SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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BRAD SCOTT,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

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INDEX NO. 158952/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43

were read on this motion to/for DISMISS.

The motion by the remaining defendant the New York City Transit Authority ("NYCTA") (the case already settled with a previously named defendant, Amalgamated Transit Union Local 726) to dismiss is granted.

Background

In this discrimination case, plaintiff claims that he was unlawfully discriminated against while working as a bus driver for NYCTA. Plaintiff, an African American, alleges that he suffered disparate treatment when compared with white NYCTA employees. He complains that he was initially assigned to work on Staten Island and wanted an accommodation to be closer to his home due to his son's medical condition. Plaintiff maintains his request was denied.

Plaintiff noted that his wife worked during the day (while he was assigned to work at night) and his commute from the Bronx to Staten Island was becoming unbearable. He claims that after he submitted his transfer request (in April 2019), he was selected for a random drug test without any legitimate basis.

On July 28, 2019, plaintiff claims he was in an accident during his shift although no passengers were on the bus when it occurred. Plaintiff alleges that he went to the hospital for observation but did not suffer any broken bones. He insists NYCTA was supposed to tell him when to return to work and it never did. Plaintiff details his conversations (usually via text messages) with various union members about returning to work over the next few months.

Plaintiff claims that he received a letter in May 2020 from NYCTA stating that his health insurance had been terminated as of September 1, 2019 and indicating that he had been fired as of that date. He argues that he was officially fired by NYCTA on July 6, 2020 and claims it was due to discriminatory animus. He claims he was subjected to many more drug tests than other non-African American employees and that he should have been given an accommodation due to his family situation.

NYCTA moves to dismiss and offers a different version of events. It claims that its investigation of the accident revealed that plaintiff fell asleep while driving his bus route, drove over the curb and into a wooded area. The bus purportedly hit a tree and then plaintiff moved the bus in reverse and hit another tree. NYCTA acknowledges that after the accident, plaintiff was subjected to a post-accident drug and alcohol test. It claims that he was held out of work following the accident while the investigation into the accident continued.

NYCTA claims that plaintiff was terminated on August 5, 2019 because of the accident and that plaintiff surrendered his employee pass and badge on August 5, 2019. It insists he was issued a cash out payment for paid leave on August 6, 2019. NYCTA also observes that plaintiff's employment record (which was probationary) included another bus collision on February 27, 2019.

NYCTA claims there is no evidence or allegation of discriminatory animus towards plaintiff. It argues that while plaintiff expressed his preference not to be placed on Staten Island, the operational needs of NYCTA required that he be assigned to that location. With respect to the drug tests, NYCTA claims that plaintiff was subjected to only three tests: an initial pre-employment test, a post-accident test on July 28, 2019 and a return-to-work test on July 31, 2019. It attaches plaintiff's drug test history that only shows drug tests on three dates (NYSCEF Doc. No. 20). NYCTA also denies that there was any pretext for plaintiff's termination.

In opposition, plaintiff argues that he requested a reasonable accommodation because his son suffered from Type 1 Diabetes and that other employees who were white regularly received transfers, even those who did not have caregiver responsibilities. He argues that had his reasonable accommodation request been issued, he would not have had the accident in July 2019. Plaintiff points out that this signature is absent from the termination document submitted by NYCTA in its moving papers and that he should be afforded the opportunity to conduct discovery.

In reply, NYCTA points out that plaintiff ranked number 67 out of 68 in his new bus operators' class and that this is what was used to determine employees' work locations. It emphasizes that plaintiff did not provide any specifics about who was granted transfer requests or the circumstances under which those transfers were afforded. NYCTA also points out that neither the New York State Humans Rights Law ("NYSHRL") nor the New York City Human Rights Law ("NYCHRL") create a right to reasonable accommodation for childcare responsibilities.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss on the ground that the action is barred by documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Discrimination

"A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, 3 NY3d 295 [2004] [internal quotations and citations omitted]).

Here, the Court grants the motion and dismisses the verified complaint. As an initial matter, the Court recognizes the bizarre set of facts at issue here. On the one hand, plaintiff claims he had no idea he was fired until July 2020 while NYCTA claims he was fired in August 2019. The termination document submitted by NYCTA contains a line for plaintiff's signature with an "unavailable" written above it (NYSCEF Doc. No. 24 at 3). This could explain the parties divergent accounts although, as NYCTA points out, plaintiff's text messages to a union member includes conversation about whether NYCTA would take him back.

However, whether plaintiff knew he was fired or not has little bearing on this decision. The Court must consider the nature of plaintiff's alleged racial discrimination claims in the context of the facts alleged in the verified complaint (plaintiff did not submit an affidavit in opposition). Those allegations are simply too vague to support plaintiff's claims for discrimination under the NYCHRL and the NYSHRL or retaliation under those statutes.

With respect to plaintiff's claim for racial discrimination, the incidents plaintiff complains about do not state a claim for discrimination under either statute. Plaintiff claims that other non-black workers requested and received transfers. But no details are provided about how many other transfer requests were granted and under what circumstances (*Pelepelin v City of New York*, 189 AD3d 450, 137 NYS3d 316 [1st Dept 2020] [concluding that bare allegations about disadvantageous treatment did not support a discrimination claim]). And, as NYCTA points out, plaintiff was 67 out of 68 in his class (NYSCEF Doc. No. 21) and that determined the seniority for his work location. The timelines offered by plaintiff show that he was assigned to Staten Island on January 3, 2019 and he asked for a transfer request on January 25, 2019. The Court is unable to find that the denial of a transfer request submitted immediately after starting work is racial discrimination on these facts.

In fact, according to plaintiff, the supervisor told plaintiff to be patient about the transfer request. The complaint contains no allegations about how quickly other transfers were granted, or even whether petitioner's request was formally denied.

Moreover, as NYCTA points out, nothing in the NYSHRL and NYCHRL required NYCTA to provide an accommodation for childcare responsibilities. While the Court empathizes with plaintiff's situation—he claims his son has Type 1 diabetes, his wife works during the day and he was assigned to night shifts—that does not constitute an actionable claim for discrimination.

The drug test issue also does not support a claim for discrimination. The parties agree that plaintiff received a drug test before starting work and two after the July 2019 accident (one right after the accident and one a few days later). Plaintiff also claims that he received another one in April 2019 after making his transfer request several months earlier. The Court is unable to find that these tests support a claim for racial discrimination. NYCTA is entitled to do a pre-employment test, to perform tests after a major accident and to perform a random test.

Plaintiff admits in the complaint (although he downplays the extent of the accident) that the accident was so severe he went to the hospital for evaluation. It is entirely reasonable for NYCTA to explore whether a bus driver in a single vehicle accident was under the influence of drugs or alcohol and to perform that same evaluation as part of a return-to-work procedure. That leaves a single additional occurrence of an April 2019 drug test (assuming this happened, which the Court must on a motion to dismiss). That does not rise to the level of an actionable claim for racial or familial discrimination as alleged by plaintiff.

Retaliation

"The State HRL provides, in pertinent part, that it shall be unlawful to retaliate against any person because he or she has opposed any practice forbidden under this article. To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [plaintiff] engaged in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) [plaintiff] was subject to adverse action; and (4) there was a causal connection between the protected activity and the adverse action " (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51, 948 NYS2d 263 [1st Dept 2012] [internal quotations and citations omitted]).

"[T]o make out a retaliation claim under the City HRL, the complaint must allege that (1) [plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [plaintiff]; and (3) a causal connection exists between the protected activity and the adverse action" (*id.* at 51-52).

Plaintiff's retaliation claims similarly do not state a cause of action. It is undisputed that he was in a serious bus accident where he allegedly drove off the road because he fell asleep and caused significant damage to the bus. The Court cannot find that terminating a probationary employee who was involved in two accidents within the first seven months of his employment somehow constitutes retaliation.

To the extent that the retaliation claim is premised on the drug testing issue, the Court finds that also does not state a valid cause of action for the reasons cited above. At most, plaintiff had a single additional drug test (outside of the three that were absolutely justified) that was purportedly without justification. That does not constitute an activity that disadvantaged plaintiff to the point where he can recover under a retaliation theory. Plaintiff was not fired because of that drug test (if it happened). To be clear, the Court makes no finding whether drug

testing could ever establish a claim for retaliation (at some point repeated drug testing might be actionable); it merely finds that a single test does not support his claim.

Accordingly, it is hereby

ORDERED that the motion by defendant New York City Transit Authority to dismiss is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

3/2/2022
DATE

ARLENE BLUTH, 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