

Fawcett v Fox News Network, LLC
2022 NY Slip Op 30691(U)
March 4, 2022
Supreme Court, New York County
Docket Number: Index No. 157135/2021
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JOHN FAWCETT,

Plaintiff,

- v -

FOX NEWS NETWORK, LLC, FOX CORPORATION, ANDREW NAPOLITANO, LARRY KUDLOW, LACHLAN MURDOCH, VIET DINH, GARY SCHREIER, SUZANNE SCOTT, JAY WALLACE, KEVIN LORD, DENISE COLLINS, STEPHANIE FREEMAN, JENNA STREM,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 96, 98, 99, 104

were read on this motion to dismiss

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91-93, 100, 105

were read on this motion to dismiss

In this action, plaintiff seeks damages for alleged sexual harassment, gender discrimination, and retaliation. Defendants Fox News Network, LLC and Fox Corporation (corporate defendants) move for an order dismissing the complaint against them (mot. seq. 3). Plaintiff opposes.

By notice of motion, individual defendants Kudlow, Murdoch, Dinh, Schreier, Scott, Wallace, Lord, Collins, Freeman, and Strem move for an order dismissing the complaint against them (mot. seq. 4). Plaintiff opposes.

By decision and order dated February 14, 2022, defendant Napolitano's motion to dismiss plaintiff's claims against him was granted (mot. seq. 5). (NYSCEF 194).

I. FIRST AMENDED COMPLAINT (NYSCEF 3)

A summary of the facts pertinent to the instant motion as set forth in the first amended complaint follows.

A. Parties

Plaintiff was an associate producer for a Fox Business program hosted weekly by defendant Kudlow. Fox Business is a division of defendant Fox News Network, LLC (Fox News), which is a division of parent company, defendant Fox Corporation; they are headquartered in New York. Defendant Napolitano is a former legal analyst for Fox News. Defendant Murdoch, chief executive officer (CEO) of Fox Corporation, as is defendant Dinh, its chief legal officer and chief operating officer of Fox Corporation. Defendant Lord is executive vice president for human resources at Fox Corporation.

Defendant Scott is CEO of Fox News, defendant Wallace is its president, and defendant Collins is its vice president for human resources. Defendant Schreier is senior vice president for programming at Fox Business, defendant Freeman is its executive producer, and defendant Strem is one of its senior producers.

B. Encounter with Napolitano

In late September or early October 2019 while on an elevator at Fox, plaintiff had an encounter with Napolitano that plaintiff believed was sexually harassing. When plaintiff returned to his work area and told his co-workers about the encounter and how uncomfortable he had felt, they laughed as “[i]t was common knowledge that [Napolitano] sexually harassed young men at Fox News . . .” According to plaintiff, one of his co-workers also experienced it.

Fearful of jeopardizing his career at Fox, plaintiff did not immediately report the incident to human resources, but told Dobbs about it. Dobbs then told Lord that plaintiff had “had an

encounter with [Napolitano], and . . . seemed to be upset.”

Toward the end of October 2019, Lord scheduled a meeting with plaintiff at which plaintiff told him about the encounter with Napolitano and how uncomfortable he had felt. Lord responded “dismissively, asking ‘Well, what do you want us to do about it?’” Plaintiff complains that Fox News did nothing about it.

Shortly thereafter, a co-worker who had also allegedly been harassed by Napolitano met with Lord who was reportedly “similarly dismissive” and “never initiated any sort of investigation, nor did anyone else at Fox Corporation or Fox News.” Sometime during the spring of 2021, Fox News informed Napolitano that it would not renew his contract, a decision that “had nothing to do with [plaintiff’s] report of sexual misconduct.”

On August 2, 2021, the day that plaintiff commenced the instant action, Fox News issued a “deceptive press release” suggesting that it had acted immediately and terminated Napolitano after learning of plaintiff’s allegations against him.

C. Other incidents involving Napolitano

In September 2020, two men claimed to have been subject to coercive sexual conduct by Napolitano, one in the 1980s and one between 2014 and 2017. Even after the airing of these accusations, Fox News took no action against Napolitano, and instead paid his legal bills. Following the filing of the instant action, plaintiff heard from other Fox employees who had been sexually harassed by Napolitano. While defendants knew of Napolitano’s pattern of sexual harassment, they did not hold him accountable but protected him as they did with respect to another former Fox News host who had sexually harassed numerous male employees.

D. Other incidents involving defendants other than Napolitano

In 2016, a law firm hired by Fox News to investigate sexual misconduct within the

company informed defendants “of numerous instances of sexual misconduct.”

A complaint filed on December 28, 2018 against Fox News by the New York City Human Rights Commission (NYCHRC) reflects that “sexual harassment and discrimination were commonplace at Fox News, and that employees and contractors who reported sexual harassment or discrimination routinely suffered retaliation.” Plaintiff alleges that Murdoch, Dinh, Schreier, Scott, Wallace, Lord, and Collins “were fully aware” of the contents of that complaint, as well as the underlying facts, but took no remedial action.

In June 2021, an action was filed in New Jersey against Fox News by a former Fox host, in which a former Fox News reporter had overheard a subordinate employee’s amorous conversations with Wallace and had settled her own gender discrimination lawsuit against Fox News in 2018. Plaintiff alleges that the reporter signed a non-disclosure agreement, but he will bypass it and force her to testify on his behalf in this action.

In response to the New Jersey lawsuit, corporate defendants issued “flagrantly dishonest” press releases. In one, they praised Scott for executing a zero-tolerance policy regarding workplace misconduct, whereas in reality, Scott and Fox ignored Napolitano’s misconduct.

In another press release, Fox News advised that it had fully investigated sexual misconduct claims made against Wallace and cleared him of wrongdoing. However, after the purported investigation, the subordinate with whom Wallace had had an affair was transferred to a position for which she was unqualified, and in 2018, Scott promoted Wallace to president of Fox News.

E. Freeman and Strem

Shortly after he was hired to work for Dobbs, plaintiff began performing the work of a producer and within a year, he appeared on the air for Dobbs’s show. In October 2020, plaintiff

was promoted to associate producer, skipping an intermediate position, which was “extremely unusual for Fox.” Dobbs had personally requested “the merit-based promotion in recognition of [plaintiff’s] great performance, working long hours and above his pay grade at Fox Business.” The president of Fox Business personally called plaintiff “to congratulate him on the promotion and thank him for his hard work.” Sometime thereafter, plaintiff began work on Kudlow’s show.

In April 2021, defendants Freeman and Strem were named, respectively, executive producer and senior producer of Kudlow’s show. Shortly thereafter, the two “began discriminating against male staff and trying to get them fired, namely by making false accusations against male employees.” The male staff members who left the show due to the pressure were replaced by females. Plaintiff and his co-workers were particularly shocked by Freeman’s “ongoing harassment of a colleague who is in his 60s and has been in the business for nearly 40 years.” Plaintiff’s co-workers were “so disgusted with the toxic atmosphere created by [Freeman] that they began looking for employment elsewhere.”

As soon as Freeman was promoted, plaintiff wanted to meet her and although he had been working remotely since April 2021 due to the pandemic, he sought her out at defendants’ headquarters. When he introduced himself, Freeman “glared at him,” refused to shake his hand, and told him that he should not have appeared at the office without notifying her and that “[w]hen you do something around here, you’d better tell me.” She and Strem then “started ‘papering’ [plaintiff] with baseless write-ups alleging poor performance.” He was warned by another producer that Freeman and Strem “were trying to document any purported mistake made by [plaintiff] in order to get him fired.” Plaintiff repeatedly notified Collins about Freeman’s and Strem’s “baseless allegations, and that he had never had any performance complaints until [the two] were transferred to [Kudlow’s] show.”

