

Otero v District Council 37, AFSCME, AFL-CIO

2019 NY Slip Op 32313(U)

July 30, 2019

Supreme Court, New York County

Docket Number: 161421/2013

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
JOSE OTERO,

Plaintiff,

-against-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and
NEW YORK CITY HEALTH AND HOSPITAL CORP.,

Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

DECISION AND ORDER

Index No.: 161421/2013
Motion Sequence 004, 005

MEMORANDUM DECISION

In this action alleging breach of contract and workplace discrimination, Defendant District Council 37, AFCSME, AFL-CIO (“DC 37”, or the “Union”) moves for summary judgment dismissing the complaint against it pursuant to CPLR 3212 (Motion Seq. 004). Co-Defendant New York City Health and Hospital Corp. (“HHC”) also moves for dismissal of the complaint pursuant to CPLR 3212 (Motion Seq. 005). In response to both motions, Plaintiff opposes and cross-moves for leave to supplement his complaint pursuant to CPLR 3025(b). The motions are consolidated for disposition.

BACKGROUND FACTS

Plaintiff, a public employee and member of the union DC 37, commenced this action on February 28, 2014, alleging a breach of the Union’s duty of fair representation and fraud. The complaint also includes claims against Plaintiff’s employer, HHC, for subjecting him to disparate treatment and retaliating against him in violation of the New York City Human Rights Law (“the City HRL”). Plaintiff also has a breach of contract claim against HHC for allegedly violating the collective bargaining agreement (“CBA”) between HHC and DC 37. Plaintiff’s claims against

DC 37 charge that the union failed to provide proper representation for various grievances he filed related to his employment with HHC, which include alleged out-of-title work, denial of overtime, backpay issues, and discriminatory conduct.

After DC 37 filed a motion to dismiss the original complaint, this Court issued a decision dated December 9, 2014, granting the motion in part and dismissing the majority of Plaintiff's claims (NYSCEF doc No. 40). This Court found that Plaintiff's claims for breach of fair representation and fraud related to his grievances were meritless, with the exception of the claims related to the out-of-title work grievance.

DC 37 now moves for summary judgment on the remaining claims, arguing that the complaint must fail as Plaintiff cannot establish that every member of the DC 37 union authorized the conduct in question, and that there is no evidence DC 37 engaged in conduct that was arbitrary, capricious, or otherwise in bad faith. DC 37 also argues that Plaintiff's out-of-title work grievance, which was originally filed in March 2003, is time-barred. Plaintiff refutes these assertions.

The out-of-title work grievance in question alleged that Plaintiff was performing duties substantially different from those of his job description. It was originally filed as a Step I grievance by DC 37 representative Chandler Henderson on behalf of Plaintiff in March 2003 (NYSCEF doc No. 169 at 3). Henderson later filed additional Step II and Step III grievances, as no response was ever received from Plaintiff's employer (*id.* at 4). In 2005, Henderson submitted a request to DC 37 to proceed with arbitration after having still received no response, but no arbitration was filed by DC 37. In 2006, Plaintiff requested a transfer from his assigned place of work, Lincoln Hospital, to Harlem Hospital, and began working at the latter shortly thereafter but never received any resolution of his original grievance.

Separately, HHC, Plaintiff's employer, moves for summary judgment in its favor regarding Plaintiff's hostile work environment and breach of contract claims. This Court's 2014 decision dismissed Plaintiff's claims for disparate treatment and retaliation that occurred before 2009, so only post-2009 hostile work environment claims are actionable, along with the breach of contract claim. Plaintiff, who is Latino, alleges that between 2009 and 2011 while working at the hospital, he was subjected to harassment and undesirable work assignments, and denied the opportunity to work overtime hours or advance into higher positions. He was then laid off for a year due to budget cuts, but reinstated in 2012, where he allegedly continued to suffer harassment from new supervisors. He also claims he experienced retaliatory conduct after filing his lawsuit. HHC argues that Plaintiff has failed to make out a *prima facie* case for discrimination under the City HRL, and that the breach of contract claim with respect to the CBA is improper as Plaintiff must first exhaust all contractual remedies against DC 37 before taking action against his employer.

In his complaint against HHC, Petitioner specifically claims that he was subjected to disparate treatment and a hostile work environment based on his ethnicity, color, and race. He also claims he was retaliated against for filing complaints against his employer. HHC allegedly retaliated against Plaintiff by denying him the opportunity to work overtime and preventing him from advancing into more senior positions. The overlapping breach of contract claim related to HHC's CBA with DC 37 claims that Plaintiff was forced to perform out of title work, prevented from performing the duties of a laborer, and denied overtime and backpay.

In addition to opposing both motions, Plaintiff also moves for leave to amend his complaint pursuant to CPLR 3025(b). Plaintiff seeks to supplement his complaint with additional detail not included in the original complaint against DC 37 and his employer.

DISCUSSION

Summary judgment is granted when “the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, “‘regardless of the sufficiency of the opposing papers’” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Plaintiff's Claims against DC 37 for Breach of Representation and Fraud

Plaintiff argues that DC 37 breached its duty of fair representation to him and engaged in fraud by not adequately pursuing his grievances for out-of-title work. These claims were the only ones against it left intact in this Court's 2014 decision, as the Court found that DC 37 failed to establish its entitlement to dismissal in its moving papers. Now, DC 37 argues that as a threshold matter, Plaintiff's allegations against DC 37 are barred by the Court of Appeals' determination in *Martin v Curran* (303 NY 276, 281 [1951]). *Martin* held that that a voluntary unincorporated association “is neither a partnership nor a corporation. It is not an artificial person, and has no

existence independent of its members” (303 NY at 280). The Court of Appeals determined that “for better or worse, wisely or otherwise, the Legislature has limited ... suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven” (*id.* at 282). The *Martin* ruling, which held that unincorporated organizations, a category that includes labor unions, cannot be held liable unless every member ratifies or otherwise authorizes the conduct at issue, has been upheld through the years by courts in a variety of contexts. *Martin* applies to both contractual and tortious claims, including breach of representation and fraud.

The *Martin* ruling has been criticized, with some opining that it essentially grants complete immunity to labor unions from lawsuits in New York state court (*Modeste v Local 1199 Drug, Hosp. & Health Care Empls. Union, RWDSU, AFL-CIO*, 850 F Supp 1156, 1168 [SDNY 1994]). However, courts have continued to uphold the decision, especially in application to unions, as the unincorporated organization in *Martin* was itself a labor union. The Court of Appeals recently reaffirmed *Martin* in *Palladino v CNY Centro Inc.*, 23 NY3d 140 (2014). *Palladino* was a bus driver who, like Plaintiff here, brought a breach of fair representation claim against his union after his grievance was not submitted to arbitration. The Court of Appeals dismissed the claim as there was no evidence the entire union ratified the conduct, noting that “for better or worse, wisely or otherwise, the Legislature has limited . . . suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven” *Id.* at 146.

Plaintiff’s complaint, of course, does not allege that all 125,000 members of DC 37 ratified the wrongful conduct of failing to handle his out-of-title work grievance. The record does not demonstrate that DC 37 ever held any sort of meeting or voted on how to handle the

grievance. Thus, Plaintiff cannot hold DC 37 as a union liable for the alleged failure of Henderson to adequately pursue his grievances and commence an arbitration proceeding. Plaintiff questions DC 37's status as an unincorporated association, but offers no evidence that would raise a question of fact as to this issue.

Plaintiff also argues that DC 37's affirmative defense is improper as it was not raised in its initial answer. While DC37's answer states in general that Plaintiff's complaint fails to state a proper claim, it does not make specific reference to its argument under *Martin* (NYSCEF doc No. 225 at 4). Even if this could be construed as a failure to plead, which it cannot, the argument would still be valid given that Plaintiff has not shown that he was unfairly prejudiced or otherwise surprised (*See Bank of New York v River Terrace Assocs., LLC*, 23 AD3d 308, 310 [1st Dep't 2005] (*citing Rogoff v San Juan Racing Ass'n*, 54 NY2d 883, 885 [1981])).

DC 37 additionally contends that Plaintiff's out-of-title grievance is time barred pursuant to CPLR 217(2)(a), which provides:

“Any action or proceeding against an employee organization subject to article fourteen of the civil service law or article twenty of the labor law which complains that such employee organization has breached its duty of fair representation regarding someone to whom such employee organization has a duty shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.”

DC 37 argues that, as Plaintiff has been aware of the events underlying the breach claim since at least 2003 when his initial grievance was filed, the claim is barred by CPLR 217 (2) (a). However, as this Court noted in its 2014 decision, Plaintiff is not bringing an action against DC 37 for the underlying alleged events themselves, but rather the Union's failure to take the proper actions regarding his grievances. This Court thus dismissed DC 37's untimeliness argument as

speculative, given that it was not clear when Plaintiff became aware of the Union's alleged failure to take proper actions on his behalf.

However, while Plaintiff's remaining claims are timely, as discussed *above*, they are rendered moot by the Court of Appeals' ruling in *Martin*. Regardless of Plaintiff's contentions, DC 37 has now sufficiently demonstrated its entitlement to dismissal of the breach of representation and fraud claims pertaining to the out-of-title grievance, and DC 37 is dismissed from this action. Plaintiff's cross-motion to amend his complaint as against DC 37 is also rendered moot.

The Court now turns to Plaintiff's remaining claims against his employer.

II. Plaintiff's Claims against HHC

Petitioner claims that he was subjected to disparate treatment and a hostile work environment by HHC based on his ethnicity, color, and race. He also claims he was retaliated against for filing complaints against his employer. HHC allegedly retaliated against Plaintiff by denying him the opportunity to work overtime and preventing him from advancing into more senior positions. The overlapping breach of contract claim related to HHC's CBA with DC 37 claims that Plaintiff was forced to perform out of title work, prevented from performing the duties of a laborer, and denied overtime and backpay.

A. HHC's Alleged Violations of the City HRL

The City Human Rights Law is codified in title 8 of the Administrative Code (§ 8-101 *et. seq.*). As is relevant here, Administrative Code § 8-107 (1) (a) (3) prohibits employers from discriminating on the basis of "race," "color," "national origin," and "gender" in "compensation or terms, conditions or privileges of employment." The Code is in accord with the federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000; *Matter of*

Aurecchione v New York State Division of Human Rights, 98 NY2d 21, 25-26 [2002]). In *Williams v New York City Housing Authority* (61 AD3d 62, 65 [1st Dept 2009]), the First Department established that the Code must be interpreted more broadly than its state and federal counterparts, in the wake of the Local Civil Rights Restoration Act of 2005, which held that courts must “be sensitive to the distinctive language, purposes, and method of analysis required by the City Human Rights Law ... requiring an analysis more stringent than that called for under either title VII or the State Human Rights Law” (*id.*). The Act mandated that the City HRL should “be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York civil rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed” (*Administrative Code § 8-130*). Therefore, under *Williams*, the plaintiff need only allege that he has been treated “less well” than other employees because of his protected status, or that discrimination was a motivating factor for the defendant’s conduct (*see also Chin v New York City Housing Auth.*, 106 AD3d 443 [1st Dept 2013]).

Thus, “[a] person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence” (*Forrest*, 3 NY3d at 326). This is because “[i]t is not often that an employer will use overt methods to discriminate” (*id.* at 322). “[T]he record must therefore be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent” (*Sogg v American Airlines, Inc.*, 193 AD2d 153, 160 [1st Dept 1993]).

