

Cascalenda v City of New York
2021 NY Slip Op 30936(U)
March 26, 2021
Supreme Court, New York County
Docket Number: 157807/2020
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X

ROBERT CASCALENDA

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 157807/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

This action arises out of allegations of disability discrimination, hostile work environment, constructive discharge, and retaliation. Defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(7). Plaintiff opposes the instant motion and cross-moves to amend the complaint. For the reasons set forth below, defendant’s motion to dismiss is denied and plaintiff’s cross-motion is granted¹.

Plaintiff began his employment with the New York City Police Department (NYPD) in 2008. Before and during his employment with the NYPD, plaintiff suffered with multiple physical and mental health issues. As a result of plaintiff’s medical issues, plaintiff was prescribed multiple medications including opioids and medical marijuana. Plaintiff alleges that he was a certified medical marijuana user and NYPD District Surgeon Joseph Hedderman approved his medical marijuana use.

¹ Plaintiff withdraws Count X of proposed second amended complaint which alleges “negligent failure to train”. Moreover, as plaintiff conceded during oral argument Public Health Law 3369 does not create a private right of action, Count XIII is dismissed.

Plaintiff was subjected to random drug testing because of his employment and failed three tests because of his medical marijuana use. Plaintiff was told that he could not use medical marijuana and was disciplined as a result of the failed drug tests. Plaintiff admits that he did not formally request a reasonable accommodation for his disabilities through the Equal Employment Opportunity Division (EEOC).

Plaintiff alleges he was subjected to surveillance by the Internal Affairs Bureau as a result of his medical marijuana use. Plaintiff also alleges he was held in custody at IAB offices overnight and was harassed by IAB officers. Plaintiff alleges the harassment included allegations that plaintiff was faking his illness as well as opening the restroom door when he was in the bathroom and pointing and laughing.

In March 2020, plaintiff's application for disability retirement was approved and plaintiff retired from the NYPD on September 17, 2020.

Plaintiff's Cross-Motion to Amend

Generally, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *Murray v City of New York*, 51 AD3d 502, 503 [1st Dept 2008] (internal quotation marks and citations omitted). "[P]laintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" *MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499, 500 [1st Dept 2010] (internal citations omitted).

Defendant opposes plaintiff's cross-motion to amend on the grounds that the proposed amendments are futile. Defendant contends that the allegations in the proposed amended complaint are substantially similar to the original complaint and are equally insufficient.

Plaintiff contends the amendment is to clarify allegation that the defendant failed to engage in a “cooperative dialogue”. The Court does not find that the defendant is prejudiced by such an amendment, therefore plaintiff’s cross-motion is granted.

Defendant’s Motion to Dismiss

In support of its motion to dismiss, defendant essentially argues, that because plaintiff did not seek a reasonable accommodation through the appropriate channels, the Equal Employment Opportunity Division (EEOC), he has failed to state a claim upon which relief can be granted. Further, defendant contends that the lawful non-discriminatory drug policy of the NYPD cannot be the basis of plaintiff’s claims because he was aware his use of medical marijuana was not approved. Defendant also contends that plaintiff’s complaint fails to allege sufficient facts to articulate claims of hostile work environment, constructive discharge, and retaliation.

In opposition, plaintiff argues that the onus is on the employer to ensure an interactive dialogue is undertaken to determine the availability of a reasonable accommodation. Moreover, plaintiff claims that NYPD District Surgeon Joseph Hedderman approved plaintiff’s reasonable accommodation request to use his medical marijuana prescription. Plaintiff claims that the facts pled in the second amended complaint, the unfavorable treatment, work assignments and discipline resulting from failed drug tests, are sufficient to state a claim for the remaining causes of action.

Defendant has moved for relief under CPLR § 3211 (a) (7). For the purposes of this motion, the court accepts the allegations in the proposed second amended complaint as true and interprets the complaint liberally (*see Alden*, 159 AD3d at 621-622). Moreover, it gives plaintiff “the benefit of every . . . favorable inference” and “determine[s] only whether the facts

as alleged fit within any cognizable legal theory” (*Gottlieb v Wynne*, 159 AD3d 799, 800 [2nd Dept 2018]).

Failure to Accommodate

The New York State Human Rights Law (SHRL) applies the same legal standard as the American with Disabilities Act (ADA) (*I.M. v City of New York*, 178 AD3d 126, 135 [1st Dept 2019]). That is, under the SHRL, plaintiff must show that “(1) she is a qualified individual with a disability; (2) that the defendants are subject to one of the [statutes]; and (3) that she was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability” (*id.* [internal quotation marks and citation omitted]). Further, “the complaint and supporting documentation must set forth factual allegations sufficient to show that, upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job” (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 884 [2013] [internal quotation marks and citation omitted]).

The New York City Human Rights Law (CHRL) provides even broader protections (*id.* at 884-885). It requires an employer to make reasonable accommodation that allow a disabled person to satisfy the essential requisites of a job, whether the employer knows or should have known about the disability (*id.* at 885). The CHRL also places the burden on the employer rather than the employee to show that it would have been a hardship to accommodate the disability (*id.*). “Thus, the employer, not the employee, has the “pleading obligation” to prove that the employee “could not, with reasonable accommodation, satisfy the essential requisites of the job” (*id.*, [quoting *Phillips v City of New York*, 66 AD3d 170, 183 [1st Dept 2009]). Thus, a discrimination complaint survives a CPLR § 3211 motion if it contains allegations that, if true,

satisfy the minimal pleading requirements (*see Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]). Further, if a plaintiff satisfies his burden under the SHRL, then his CHRL cause of action also should be sustained (*see I.M.*, 178 AD3d at 135 [stating that if a claim is sustainable under the ADA, it also survives under the SHRL and the CHRL]).

Here, it is undisputed that plaintiff was disabled. The Court disagrees with the City's contention that a formal request must be made for an accommodation. The NYPD has an affirmative obligation "to accommodate an officer's needs when it is aware of the officer's disability." *Benitez v City of NY*, ___AD3d___, 2021 NY Slip Op 00617, *4 [2021].

Disparate Treatment

Plaintiff alleges that defendants discriminated against him in violation of the NYCHRL by treating him differently than officers who did not suffer from any disability. Specifically, plaintiff alleges that he was accused of lying about his illnesses, subjected to surveillance at his home, and transferred plaintiff to an undesirable work location. Despite knowing that plaintiff was a certified medical marijuana user, defendant continued to drug test and discipline plaintiff for failed drug tests.

Under the NYCHRL, the focus is on "unequal treatment based on [a protected characteristic] . . ." *Williams v New York City Housing Auth.*, 61 AD3d 62, 79 [1st Dept 2009]. "Thus, even assuming that a plaintiff could not prove that she[he] was dismissed for a discriminatory reason, she[he] could still recover for other differential treatment based on her[his] [disability]." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 [1st Dept 2018] (internal citation omitted). Accordingly, to establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that she[he] has been treated less well

than other employees because of her[his] [protected characteristic].” *Williams v New York City Housing Auth.*, 61 AD3d at 78.

Given the liberal pleading standards, the court finds that plaintiff has sufficiently alleged that he was treated less well than other employees because of his disability. *See e.g. Boncimino v N.Y. State Unified Court Sys.*, 2018 WL 2225004, *10, 2018 US Dist LEXIS 82024, *30 (SD NY 2018) (internal quotation marks and citation omitted) (Court held that at the motion to dismiss stage, “name-calling, posting of pictures, and mocking alleged in the Amended Complaint create a plausible claim for discrimination under the NYCHRL”); *see also EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005] (“Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss”).

A plaintiff may sufficiently allege a violation of the NYCHRL by an employer’s failure to engage in the required individualized process to accommodate and also separately allege causes of action for disability discrimination. *See e.g. Phillips v City of New York*, 66 AD3d at 178 (“Separate and apart from the City’s failure to engage in an individualized interactive process in evaluating plaintiff’s request for accommodation, plaintiff has sufficiently pleaded causes of action for disability discrimination under both statutes”). Accordingly, at this stage, defendants’ motion is denied with respect to plaintiff’s failure to accommodate and discrimination claims.

The Court finds that the complaint contains sufficient factual allegations to survive a motion to dismiss and support the hostile work environment, retaliation, and constructive discharge claims.

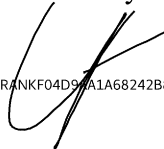
For all these reasons and after consideration of all defendant’s arguments, the court denies the motion, as the defendant has not shown that dismissal is warranted under CPLR § 3211. Accordingly, it is

ADJUDGED that defendant’s motion to dismiss is denied; and it is further

ADJUDGED that plaintiff’s cross-motion to amend the complaint is granted; and it is further

ORDERED that the second amended complaint shall be deemed served upon service of this order with notice of entry, except that Counts X and XIII of such complaint are dismissed; and it is further

ORDERED that the City of New York serve and file its answer to the second amended complaint within 20 days after service of a copy of this order with notice of entry.

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3/26/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE