SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 52

JEROME JONES,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

Index No.: 150316/12

DECISION/ORDER

ALEXANDER M. TISCH, J.:

Plaintiff Jerome Jones (Jones) commenced this employment discrimination action against his former employer, the City of New York (City), alleging sexual harassment and retaliation in violation of the New York State Human Rights Law (Executive Law § 296 [1]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 [1])(NYCHRL). By decision and order dated March 8, 2018, this Court granted in part and denied in part the City's motion for summary judgment, dismissing plaintiff's sexual harassment claim under the NYSHRL, but not under the NYCHRL, and dismissing plaintiff's retaliation claim. Plaintiff now moves, pursuant to CPLR 2221, for leave to reargue the Court's decision dismissing the branch of his retaliation claim that alleged retaliatory termination of his employment.

A motion for leave to reargue "is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or

misapplied any controlling principle of law." *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999) (citations omitted); *see* CPLR 2221 (d) (2); *Hernandez v St. Stephen of Hungary School*, 72 AD3d 595, 595 (1st Dept 2010); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992); *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). "'Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.'" *Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 (1st Dept 2016), *quoting William P. Pahl Equipment Corp.*, 182 AD2d at 27; *see Matter of Carter v Carter*, 81 AD3d 819, 820 (2d Dept 2011); *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 874 (2d Dept 2010); *Foley*, 68 AD2d at 567-568.

Plaintiff claims that the Court, in dismissing his retaliation claim, overlooked the fact that he filed a complaint with the EEOC in March 2011, alleging retaliation for complaining about sexual harassment in June 2009. *See* Charge of Discrimination, dated March 2,2011, NYSCEF Doc. No. 82. Although he does not seek to reargue the dismissal of his retaliation claims arising out of his earlier complaints, he argues that the March 2011 complaint was sufficiently close in time to the June 2011 layoff to show a causal connection between the protected activity and his termination.

The complaint in this action alleges that plaintiff, while employed by the City as an Associate Call Center Representative II (ACCRII) at its 311 Call Center (Call Center), a division of the City's Department of Information Technology and Telecommunications (DoITT or the agency), filed a sexual harassment complaint against his supervisor in June 2009, and subsequently "was subject to retaliation that led to Plaintiff's termination." Complaint, NYSCEF Doc. No. 28, ¶¶ 6-7. The complaint, filed in January 2012, does not include any allegations with respect to the March 2011 complaint, and otherwise does not allege that plaintiff was retaliated against for complaining about retaliation.

At his deposition, the transcript of which was submitted on the prior motion, plaintiff testified that after he complained about sexual harassment in June 2009, he felt that Call Center Director Saida Chaudry (Chaudry) and Executive Director Joe Morrisroe (Morrisroe) treated him unfairly and retaliated against him for filing the sexual harassment complaint. Plaintiff's Deposition, March 5, 2015 (Pl. Mar. 5 Dep.), NYSCEF Doc. No. 33, at 19-20, 35-36. Plaintiff testified that the unfair and retaliatory treatment consisted of being denied schedule changes (*id.* at 16-17, 19), being denied promotions (*id.* at 22), being charged with a violation of the dress code policy for wearing an untucked shirt (*id.* at 29-30), and being brought up on

disciplinary charges for other menial infractions (*id.* 31-32, 33), which, he said, made it "clear . . . that they were trying to terminate me." *Id.* at 32.

He also testified that he complained in August 2010 that he was being retaliated against because he filed a sexual harassment complaint. *Id.* at 16, 20-21. On or about August 22, 2010, he filed a complaint with the agency's EEO office, alleging that he was treated unfairly during an incident involving the alleged dress code violation, when he was walked out of the building, which was not how others were treated. *See* Complaint of Discrimination, NYSCEF Doc. No. 44. There was no testimony that he made a complaint in March 2011, and when asked whether there were other instances of retaliation, or whether he had anything to add to his testimony, he answered "no." Pl. Mar. 5 Dep., at 53, 54. Thus, plaintiff alleged for the first time in opposition to defendant's summary judgment motion that he was laid off in retaliation for making a retaliation complaint in March 2011.

In general, courts have held, "a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting, for the first time in opposition to the motion, a new theory of liability that was not pleaded in the complaint or bill of particulars." *Troia v City of New York*, 162 AD3d 1089, 1092 (2d Dept 2018) (citations omitted); *see Ostrov v Rozbruch*, 91 AD3d 147, 154 (1st Dept 2012); *Mezger v Wyndham Homes, Inc.*, 81 AD3d

795, 796-797 (2d Dept 2011); *DiFabio v Jordan*, 113 AD3d 1109, 1110-1111 (4th Dept 2014); *Tomizawa v ADT LLC*, 2015 WL 5772106, *30, 2015 US Dist LEXIS 132182, *17-18 (ED NY 2015); *see also Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 (1st Dept 2018); *Siegried v West 63 Empire Assoc., LLC*, 145 AD3d 456, 457 (1st Dept 2016).

On the other hand, courts have also held that a new theory of liability, not raised in the complaint, may be considered in opposition to summary judgment if "plaintiff adduced evidentiary facts in support of such an unpleaded cause of action." *Swift Funding, LLC v Isaac*, 144 AD3d 471, 472 (1st Dept 2016), citing *Alvord and Swift v Stewart M. Muller Constr. Co., Inc.*, 46 NY2d 276, 281 (1978) (other citation omitted). "[M]odern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by plaintiff's submissions." *Comsewogue Union Free Sch. Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 (2d Dept 2005); *see Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 736 (2d Dept 2008). "A court may properly look beyond the allegations in the complaint and deny summary judgment where a party's papers in opposition to the motion raise triable issues of fact." *Gold Connection Discount Jewelers v American Dist. Tel. Co.*, 212 AD2d 577, 578 (2d Dept 1995). Nonetheless, as courts have further held, a protracted, unexcused delay in

asserting the new theory of liability would warrant the court's rejection of it. *See Begley v City of New York*, 111 AD3d 5, 35 (2d Dept 2013); *Langan v St. Vincent's Hosp. of N.Y.*, 64 AD3d 632, 633 (2d Dept 2009); *Yousefi v Rudeth Realty, LLC*, 61 AD3d 677, 678 (2d Dept 2009); *Comsewogue Union Free Sch. Dist.*, 15 AD3d at 524.

In this case, in any event, while plaintiff's failure to plead that his termination was in retaliation for making the March 2011 complaint did not necessarily preclude its assertion in opposition to defendant's motion for summary judgment, plaintiff's submissions failed to raise a triable issue of fact with respect to that unpleaded claim. *See DiFabio*, 113 AD3d at 1111. In opposition to defendant's motion, plaintiff submitted no evidence of a causal connection between the March 2011 complaint, but, arguing that retaliation he experienced after he filed a sexual harassment complaint in June 2009 "set Plaintiff up for termination," he claimed that the "close proximity" of his complaint in March 2011 and his termination in June 2011 showed that a causal connection "clearly exists." Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, NYSCEF Doc. No. 58, at 7, 22, 27.

By plaintiff's own account, however, after he filed a retaliation complaint with the EEOC on March 2, 2011, and sent an email about retaliation to the agency's EEO office on March 7,

2011, he "coincidentally" was fired (Pl. Aff., ¶¶ 30-33) more than three months later. By letter dated June 15, 2011, he was notified that he would be laid off due to budgetary cutbacks on July 1, 2011. *See* Letters, NYSCEF Doc. No. 36.

"The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . uniformly hold that the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v Breeden*, 532 US 268, 273-274 (2001) (internal citations omitted). While "there is no 'bright line rule' that defines 'the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship'" (*Walder v White Plains Bd. of Educ.*, 738 F Supp 2d 483, 504 [SD NY 2010] [citation omitted]), "[g]enerally, periods greater than two months are too long to support the inference of causation." *United States v New York City Dept. of Educ.*, 2018 US Dist LEXIS 133828, *80 (SD NY 2018) (finding where "the protected and adverse actions all took place within a two-month window between June and July . . . . temporal proximity alone is sufficient to support the inference of causation"); *see Cunningham v Consolidated Edison Inc.*, 2006 WL 842914, *19, 2006 US Dist LEXIS 22482, *55 (ED NY 2006) (passage of two months between the protected activity and the adverse employment action seems to be the dividing line).

Courts similarly have held that a "strong temporal correlation" alone is sufficient to raise an issue of fact as to retaliatory motive only when the protected activity is followed within a few days or weeks by termination. *See Delrio v City of New York*, 91 AD3d 900, 902 (2d Dept 2015); *Hruska v Bohemian Citizens' Benevolent Socy. of Astoria, Inc.*, 2017 WL 837717, 2017 NY Misc LEXIS 772, *6-7, 2017 NY Slip Op 30423(U) (Sup Ct, NY County 2017); *see also Cook v EmblemHealth Servs. Co., LLC*, 167 AD3d 459 (1st Dept 2018) (termination days after complaint of racism sufficient to raise issues of fact as to causal connection); *Calhoun v County of Herkimer*, 114 AD3d 1304, 1307 (4th Dept 2014) (protected activity followed closely, "i.e., within a few days or weeks" by termination raised issue of fact based on temporal proximity); *Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 (1st Dept 2010)(causal connection inferred where employee terminated within a day after employer learned of protected activity). While the absence of a close temporal connection "is not necessarily fatal to a retaliation claim . . . where . . . there are other facts supporting causation" (*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]; *see e.g. Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18 [1st Dept 2014] [termination two months after second discrimination complaint together with evidence that the department was

expanding raised issues as to whether asserted reason of workforce reduction was pretextual]), "[m]erely pointing to the sequence in time of events is insufficient to establish a causal connection." *Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1016 (2d Dept 2017). Plaintiff thus has not demonstrated that the Court overlooked relevant facts or law with respect to a causal connection.

Plaintiff also does not show that the Court overlooked material facts or misapplied the law in determining that plaintiff did not raise a triable issue of fact as to whether defendant's stated reason for his termination was pretextual or based in any part on retaliation. Plaintiff contends that the Court "misapprehended a fundamental point," i.e., that he was not challenging that provisional employees were laid off for financial reasons, but that he was laid off when other similarly situated provisional employees were not. Karlin Aff. in Support of Motion to Reargue, NYSCEF Doc. No. 78, ¶ 14.

Although plaintiff argues, as he did on the prior motion, that his termination was in violation of a policy that layoffs of provisional employees should be based on seniority, and that he was laid off when other employees with less seniority were not, he offers no evidence that such a policy existed. Further, evidence shows that four provisional ACCRIIs, including plaintiff, were laid off in June 2011 due to budget cuts. *See*

NYSCEF Doc. No. 84. Of the four, one had more seniority than plaintiff, and two had less. Neither this evidence, nor evidence of the retention of other ACCRIIs, some with more seniority and some with less, raises an inference of discrimination or retaliation.

Accordingly, it is

ORDERED that plaintiff's motion for leave to reargue is denied.

Dated: February 14, 2019

ENTER:

HON. ALEXANDER TISCH, J.S.C.

HON. ALEXANDER M. TISCH