Estatico v Department of Educ. of City of N.Y.
2014 NY Slip Op 33611(U)
October 30, 2014
Supreme Court, New York County
Docket Number: 155092/2013
Judge: Kathryn E. Freed
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[* 1]

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

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT, *Justice*

PART 5

Index Number : 155092/2013
ESTATICO, LAWRENCE
vs.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. 02
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits ______	
Replying Affidavits ______	

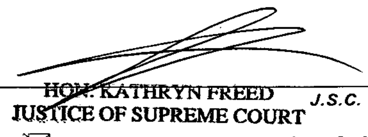
Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 10/30/14
OCT 30 2014



HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

---X

LAWRENCE ESTATICO,

Plaintiff,

- against -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND ANTHONY ORZO, Deputy Chief Executive Officer and Supt of District 88; EDWARD GARDELLA, Principal; KEVIN DUFFY, Assistant Principal, RON BRIJALL, Assistant Principal; JOSETTE SMITH, Guidance Counselor AND WILLIAM MARTINEZ, School Aide IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants.

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DECISION AND ORDER
Motion Sequence No. 002
Index No.: 155092/13

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED....................	1-2 (Exhibit A)
ANSWERING AFFIDAVITS..	
REPLY AFFIDAVITS...	
MEMORANDA OF LAW..	3-5
EXHIBITS..	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move to dismiss the amended complaint, pursuant to CPLR 3211 (a) (7), on the ground that the causes of action are barred by the one-year statute of limitations set forth in New York Education Law § 3813 (2-b), and for failure to state a claim as against defendant Anthony Orzo.

[* 3]

Plaintiff Lawrence Estatico, a teacher employed by the defendant Department of Education of the City of New York ("the DOE"), opposes the motion. After oral argument, and after consideration of the parties' papers and the relevant statutes and case law, this Court **grants** the motion insofar as it seeks dismissal against defendant Anthony Orzo but otherwise **denies** the motion.

Factual and Procedural Background:

Plaintiff began his employment with the DOE in September of 2005. He has been employed as a teacher at the Bronx Alternate Learning Center since September of 2006. Plaintiff alleges that he suffers from a number of chronic disabilities, including Crohn's disease, reactive airway disease, primary immunodeficiency, and alopecia.

Because plaintiff's Crohn's disease subjects him to "sudden urgency," he asserts that teaching triple periods is difficult for him. His reactive airway disease is under control provided that he is not exposed to triggers, such as volatile chemicals, tobacco smoke, perfumes and lotions. If exposed to such triggers, he may suffer an attack, which causes instant swelling of the nasal passages and reddening and tearing of the eyes, which at times can lead to infection. Plaintiff is required to undergo weekly antibody infusions in order to maintain adequate immunity given his immunodeficiency. In addition, his alopecia causes hair loss on his scalp and exposed parts of his body, such as his eyebrows.

Plaintiff alleges that since he disclosed and requested a medical accommodation for his alleged disabilities in November 2010, he has been subjected to an ongoing, continuous intentional pattern of disability discrimination creating a hostile work environment. He also

[* 4]

claims that he has been subjected to disparate treatment based on his disability and/or perceived disability, as well as retaliated against for requesting a reasonable accommodation and for engaging in a protected activity by complaining about the discrimination against him.

Specifically, on November 3, 2010, plaintiff requested a medical accommodation from the principal of his school, defendant Ed Gardella. On November 8, 2010, Gardella denied the request. On June 6, 2011, the air conditioning system at the school failed and plaintiff suffered a respiratory attack and subsequent infection, causing him to miss work for six days. Plaintiff submitted an accident report and a "Line of Duty" ("LODI") claim, which was denied by Kevin Duffy, the assistant principal, who claimed that plaintiff abandoned the class.

On June 10, 2011, plaintiff filed another request for accommodation with the DOE medical bureau, and provided supporting documentation. On June 28, 2011, plaintiff received a notice from human resources advising that Gardella refused to sign the LODI request and that plaintiff had an additional 21 days to have it signed. Although Gardella refused to sign the LODI request, the DOE medical bureau granted the request on August 30, 2011, and plaintiff was thereafter provided with an oscillating fan to ventilate his work area and to prevent his direct exposure to chemicals.

Plaintiff asserts that, after his request for medical accommodation was granted, he was subject to incidents of harassment and disparate treatment, including but not limited to the following:

October, 17, 2011 - Duffy humiliated plaintiff in front of his peers stating that he, Duffy, would not tolerate opening the windows, despite plaintiff's need to prevent exposure to triggers. Plaintiff reported Duffy's behavior and the fact that the DOE put lockboxes over the thermostats, preventing him from adjusting the ventilation as required for his condition, to Gardella, who in turn responded that plaintiff was "opening a can of worms;"

October 18, 2011 - plaintiff filed a complaint of discrimination and retaliation with William Brewton of the EEO office;[1]

November 1, 2011 - plaintiff had undergone a second fitness for duty medical examination, after an order from Gardella to do so;

December 8, 2011 - plaintiff received a written formal observation, despite not being given a pre-observation conference or notice of when the observation would be taking place, in violation of DOE policy;[2]

May 4, 2012 - defendant assistant principal Ronald Brijlall put a letter in plaintiff's file alleging inappropriate behavior and a lack of classroom planning, attaching the letter statements from three students. Plaintiff claims that these three students had constant severe behavioral issues, including being loud, disruptive and insubordinate to plaintiff, making comments to plaintiff about his lack of eyebrows, as a result of his disability, and vandalized plaintiff's desk and fan. He claims that after being spit on by a student, plaintiff requested assistance. Brijlall came in demanding to see plaintiff's lesson plan. Plaintiff claims he did not have one prepared because an outside group, ENACT[3] was supposed to be teaching a lesson, but abandoned the class because of the unruliness of the class;

Plaintiff was given an "unsatisfactory" annual performance review for the 2011-2012 school year;

November 27, 2012 - defendant guidance counselor Josette Smith entered plaintiff's classroom while he was working with a student, telling plaintiff to do his grades. Plaintiff was on his way to complain to Duffy when he saw Smith, who again berated him;

November 29, 2012 - Smith again began yelling at and insulting plaintiff over a student's grade. Plaintiff showed Smith the grade had been completed on November 26, 2012, however "she continued to yell at plaintiff and instructed him not to come around her any longer;"

December 13, 2012 - in Duffy's absence, Smith issued an order that males were not permitted to use the "East" bathroom. The directive was problematic for plaintiff given his

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[1] It is not clear from the complaint what, if anything, was done after plaintiff filed his complaint.

[2] Plaintiff claims he had a second observation during the 2011-2012 school year after which he was verbally advised that his lesson had been satisfactory, although this review was never reduced to writing.

[3] ENACT is an organization which focuses on bringing life lessons into the most under-sourced neighborhoods in New York City.

occasional bouts of urgency due to having Crohn's disease;

April 3, 2013 - plaintiff received a letter to file from Duffy, regarding an alleged incident that occurred on March 7, 2013 between plaintiff and a student, who had physically assaulted plaintiff. The letter was rescinded on April 9, 2013, and replaced with a second letter on April 15, 2013;

April 7, 2013 - plaintiff received another letter to file from Duffy, alleging that plaintiff made inappropriate comments to the classroom on March 6, 2013. The letter was rescinded on April 9, 2013, and replaced with a second letter on April 22, 2013;[4]

April 23, 2013 - plaintiff was sent for a third medical evaluation by Gardella, who claimed that plaintiff could not perform his duties as a science teacher because he was unable to perform laboratory experiments. Plaintiff claims that the classrooms in the school had no laboratory facilities. Plaintiff was found fit for duty.

April 24, 2013 - after being out one day due to the required medical exam, plaintiff found his fans dismantled in one classroom and broken in a second.

