

Emengo v State of New York
2015 NY Slip Op 32915(U)
October 9, 2015
Supreme Court, New York County
Docket Number: 150733/13
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice

PART 47

Index Number : 150733/2013
EMENGO, BENEDICT O.
vs.
STATE OF NEW YORK
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is 2, 3,

Memo
This motion is decided in accordance with the annexed hereto decision/order.

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

Dated: 10/9/15

G
GEOFFREY D. WRIGHT
AJSC, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 47

-----X
BENEDICT EMENGO,

Plaintiff,

Index No. 150733/13
DECISION/ORDER

- against -

STATE OF NEW YORK, NEW YORK STATE
INSURANCE FUND, FRANCINE JAMES, PUBLIC
ADMINISTRATOR OF WESTCHESTER COUNTY, as
Administrator of the Estate of Dennis J.
Hayes, Deceased, SHIRLEY STARK, SUSAN
LEFKOWITZ, JOSEPH MULLEN, COLLEEN GARDNER,
and JOHN and JANE DOE (said names being
fictitious, the persons intended being
those who aided and abetted the unlawful
conduct of the named Defendants),

Defendants.

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

-----X
RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment.

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed.....	___ 1 ___
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____
Replying Affidavits.....	___ 4 ___
Exhibits.....	_____
Memoranda.....	___ 2, 3 ___

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants State of New York (the "State"), New York State Insurance Fund
("NYSIF"), Francine James ("James"), Public Administrator of Westchester County, as
Administrator of the Estate of Dennis J. Hayes, Deceased ("Hayes"), Shirley Stark

(“Stark”), Susan Lefkowitz (“Lefkowitz”), Joseph Mullen (“Mullen”), and Colleen Gardner (“Gardner”) move, pursuant to CPLR 3211(a)(2) and (7), to dismiss the second amended Complaint (“Complaint”). Alternatively, defendants seek an order granting them leave to answer the Complaint within 30 days after service of the notice of entry denying the motion.

BACKGROUND

Plaintiff, Benedict Emengo, commenced this action seeking a declaratory judgment, injunctive relief, compensatory and punitive damages based on alleged discrimination and retaliation by defendants, in violation of the New York Human Rights Law in Executive Law §296 (“NYHRL”), and the New York City Human Rights Law in the Administrative Code of the City of New York § 8-107 *et seq.* (“NYCHRL”).

Plaintiff is a Black male of Nigerian national origin. The individual defendants, all of whom, except James, are white, are current or former employees of NYSIF, an agency of the State. James, a Black female, was the Chief Deputy Executive Director until July 1, 2011. Hayes succeeded James as Chief Deputy Executive Director until his death on December 6, 2013. Stark is the current Chief Deputy Executive Director. Lefkowitz is the Director of Personnel. Mullen is the Director of Administration, and Gardner is a Deputy Executive. Defendants John and Jane Doe, said names being fictitious, are unidentified persons who allegedly aided and abetted defendants in the claims asserted by plaintiff.

Plaintiff asserts, in essence, that defendants discriminated against him, on the basis of his race, color, and national origin, by failing to promote him on two occasions, in 2010 and 2012; failing to award him merit pay for 2011; and requiring him to perform duties outside of his job description, without additional compensation, from 2009 onward. Plaintiff also claims that defendants retaliated against him when he complained about the discrimination.

The Complaint includes the following factual allegations. Plaintiff has been employed by the State and NYSIF for more than 23 years, beginning as an Auditor in NYSIF's Audit and Review Division, and eventually achieving the position of Supervising Insurance Field Investigator in the Division of Confidential Investigations ("DCI"). From 2006 to August 2010, plaintiff acted as Special Assistant to nonparty Laurence LaPointe ("LaPointe"), a former Director of Confidential Investigations. In 2009, plaintiff helped to establish a policyholder fraud referral system at NYSIF. In September 2009, he assumed additional responsibilities, including managing a forensic unit that focuses on proactive solutions to policy fraud investigations. In addition, in December 2009, he assumed the responsibilities of another employee who was out on medical leave. Plaintiff states that he did not receive increased compensation for assuming the additional responsibilities.

In 2010, plaintiff was a principal participant in a major Workers Compensation premium fraud investigation. In July 2010, LaPointe recommended plaintiff for the position of DCI Deputy Director. Plaintiff did not get the promotion.

Plaintiff insists that the decision not to promote him was based on considerations of race, color, and national origin. He claims that defendants harbor a discriminatory animus toward Blacks and person who were not born in the United States. He also asserts that the recommendation to promote him was met with hostility from the individual defendants, and that said hostility motivated by discriminatory animus, despite his obvious qualifications, experience, and seniority. He further asserts that he was informed that the decision not to promote him was based on defendants' knowledge that if plaintiff received the promotion, then the position he would have vacated would be filled by another Black man, resulting in two Black employees in high managerial positions with DCI. In addition, he states that there is an under-representation of Blacks in senior managerial positions at DCI, and that since 2002, no Black employee has held a senior managerial or Director position or title within DCI. He also asserts that although the

position of DCI Deputy Director remained vacant for more than two years, he was assigned the additional responsibilities of the position, but without an increase in salary or benefits.

Plaintiff also asserts that prior to July 2010, he challenged a decision relating to the transfer of personnel under his supervision. He claims that he was told that an immigrant should not challenge defendants' personnel decisions, and that he was never be promoted beyond the title of Supervising Insurance Field Investigator.

Plaintiff further asserts that since July 2010, defendants have continued to belittle and denigrate him because of his race, color, and national origin. He claims that the discriminatory treatment persisted despite changes in leadership at NYSIF.

In November 2011, nonparty Phil DiSenso ("DiSenso"), a former DCI Deputy Director, recommended that plaintiff be awarded merit pay for 2011, but defendants rejected the recommendation. Plaintiff claims that the decision not to award him merit pay was also based on considerations of race, color, and national origin, and that defendants did not withhold merit pay for any other similarly situated employee.

DiSenso retired in June 2012, and plaintiff and nonparty Salvatore Dioguardi, a DCI Principal Investigator, began functioning as DCI Directors. In July 2012, plaintiff expressed an interest in the position of DCI Director. He claims that defendants failed to consider him for the position, despite his qualifications and seniority, but considered two less qualified, white, non-Nigerian candidates. He also asserts that he continues to assume the responsibilities of the position, without any increase in compensation or benefits.

On November 14, 2012, plaintiff reportedly complained to nonparty Dorothy Carey ("Carey"), the Chief of Staff of NYSIF, about the failure of defendants to approve and pay him merit pay for 2011; the failure to promote him to DCI Director or Deputy Director; and the assignment to him of duties outside the scope of his job title. Following his complaints, plaintiff was reportedly subjected to an official agency investigation;

stripped of certain responsibilities; isolated and excluded from management meetings; denied access to a certain database; repeatedly harassed; given unfavorable performance evaluations; and denied merit pay. This action ensued.

The Complaint alleges causes of action for discrimination based on race, color, and national origin in violation of NYHRL (first cause of action); retaliation in violation of NYHRL (second cause of action); race and national origin discrimination in violation of NYCHRL (third cause of action); retaliation in violation of NYCHRL (fourth cause of action); aiding and abetting discrimination in violation of NYCHRL (fifth cause of action); and aiding and abetting discrimination in violation of NYHRL (sixth cause of action). Plaintiff seeks declaratory and injunctive relief, as well as compensatory and punitive damages in order to remedy alleged acts of discrimination and retaliation perpetuated against him by defendants.

Defendants now seek to dismiss the Complaint on the grounds that the Court lacks subject matter jurisdiction and plaintiff fails to state viable claims for relief.

DISCUSSION

As stated, the Complaint seeks declaratory and injunctive relief, as well as compensatory and punitive damages, for defendants' alleged discrimination, aiding and abetting discrimination, and retaliation based on plaintiff's race, color, and national origin, in violation of NYHRL and NYCHRL.

Preliminarily, defendants assert that the Court lacks subject matter jurisdiction over some of plaintiff's claims due to the doctrine of sovereign immunity, which, among other things, bars suit against a State without its consent (*see Maloney v State of New York*, 3 NY2d 356 [1957]). Any waiver of immunity from suit must be clearly expressed (*id.*).

As to the claims of discrimination, aiding and abetting discrimination, and retaliation, in violation of NYHRL, the State Legislature waived sovereign immunity when it passed the NYHRL and made its provisions applicable to the State (*see Jattan v*

Queens Coll. of City Univ. of N.Y., 64 AD3d 540, 541-542 [2d Dept 2009]). Thus, the State, its agencies, and employees may be brought before this Court to answer claims under the NYHRL for ministerial actions; namely, actions that envision direct adherence to a governing rule or standard with a compulsory result (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

However, New York State law provides absolute immunity for public employees performing discretionary functions, involving the exercise of reasoned judgment which could typically produce different acceptable results, even where the State has generally waived its sovereign immunity (*id.*). The common law doctrine of governmental immunity continues to shield public entities from suit in this Court for discretionary or quasi-judicial actions (*see Valdez v City of New York*, 18 NY3d 69, 75-76 [2011]). Furthermore, as a matter of public policy, defendants cannot be held individually liable where they are acting in their official capacity; that is, “doing the employer’s work, no matter how irregularly or without regard of instructions (*see Van Buskirk v Bleiler*, 46 AD2d 707 [3d Dept 1974]).

As to the claims of discrimination, aiding and abetting discrimination, and retaliation under the NYCHRL, the City of New York lacks the power to waive the State’s sovereign immunity by passing an anti-discrimination code provision applicable to instrumentalities of the State (*see Jattan v Queens Coll. of City Univ. of N.Y.*, *supra*). In addition, the State’s immunity extends to agencies and officers of the State engaged in carrying on the State’s governmental functions (*see Glassman v Glassman*, 309 NY 436, 440 [1956]). The State, its instrumentalities, and employees, engaged in carrying on the State’s governmental functions, are not subject to the provisions of the NYCHRL (*Jattan v Queens Coll. of City Univ. of N.Y.*, *supra*, at 542).

Therefore, this Court has subject matter jurisdiction to entertain only plaintiff’s NYHRL claims against defendants for ministerial, discriminatory and retaliatory actions taken against plaintiff. In addition, the Court may entertain only plaintiff’s NYCHRL

claims against the individual defendants, in their individual capacities, for ministerial acts of discrimination, aiding and abetting discrimination, and retaliation against plaintiff.

Plaintiff asserts that his claims of discrimination and retaliation are alleged primarily against the individual defendants in their official and individual capacities under the NYHRL, and in their individual capacities under the NYCHRL. He also asserts that he joined the State and NYSIF as defendants in order to clarify that, in suing the named individual defendants in their official capacities, he intends to hold the State and NYSIF liable for discriminatory acts taken against him. He further asserts that he does not allege any claims against the State and NYSIF under the NYCHRL.

Defendants urge that Complaint be dismissed since all of the actions complained of were purely discretionary.

It is well established that on a motion to dismiss, pursuant to CPLR 3211, the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As previously stated, the Complaint asserts claims for discrimination, aiding and abetting discrimination, and retaliation based on plaintiff’s race, color, and national origin, in violation of the NYHRL and NYCHRL. The standards for recovery under the NYHRL are in accord with the Federal standards under Title VII of the Civil Rights Act of 1964 (42 USC §2000e *et seq.*) (*See Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]). Therefore, since the NYHRL and Title VII address the same type of discrimination, afford victims similar forms of

redress, are textually similar, and ultimately employ the same standards of recovery, Federal case law in this area also proves helpful to the resolution of discrimination claims under the NYHRL (*see Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 26 [2002]). Furthermore, since the provisions of the NYCHRL mirror the provisions of the NYHRL, a similar analysis is warranted when addressing claims of discrimination under the NYCHRL (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 307 [2004]).

Plaintiffs seeking to recover for racial discrimination in employment, under the NYHRL and NYCHRL, must allege (1) that they are members of a protected class; (2) that they are qualified for the position and are performing their duties satisfactorily; (3) that they suffered adverse employment actions; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

The burden to establish a prima facie case is minimal and once accomplished, it creates a presumption that the defendant unlawfully discriminated against the plaintiff (*see Fridia V Henderson*, 2000 WL 1772779, *7 [SD NY 2000]). To rebut this presumption, the defendant must articulate a legitimate, non-discriminatory reason for its action (*id.*).

Here, construed in the light most favorable to plaintiff, the pleadings satisfy the first three elements of a racial discrimination claim. Plaintiff is a member of a protected class, who has been employed by the State and NYSIF in various positions for more than 23 years.

The Complaint also alleges that plaintiff was denied certain promotional opportunities and merit pay, and was required to perform additional duties without compensation. An adverse employment action requires a materially adverse change in the terms and conditions of employment (*see Forrest v Jewish Guild for the Blind, supra*, at 306). To be materially adverse, a change in working conditions must be “more disruptive

than a mere inconvenience or an alteration of job responsibilities” (*id.*). “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.*, quoting *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000][internal citations and quotation marks omitted]). While excess work does not constitute a materially adverse change in the terms, conditions, or privileges of employment, a deprivation of a position or an opportunity may qualify (*see Fridia v Henderson*, *supra*).

However, plaintiff fails allege facts sufficient to satisfy the remaining element of a racial discrimination in employment claim, that the adverse action in his employment occurred under circumstances giving rise to an inference of discrimination. The accusations that defendants harbor discriminatory animus toward Blacks and persons born outside the United States amount to mere legal conclusions and do not suffice to make out this element of his claim (*see Forrest v Jewish Guild for the Blind*, *supra*, at 310; *Askin v Department of Educ. of the City of New York*, 110 AD3d 621, 622 [1st Dept 2013]). Thus, plaintiff’s claims for discrimination based on race, color and national origin under the NYHRL and NYCHRL must be dismissed.

A claim for aiding and abetting discrimination based on race, color, and national origin, in violation of the NYHRL and NYCHRL, requires the existence of a violation by the primary party, knowledge of the violation on the part of the aider and abetter, and substantial assistance by the aider and abetter in the achievement of the primary violation (*see Poolt v Brooks*, 38 Misc 3d 1216[A][Sup Ct, NY County 2013]). However, in the absence of a viable claim for discrimination based on race, color and national origin under the NYHRL and NYCHRL, the claim for aiding and abetting discrimination must fail (*id.*).


Under both the NYHRL and NYCHRL, it is unlawful to retaliate against an employee for opposing discriminatory practices (*see* Executive Law §296[7]; Administrative Code of the City of New York §8-107[7]). In order to establish a prima facie case of retaliation, plaintiff must establish that he is engaged in a protected activity; that defendants were aware that he participated in said activity; that defendants acted adversely toward him; and that his protected activity is causally connected to the adverse action taken by defendants (*Gad-Tadros v Bessemer Venture Partners*, 326 F Supp 2d 417, 423 [ED NY 2004]). Adverse actions are those which affect the terms privileges, duration, or conditions of the plaintiff's employment (*see Dortz v City of New York*, 904 F Supp 127, 156 [SD NY 1995]).

Here, plaintiff alleges that he engaged in protected activity by protesting the denial of promotional opportunities, merit pay, and pay increases for handling additional responsibilities. However, since plaintiff fails to satisfactorily allege that he was discriminated against because of his race, he cannot establish a causal connection between the protected activities and any adverse action. Thus, his claim for retaliation cannot survive (*see Forrest v Jewish Guild for the Blind, supra*).

Accordingly, it is

ORDERED that the motion is granted and the Complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.


GEOFFREY D. WRIGHT
AJSC

Dated: October 9, 2015

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court