SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANDRE TEMIDIS,

Plaintiff,

- v -

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

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INDEX NO. 156289/2018

MOTION DATE 09/19/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294

were read on this motion to/for SUMMARY JUDGMENT.

Defendant's motion for summary judgment and dismissal of plaintiff's punitive damages claim is denied.

Background

This action stems from plaintiff's termination as an employee of defendant IBM. Plaintiff claims he was terminated in retaliation for complaints he made as to his belief that a colleague was denied full commission because he was black. Plaintiff made the complaints to his direct supervisor because another colleague, who was white, had earned a full commission on a similar type of sale. Shortly after the complaint was made, IBM fired plaintiff, his direct supervisor, and another executive. IBM claims it never knew of plaintiff's discussions with his supervisor.

Plaintiff was a sales manager of a small, 3-person team at IBM overseeing large deals in which IBM licensed its software to tech companies. According to plaintiff, IBM's sales policy operated on an uncapped commissions basis, meaning that all commissions made by sales representatives were paid and were not subject to any maximum. Each individual eligible for commission incentives received an Incentive Plan Letter ("IPL"), a document detailing how commission payouts operated. These IPLs were operative on a 6-month basis, from January 1-June 30, and from July 1-December 31. New IPLs were issued after each 6-month period.

On June 30, 2017, Nick Donato, who is white and was a member of plaintiff's sales team, closed a large deal in which he earned commission of over $1.6 million (NYSCEF Doc. No. 216 at 10). Although the commission was high, a commissions executive personally approved Mr. Donato's commission, stating it was IBM's policy to not cap commissions (*id*. at 13).

Months later, in October of 2017, a member of a corresponding sales team, James Beard, who is black, closed a large deal for IBM in which he was set to make over $1.4 million (NYSCEF Doc. No. 216 at 14). Mr. Donato's and Mr. Beard's sales were similar in that both occurred outside of the sales' representatives usual selling territory, and each had the same quota value of 0 attached to the sale. Due to the high value of the commission, IBM began an investigation into the matter and determined that IBM would "cap" Mr. Beard's earnings at $205,286 (*id*. at 16). Plaintiff and his direct supervisor, Scott Kingston (originally a plaintiff in this action), believed Mr. Beard's salary cap was a product of his race since Mr. Donato's commission was approved. Mr. Kingston appealed to finance executives, detailing how the deals were similar and noting his suspicions that Mr. Beard's commission cap was racially motivated.

On October 16, 2017, executives opened an investigation into the commission earned by Mr. Donato, specifically investigating Mr. Kingston, plaintiff, and another IBM executive.

Defendant's audit team found that Mr. Donato's commission failed to comply with his IPL, and plaintiff, Mr. Kingston, and the executive should have taken more proactive steps in compliance with the IPL to reduce Mr. Donato's commission. As a result, on April 16, 2018, plaintiff, Mr. Kingston and the executive were fired.

Plaintiff brought suit alleging his termination was retaliation in violation of New York State Human Rights Law § 296, New York City Human Rights Law § 8-107, and New York Labor Law ("NYLL") § 215. Additionally, plaintiff seeks recovery of wages pursuant to NYLL § 193. Plaintiff contends his firing was due to his discussions with Mr. Kingston regarding the perceived discrimination defendant was engaging in against Mr. Beard. Additionally, plaintiff asserts he is owed commission for deals he closed prior to his termination on April 16, 2018 and seeks punitive damages for his termination. Defendant previously moved to dismiss plaintiff's claims, but the First Department found plaintiff's claims were sufficiently stated (*see Kingston v. International Business Machs. Corp.*, 187 AD3d 578, 135 NYS3d 9 [1st Dept 2020]).

Defendant moves for summary judgment against all of plaintiff's claims, contending that decisionmakers employed by defendant had no knowledge of plaintiff's discussions with Mr. Kingston, nor did decisionmakers discuss Mr. Beard's commission cap with plaintiff at any time. Defendant further contends that plaintiff is not owed any wages because plaintiff can only collect wages for services provided prior to his termination, and according to his IPL, he can only recover for the last day of the last full month of his employment.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v. Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

Retaliation--NYCHRL

"To establish a retaliation claim under the City HRL, a plaintiff must make out a *prima facie* case that: (1) he participated in a protected activity known to the defendant; (2) the defendant took an employment action that disadvantaged plaintiff; and (3) a causal connection exists between the protected activity and the adverse employment action" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 140-41, 946 NYS2d 27 [1st Dept 2012]). When a defendant moves for summary judgment in a retaliation case, “a defendant must demonstrate that the plaintiff cannot

make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" (*Brightman v Prison Health Serv., Inc.*, 108 A.D.3d 739, 741, 970 NYS2d 789 [2nd Dept 2013] *quoting Delrio v City of New York*, 91 AD3d 900, 901, 938 NYS2d 149, [2nd Dept 2012]).

The Court finds there are issues of material fact with respect to plaintiff's retaliation claims against IBM. Defendant contends that plaintiff did not engage in protected activity, and if he did, that activity was not known to defendant. Plaintiff testified that he discussed details of Mr. Donato's and Mr. Beard's sales and commissions with Mr. Kingston, his direct supervisor (NYSCEF Doc. 216 at 18). Both Mr. Kingston and plaintiff agreed they were suspicious of discriminatory behavior by IBM. Plaintiff did not escalate his concerns to a formal complaint because his direct supervisor advised he would relay both his and plaintiff's concerns to executives (NYSCEF Doc. 216 at 18). Mr. Kingston then reported those details to the very executives who would go on to recommend firing Mr. Kingston, plaintiff and one other IBM executive. Because Mr. Kingston was relaying details about Mr. Donato's commission in comparison to Mr. Beard's, a factfinder could conclude that IBM executives were aware of plaintiff's discussions with Mr. Kingston because plaintiff was Mr. Donato's direct supervisor, not Mr. Kingston. The fact finder will decide whether IBM decisionmakers believed Mr. Kingston knew the transaction details of plaintiff's sales team without having spoken directly to plaintiff.

