Mitchell v City of New York
2022 NY Slip Op 32234(U)
July 12, 2022
Supreme Court, New York County
Docket Number: Index No. 155247/2021
Judge: Leslie Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE STROTH** **PART** **52**

Justice

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LEE MITCHELL,

Plaintiff,

- V -

THE CITY OF NEW YORK, CYNTHIA BRANN in her official capacity as the Commissioner of the New York City Department of Correction, and HAZEL JENNINGS in her official capacity as Chief of the Department of Correction,

Defendants.

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INDEX NO. 155247/2021

MOTION DATE 01/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to DISMISS.

Plaintiff Lee Mitchell (plaintiff), an African-American male formerly employed by the New York City Department of Correction (DOC), commenced this action stemming from his suspension from employment under the New York State Constitution, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL). Defendants move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint in its entirety. For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff is a former uniform staff member of DOC, who held the rank of assistant deputy warden, and is of "Black/African-American descent" (NY St Cts Elec Filing [NYSCEF] Doc No. 2, complaint, ¶¶ 4, 54). Plaintiff alleges that, in April 2017, the DOC announced its intention to reduce its workforce in accordance with the Lippmann Commission Report (*id.*, ¶¶ 23-36). According to plaintiff, the Department's most recent publicly-available demographics report

dated October 15, 2018 indicates that there are "69 Black uniform staff (71% of the [assistant deputy wardens] [ADWs] uniform staff," and that "[s]lightly more than 60% [are] Black" (*id.*, ¶¶ 41, 44). He states that he brings this "action for relief for disparate impact" (*id.*, preliminary statement). Plaintiff further alleges that, during the course of his employment with DOC, he was "falsely suspended and accused of wrongdoing, which the Defendant quickly admitted was wrong" (*id.*, ¶¶ 46, 50, 55, 60). According to the complaint, he was "the subject of fabricated and feigned claims of misconduct" (*id.*, ¶¶ 47, 51, 56, 61). Plaintiff alleges that "[t]he fabricated and feigned claims were designed to bring about [his] constructive termination" (*id.*, ¶¶ 48, 52, 57, 62). Plaintiff also alleges that defendants subjected him to "discriminatory conditions," suspended his employment, and threatened "baseless discipline" as a pretext for their discriminatory conduct (*id.*, ¶ 58).

The complaint asserts four causes of action, seeking recovery under article 1, section 11 of the New York State Constitution, section 296 of the NYSHRL, and section 8-107 of the NYCHRL (*id.*, ¶¶ 45–62). Plaintiff seeks compensatory damages, punitive damages, injunctive relief, and costs and expenses, including attorney's fees (*id.*, wherefore clause).

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105–106 [2018], quoting *Leon*, 84 NY2d at 87-88 [1994]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to

such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

As a preliminary matter, the court shall consider plaintiff's opposition, even though he has not submitted a certification of the word count of his opposition papers (*see* 22 NYCRR 202.8-b [c]). The court finds that this is a technical defect that may be overlooked (*see* CPLR 2001; *Sklar v Itria Ventures, LLC*, 2022 NY Slip Op 31800[U], *4 [Sup Ct, NY County 2022]).

A. Civil Service Law § 80

Contrary to defendants' contention, the complaint does not mention Civil Service Law § 80. In response to defendants' motion, plaintiff also does not rely on this statute, and states that "his claims are of disparate discriminatory treatment . . ." (NYSCEF Doc No. 10 at 3).

B. New York State Constitution Claim

The third cause of action asserts, in part, a claim under article 1, section 11 of the New York State Constitution (NYSCEF Doc No. 2, complaint, ¶¶ 53-58).

Defendants argue that plaintiff's claim under the New York State Constitution fails because he has an adequate remedy under the NYSHRL and NYCHRL, and fails to plead that he filed a prior notice of claim.

Article 1, section 11 of the New York State Constitution contains, in addition to an equal protection clause, a prohibition of discrimination based on race, creed, color or religion (NY Const art 1, § 11). However, "a private right of action for a violation of the NY Constitution is unavailable where an alternative remedy, such as, among other things, a common-law action for damages, exists" (*Waxter v State of New York*, 33 AD3d 1180, 1181 [3d Dept 2006]; *see also*

Brown v State of New York, 89 NY2d 172, 190–192 [1996]; *Martinez v City of Schenectady*, 97 NY2d 78, 83–84 [2001]).

Here, plaintiff does not have a private right of action for discrimination under article 1, section 11 of the New York State Constitution because the NYSHRL and the NYCHRL provide adequate remedies for his allegations of discrimination (*see Muhammad v New York City Tr. Auth.*, 450 F Supp 2d 198, 212 [ED NY 2006] ["recognition of a State constitutional tort (was) unnecessary . . . to afford plaintiff a remedy" where her religious discrimination claim could be addressed under the NYSHRL]; *see also Lyles v State of New York*, 2 AD3d 694, 695 [2d Dept 2003], *affd* 3 NY3d 396 [2004]; *Albright v State of New York*, 32 Misc 3d 855, 860 [Ct of Claims 2011]).

Moreover, a plaintiff alleging a violation of the New York State Constitution must serve a prior notice of claim (*see* General Municipal Law §§ 50-e, 50-i; *423 S. Salina St. v City of Syracuse*, 68 NY2d 474, 482 [1986], *cert denied* 481 US 1008 [1987]; *Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018]). Plaintiff does not allege that he filed a notice of claim prior to commencing this action. Accordingly, the part of the third cause of action alleging a claim under the New York State Constitution must be dismissed.

C. Discrimination Claims Under the NYSHRL and NYCHRL

The first, second, and third causes of action allege that defendants subjected plaintiff to discriminatory conditions in violation of the NYSHRL and the NYCHRL, and seek compensatory damages, including damages for his mental anguish, and punitive damages (NYSCEF Doc No. 2, complaint, ¶¶ 45-48, 49-52, 53-58).

Defendants contend that plaintiff's discrimination claims must be dismissed, given that plaintiff has failed to allege an adverse employment action, and even if he had, he has failed to

allege any facts indicating that he was treated differently under circumstances giving rise to an inference of discrimination.

The NYSHRL makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of, inter alia, the individual's race or sex (Executive Law § 296 [1] [a]; *see generally Basso v EarthLink, Inc.*, 157 AD3d 428, 429 [1st Dept 2018]). To establish a prima facie case of racial discrimination under the NYSHRL, a plaintiff must prove that: (1) he or she is a member of the class protected by the statute; (2) he or she was qualified to hold the position; (3) he or she was terminated from employment or suffered other adverse employment action; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of racial discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

Once a plaintiff makes a prima facie case of discrimination, the burden 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" (*Forrest*, 3 NY3d at 305 [internal quotation marks and citation omitted]). Therefore, in order to succeed on his or 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" (*id.* [citation omitted]).

The NYCHRL (Administrative Code of the City of NY § 8-107 [1]) provides, in pertinent part, that "[i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof. because of the actual or perceived . . . race, . . . [or] gender . . . to

discharge from employment such person or . . . [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment" (Administrative Code of City of NY § 8-107 [1] [a] [2], [3]).

The First Department has instructed that, under the NYCHRL, a court's analysis "'must be targeted to understanding and fulfilling what the statute characterizes as the [NYCHRL's] uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights laws'" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012], quoting *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Moreover, the Court of Appeals has indicated that the NYCHRL should be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477–478 [2011]). Thus, "[t]o establish a gender or race discrimination claim under the City Human Rights Law, a plaintiff need only demonstrate 'by a preponderance of the evidence that she has been treated less well than other employees because of her gender [or race]'" (*Henry v Baco Enters, Inc.*, 2021 WL 6777535, *2 [Sup Ct, Bronx County 2021], quoting *Williams*, 61 AD3d at 78).

> "An inference of discrimination can arise from circumstances including, but not limited to, 'the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge'"

(*Littlejohn v City of New York*, 795 F3d 297, 312 [2d Cir 2015], quoting *Leibowitz v Cornell Univ.*, 584 F3d 487, 502 [2d Cir 2009]).

Even under notice pleading standards (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009], *lv denied* 19 NY3d 807 [2012], *rearg denied* 19 NY3d 1008 [2012]

["employment discrimination cases are themselves generally reviewed under notice pleading standards"]), plaintiff's discrimination claims under the NYSHRL and the NYCHRL are legally insufficient. The complaint fails to allege facts indicating that he was suspended or treated differently on the basis of his race (*see Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014] [employee failed to plead discriminatory animus where "the complaint contain[ed] no allegations of any comments or references to plaintiff's age or race made by any employee of defendants" or "any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff"]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013] [plaintiff failed to adequately allege fourth element of a prima facie claim of employment discrimination, under the NYSHRL and NYCHRL, i.e., that she was "terminated or treated differently under circumstances giving rise to an inference of discrimination"]). Indeed, plaintiff does not allege, for example, that DOC criticized his performance in racially degrading terms, that his supervisors made comments about Black employees, or that non-Black employees were treated better than Black employees.