On May 14, 2021, Freeman sent plaintiff and one of his colleagues a “blistering” email, to which plaintiff responded in writing concerning Freeman’s “baseless accusations.” Freeman scheduled a virtual meeting instead of “creat[ing] more of a paper trail of her discriminatory behavior.” At the advice of a colleague, plaintiff recorded the meeting at which nobody criticized his performance until Freeman appeared.

On May 19, 2021, a meeting was held with plaintiff, Freeman, Strem, and Collins at which Freeman and Strem sought disciplinary action against plaintiff for a spelling error in an on-air crawl at the bottom of a television screen during a news broadcast. Plaintiff characterizes Freeman’s “fixation” on his error as ironic, alleging that on March 31, 2019, while Freeman was serving as a senior producer for another program, she produced “the infamous” on-air crawl, “Trump cuts aid to three Mexican countries” and was then transferred “to one of the lowest-rated shows at Fox Business.”

On June 18, 2021, plaintiff was again warned by a colleague that Freeman and Strem were attempting to fire him, that while working under Kudlow, Freeman would blame others for her mistakes, and although the two discriminated against male staff, Collins and Schreier “ignored the concerns raised by [plaintiff] and other staff members.” The colleague who had warned plaintiff soon thereafter left the show and was replaced by a woman. Collins “purportedly” investigated Freeman and Strem, but in June 2021, she claimed that she had found no evidence of wrongdoing, blaming the dispute on a miscommunication. Due to “the ongoing discrimination, harassment, and retaliation,” plaintiff told Collins that he was considering whether he should leave Fox News, and on June 25, 2021, Collins sent plaintiff an “onerous” separation agreement with a non-disclosure clause.

After taking two weeks of vacation time, plaintiff informed Collins that he was no longer

interested in resigning, that he had consulted a lawyer, and that he was considering whether he should file a lawsuit or a complaint with an anti-discrimination agency. Freeman and Strem then began excluding plaintiff from staff emails, thereby impairing his ability to do his job. At the same time, someone at Fox Business decided that Kudlow's morning conference calls would not be attended by most of the staff.

After plaintiff filed his original complaint in August 2021, Freeman and Strem increased their efforts to fire him. After working remotely due to COVID-19, in early September 2021, Kudlow's entire team, except plaintiff, was directed to return to the office, and Freeman and Strem "increased their efforts to 'paper' [him] with continual and baseless accusations of mistakes in his work."

Following the agreed upon payment by Fox News of "a record \$1 million fine to the NYCHRC" and the "widespread media coverage" attracted by plaintiff's original complaint in this case, defendants issued a press release denying plaintiff's allegations against Kudlow before the commencement of an investigation, and characterizing plaintiff's additional allegations as "completely baseless and nothing more than a desperate attempt at a payday by trying the case in the court of public opinion as the complaint does not meet the standards of the law," while at the same time, the NYCHRC had found that defendants had engaged in, with respect to other employees, the conduct alleged by plaintiff.

In light of these facts, all of the defendants named in the first amended complaint were aware of his allegations that Freeman and Strem were discriminating against him. Nonetheless, Murdoch, Dinh, Lord, Scott, Wallace, Schreier, and Collins allowed Freeman and Strem to retaliate against plaintiff for filing suit against Fox News.

Plaintiff denies the accusation that he is seeking a "payday" and alleges that he had

attempted to resolve the matter by speaking to Collins.

G. Causes of action

Based on the foregoing, plaintiff advances three causes of action:

- (1) Defendant and its supervisory employees violated the New York City Human Rights Law (NYCHRL) § 8-107 by discriminating against him on the basis of his gender, retaliating against him for reporting gender discrimination and for filing suit pursuant to the NYCHRL, and/or failing to supervise those responsible for the discrimination and retaliation.
- (2) Although aware of Napolitano's prior "unwanted gender-based conduct" against others, defendant's executives did nothing to prevent it before or after.
- (3) Defendants discriminated against him on the basis of his gender and retaliated against him for filing this lawsuit, in violation of Executive Law § 297 (New York State Human Rights Law [NYSHRL]).

Plaintiff indicates that he "wishes to forego all claims asserted under the NYSHRL (but not the NYCHRL)." (NYSCEF 99, fn.1).

II. CORPORATE DEFENDANTS' MOTION

A. Gender discrimination

The NYCHRL provides, in pertinent part, that:

[i]t shall be an unlawful discriminatory practice ... [f]or an employer ... because of the actual or perceived gender [or] disability ... of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(NYC Admin Code § 8-107[a][1]).

A cause of action for employment discrimination under the NYCHRL is set forth, *prima facie*, on a showing that (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified to hold the position; (3) the plaintiff 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. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). The plaintiff's burden of proof is to show, by a preponderance of the evidence, that he was treated worse than other employees because of his gender. (*Suri v Grey Global Group, Inc.*, 164 AD3d 108 [1st Dept 2018]).

The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." (Admin Code § 8-130). Thus, the NYCHRL is "to be more broadly interpreted than similarly-worded federal or State antidiscrimination provisions." (*Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158, 1161 [2d Dept 2015]).

The required element of an adverse employment action must be shown to have occurred under circumstances giving rise to an inference of discrimination. To satisfy this element, a plaintiff must plead facts sufficient to support such an inference beyond conclusory allegations of bias. (*Wolfe-Santos v NYS Gaming Commission*, 188 AD3d 622 [1st Dept 2020]; *Askin v Dept. of Educ. of City of NY*, 110 AD3d 621, 622 [1st Dept 2013]). Allegations of discriminatory comments by an employer may suffice (*O'Rourke v Natl. Foreign Trade Council*, 176 AD3d 517 [1st Dept 2019]; *Whitfield-Ortiz v Dept. of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014]) or of disparate treatment of similarly-situated employees (*Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020]; *Whitfield-Ortiz*, 116 AD3d at 581).

Here, plaintiff alleges no discriminatory comments by his employers. Nor does he allege that he was treated differently than similarly-situated employees. While he claims that his two

female supervisors criticized his performance and tried to get him fired, he does not allege that they did not treat similarly-situated female employees the same way.

Moreover, plaintiff's allegations regarding the male employees who left and the females who replaced them are unsupported. There is no claim as to the reasons for the departures, the positions that the departing employees held with defendants, and whether the female hires were qualified to replace them. (*See e.g., Suri*, 164 AD3d at 108 [court correctly dismissed gender discrimination claims under State and City HRLs; while non-white female plaintiff was replaced by two white males, she did not show that her termination was discriminatory as duties performed by white males were not same as hers]).

Plaintiff thus fails to state a claim for gender discrimination under the NYCHRL. (*See Thomas v Mintz*, 182 AD3d 490 [1st Dept 2020] [plaintiff failed to state claim for discrimination as complaint alleged no facts that would establish that similarly-situated persons were treated more favorably than plaintiff]; *compare with O'Rourke v Ntl. Foreign Trade Council, Inc.*, 176 AD3d 517 [1st Dept 2019] [plaintiff stated gender discrimination claim based on supervisor's remarks reflecting gender-based animus]).

And, as plaintiff does not sufficiently establish that he was subject to discrimination based on his gender, whether he suffered an adverse employment action is immaterial. (*See eg, Golston-Green v City of New York*, 184 AD3d 24 [2d Dept 2020] [even if adverse employment actions constituted actionable unfavorable treatment under NYCHRL, plaintiff alleged no facts from which it could be inferred that actions were based on her gender or race]).

B. Sexual harassment

As plaintiff's sexual harassment claim against Napolitano has been dismissed, the claims against corporate defendants based on that conduct are not viable.

C. Retaliation

Pursuant to Administrative Code § 8-107(7), as pertinent here, “[i]t shall be an unlawful discriminatory practice ... to retaliate or discriminate in any manner against any person because such person has ... opposed any practice forbidden under this chapter.”

To state a cause of action for retaliation under the NYCHRL, the plaintiff must allege that she was engaged in a protected activity, that her employer was aware of the activity, that she suffered an adverse employment action, and that there exists a causal connection between the protective activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]).

“Protected activity” includes opposing or complaining about unlawful discrimination. (*Forrest*, 3 NY3d at 313). The NYCHRL requires that the employer’s conduct be “reasonably likely to deter a person from engaging in protected activity.” (*Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009]). A causal connection between a protected activity and a negative employment outcome may be reasonably inferred from the passing of a brief period of time between the two. (*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]).

Plaintiff alleges no facts from which it may be inferred that his supervisors were aware either that he was contemplating the filing of a discrimination lawsuit or that he had filed one. Moreover, their alleged discriminatory treatment of him was the same before and after he filed his complaint. (*See eg, Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 130 [1st Dept 2012] [continuing course of conduct by employer that began before employee complained does not constitute retaliation as there is no causal connection between employee’s protected activity and employer’s challenged conduct]).

Plaintiff’s allegation that he was the sole employee who was not permitted to return to the

office, absent facts supporting his conclusory statement that it affected his performance or ability to do his work, does not demonstrate an adverse employment action, and he does not allege that such conduct would be reasonably likely to deter a future complaint. In any event, he fails to allege that his supervisors were aware of his alleged protected activity, and thus he does not establish that their conduct was motivated by retaliation. Consequently, plaintiff fails to state a claim against corporate defendants for retaliation.

III. INDIVIDUAL DEFENDANTS' MOTION

Given the foregoing, plaintiff does not state a claim against individual defendants for discrimination or retaliation and/or aiding and abetting same.

Specifically, there are no allegations that defendants Murdoch, Dinh, Lord, Schreier, Scott, Wallace, Lord, and/or Collins actually participated in the alleged gender discrimination, sexual harassment, or retaliation. (*See eg. Doe v Bloomberg, L.P.*, 36 NY3d 450 [2021] [employees of corporate employer may be held liable under NYCHRL only for own discriminatory conduct, for aiding and abetting such conduct, or for retaliation against protected activity]; *McHenry v Fox News Network, LLC*, 510 F Supp 3d 51 [SD NY 2020] [dismissing NYCHRL claims for discrimination, harassment, and retaliation against individual employee absent pleading of allegations that employee actually participated in conduct]).

For the reasons set forth previously, plaintiff does not state a claim for discrimination or retaliation against Freeman and Strem, and they cannot have aided and abetted their own alleged misconduct.

Moreover, plaintiff offers no basis for finding that this court has long-arm jurisdiction against defendants Murdoch and Dinh, having failed to assert that they participated in any of the conduct at issue in his complaint. (*See Robins v Procure Treatment Centers, Inc.*, 179 AD3d 41

[1st Dept 2020] [while individual defendants were employees of defendant, they did not engage in activities in New York sufficient to exercise jurisdiction over them]].

IV. PLAINTIFF’S REQUEST TO AMEND FIRST AMENDED COMPLAINT

Given the deficiencies detailed above in plaintiff’s first amended complaint, and as the allegations he seeks to add in a second amended complaint remain fatally conclusory, his request to file a second amended complaint is denied. (See e.g., *Peterson v City of New York*, 120 AD3d 1328 [2d Dept 2014] [court properly denied leave to amend complaint in employment discrimination matter as plaintiff’s proposed amendments palpably insufficient as matter of law]).


V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Fox News Network, LLC and Fox Corporation’s motion to dismiss (seq. 3) is granted in its entirety, and the complaint is severed and dismissed as against said defendants; it is further

ORDERED, that defendants Kudlow, Murdoch, Dinh, Schreier, Scott, Wallace, Lord, Collins, Freeman, and Strem’s motion to dismiss (seq. 4) is granted in its entirety, and the complaint is severed and dismissed as against said defendants; and it is further

ORDERED, that in light of this result, the complaint is dismissed in its entirety and the clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

3/4/2022
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE