

Pitter-Green v NYU Langone Med. Ctr.
2022 NY Slip Op 34276(U)
December 16, 2022
Supreme Court, New York County
Docket Number: Index No. 155386/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

-----X

MEMORIS PITTER-GREEN

Plaintiff,

- v -

NYU LANGONE MEDICAL CENTER,

Defendant.

-----X

INDEX NO. 155386/2021

MOTION DATE 06/13/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 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, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISS.

In this action, plaintiff sues defendant, her former employer, for its alleged discriminatory treatment of her. Before commencing the instant action, plaintiff sued defendant in federal court, asserting claims under both federal and state anti-discrimination law. In May 2021, plaintiff’s federal claims were dismissed, and the federal court declined to exercise jurisdiction over plaintiff’s state law claims (NYSCEF 14).

Now, by notice of motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. PERTINENT BACKGROUND

The following facts are derived from the federal court’s dismissal decision (NYSCEF 14) and the parties’ statements of material facts (NYSCEF 12, 68):

Plaintiff began working for defendant in 1987 as a phlebotomist. On August 6, 2010, she was fired. She then filed a grievance with her union, which resulted in her reinstatement and

return to work on October 5, 2010. She claims that she was subjected to discrimination, retaliation, and a hostile work environment both before and after her reinstatement.

On April 17, 2012, plaintiff filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC), and received a right to sue determination on February 2, 2015. She commenced the federal action on April 29, 2015.

On May 12, 2021, the federal court dismissed the action, finding that:

Defendant argues, and Plaintiff does not dispute, that Plaintiff's federal claims are barred by the applicable statutes of limitations . . . Here, Plaintiff's employment was terminated on August 6, 2010, and the last act upon which Plaintiff bases her hostile work environment claim occurred on November 8, 2010. Accordingly, Plaintiff had until June 2, 2011, and September 4, 2011, to file a charge with the EEOC regarding her discrimination and retaliation claims and her hostile work environment claim, respectively. However, Plaintiff filed her charge with the EEOC on April 17, 2012, well beyond 300 days after both her termination and her return to [work]. Therefore, Plaintiff's claims under Title VII are barred by the statute of limitations and Defendant is entitled to dismissal of those claims as a matter of law.

(NYSCEF 14 [citations omitted]).

Following the federal court dismissal, plaintiff commenced the instant action in June 2021, asserting discrimination and hostile work environment claims, and filed a note of issue in November 2021.

As pertinent here, plaintiff alleges in her complaint that in 2009, two new non-black male supervisors were appointed to oversee her work assignment, and from then on, they harassed and verbally abused black employees, treated them differently than similarly-situated Hispanic and Filipino employees, treated males better than females, and treated younger employees better than older ones (NYSCEF 1).

II. ANALYSIS

A. Statute of limitations

CPLR 205(a) permits the commencement of an otherwise time-barred action in state court if the federal action was itself timely commenced and if the state action would have been timely if filed when the federal action was commenced. (*Jordan v Bates Advertising Holdings, Inc.*, 292 AD2d 205 [1st Dept 2022]).

There is federal authority to support the proposition that the timely filing of an EEOC complaint tolls the statute of limitations for NYSHRL and NYCHRL claims (*see Nixon v TWC Admin. LLC*, 2017 WL 4712420 [SD NY 2017]), as does the untimely filing of an EEOC complaint (*Burns v County of Schenectady*, 2009 WL 2568546 [ND NY 2009]). Recently, the Appellate Division, First Department, held that the filing of an EEOC complaint tolls the statute of limitations for both State and City HRL claims (*Gabin v Greenwich House, Inc.*, 2022 WL 16935706 [2022]).

Here, the applicable toll period would be the 1031 days between April 7, 2012 (when plaintiff filed her EEOC complaint) to February 2, 2015 (when she received her EEOC letter), minus the 86 days between February 2, 2015 (the EEOC letter) and April 29, 2015 (when she filed her federal complaint), resulting in a net toll period of 945 days, or approximately two years and six months.

The dates for determining whether plaintiff's claims are timely, per the federal court decision, are: (1) April 6, 2010, the date of plaintiff's termination, which involves plaintiff's discrimination and retaliation claims; and (2) November 8, 2010, the last act at issue in plaintiff's hostile work environment claim.

Plaintiff had until April 8, 2013 to commence the federal action and timely interpose State and City HRL discrimination claims, which would have expired on April 8, 2013, and thus adding the two year-six month toll period to that deadline, her claims were timely interposed when she filed her federal action in April 29, 2015. Similarly, for the hostile work environment claim, plaintiff had until November 8, 2013, and thus her claims were timely filed in the federal action. Moreover, plaintiff timely filed her state action within six months of dismissal of the federal action (*See Jordan*, 292 AD2d at 206 [plaintiff's state law claims were not time-barred as action commenced within six months of federal court dismissal, and state claims were timely interposed in federal action]; *see also Leavy v New York City Tr. Auth.*, 11 Misc 3d 1052[A], 2006 NY Slip Op 50177[U] [Sup Ct, Kings County 2006] [statute of limitations for HRL claims was tolled during pendency of EEOC investigation, notwithstanding that federal court determined that EEOC complaint was untimely filed]).

Defendant thus fails to establish that plaintiff's claims are time-barred.

B. Discriminatory discharge claim

1. State HRL

The New York State Human Rights Law (NYSHRL) (Exec Law § 296 *et seq*) prohibits unlawful discriminatory practices. In 2019, the NYSHRL was amended to provide that

[t]he provisions of [Executive Law 296] shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

A plaintiff advancing a claim for discrimination under the NYSHRL must plead and prove that: (1) she is a member of a protected class; (2) she was qualified to hold her employment position; (3) she was terminated from employment or suffered another adverse

employment action; and (4) the discharge or adverse action took place under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

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” (*id.* [citations omitted]). 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 (*see id.* at 629-630).

To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. In that event, summary judgment would constitute “a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources” (*Matter of Suffolk County Dept. of Social Servs. [Michael V.] v James M.*, 83 NY2d 178, 182 [1994]), inasmuch as no valid purpose is served by submitting to a jury a cause of action that cannot survive as a matter of law.

(*Id.* at 305-306).

It is undisputed that plaintiff, a black woman over 40 years of age, is a member of a protected class, is qualified to hold her position, and was terminated from her employment. The sole issue is whether the termination took place giving rise to an inference of discrimination.

Addressing defendant's contentions, while the fact that the same people hired, promoted, and then fired plaintiff may negate an inference of discrimination in certain circumstances, plaintiff was hired in 1987 and fired in 2010, which is too long a time span to negate the inference (*See Tirschwell v TCW Group, Inc.*, 94 AD3d 665 [1st Dept 2021] [“same actor” inference unavailing as one and half years passed between hiring and firing]; *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326 [1st Dept 2005] [“in cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span

following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer”]).

In terms of differential treatment, plaintiff may raise an inference of discrimination by showing that similarly-situated individuals were treated differently than her. Defendant argues that plaintiff has not identified anyone as similarly-situated to her, and thus fails to establish differential treatment. However, by its own admission, defendant reinstated plaintiff when it “became known that other individuals (possessing unspecified characteristics) had not been discharged for similar conduct” (NYSCEF 65, p. 20), and it thereby undermines its argument.

Nevertheless, defendant establishes legitimate, independent, and nondiscriminatory reasons for its discipline of plaintiff, by the undisputed facts (as set forth in plaintiff’s response to defendant’s statement of material facts) which demonstrate that defendant was critical of certain aspects of plaintiff’s work beginning in 2008, that she was given verbal and written warnings between 2008 and 2010, that she was suspended for a few days in 2010, that her union grieved her suspension but it was denied, that she was put on a performance improvement plan, and that she was eventually terminated but then reinstated. Moreover, once reinstated, plaintiff’s supervisors, including a black woman over the age of 40, recommended that her performance improvement plan continue; in 2012 other supervisors advised plaintiff that she was continuing to make the same mistakes as before; by 2013 the two non-black male supervisors had retired but plaintiff received a written memo about her work in 2014 along with a “needs improvement” rating in certain areas of her 2014 performance review; in 2015 plaintiff received a verbal and written warning regarding her performance; and in 2016 plaintiff received a verbal warning and a “needs improvement” rating on some portions of her 2016 performance review (NYSCEF 68).

While plaintiff observes that she worked for defendant for many years until her voluntary

retirement in 2018 and that she received compliments and positive comments about her work, she offers no evidence showing that the criticisms of her work were either unwarranted or resulting from animus based on her race, gender, and/or age. And, even if plaintiff's termination was unwarranted, as recognized by the fact that she was reinstated shortly thereafter, she also does not show that it occurred due to her supervisors' animus based on race, gender, or age (*see Weir v Montefiore Med. Ctr.*, 208 AD2d 1122 [1st Dept 2022] ["[p]laintiff's disagreement with defendant[s'] assessment of [his] performance is insufficient to raise' an issue of fact as to whether poor performance was a pretext for unlawful conduct"] [citations omitted]).

Plaintiff points to one race-related remark made by her non-black male supervisor as evidence of discriminatory intent, but does not relate it to the issues defendant had with her work or its decision to terminate her (*see Kwong v City of New York*, 204 AD3d 442 [1st Dept 2022] [eve if remarks were derogatory or indicative of animus, plaintiff failed to identify evidence connecting such animus to decision to demote him]). Plaintiff's allegations that certain employees of other races, ages, and genders were treated better by her supervisors are too general to sustain a discrimination claim (*Lent v City of New York*, 9 AD3d 494 [1st Dept 2022] [allegations that younger employees did not receive unfavorable assignments too general to support inference of age discrimination]). Plaintiff also admits that no one at her workplace ever made a negative comment to her about her age or gender, nor did she witness anyone make such comments about other employees.

Defendant thus establishes that it is entitled to summary judgment on plaintiff's NYSHRL discriminatory discharge claim.

2. City HRL

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 discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment. (Admin Code § 8–107[a][1]).

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).

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*, 3 NY3d at 295; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). The plaintiff’s burden of proof in a discrimination case is to show, by a preponderance of the evidence, that he was treated worse than other employees because of his protected characteristic (*Suri v Grey Global Group, Inc.*, 164 AD3d 108 [1st Dept 2018]).

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).

For the same reasons discussed in analyzing plaintiff’s NYSHRL claim, defendant demonstrates that plaintiff’s NYCHRL claim must be dismissed.

C. Hostile work environment claims

The NYSHRL defines a hostile work environment claim as arising from acts that subject an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in a protected category (Executive Law 296[1][h]). The plaintiff need not show that the conduct was severe or pervasive (*Id.*; NY PJI 9:5 [2002]).

A hostile work environment violates the NYCHRL where an employee “has been treated less well than other employees because of [his/her] protected status.” (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]; *see also Golston-Green v City of New York*, 184 AD3d 24, 40-41[2d Dept 2020] [“Another way in which a plaintiff may establish discrimination in the terms, conditions, and privileges or employment is by showing that she or he was subject to a hostile work environment”] [internal quotation marks and citation omitted]). Under the NYCHRL, “the conduct’s severity and pervasiveness are relevant only to the issue of damages.” (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d at 110) [2d Cir 2013] [internal citation omitted]).

Despite the broader application of the NYCHRL, conduct that consists of “petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim” (*Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 [1st Dept 2017] [citation omitted]). However, the employer bears the burden of proving that the conduct was trivial (*Mihalik*, 715 F3d at 111). Nonetheless, “[c]ourts must be mindful that the NYCHRL

is not a general civility code and that the plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive” (*Id.* at 110 [internal quotation marks and citation omitted]). Plaintiff must also show that the workplace was both subjectively and objectively hostile (*Long v Aerotek, Inc.*, 202 AD3d 1216 [3d Dept 2022]).

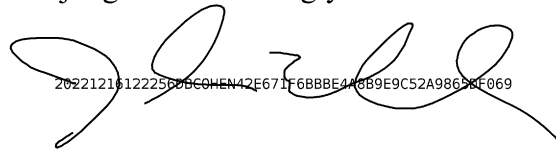
Here, plaintiff does not submit proof that she was subject to behavior consisting of anything more than petty slights and trivial inconveniences, nor that her supervisors’ conduct toward her was motivated by a discriminatory animus (*see Sedhom v SUNY Downstate Med. Ctr.*, 201 AD3d 536 [1st Dept 2022] [alleged remarks made to plaintiff were not sufficiently severe or pervasive to permeate workplace or alter conditions of employment, and no indication that alleged hostile conduct toward plaintiff was related to her age]).

Moreover, as plaintiff has not shown any animus toward her based on race, gender, or age, her hostile work environment claim may not be maintained (*Lent v City of New York*, 9 AD3d 494 [1st Dept 2022]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion for summary judgment is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.



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DAVID B. COHEN, J.S.C.

12/16/2022
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

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APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE