Kennedy v City of New York
2019 NY Slip Op 30566(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 153406/2018
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 52EFM

Justice

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DANIEL KENNEDY,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES

Defendant.

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INDEX NO. 153406/2018

MOTION DATE 01/16/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 14, 15

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, defendants move to dismiss the complaint pursuant to CPLR Rule 3211 (a) (7) for failing to state a cause of action. Plaintiff's complaint alleges two causes of action for retaliation under Civil Service Law § 75-b and Labor Law § 27-b. For the following reasons, the motion is granted in part.

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction. The facts as alleged in the [complaint] are accepted as true [and] the plaintiff is accorded the benefit of every possible favorable inference" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). "[T]he court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (id.) and not "[w]hether a plaintiff can ultimately establish its allegations" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]) or if "there is evidentiary support to establish a meritorious cause of action" (W2007 Monday 230 Park Mezz II, LLC v Landesbank Baden-Wuerttemberg, 38 Misc 3d 1209[A], 2013 NY Slip Op 50031[U], *3 [Sup Ct New York 2013]).

In order to state a claim for retaliation under Civil Service Law § 75-b, plaintiff must allege that he engaged in the requisite protected activity, suffered an adverse personnel action, and that a causal connection exists between the protected activity and the adverse action. The protected activity must be the "disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which [he] reasonably believes constitutes an improper governmental action" (Wetzel v Town of Orangetown, 06 CIV 6117 [SCR], 2010 WL 743039, at *17 [SDNY Mar. 2, 2010], quoting Burns v Cook, 458 F Supp 2d 29, 44 [NDNY 2006]; see Civ. Serv. L. § 75-b).

The Court finds that the complaint states such cause of action. More specifically, plaintiff's complaint alleges that his supervisors would obstruct subordinates' ability to file accurate and detailed incident reports required under 18 NYCRR § 352.38(c), which concerns the time-sensitive reporting of serious incidents that take place at homeless shelters, such as attempted suicides, or assaults and rapes (see NYSCEF Doc. No. 1, ¶¶ 9, 12-14) and that he made complaints about the same (see id. at ¶¶ 20-21). Plaintiff continues to allege that, shortly after his complaint/reporting of a serious incident and/or violation of the reporting rule, he was told that he had to undergo a clinical evaluation, which never happened although plaintiff attempted to comply with the same (see id. at ¶¶ 23-24). At a meeting thereafter, he again voiced his concerns orally and was terminated from employment less than a week later (see id. at ¶¶ 25-26).

It is clear to the Court that "there are well-pleaded factual allegations," which are entitled to the assumption of truth (see Ashcroft v Iqbal, 556 US 662, 679 [2009]; Gertler v Goodgold, 107 AD2d 481, 485 [1st Dept 1985], affd, 66 NY2d 946 [1985]). Further, these allegations

sufficiently state that he engaged in the requisite protected activity, suffered an adverse employment action, and demonstrated a causal connection between the two. Defendants' argument that the allegations are conclusory are borderline frivolous. There is no requirement that plaintiff's complaint contain the exact, specific factual detail that the defendants desire.

Regarding plaintiff's retaliation claim under Labor Law § 27-b, defendants argue that it must be dismissed because there is no private cause of action under that law. Plaintiff acknowledges that no cause of action is explicitly provided in the statute but contends that one should be implied. Based on the parties' and the undersigned's research, this issue appears to be one of first impression in New York State Court, and has not been conclusively resolved by the federal courts (see Morales v City of New York, 14 CV 7253 [JGK], 2016 WL 9651130, at *8 [SDNY Aug. 9, 2016] [hereinafter Morales I]; Morales v City of New York, 14 CV 7253 [JGK], 2017 WL 4277174, at *5 [SDNY Sept. 25, 2017] [hereinafter Morales II]).[1]

