherance of a specific police or firefighting function [which] exposed the officer to a heightened risk of sustaining the particular injury. *Zanghi v Niagara Frontier Transp. Comm'n*, 85 NY2d 423, 439 [1995]. In Hoey v Kuchler, 208 AD2d 805, 806 [2d Dept 1994], a police officer struck by a fleeing suspect's vehicle during a buy and bust operation had no common law negligence claim against his employer as such occurrences are "a risk associated with the particular dangers inherent in police work. Wadler v City of New York, 14 NY3d 192, 196 [2010]. And while General Obligation Law § 11-106 partially abrogates the common law rule to permit a police officer to assert a common law tort claim against the general public, it does not make any exception for suit against the officer's employer or co-employees. *Williams v City of New York*, 2 NY3d 352, 363 [2004].

Plaintiff has also failed to state a claim pursuant to General Municipal Law § 205-E

which applies when a police officer is injured by another's failure "to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus. *Williams*, 2 NY3d at 363-64. Section 205-E was intended "to provide police officers with an avenue for recourse where injury is the result of negligent non-compliance with well-developed bodies of law and regulation which impose clear duties". *Desmond v City of New York*, 88 NY2d 455, 463-64 [1996]. Plaintiff states only that he sustained injury as a result of defendant failing to comply with the Occupational Safety Health Act ("OSHA") and Labor Law §§ 27-a and 200. Yet plaintiff fails to state what provisions were violated and what actions, in fact, violated those provisions. Moreover, the Court of Appeals has specifically held that Labor Law 27-a "does not cover the special risks faced by police officers because of the nature of police work" and thus does not permit an officer to recover for negligence pursuant to General Municipal Law § 205-e. *Williams*, 2 NY3d 352 at 367.

Finally, plaintiff has failed to state any claim for intentional infliction of emotional distress. "Public policy bars claims for intentional infliction of emotional distress against a government entity". Liranzo v NYC Health & Hosps. Corp, 300 AD548, 548 [2dd Dept 2002].

WHEREFORE, it is hereby

ORDERED and ADJUDGED that defendants' Motion to Dismiss is granted in all respects and this action is dismissed, with prejudice, pursuant to CPLR § 3212.

The foregoing constitutes the Decision and Order of this Court.

ENTER

FILED
KINGS COUNTY CLERK
2014 MAR 14 AM 7:40

JOHNNY L. BAYNES, JSC