McElroy v Department of Educ. of the City of New York
2019 NY Slip Op 30061(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 160689/2017
Judge: Alexander M. Tisch
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At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 4th day of JANUARY 2019

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

HEATHER MCELROY,

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,

Defendants.

MOTION SEQ. NO.#1

INDEX NO.: 160689/2017

The following papers numbered 18 to 30 read on this motion	Papers Numbered
Notice of Motion/Order to Show Cause, Affirmation(s), Affidavit(s)	5-8
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ALEXANDER M. TISCH, J.

Upon the foregoing papers, defendants Department of Education of the City of New York and The Board of Education of the City of New York (collectively DOE), move pursuant to CPLR 3211 (a)(7) to dismiss the complaint.

On December 4, 2017, plaintiff filed the instant lawsuit asserting causes of action for discrimination and hostile work environment pursuant to New York City Human Rights Law, New York City Administrative Code § 8-107 (NYCHRL) and New York State Human Rights Law, New York State Executive Law § 296 (NYSHRL). Plaintiff's claims stem from allegations that she was treated differently because of her obesity, in addition to her race, age, and disability (clinical depression).

On a motion to dismiss pursuant to CPLR 3211, the "facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and

the court must determine simply "whether the facts as alleged fit within any cognizable legal theory" (Mendelovitz v Cohen, 37 AD3d 670, 671 [2d Dept 2007]). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (Silverman v Nicholson, 110 AD3d 1054, 1055 [2d Dept 2013] [internal quotation marks and citation omitted]). "In assessing a motion under CPLR 3211 (a)(7), however, a 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'" (Leon v Martinez, 84 NY2d 83, 88 [1994] [internal citations omitted]).

Hostile Work Environment

To state a claim under the NYSHRL, a plaintiff must first plead facts that would tend to show that the complained conduct is objectively severe or pervasive (see Gregory v Daly, 243 F3d 687, 691 [2d Cir 2001]). Second, plaintiff must show that a "specific basis exists for imputing the conduct that created the hostile environment to the employer" (Lamarr-Arruz v CVS Pharmacy, Inc., 271 F3d 646, 656 [2d Cir 2017]). In making a determination of the severity or pervasiveness, courts consider the "totality of the circumstances, including the frequency of the discriminatory conduct … whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (Littlejohn v City of New York, 795 F3d 297, 321 [2d Cir 2015]).

Here, in addition to the allegations underlying the discrimination claims (discussed *infra*), plaintiff alleges the following: 1) Carol Brown (plaintiff's field supervisor) laughed at a joke made about plaintiff's weight; 2) Brown told plaintiff she would be more comfortable in a school with a predominantly white and Asian student body; 3) Brown frequently discussed and criticized the clothing Plaintiff wore; and 4) other teachers were not subjected to the same kinds of comments. While there was more than one comment made, plaintiff's allegations do not amount to the severity

and pervasiveness required by the NYSHRL (see Figueroa v KK Sub II, LLC, 289 F3d 426 [2d Cir 2018] [finding that four verbal comments did not rise to the level of a hostile work environment]; see also Terry v Ashcroft, F3d 128, 148 [2d Cir 2003] [holding that the standard for establishing a hostile work environment is "high"]).

While plaintiff's allegations are insufficient to meet the standard required by the NYSHRL, the New York Court of Appeals requires courts to broadly interpret the NYCHRL "in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v City of New York, 16 NY3d 472, 477-478 [2011]). The conduct alleged must exceed "what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" (Williams v New York City Hous. Auth., 61 AD3d 62, 80 [1st Dept 2009]). Whether statements may have been isolated is irrelevant in analyzing the claim under the NYCHRL, as a single comment may be actionable under the statute (Hernandez v Kaisman, 103 AD3d 106, 115 [1st Dept 2012]; Williams, 61 AD3d at 84, n 30). However, a plaintiff must still show that the less favorable treatment was because of his or her membership to a protected class. (see Zimmer v Warner Bros. Pictures, Inc., 56 Misc 3d 1208[A], 2016 NY Slip Op 51889[U] *2, *6 [Sup Ct, NY County 2016]).

Here, plaintiff's allegations do state a claim under the broader NYCHRL as they are more than "petty slights and trivial inconveniences" (see Williams, 61 AD3d at 80). Thus, its applicability rests on whether plaintiff pleads that the hostility was directed at her because of her membership in a protected class. While one comment was directed at her because of her race, most of plaintiff's claim relies on morbid obesity being a protected class.

Whether morbid obesity, on its own, is a disability under NYCHRL is not well settled. Section 8-102 (16) defines disability as:

> (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.

(b) The term "physical, medical, mental, or psychological impairment" means:
(1) An impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system

The New York Court of Appeals has ruled that even under the more rigid NYCHRL, obesity can be considered a disability (see State Div. of Human Rights ex rel. McDermott v Xerox Corp, 65 NY2d 213 [1985]). However, obesity alone is not a disability, but rather must be connected to a medical diagnosis (Delta v New York State Div. of Human Rights, 229 AD2d 132, 139 [1996]). A plaintiff must establish that they have been clinically observed as having an "abnormal medical condition" and that the condition affects their ability to meet certain work requirements (id. at 140). Even under the NYCHRL, a plaintiff must show that his/her obesity is an impairment. Here, as discovery has not begun, plaintiff has not been afforded the opportunity to establish that her obesity is a medical or physical impairment. Accordingly, the branch of the motion for an order dismissing the hostile work environment claim under the NYSHRL is granted, however the claim under the NYCHRL is denied without prejudice.

Discrimination

"On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination" (McDonnell Douglas Corp. v Green, 411 US 792, 802 [1973]). To establish a prima facie case of discrimination under both the NYCHRL and the NYSHRL, a plaintiff must show (1) that he/she is a member of a protected class; (2) that he/she was qualified to hold the position; (3) that he/she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination (see Hudson v Merrill Lynch & Co., Inc., 138 AD3d 511, 514 [1st Dept 2016]; see also Ferrante v American Lung Assn., 90 NY2d 623, 629 [1997]). Once a plaintiff meets his or her

initial burden, the burden shifts to the defendant to demonstrate that the action(s) taken against the plaintiff were for legitimate, nondiscriminatory reasons (Balsamo v Savin Corp., 61 AD3d 622, 623 [2d Dept 2009]). The plaintiff must then bear the burden "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" (Ferrante, 90 NY2d at 629-630; see also Casablanca v New York Times Co., 47 Misc 3d 1215[A], 2015 NY Slip Op 50629[U] [Sup Ct, NY County 2015]).

Here, plaintiff satisfies the first and third prong of establishing a prima facie case.[1] Plaintiff was qualified for the position she held as she has a certification in teaching biology, grades 7-12. However, according the plaintiff the benefit of every possible favorable inference, plaintiff's allegations fall short of the standard for adverse action, even under the more liberal standards of the NYCHRL (see Gaffney v City of New York, 101 AD3d 410, 410 [1st Dept 2012]; Bayley v City of New York, 2013 NY Slip Op 33473[U] [Sup Ct, NY County 2013] [placement in performance monitoring program, after multiple unsatisfactory performance evaluations, not an adverse action under NYCHRL where no impact on job responsibilities, pay or title]).

An adverse employment action constitutes a change that is "materially adverse" to the terms and conditions of a person's employment, "including termination, demotion, material loss of benefits or a significant diminution of responsibilities" (see Galabya v New York City Bd. of Educ., 202 F3d 636, 640 [2d Cir 2000]). Such changes must be beyond a mere alteration of job responsibilities (Matter of Block v Gatling, 84 AD3d 445, 445 [1st Dept 2011]; Messinger v Girl Scouts of U.S.A., 16 AD3d 314, 314-315 [1st Dept 2005]). Plaintiff alleges that she suffered the following actions: 1) she was subject to three (3) observations, two of which were formal, and was evaluated as if she was a permanent teacher assigned to one class; 2) one of the observations was in

[1] The parties do not dispute that plaintiff is a member of a protected class with regards to her race, age, and disability of clinical depression. For the purposes of this analysis, plaintiff's obesity is considered to be a protected class as well.

a bilingual class, which is out of her certification area, and the DOE is not supposed to conduct observations out of certification areas; 3) plaintiff received two biased letters in her file in which the allegations were false; 4) plaintiff received an unsatisfactory annual performance review for the 2016-17 school year; 5) she was only trained in Apple software and was given a Dell computer; 6) she suffered loss of pay and benefits, pain and suffering to her reputation; and finally (7) that because of the negative evaluation, she cannot go out of her Absent Teacher Reserve (ATR) status and no school will hire her, and she might be subjected to a section 3020-a charge under the New York State Education Law.

Plaintiff has failed to show that the actions taken even somewhat materially altered the terms and conditions of plaintiff's employment or responsibilities (see Smalls v Allstate Ins. Co., 396 F.Supp 2d 364 [2d Cir 2005] [finding that being yelled at, receiving unfair criticism or unfavorable work assignments do not rise to the level of adverse employment actions]). Plaintiff alleges that she can no longer change out of her ATR status, however as plaintiff has had such status for several years, this is not a material alteration. Nor is the potential section 3020-a charge adverse, as no such charge has yet been brought. Further, even though plaintiff alleges that she suffered a reduction in pay and benefits "bare legal conclusions" are not entitled to the same presumption as factual allegations (see Nicholson, 110 AD3d at 1055). Accordingly, the branches of the motion for an order dismissing the first causes of action for discrimination under the NYCHRL and NYSHRL are granted.

This shall constitute the decision and order of the Court.

Dated: January 4, 2019

ENTER,

J.S.C.
HON. ALEXANDER M. TISCH