Accordingly, the first, second, and third causes of action are dismissed.[1]

D. Disparate Impact Allegation

Plaintiff asserts that he is bringing this action as an "action for relief for disparate impact" (NYSCEF Doc No. 2, complaint, preliminary statement). According to the complaint, in April

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[1] Plaintiff's memorandum of law alleges that "the conduct complained of that resulted in Mr. Mitchell's forced retirement, constitutes an adverse employment action" (NYSCEF Doc No. 10 at 13). However, plaintiff "may not amend [his] complaint . . . via statements in a memorandum of law" (*Cambridge Invs. LLC v Prophecy Asset Mgt., LP*, 188 AD3d 521, 521 [1st Dept 2020], *lv denied* 37 NY3d 906 [2021]).

2017, DOC announced its intention to reduce its workforce levels (*id.*, ¶ 23). These allegations, though, are insufficiently pled.

"To make out a prima facie case of disparate impact[,] this require[s] proving, by a preponderance of the evidence, that a facially neutral practice had a racially disproportionate effect" (*Matter of New York State Off. of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights*, 223 AD2d 88, 90 [3d Dept 1996], *lv denied* 89 NY2d 806 [1997]). "A prima facie case of disparate impact is not established by a simple showing of statistical disparities in an employer's workforce" (*id.*; *see also Abbott v Memorial Sloan-Kettering Cancer Ctr.*, 276 AD2d 432, 433 [1st Dept 2000] ["a plaintiff may use statistical evidence to rebut an employer's non-discriminatory explanation of its actions"]).

Here, the complaint alleges that "the Department's most publicly available demographics report of October 15, 2018" shows that there are "69 Black uniform staff (71% of the ADWs uniform staff)" (NYSCEF Doc No. 2, complaint, ¶¶ 37, 41). Nevertheless, "[t]he mere fact that there is racial imbalance in one segment of an employer's workforce does not, without more, establish a prima face case of disparate impact" (*Matter of New York State Off. of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights*, 223 AD2d at 91). Plaintiff also does not allege that he was somehow affected by any such policy or practice.[2]

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[2] Plaintiff references an IBO Budget Summary, which allegedly "makes clear that [DOC] is dismissing thousands of uniform staff, who are disproportionately Black and Hispanic" (NYSCEF Doc No. 10 at 12 n 2). This document, however, is not annexed to the complaint or plaintiff's opposition papers.

E. Hostile Work Environment and Constructive Discharge Claim

The fourth cause of action alleges that plaintiff was subjected to a hostile work environment, and was constructively discharged from his employment (NYSCEF Doc No. 2, complaint, ¶¶ 59–62).

Defendants assert that plaintiff's hostile work environment and constructive discharge claims are conclusory and insufficient to state a cause of action.

In this case, plaintiff's failure to plead discriminatory animus is fatal to his hostile work environment claims (*see Pelepelin v City of New York*, 189 AD3d 450, 451–452 [1st Dept 2020]; *Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 [1st Dept 2014], *lv denied* 26 NY3d 903 [2015]; *Askin*, 110 AD3d at 622; *Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]).

Furthermore, the complaint fails to state a cause of action for a constructive discharge based upon a hostile work environment. "An employee is constructively discharged when his employer, rather than discharging him directly, intentionally creates a work atmosphere so intolerable that he is forced to quit involuntarily" (*Terry v Ashcroft*, 336 F3d 128, 151–152 [2d Cir 2003]). Plaintiff's bare conclusions that he was "falsely suspended," "accused of wrongdoing," and the "subject of fabricated and feigned claims of misconduct," are insufficient to allege that he was constructively discharged from DOC (NYSCEF Doc No. 2, complaint, ¶¶ 60–62).

In light of the above, the complaint must be dismissed in its entirety.[3]

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[3] Although plaintiff asserts a separate cause of action for punitive damages, it is well settled that "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 616 [1994]). Given that the complaint fails to state a cause of action, plaintiff's request for punitive damages cannot stand.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss (motion sequence number 001) is granted and the complaint is hereby dismissed as to all defendants with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that within twenty days from the date of this decision and order, defendant City of New York shall serve a copy of this decision and order, with notice of entry, upon the New York County Supreme Court's General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Court (60 Centre Street, Room 141B), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

7/12/2022
DATE

LESLIE STROTH, 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