Williams collapsed the analytical distinction between hostile work environment claims and other discrimination claims. The Court held that, under the City HRL, “the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff

has been treated less well than other employees” based on characteristics protected by the City Human Rights Law, such as race, religion and national origin (*id.* at 78; *Nelson v HSBC Bank USA*, 87 AD3d 995 [2d Dept 2011] [holding that the differential-treatment standard applies to claims of racial discrimination]).

Thus, under the formulation of the differential-treatment standard in *Williams*, summary judgment “should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred” (*Williams*, 61 AD3d at 78). Moreover, “questions of severity and frequency,” which go to liability in the analysis of discrimination claims under federal and state laws antidiscrimination laws, should typically “be reserved for consideration of damages” under the differential-treatment standard (*id.* [internal quotation marks and citation omitted]).

However, the First Department has also observed that the City HRL is not a civility code and that summary judgment is appropriate under the differential-treatment standard where the alleged discriminatory conduct “could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences” (*id.* at 80). Moreover, the First Department has also held that “stray remarks” that are marginally-related to a protected category are not actionable under the City HRL (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012] [affirming the trial court’s grant of summary judgment dismissing the plaintiff’s age discrimination claims]).

The Second Circuit Court of Appeals, surveying New York caselaw evaluating workplace discrimination claims under the City’s HRL after the Restoration Act, sketched the broad guidelines to be considered when applying the differential-treatment test:

“(1) NYCHRL claims must be analyzed separately and independently from federal and state discrimination claims; (2) the totality of the circumstances must be considered because the overall context in which [the challenged conduct occurs] cannot be ignored”; (3) the federal severe or pervasive standard of

liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages; (4) the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives, or if the defendant proves the conduct was nothing more than petty slights or trivial inconveniences; (5) while courts may still dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, (6) summary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory”

(*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 [2d Cir 2013]).

The First Department recently stated that it found *Mihalik's* approach “persuasive” and noted that that the Second Circuit recognized that City HRL permits plaintiffs to recover for differential treatment even “where the treatment does not result in an employee’s discharge” (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 [1st Dept 2018]).

Hostile Work Environment and Disparate Treatment

As discussed above, a plaintiff alleging disparate treatment under the City HRL need only demonstrate that he was treated “less well” than others because of his protected status (*Williams*, 61 AD3d 62 at 65). To ensure that communities of color do not suffer from discrimination and harassment, “race and “national origin” are among the protected categories under the City HRL. Given that employers can discriminate in a variety of ways that are not always overt or explicit, plaintiffs need not prove discrimination by direct evidence. Rather, Courts must look at the broader picture presented by Plaintiff “to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent” (*Sogg*, 193 AD2d 153 at 160). In an affidavit prepared as part of Plaintiff’s opposition to HHC’s motion, Plaintiff alleges that he was denied favorable work assignments in comparison to his Caucasian colleagues, and also did not receive the same support when working on assignments (NYSCEF doc No. 205, ¶¶ 12-13). He claims his supervisor spoke to him in a threatening and demeaning manner, and punished him for

infractions, such as reporting late to work, that Caucasian coworkers were allowed to commit with no consequences (*Id.* at ¶¶ 14-16). Plaintiff also claims coworkers used epithets directed at his ethnicity (NYSCEF doc No. 211, ¶ 78).

Although some of Plaintiff's claims, such as that he was denied the ability to work overtime, are refuted by HHC with documentary evidence (NYSCEF doc No. 213), Plaintiff's general allegations of the treatment he was subjected to by coworkers must be taken as true at this juncture. Under the City HRL, Plaintiff's allegations that he and other Latino workers were treated less favorably are sufficient to raise an inference of discrimination (*Williams*, 61 AD3d at 76-77; *Hernandez v Kaisman*, 103 AD3d 106, 113 [1st Dept 2012]). As the non-moving party, Plaintiff is entitled to the benefit of all favorable inferences. Under the *Williams* standard, the determination of whether the conduct described by Plaintiff actually occurred must be made by a finder of fact. HHC's arguments for why Plaintiff did not experience disparate treatment are not appropriate for resolution in a summary judgment motion. For example, HHC argues that the other laborers mentioned by Plaintiff, despite having the same job title, do not share equal responsibilities. However, the question of whether two employees are similarly situated in such an action is a question for the jury (*see Feingold v New York*, 366 F3d 138, 154 [2d Cir 2004]). Plaintiff has thus sufficiently stated a cause of action for disparate treatment under the City HRL.

Given that the standards for a hostile work environment claim are similar to those of disparate treatment, the Court finds that Plaintiff has also demonstrated a hostile work environment claim under *Williams and Hernandez*. Under the latter, the Court held that dismissal of a hostile work environment claim is not appropriate when a plaintiff has demonstrated he experienced differential treatment (*Hernandez*, 103 AD3d at 115). HHC thus cannot demonstrate

entitlement to dismissal of Plaintiff's hostile work environment claim as it is necessarily interrelated with Plaintiff's disparate treatment claim.

Retaliation

With respect to Plaintiff's retaliation claim, the Court finds that Plaintiff has not demonstrated that he suffered an adverse action sufficient to shift the evidentiary burden to HHC. To sustain an action for retaliation, Plaintiff "must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest*, 3 NY 3d 295 at 312-13). The standard for what constitutes an adverse action is fairly broad and can include any employer action which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (*Burlington Northern & Santa Fe Railway Co. v White*, 548 US 53, 68 [2006]).

The First Department has recently held that while the federal burden-shifting analysis does not apply to disparate treatment analysis, it does apply to retaliation claims (*see Suri v Grey Global Group, Inc.*, 164 AD3d 108, 117-118 [1st Dept 2018]; *see also Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011])

Under the burden shifting test, the plaintiff employee must make out a *prima facie* showing of retaliation by demonstrating that (1) he is a member of a protected class; (2) he was qualified to hold the position in question; (3) he was actively or constructively discharged, or subject to some other adverse employment action; and (4) that the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Bennett*, 92 AD3d at 36; *see also McDonnell Douglas v Green*, 411 US 792 [1973]).

Once the plaintiff has satisfied his burden, the defendant must articulate a clear nondiscriminatory reason for the termination or other action to shift the burden back to the plaintiff. Then, the employee must show that the defendant's preferred reasons are pretextual (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316-317 [2004]). Here, Plaintiff argues he has made a *prima facie* case for retaliation as his overtime hours decreased substantially after he filed a complaint with the Equal Employment Opportunity agency in 2016 (NYSCEF doc No. 246, ¶ 17). However, as discussed, the documentary evidence establishes that Plaintiff continued to perform overtime hours.

Plaintiff argues that the alleged conduct of his colleagues continued unabated after his complaints were made, but “a continuation of conduct that has begun before [he] complained” does not warrant a proper claim of retaliation (*Melman*, 98 AD3d 107 at 129). Plaintiff also retired in November 2018 due to personal reasons. As Plaintiff has not demonstrated any adverse actions taken by HHC directly in response to his complaints or grievances, the claim for retaliation under the City HRL must be dismissed.

B. HHC's Alleged Violation of the CBA

Separately from his claims against HHC under the City HRL, Plaintiff claims HHC is liable for a breach in the CBA between HHC and DC 37. To recover against a defendant in a breach of contract action, plaintiff must demonstrate (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*Junger v John V. Dinan Assocs., Inc.*, 164 AD3d 1428, 1430 [2d Dept 2018]).

HHC argues that the claim cannot survive as Plaintiff has not exhausted his administrative remedies under the CBA. Generally, “when an employer and a union enter into a

collective bargaining agreement that creates a grievance procedure an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract” (*Bd. of Educ. v Ambach*, 70 N.Y.2d 501, 508 [1987]). Plaintiff, of course, challenges this by arguing that he has already exhausted his remedies *vis-à-vis* the grievance procedures that have not been adequately addressed by the Union, and therefore his direct claim against HHC is proper.

However, as discussed *supra*, Plaintiff’s breach of fair representation claim against DC 37 has been dismissed. Courts have repeatedly held that a plaintiff may not go after an employer for a breach of the CBA unless the plaintiff also has a viable claim against the union itself, as the claims are interdependent and cannot logically be separated (*see DelCostello v Int’l Brotherhood of Teamsters*, 462 U.S. 151, 164 [1983]; *White v White Rose Food*, 237 F.3d 174, 178 [2d Cir. 2001]). Since a viable claim against the union is a prerequisite to a claim against the employer for a breach of the CBA, “courts presented with [these] hybrid claims need not reach the question of whether the employer violated the CBA unless the union has acted arbitrarily, in bad faith, or discriminatorily” (*Acosta v Potter*, 410 F. Supp. 2d 298, 309 [SDNY 2006] (*citing Young v United States Postal Serv.*, 907 F.2d 305, 307 [1990])). Here, Plaintiff has not established that the Union acted in bad faith. Since a failure to establish that the union has breached its duty renders a claim against the employer moot, HHC has demonstrated its entitlement to dismissal of Plaintiff’s claim for breach of the CBA

Plaintiff’s Cross-Motion to Amend the Complaint

The Court has wide discretion to grant a party leave to supplement or amend his pleading to add new facts, circumstances, and parties (*Maor v One Fifty Fifty Seven Corp.*, 169 AD2d 497, 498 [1st Dept 2019]). Whether to grant or deny a party’s motion under CPLR § 3025(b) is

left to the sound discretion of the court (*see Corsello v Verizon New York Inc.*, 18 NY3d 777 [2012]). Generally, leave to amend under CPLR § 3025(b) is to be freely granted and there is no time restriction as to when a party may seek leave to amend by permission. The court, however, may consider a movant's extended delay in moving for leave to serve an amended complaint and deny leave to amend where a lengthy delay is not explained by a reasonable excuse (*see Sewkarran v DeBellis*, 11 AD3d 445, 445 [2d Dep't 2004]). A delay is generally considered to be lengthy when the motion to amend is filed "significantly after" the note of issue (*see g IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 NYS2d 100 [Sup. Ct., NY Cnty. 2010]). Plaintiff's counsel explained that the motion to amend was filed several months after the Note of Issue because she is a solo practitioner and was unable to find time to amend prior to the defendants filing their summary judgment motions (NYSCEF doc No. 247 at ¶ 13).

Here, the Court finds that granting leave to Plaintiff to supplement his complaint would be an imprudent exercise of discretion, as Plaintiff's proposed amended complaint is superfluous in nature. The motion seeks to supplement Plaintiff's complaint with additional incidents of harassment that he contends HHC already asked him about during his deposition. All of the incidents described in the proposed amended complaint occurred years before this motion was made, and Plaintiff already had the opportunity to discuss them in depositions. If the Court were to allow Plaintiff to supplement his complaint, HHC would be entitled to additional discovery on the claims, which would further delay both parties' ability to move forward with this proceeding. Furthermore, none of the allegations in the amended complaint would resuscitate any of the claims dismissed by this decision.

Plaintiff's cross-motion to amend his complaint is thus denied in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant District Council 37, AFSCME, AFL-CIO.'s motion for summary judgment dismissing all claims as against it (Motion Seq. 004) is granted and said claims are severed and dismissed; and it is further

ORDERED that Plaintiff Jose Otero's cross-motion to District Council 37's motion seeking to supplement the complaint as against District Council 37 is denied;


ORDERED that Defendant New York City Health and Hospital Corp.'s motion for summary judgment (Motion Seq. 005) is granted only to the extent that Plaintiff's claims for retaliation and breach of contract are dismissed; and it is further

ORDERED that the branch of Plaintiff's cross-motion that seeks to supplement the complaint as against New York City Health and Hospital Corp. is denied in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendant District Council 37 shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: July 30, 2019


Hon. Carol R. Edmead, J.S.C.
HON. CAROL R. EDMÉAD
J.S.C.