"Where a statute does not explicitly provide for a private cause of action, such a right may only be implied where three factors are established: (1) plaintiff must be one of the class for whose benefit the statute was enacted; (2) recognition of a private right of action must promote the legislative purpose; and (3) creation of such a right must be consistent with the legislative

[1] There are two federal court matters that mention the issue. In Hakim v Hall, the District Court adopted the recommendation of Magistrate Judge Smith to decline to exercise supplemental jurisdiction over plaintiffs' state law claims, including the claim under Labor Law § 27-b, given that no federal claims remained viable in considering a motion to dismiss (see DD v Lincoln Hall, 09-CV-860 CS/LMS, 2010 WL 695027, at *13 [SDNY Feb. 19, 2010]). The Magistrate Judge's report, however, analyzed the claim and simply noted that no private cause of action was contained within the statute; also that plaintiffs' claims alleged substantive violations of the law, and were not premised upon protected activity or retaliation (see Hakim v Hall, 09 CIV. 860 CS/LMS, 2009 WL 5910310, at *12 [SDNY Oct. 23, 2009], report and recommendation adopted in part sub nom. DD v Lincoln Hall, 09-CV-860 CS/LMS, 2010 WL 695027 [SDNY Feb. 19, 2010]). Additionally, D'Olimpio v Crisafi, a false arrest/imprisonment case, merely presumed in dicta that a cause of action for retaliation may be maintained under Labor Law § 27-b (6) (see 718 F Supp 2d 340, 354-55 [SDNY 2010], affd, 462 Fed Appx 79 [2d Cir 2012]).

scheme" (Hammer v American Kennel Club, 304 AD2d 74, 79 [1st Dept 2003], affd 1 NY3d 294 [2003]; see Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 325 [1983]).

Labor Law § 27-b, also known as the Workplace Violence Protection Act (WVPA) (see Morales I, at *8), contains a provision prohibiting certain public employers from retaliating against public employees for reporting "a serious violation of a workplace violence protection program" or some other "imminent danger" (see Labor L. § 27-b [6] [e], [a]). The WVPA explicitly states its purpose is to "ensure that the risk of workplace assaults and homicides is evaluated by affected public employers and their employees and that such employers design and implement workplace violence protection programs to prevent and minimize the hazard of workplace violence to public employees" (Labor L. § 27-b[1]).

Plaintiff does not explain how his complaints meet the statute's protected activity requisites, i.e., a "written notice" about a serious "workplace violence protection program" violation or "imminent danger" (see Labor L. § 27-b [6] [a]). In any event, plaintiff's allegations center around violations of law and/or risks of violence or harm placed upon the shelter residents that the public employer serves. Even construed liberally, the complaint does not contain any allegations about how he, or other coworkers, are placed at risk with respect to their own safety. Yet the statute repeatedly focuses on the risk(s) placed upon employees — not clients that the governmental entity may serve (see Labor L. § 27-b [1], [3], [6] [h]). Thus, although plaintiff, as a public employee, may be part of the class of persons for whose benefit the statute was enacted, the Court finds that creating a private right of action would not promote the legislative purpose and would not be consistent with the legislative scheme.

This is not to say that no cause of action may ever be implied under this statute (see, e.g., Morales I, 2016 WL 9651130, at *2-3 [where at least one of plaintiff's allegations concerned her reporting of a threat made by an employee to other officer-employees] and Morales II, 2017 WL 4277174 at *6 [dismissing claim on the ground that, even if the cause of action could be maintained, there was no inference of a causal connection]); only that it would be inappropriate to recognize such a right in the case sub judice.

Accordingly, it is ORDERED that the motion is granted solely to the extent that plaintiff's second cause of action for retaliation under Labor Law § 27-b is dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that counsel appear for a preliminary conference in DCM, Room 103 of 80 Centre Street, on April 3, 2019 at 2:00 PM.

This constitutes the decision and order of the Court.

2/28/2019
DATE

ALEXANDER M. TISCH, J.S.C.

HON. ALEXANDER M. TISCH

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE