SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART 52**

Justice

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JOHN SKARIAH,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK

Defendant.

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INDEX NO. 153189/2013

MOTION DATE 06/11/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

This action arises out of plaintiff's claims that he was subject to discrimination, retaliation and a hostile work environment, on the basis of his race and national origin, in violation of New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL). Defendants the City of New York, and The Fire Department of the City of New York (FDNY), collectively the defendants, move, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint. For the reasons set forth below, defendants' motion is granted in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff has been an employee of the FDNY since 1992. Plaintiff was hired as a Fire Protection Inspector and was promoted to Associate Fire Protection Inspector I in November 1997.

Plaintiff is from India and alleges he is the only Indian-American employed in his District Office. Plaintiff's complaint contains several allegations that he was retaliated against, denied several promotions, and subjected to a hostile work environment on the basis of his national origin and in retaliation for EEOC complaints. Plaintiff alleges a lengthy history of a denial of promotions, denial of overtime, denial of the assignment of a work vehicle and denial of field work related supplies.

On June 26, 1998, Plaintiff was given a raise and promoted from Associate Fire Inspector I to the position of Deputy Chief Inspector as part of a 1998 Equal Employment Opportunity Commission ("EEOC") Settlement Agreement.

Plaintiff alleges, in contradiction to the documentary evidence, that he has never had a disability or a reasonable accommodation for a disability. However, the evidentiary record before this Court establishes that plaintiff reported to FDNY that he had a disability and received an accommodation for said disability after an EEOC settlement agreement. Based on the record, it is clear that plaintiff was aware of both the accommodation and his classification as having a disability. Plaintiff submitted a doctor's note to FDNY stating, "P[atien]t is under my care for asthma. Due to his condition it is advisable for him to work in the office and not in the field." See defendant's Exhibit O.

Plaintiff also alleges, that he was subjected to racial epithets by his employer resulting in a hostile work environment. Additionally, plaintiff alleges that his status as having a reasonable accommodation based on a disability is false and is a pretext for the conduct complained of.

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]. The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008] (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] (internal quotation marks and citation omitted).

On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016] (internal quotation marks, citations and brackets omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

In the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other

adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]. If the plaintiff can set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 965. If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012] (internal quotation marks and citations omitted).

To establish a prima facie case of discriminatory failure to promote, plaintiff must demonstrate that "(1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualification." *Brown v Coach Stores, Inc.*, 163 F3d 706, 709 (2d Cir 1998) (internal quotation marks and citation omitted).

"[F]ailure to promote can constitute an adverse employment action." *Mejia v Roosevelt Is. Med. Assoc.*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50506[U], *3 (NY Sup Ct, 2011), *affd* 95 AD3d 570 [1st Dept 2012]. Here, however, plaintiff has not established that he was qualified for the positions he applied for. In fact, plaintiff is a civilian employee of the FDNY and applied for positions that were for uniformed employees. Furthermore, plaintiff applied to other

positions that required fieldwork, which was in contravention of the EEOC settlement agreement and plaintiff's reasonable accommodation.

Even if plaintiff could establish a prima facie claim, in response, defendants have proffered a legitimate nondiscriminatory reason for why plaintiff was not promoted, that is the disability he suffered for why a reasonable accommodation was required. In opposition plaintiff failed to raise triable issues of fact.

Hostile Work Environment

A hostile work environment exists in violation of the NYCHRL where an employee "has been treated less well than other employees because of her protected status." *Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]. Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment -- that she is treated 'less well' -- because of a discriminatory intent." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 [2d Cir 2013] (internal citation omitted).

To establish a hostile work environment claim under the NYCHRL, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her [protected status]." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]. Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 [1st Dept 2017] (internal quotation marks and citation omitted).

Plaintiff's hostile work environment claim, as with the other discrimination claims, includes the failure to promote and decisions regarding certain work equipment and overtime, as well as allegations of disparaging comments because of his national origin. However, plaintiff has not established that he was treated less well because of his national origin or that these remarks were more than "petty slights or trivial inconveniences." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560 [1st Dept 2017].

Plaintiff conclusory assertions that he was qualified for positions in which he did not receive is not supported on this record. Plaintiff fails to state the qualifications for the positions, how he was qualified and a nexus between his national origin and not getting the positions applied for. It is well established that "a plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination." *Basso v Earthlink, Inc.*, 157 AD3d 428, 430 [1st Dept 2018] (internal quotation marks and citation omitted). Moreover, plaintiff fails to address how the candidates that were ultimately hired for the positions are not qualified.

Furthermore, plaintiff's repeat contention that he does not have a disability, and such was only perceived by the FDNY, is also absent of any evidentiary support. To the contrary, the record is clear that plaintiff requested and received an accommodation as a result of his disability. Moreover, plaintiff was advised on how to remove such classification if he desired.

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she]

participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]. Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010] (internal quotation marks and citations omitted).

Plaintiff also alleges retaliation over his repeated EEOC complaints; however he fails to allege knowledge of these complaints by any of his supervisors, nor does he identify the link between the timing of his complaints and any alleged retaliatory conduct.

Plaintiff has failed to allege either any adverse employment actions, or that any employment actions were taken under discriminatory circumstances. He has also failed to provide any evidence that defendant's non-discriminatory reasons for the actions taken were pretextual. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and plaintiff's Second Amended Complaint dismissed in its entirety.

6/18/2020
DATE

LYLE E. FRANK, J.S.C.

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

HON. LYLE E. FRANK J.S.C.