SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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VINCENZO LOPES

Plaintiff,

- v -

NEW YORK DISTRICT COUNCIL OF AFSCME MUNICIPAL LOCAL UNIONS, NUMBER 37,

Defendant.

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INDEX NO. 653957/2022

MOTION DATE 01/11/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISS.

Defendant's motion to dismiss is granted.

Background

In this action, plaintiff contends that he worked for the Office of the Comptroller of the City of New York and that he was a member of defendant's union in connection with his employment. Plaintiff complains that defendant entered into an agreement with the City of New York concerning a vaccine mandate related to COVID-19. He insists that the agreement did not provide a fair and reasonable accommodation for individuals, like plaintiff, who wanted to seek a religious exemption from the mandate.

Plaintiff maintains that the agreement was never ratified by the union membership and he was still required to comply. He admits that he applied for a religious accommodation but that his employer rejected it and he was eventually discharged from his job on February 11, 2022. He

alleges that defendant failed to obtain proper ratification from the union membership before agreeing to the mandate policy and demands damages of $3 million.

Defendant moves to dismiss the complaint and argues that plaintiff is improperly attempting to blame the defendant for the mandate issued by his employer. It emphasizes that it fought for and obtained the religious exemption policy and that it had no involvement with the denial of his requested exemption or his subsequent discharge from his job.

Defendant asserts that its Executive Director has the discretion to determine which agreements should be put to a ratification by the members and allows members to object to such a determination. It observes that plaintiff never objected to that decision here. Defendant also contends that plaintiff has no viable claim against defendant. To the extent that plaintiff alleges an improper practice in collective bargaining, defendant observes that such a claim has to be sent to NYC Office of Collective Bargaining. It also contends that a cause of action for the breach of the duty of fair representation is time barred because the religious exemption agreement was effective in November 2021, well more than the four months before this action was commenced.

In opposition, plaintiff contends that the sole issue in dispute is whether plaintiff acted in contravention of defendant's constitution. He points to a section of this constitution which he argues required the mandate to be put to a vote of the members of the union. Plaintiff emphasizes that the instant action is not time barred because he was discharged on February 11, 2022 but received benefits until July 28, 2022, which renders this action (brought in October 2022) as timely. He emphasizes that the statute begins to run when the employee suffers actual harm and that should be when he stopped receiving benefits.

In reply, defendant emphasizes that its constitution contains a clear provision that leaves the initial determination about whether an agreement should be sent to the members with the

Executive Director and plaintiff did not timely challenge that determination. It questions plaintiff's assertion that his employer is not a necessary party but that his harm all flowed from his employer, the entity that fired him.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted])."

The key issue in this motion, according to plaintiff, is whether defendant breached the terms of its own constitution. That document contains the following provision:

> "Section 2. The Executive Director, or his or her designee, shall promptly determine whether, pursuant to Section 1 of this article, an agreement needs to be ratified. A decision not to conduct a ratification vote may be challenged by a member affected by the agreement. The aggrieved member must file a written complaint with the Ethical Practices Officer appointed pursuant to Article XIII no later than seven days after the member knew, or should have known, that an agreement was to be executed but would not be presented to the membership for a ratification vote. Within two weeks following receipt of the complaint, the Ethical Practices Officer shall review the complaint and determine whether a membership ratification vote is required pursuant to Section 1 and order whatever relief is deemed necessary. The decision of the Ethical Practices Officer shall be final" (NYSCEF Doc. No. 9 at 21).

Plaintiff does not dispute that he never challenged the decision by the Executive Director as provided in the provision cited above. That plaintiff contends that another provision of the constitution required the exemption policy issue to be put to a membership vote is an argument

he could have (and should have) raised as part of the process described above. But plaintiff did not do that. Instead, he clearly knew about the process to apply for a religious exemption as early as November 2021 and he did not do anything to challenge it until now. Instead, he *followed* the process created by the policy and applied for a religious exemption, which was later denied by his employer—not defendant. And, of course, it was his employer that terminated him from his employment. The Court therefore finds that plaintiff failed to state a cognizable cause of action against defendant.

The Court also finds that to the extent plaintiff asserts a breach of the duty of fair representation by defendant (which has a four-month statute of limitations), that allegation is time-barred. The subject policy became effective in *November 2021* and this case was commenced in October 2022. The harm to plaintiff, based on the complaint, arises from defendant's implementation of the religious exemption policy. The other harm identified by plaintiff, his later termination and the termination of certain benefits were imposed by his employer, not by defendant.

That plaintiff stopped receiving certain benefits in July 2022 does not compel the Court to ignore the fact that he was terminated in February 2022. Additional compensation received after the termination date does not extend the date from which the limitations period runs. As defendant points out, public employees such as plaintiff often receive benefits after their employment has ended (this might include pension payments or healthcare benefits).

The Court denies the remaining objections raised by plaintiff in his opposition, including the assertion that defendant forgot to include the complaint in its motion papers. As this is an e-filed case, all parties and the Court had easy access to the complaint on the e-filed docket.

Summary

The Court recognizes that plaintiff is unhappy with how his union handled the COVID-19 vaccine mandate imposed by his employer. But the record before this Court shows that defendant followed its own constitution, plaintiff did not challenge the Executive Director's determination not to put the religious exemption policy to a vote and then he utilized the exemption process agreed to by defendant. That plaintiff's religious exemption request was denied is not a reason to later sue his union. Plaintiff had ample opportunity to timely challenge defendant's decision and he did not do so.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, the complaint is severed and dismissed and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

1/24/2023
DATE

ARLENE P. 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	