April 30, 2013 - plaintiff attended a citywide "Science PD". Plaintiff had a reaction due to poor ventilation at the facility. Plaintiff was referred back and forth between the presenter, Dr. Kane, and Duffy. Duffy refused to address the situation. Plaintiff was in respiratory distress and had to sign himself in and out of the building. He went to the doctor's office, where he was treated. Plaintiff filed a notice of claim, claiming discrimination and retaliation;

Plaintiff filed an injury report and a one-day LODI claim, but the request was never acknowledged. Plaintiff claims he made a number of LODI requests that were denied or ignored;

May 8, 2013 - Brijlall requested that plaintiff meet with him to discuss abusive language toward students. A conference was held on May 10, 2013. On June 4, 2013, plaintiff learned that a number of the complaining students had a history of behavioral problems;

June 17, 2013 - plaintiff received a second unsatisfactory annual evaluation and, as a result, was ineligible for "per session" work and could not transfer to another school.

Plaintiff was served with Education Law § 3020-a charges, seeking the termination of his employment, and was suspended pending the outcome of the § 3020-a hearing due to his disability, perceived disability and retaliation.

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[4] Plaintiff does not describe the substance of any of these aforementioned letters.

Plaintiff claims that, as a result of the foregoing, the DOE violated New York City Administrative Code § 8-107, otherwise known as the New York City Human Rights Law (NYCHRL), by discriminating against him due to his disability, perceived disability, and in retaliation for protected activities.

Parties' Contentions and Legal Conclusions:

> "In considering a [CPLR 3211 (a) (7)] motion to dismiss for failure to state a cause of action . . ., the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory . . . . In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards. For example, under the Federal Rules of Civil Procedure, it has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds"

Vig v New York Hairspray Co., L.P., 67 AD3d 140, 144-145 (1st Dept 2009) (*internal citation and quotation marks omitted*).

Defendants argue that all of the causes of action accruing prior to May 31, 2012, one year prior to the date plaintiff filed this action, are barred by the one-year statute of limitations set forth under New York Education Law § 3813 (2-b). While the statute of limitations for claims under the NYCHRL is three years (*see* Administrative Code of City of NY § 8–502 [d]), under Education Law § 3813 (2-b), "no action or special proceeding shall be commenced . . . more than one year after the cause of action arose," which includes employment discrimination cases brought against the DOE. *See Stembridge v New York City Dept. of Educ.*, 88 AD3d 611 (1st Dept 2011). The one-year statute of limitations is applicable only to the DOE and its officers.

[* 8]

School principals and employees are not "officers" of a school board or district and are thus not entitled to the protection of the one-year statute of limitations set forth in Education Law § 3813 (2-b). *See Goldman v City of New York*, 2014 WL 5038401, * 4 (Sup Ct, NY County Oct. 03, 2014, No. 151073/2014), citing *Herling v New York City Dept. of Educ.*, 2014 WL 1621966, *11, 2014 US Dist LEXIS 56442, *31 (EDNY Apr. 23, 2014); *Rosenberg v City of New York*, 2011 WL 4592803, *16-17, 2011 US Dist LEXIS 112818 (EDNY Sept. 30, 2011) (*other citations omitted*). Accordingly, the claims as against individual defendants Gardella, Duffy, Brijlall, Smith and William Martinez, who is named in this action as a school aide, are subject to a three-year statute of limitations.

Moreover, plaintiff argues that his claims are not time-barred because he has alleged a "continuing violation" based upon an ongoing hostile work environment. Defendants disingenuously argue that plaintiff has not alleged such a cause of action in the amended complaint. As noted above, a plaintiff need only give fair notice of the nature of the claim and its grounds. *See Vig*, 67 AD3d *supra*, at 145. Here, plaintiff specifically alleges that he "has been subjected to an ongoing, continuous, intentional pattern of discrimination that has created a hostile work environment" (*see* amended complaint, at ¶ ¶ 10, 12), and "was subjected to a hostile work environment" (*Id.*, ¶ 54). Under the NYCHRL, hostile work environment claims are analyzed pursuant to the standard of "what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences,'" as opposed to "an overly restrictive 'severe or pervasive' bar." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79–80 (1st Dept 2009).

Here, plaintiff alleges several years of varying incidents relating to his alleged disability discrimination claim, as set forth in detail above. "[I]t cannot be said, as a matter of law, that

these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint." *Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 (1st Dept 2014).

Further, to the extent that defendants argue that the allegations in the amended complaint do not give rise to a claim of disability discrimination, this Court finds to the contrary.

Under the NYCHRL, it is unlawful, and constitutes a discriminatory practice

> "[f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

Administrative Code § 8-107 (1)(a). The NYCHRL defines disability as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Administrative Code § 8–102 (16)(a).

In order to state a cause of action for disability discrimination under the NYCHRL, the plaintiff must allege that he or she suffers from a disability and that the disability was the reason for the termination or other adverse action. *See Vig v New York Hairspray Co., L.P.*, 67 AD3d, *supra* at 147. The NYCHRL is to be construed "broadly in favor of discrimination plaintiffs." *Ambunio v City of New York*, 16 NY3d 472, 477–478 (2011). Here, plaintiff alleges that he suffers from a number of disabilities and that it was because of these alleged disabilities that he received the § 3020-a charge.

Defendants argue that plaintiff fails to allege a single comment or action that is in any way related to plaintiff's alleged disability. However the complaint sets forth a pattern of

behavior which appears, assuming the truth of the allegations, as this Court must on this motion to dismiss (*see Vig v New York Hairspray Co., L.P., supra*), and given the totality of the circumstances, to be connected to plaintiff's disabilities. For example, although Gardella and Duffy repeatedly denied plaintiff's LODI requests, plaintiff's request for accommodation was ultimately granted. This Court therefore finds that the motion to dismiss must be denied. *See Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 (2013).

Claims Against Orzo

Defendants argue that all claims against the individual defendant Anthony Orzo, former superintendent of the school district, should be dismissed as plaintiff fails to raise any allegations of discrimination, harassment and/or retaliation against him. Further, defendants assert that while not explicit, plaintiff is raising an aiding and abetting claim pursuant to the NYCHRL (*see* Admininstrative Code § 8-107 [6]), and that one can be liable under this provision only if the individual was "actively 'aiding and abetting' discriminatory practices" (*Priore v New York Yankees*, 307 AD2d 67, 74 n 2 [1st Dept 2003]), which was not alleged here. Rather, they claim that all plaintiff alleges is that Orzo authorized the evaluations and the § 3020-a charge.

The NYCHRL prohibits "any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." Administrative Code § 8–107 (6). "'Aiding and abetting liability requires that the aider and abettor share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose.'" *Tate v Rocketball, Ltd.*, — F Supp 3d —, 2014 WL 4651969, *3 (EDNY Sept. 18, 2014), quoting *Brice v Sec. Operations Sys., Inc.*, 2001 WL 185136, *4 (SDNY

Feb. 26, 2001). A plaintiff must therefore plead facts of a defendant's intent to discriminate or that he or she was involved in an alleged discriminatory scheme. *See Tate*, 2014 WL 4651969, *supra* at * 3. Here, plaintiff has not alleged any intent or discriminatory scheme by defendant Orzo and that branch of defendants' motion seeking dismissal as against him is granted.

Therefore, it accordance with the foregoing, it is:

ORDERED that the branch of the motion by defendants the Department of Education of the City of New York, the Board of Education of the City School District of the City of New York, Anthony Orzo, Deputy Chief Executive Officer and Supt of District 88, Edward Gardella, Kevin Duffy, Ron Brijlall, Jossette Smith and William Martinez to dismiss the complaint is granted to the extent of dismissing the complaint as against defendant Anthony Orzo, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the motion is otherwise denied; and it is further;

ORDERED that the action is severed and continued against the remaining defendants, and it is further,

ORDERED that the defendants remaining in the action are directed to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that counsel are directed to appear for a discovery conference in Room 103 at 80 Centre Street, New York, New York, on January 27, 2015 at 2 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 30, 2014

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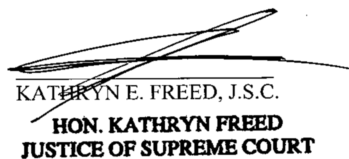

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT