| **Daphnis v Memorial Sloan-Kettering Cancer Ctr.** |
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| 2017 NY Slip Op 30484(U) |
| March 15, 2017 |
| Supreme Court, New York County |
| Docket Number: 153511/14 |
| Judge: Manuel J. Mendez |
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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**PRESENT:** MANUEL J. MENDEZ, *Justice* **PART** 13

GUS DAPHNIS,
Plaintiff

- Against -

MEMORIAL SLOAN-KETTERING CANCER CENTER, JOHN BRADFORD, and MIKE HARBISON, each being sued in his individual and official capacity,

Defendant.

INDEX NO. 153511 /14

MOTION DATE 01-11-2017

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-2, 3, 4 |
| Answering Affidavits — Exhibits | 5 |
| Replying Affidavits | 6 |

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

**Cross-Motion:** ☐ Yes X No

**Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment is granted the complaint is dismissed.**

Plaintiff brings this action against the defendants alleging that he was deprived of his constitutional rights as a result of the defendant's policies and practices of discrimination based upon his race, gender, and national origin; that he was subjected to a hostile work environment, discrimination and retaliation. His complaint asserts seventeen causes of action, alleging Race, Gender ,National Origin Discrimination, Retaliation and Hostile Work Environment in violation of New York State Executive Law 296 ( counts 1, 2. 3, 4 and 5); Race, Gender, National Origin Discrimination, Retaliation and Hostile Work Environment in violation of New York City Administrative Code 8-101 et. Seq. ( Counts 6, 7, 8, 9 and 10); Defamation, Intentional Infliction of Emotional Distress, Negligence, Negligent Hiring, Negligent Supervision, Negligent Retention and Negligent Infliction of Emotional Distress ( Counts 11 through 17).

Plaintiff alleges that as a male of Greek descent he was one of a few Caucasians in his department and was discriminated against by defendant Bradford, his supervisor, who together with his other supervisors, constantly abused plaintiff and customarily antagonized , berated and acted extremely hostile to other Caucasian employees, while treating those of black, Hispanic or Indian race or national origin in a friendly positive manner. Plaintiff alleges that this overt discrimination and hostile work environment created by his supervisors led to the Caucasian employees leaving the unit and to his ultimate dismissal as an employee.

Defendants move for summary judgment dismissing the complaint. In support of their motion they submit the deposition testimony of plaintiff, the deposition testimony and affidavits of the defendants, and evaluations and employment records of the plaintiff to show that the plaintiff's allegations have no merit and that there is no issue of fact precluding summary judgment. Defendants deny that there was any discrimination or hostile work environment created, that the other Caucasian employees left because of any discrimination or hostile environment, and assert that plaintiff was dismissed as an employee because he assaulted another employee in violation of strict rules forbidding such acts by an employee.

Plaintiff's submission does not offer any opposition with respect to the dismissal of his claims for Gender discrimination, Intentional Infliction of Emotional distress and negligence claims, essentially conceding that summary judgment is warranted with respect to these claims. Plaintiff offers no evidence to rebut the material facts that warrant dismissal of his claims under the New York State and New York City Human Rights Law.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

The issue to be decided by this court is whether defendants have demonstrated that Plaintiff has not been discriminated or retaliated against, or subjected to a hostile work environment by his supervisors .

To establish a prima facie case of discrimination a plaintiff must establish (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action, and (4) circumstances that give rise to an inference of discrimination ( Melman v. Montefiore Medical Center, 98 A.D.3d 107, 946 N.Y.S.2d 27 [1st. Dept. 2009]). To establish a prima facie case of retaliation a plaintiff must demonstrate that (1) he has engaged in protected activity, (2) his employer was aware that he participated in such activity (3) he suffered an adverse employment action, and (4) there is a causal connection between the protected activity and the adverse action ( Forrest v. Jewish Guild for the blind, 3 N.Y.3d 295, 819 N.E. 998,786 N.Y.S.2d 382 [2004]). Here plaintiff cannot establish a prima facie case of discrimination or retaliation or that defendants' legitimate, non-discriminatory reasons for dismissing plaintiff from employment was pretextual.

Plaintiff cannot establish that defendants' action was motivated in any way by discriminatory animus towards plaintiff's gender, race or national origin, or that the action was retaliatory. Similarly, plaintiff has failed to show that he was treated less well because of his protected status, or that he engaged in any protected activity, or that the

reason for his dismissal was a pretext.

"A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. The conduct must have altered the conditions of [Plaintiff's] employment by being subjectively perceived as abusive by the plaintiff and have created an objectively hostile or abusive environment- one that a reasonable person would find to be so. A merely offensive racial slur is reprehensible but is not actionable. A hostile work environment requires more than a few isolated incidents of racial enmity. Instead of a sporadic racial slur, there must be a steady barrage of opprobrious racial comments. Mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment."( Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 819 N.E. 998, 786 N.Y.S. 2d 382 [2004]; Nettles v. LSG Sky Chefs, 94 A.D. 3d 726, 941 N.Y.S. 2d 643 [2nd. Dept. 2012]).

Plaintiff cannot establish that defendants created a hostile work environment by closely monitoring his work and providing counseling regarding performance issues. Neither can he establish that his co-workers created a hostile work environment because he has not alleged that any of them ever made comments regarding his gender, race or national origin.

Plaintiff has failed to plead the required elements for a defamation claim in his complaint, and at his deposition has admitted not knowing who, when, how or to whom the alleged defamatory statement was made ( see Vardi v. Mutual Life Insurance Co., 136 A.D.2d 453, 523 N.Y.S.2d 95 [1st. Dept. 1988]).

To establish a claim of intentional infliction of emotional distress a plaintiff must demonstrate (1) extreme and outrageous conduct, (2) the intent to cause, or disregard of substantial likelihood of causing sever emotional distress, (3) causation and severe emotional distress ( Klein v. Metropolitan Child Services, Inc., 100 A.D.3d 708, 954 N.Y.S.2d 559 [2nd. Dept. 2012]). The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community ( Seltzer v. Bayer, 272 A.D.2d 263, 709 N.Y.S.2d 21 [1st. Dept. 2000]). Plaintiff has neither made allegations nor produced evidence of any action by any of the defendants that remotely approaches the level of outrageousness needed to establish a claim of intentional infliction of emotional distress.

The Workers Compensation Law is the exclusive remedy for employees claiming physical or mental harm resulting from the negligence of their employers and co-workers ( see N.Y. Workers Compensation Law § 29(6); Isabella v. Hallock, 22 N.Y.3d 788, 10 N.E.3d 673, 987 N.Y.S.2d 293 [2014]). Therefore, plaintiff's claims for negligence, negligent hiring, negligent supervision, negligent retention and negligent infliction of emotional distress must be dismissed as barred by the New York State Workers Compensation Law.

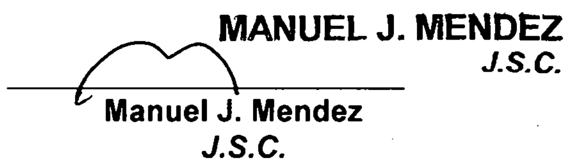
**Defendants have come forth with sufficient proof in admissible form and have made a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. Plaintiff has failed to raise a triable issue of fact as to all of his claims.**

**Accordingly , it is ORDERED that defendants' motion for summary judgment is granted, and it is further**

**ORDERED that the complaint is dismissed in its entirety as against all the defendants, and it is further,**

**ORDERED that the Clerk is directed to enter judgment accordingly.**

**ENTER:**




**Dated: March 15, 2017**

**Manuel J. Mendez**
***J.S.C.***

**Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION**

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