Retaliation--NYSHRL

Similarly, under the State HRL, "a plaintiff alleging retaliation in violation of NYSHRL must show that (1) he or she engaged in a protected activity by opposing conduct prohibited thereunder; (2) the defendant was aware of that activity; (3) he or she suffered an adverse action based upon his or her activity; and (4) there was a causal connection between the protected activity and the adverse action" (*Reichman v City of New York*, 179 AD3d 1115, 1119, 117 NYS3d 280 [2nd Dept 2020]).

Defendant brings similar contentions here as in plaintiff's NYCHRL claim. As previously noted, a reasonable jury could find that plaintiff was engaged in complaints regarding racial discrimination in the workplace which are protected activity under the statute. Plaintiff brought those complaints to his direct supervisor who relayed those complaints to IBM executives. A reasonable jury might (or might not) conclude those executives were aware of the conversations taking place between Mr. Kingston and plaintiff because Mr. Kingston relayed details about Mr. Donato's commission that he would not otherwise know without plaintiff's assistance.

Retaliation--NYLL

"In order to state a claim under [NYLL § 215], a plaintiff must adequately plead that while employed by the defendant, he or she made a complaint about the employer's violation of New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result" (*Higueros v New York State Cath. Health Plan, Inc.*, 526 F. Supp. 2d 342, 347 [E.D.N.Y. 2007])

Plaintiff has successfully shown that there is an issue of material fact as to whether IBM was aware of plaintiff's conversations with Mr. Kingston. Furthermore, pursuant to NYLL §

215, there is an issue as to whether plaintiff was terminated as a result of the complaints. Defendant failed to demonstrate that plaintiff's termination was not pretextual. Defendant's own decisionmakers had previously approved a commission that was greater than Mr. Beard's, and only weeks after denying Mr. Beard's, suddenly decided to investigate their own prior approval (NYSCEF Doc. No. 216 at 21). Moreover, the final determination from the investigation did not address the commissions executive's initial concerns at all, and weeks before plaintiff's termination, the lead investigator received forwarded emails of Mr. Kingston's complaints regarding Mr. Beard's commissions (*id*. at 28).

It is for a jury to decide whether IBM had knowledge of plaintiff's activity and whether the complaints regarding Mr. Beard's commission were a catalyst to defendant's investigation. It is unsurprising the first (and potentially only) individual that plaintiff would speak to regarding a delicate matter such as discrimination was his direct supervisor. The fact that plaintiff did not directly communicate these concerns to someone higher up is not dispositive as a reasonable jury could conclude that IBM executives knew plaintiff and Mr. Kingston had discussed these details with those executives. IBM is not entitled to dismissal of this claim solely based on its allegation that plaintiff did not tell anyone other than Mr. Kingston about the wrongdoing.

Wage Claim

"Labor Law § 193 (1) prohibits employers from making 'any deduction from the wages of an employee,' and section 190 (1) broadly defines 'wages' as 'the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis,' (*Kolchins v Evolution Mkts., Inc*., 31 N.Y.3d 100, 73 NYS3d 519 [2018]).

IBM's contentions that plaintiff seeks an unidentifiable amount in commission from deals occurring after his termination are unfounded. Plaintiff's original complaint sought approximately $251,699.28 in unpaid commission (NYSCEF Doc. No. 1 at 12). Additionally, plaintiff had only testified he could not ascertain the exact amount because he "has no way of checking," since he is no longer employed by defendant (NYSCEF Doc. No. 176 at 27). The nature of termination results in an employee losing access to resources previously supplied by his or her employer and dismissing wage claims because that same employee cannot readily ascertain an amount owed in testimony without access to the appropriate methods for calculating those wages is nonsensical and would render this provision inoperative.

Similarly, defendant points to the IPL stating that plaintiff is only owed commission for the "last day of the last full-month" plaintiff was employed with that IPL (NYSCEF Doc. No. 176 at 27). This Court finds it unacceptable to punish plaintiff and withhold wages for services he rendered because defendant chose to terminate plaintiff's employment in the middle of the month instead of a timeframe that fits more accordingly with the IPL. Taken further, that would give IBM a free pass to routinely fire people on the second to last day of the month in order to avoid paying the person for almost an entire month. Therefore, if plaintiff coordinated sales on behalf of defendant IBM, then plaintiff is afforded the commission from those sales.

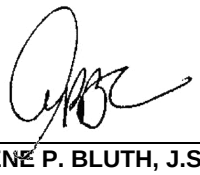
Punitive Damages

"Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489, 836 NYS2d 509 [2007] [internal quotations and citations omitted]).

The branch of Defendant's motion for dismissal of plaintiff's claim for punitive damages is denied. This dispute arose out of alleged racially discriminatory conduct. If ever there was an issue of a "high degree of moral turpitude," racial discrimination sets the mark.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing plaintiff's retaliation and wage claim as well as his request to dismiss the claim for punitive damages is denied.



10/3/2022
DATE

ARLENE P. BLUTH, J.S.C.

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