

Clarke v Metropolitan Transp. Auth.

2015 NY Slip Op 32871(U)

May 8, 2015

Supreme Court, Nassau County

Docket Number: 006312/11

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. DANIEL PALMIERI
Justice Supreme Court**

TRIAL TERM PART 20

-----X

ADELBERT CLARKE a/k/a EDMOND CLARKE,

INDEX NO.: 006312/11

Plaintiff,

Motion Date: 1-20-15

- against -

Submit Date: 3-20-15

Seq. No.: 001

**METROPOLITAN TRANSPORTATION AUTHORITY
AND MTA-LONG ISLAND BUS,**

Defendants.

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The following papers have been considered:

Notice of Motion, dated 12-21-14.....1
 Memorandum of Law, dated 12-21-14.....2
 Affirmation of Service, dated 12-21-14.....3
 Affirmation in Opposition, dated 2-24-15.....4
 Reply Affirmation, dated 3-18-15.....5
 Reply Memorandum, dated 3-18-15.....6

Motion by defendants, Metropolitan Transportation Authority and MTA-Long Island Bus, for summary judgment, pursuant to CPLR 3212, is granted.

This is an action for employment discrimination, alleging violations of Executive Law Sections 296 and 297. On April 28, 2011, a summons with notice and verified complaint were filed against defendants by plaintiff, Adelbert Clarke a/k/a Edmond Clarke. According to the verified complaint, in or about 2002, plaintiff became employed by defendants as a bus information agent and is currently employed by defendants. The verified complaint asserts that during the course of his employment with defendants, plaintiff was subjected to discrimination and a hostile work

environment by his supervisor, Susan Verneer, because of his gender and age and because he filed several written and oral complaints against her. Plaintiff alleges that Susan Verneer treated him differently than his co-workers at the call center. Specifically, the verified complaint alleges that Susan Verneer repeatedly touched plaintiff's body by, for example, placing her hand on his shoulder; followed plaintiff to the bathroom and otherwise spied on him; made false complaints about plaintiff to her manager; made comments about plaintiff's age, referring to him as the "young one;" made remarks to plaintiff which he perceived to be of a sexual nature and condoned and acquiesced in comments of a sexual nature by plaintiff's co-workers directed at him; placed him on probation from June 2009 through June 2010, falsely claiming that he had attendance problems; and caused a visit to his home to check up on him. The verified complaint further alleges that Susan Verneer insulted plaintiff; refused to allow him to have acquaintances in the workplace; punished him for being a few minutes late; yelled at him in the workplace; reprimanded him for taking necessary personal phone calls; threatened him for allegedly wearing inappropriate footwear; and told him he could not go on break or use the bathroom without permission.

Defendants move for summary judgment dismissing the verified complaint against them, relying upon the transcripts of the depositions of both plaintiff and Susan Verneer, as well as the records documenting the disciplinary charges filed against plaintiff in April 2003, for inappropriate conduct; in September 2003, for inappropriate use of a cell phone; in December 2003, for being absent without leave; in October 2004, for being absent without leave; in November 2004, for insubordination; in December 2005, for being absent without leave; in April 2006, for time and attendance violations, absenteeism, and inability to perform his job function; in August 2006, for

inappropriate conduct involving an altercation with a supervisor; in February 2007, for improper usage of a cell phone; in October 2007, for excessive unavailable time; in January 2009, for being absent without leave and again in January 2009, for theft of time; in June 2009, for a pattern of absences; in July 2009, for unexcused absences; in September 2009, for inappropriate use of his cell phone; in May 2010, for absenteeism and for inability to perform his job function; and in February 2011, for violation of probation. The disciplinary actions resulted in various warnings and suspensions, however, the last resulted in plaintiff's dismissal, which was later reduced to a suspension when brought to arbitration.

Plaintiff's employment discrimination claims are governed by a three-year statute of limitations. CPLR 214(2); *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570 (1st Dept 2012). Defendants therefore argue that any claims made by plaintiff which arose more than three years before the summons and verified complaint were filed on April 28, 2011 are time-barred.

Plaintiff counters that none of his claims are time-barred because they arise from a whole pattern of activity and that the continuing-violation doctrine therefore tolls the applicable statute of limitations. In order for the continuing-violation doctrine to apply, plaintiff must allege facts comprising a single continuing pattern or practice of unlawful conduct extending into the limitations period immediately preceding the filing of the complaint. *Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544 (1st Dept 2014); *Armstrong v Sensormatic/ADT*, 100 AD3d 492 (1st Dept 2012).

The sporadic nature of the disciplinary actions brought against plaintiff prior to 2008 does not support plaintiff's claim of a continuing pattern or practice of discrimination. Moreover, when

questioned during his deposition, plaintiff was unable to provide a clear or consistent time frame as to when Susan Verneer's alleged inappropriate behavior took place. In the absence of proof of a continuing pattern or practice of unlawful conduct, plaintiff has failed to establish facts sufficient to invoke the toll of the continuing-violation doctrine and all of his claims predating April 2008 are not actionable.

However, even if the earlier claims of discriminatory conduct alleged by plaintiff were not time-barred and were to be considered by this Court along with his more recent claims, none of plaintiff's claims are sufficient to survive defendants' motion for summary judgment. To establish entitlement to summary judgment in a case alleging discrimination, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 (2004); *King v North Shore Long Island Jewish Hosp. at Plainview*, __AD3d__, __NYS3d__, 2015 WL 1652426, 2015 NY App Div LEXIS 3076, 2015 NY Slip Op 03131 (2d Dept 2015).

The extensive documentation submitted by defendants establishes, *prima facie*, that plaintiff was disciplined for legitimate, nondiscriminatory reasons. When questioned during his deposition about each of the disciplinary actions brought against him, plaintiff testified, for the most part, that he either did not recall the circumstances underlying the charges, did not know if they were accurate or inaccurate, or conceded that the charges leveled against him were correct. In only a few instances did plaintiff dispute the factual basis of the charges referred against him by defendants.

Plaintiff's claim that he was treated differently from his co-workers is refuted by the disciplinary records of plaintiff's co-workers which were submitted by defendants in further support of their motion for summary judgment and which indicate that plaintiff did not suffer from disparate treatment. Plaintiff has failed to raise a triable issue of fact as to whether defendants' proffered reasons for bringing disciplinary action against him were merely pretextual and his claims that he was the subject of discriminatory conduct must therefore be dismissed.

Plaintiff's claims of a hostile work environment should also be dismissed. A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment and create an abusive working environment. The allegedly abusive conduct must not only have altered the conditions of employment of plaintiff, who subjectively viewed the actions as abusive, but the actions must have created what a reasonable person would find to be an objectively hostile or abusive environment. *Chiara v Town of New Castle*, 126 AD3d 111 (2d Dept 2015). The comments and actions complained of by plaintiff, if true, while perhaps offensive or demeaning, did not rise to the level of frequency and pervasiveness necessary for a finding of a hostile work environment. Moreover, plaintiff has failed to show that the remarks or behavior interfered in any way with his job performance.

In any event, even if the comments or actions of Ms. Verneer were considered to have created a hostile work environment for plaintiff, plaintiff must demonstrate that defendants became a party to such conduct by encouraging, condoning or approving it. *Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684 (1985). There is no indication of any such

condonation.

In view of the foregoing, the defendants' motion for summary judgment is granted and plaintiff's verified complaint is dismissed in its entirety.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 8, 2015



HON. DANIEL PALMIERI
Supreme Court Justice

TO: Attorneys for Plaintiff
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ENTERED

MAY 11 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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