SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M
Justice

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CRAIG HERSKOWITZ

Plaintiff,

- v -

THE STATE OF NEW YORK,

Defendant.

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INDEX NO. 153247/2022

MOTION DATE 06/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31

were read on this motion to/for DISMISS.

Plaintiff, Craig Herskowitz (plaintiff), commenced this action for retaliation and unlawful gender discrimination under the New York State Human Rights Law (NYSHRL) stemming from his alleged termination from employment by defendant, the State of New York (defendant). Defendant now moves pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the complaint. The motion is opposed. For the following reasons, the motion is granted.

According to the complaint, plaintiff began working as an Assistant Counsel in the New York State Executive Chamber, otherwise knowns as the Office of the Governor of New York State (Executive Chamber), in December 2019. On April 1, 2021, the New York Attorney General's office (AG) interviewed plaintiff concerning their investigation into allegations of sexual harassment by former Governor Andrew Cuomo. Plaintiff alleges that he was assured that he would not be retaliated against as a result of his cooperation. The complaint states that plaintiff "corroborat[ed] some allegations by a former employee of the Executive Chamber regarding her interactions with Governor Cuomo" during the interview (NYSCEF doc. no. 14, compl at ¶ 14).

On August 3, 2021, the AG released a report of its investigation, finding that Governor Cuomo had "sexually harassed a number of current and former [NYS] employees by, among other things, … making numerous offensive comments of a suggestive and sexual nature that created a hostile work environment for women" (NYSCEF doc. no. 11 at 1). On the same day, and following the news coverage of the AG's report, a female Executive Assistant (E.A.) also employed by defendant remarked to plaintiff that she felt left out because the Governor had never sexually harassed her. Plaintiff alleges that he jokingly responded, in the same tone, that she should have come forward with that information because it would have cleared Governor Cuomo of the allegations.

On August 6, 2021, Acting Counsel to the Governor, Elizabeth Garvey (Garvey), directed plaintiff to travel to the Governor's Office of Employee Relations (GOER) located in Albany. There, plaintiff was interviewed by GOER Affirmative Action Officer, Sandra van Kampen (van Kampen). According to plaintiff, van Kampen questioned plaintiff about his interactions with E.A., focusing on the August 3, 2021 conversation. Plaintiff alleges that he attempted to explain the context of the conversation to van Kampen, including by providing additional information. According to plaintiff, van Kampen was disinterested in plaintiff describing the conversation that E.A. had initiated with plaintiff about who plaintiff had gone out on a date with over the weekend, asked to see a picture of the individual, and stated to plaintiff that he should "hit it or quit it" (*id.* at ¶ 35). Plaintiff also claims that van Kampen was also uninterested in E.A.'s past comments to plaintiff and the identities of other witnesses.

After the interview, plaintiff provided van Kampen with emails between E.A. and plaintiff as further evidence showing a history of friendly banter between the two, including conversations initiated by E.A. On August 10, 2021, van Kampen confirmed receipt of the emails, and indicated that any additional proof supporting plaintiff's position should be submitted that day by close of business.

On August 12, 2021, Garvey contacted plaintiff and terminated him effective August 25, 2021. According to plaintiff, he was not contacted by van Kampen with any findings of the investigation, a determination, or recommendation by GOER. The complaint alleges that Garvey stated that plaintiff's termination was based on his August 3, 2021 conversation with E.A. and for requesting E.A.'s phone number, which was determined to be sexual harassment under the Executive Chamber's "zero tolerance" policy regarding sexual harassment. According to plaintiff, at no point prior to August 12, 2021, had the Executive Chamber ever communicated a "zero-tolerance policy" regarding sexual harassment nor documented how such a policy would be implemented. Neither GOER nor Garvey provided plaintiff with a copy of GOER's final determination.

On or about August 15, 2021, plaintiff emailed GOER Director, Michael Volforte (Volforte) apprising him of the investigation. On or about August 17, 2021, Volforte directed plaintiff to file a complaint with GOER's Anti Discrimination Investigation Division if he felt he had been retaliated against. On the same day, plaintiff emailed van Kampen requesting that she send him anything she could in relation to the GOER investigation, including findings and/or a recommendation. Plaintiff received no response.

On August 23, 2021, plaintiff filed a complaint with GOER regarding the lack of process and rushed GOER investigation concerning his interactions with E.A., the disproportionate severity of the penalty-termination-relative to the conduct alleged, and his concerns that Garvey had retaliated against him for his testimony in connection with the AG's investigation. Sometime after plaintiff filed his complaint with GOER, Garvey provided plaintiff with written notice of his termination. As part of the letter Garvey stated: "[a]s we stated before, please do not contact the complainant or your colleagues about this matter as such action could subject you to further personal liability for your conduct" (NYSCEF doc. no. 12).

On or about August 25, 2021, defendant terminated plaintiff's employment. On the same day, defendant delivered a box containing plaintiff's personal effects from his office. Inside were two notes with messages written in E.A.'s handwriting. One read, "maybe you can go back to dating shows $$." The other read "You had it coming." Plaintiff took a picture of the two notes and sent it to Volforte and van Kampen at GOER with a request that the notes be included in his pending GOER complaint.

On September 3, 2021, October 5, 2021, and November 23, 2021, counsel for Plaintiff requested in writing that, among other things, the AG's office provide plaintiff a copy of GOER's final determination and preserve evidence related to plaintiff's termination. On information and belief, GOER's policies required that it notify a complainant within 60 days of the outcome of any investigation. To date, GOER has not contacted plaintiff regarding the outcome of his complaint.

In support of its motion, defendant argues that the complaint fails to allege any facts suggesting that he was terminated because of his sex or on the basis of a discriminatory intent. Further, defendant contends that plaintiff failed to allege facts to suggest disparate treatment, in that only plaintiff was subject to punishment. Specifically, defendant contends that plaintiff and E.A. were not similarly situated, in that plaintiff was a senior level attorney, while E.A. was an executive assistant, and thus, defendant contends, plaintiff and E.A. did not have similar duties and responsibilities. Defendant further argues that plaintiff's allegation that he was investigated concedes a non-discriminatory basis for terminating plaintiff. Defendant further argues that even taking plaintiff's factual allegations as true, the facts alleged do not indicates that plaintiff's termination was because of his gender.

In opposition, plaintiff argues that the complaint states a claim pursuant to the NYSHRL by alleging that he and E.A. were similarly situated in all respects concerning the general application of GOER's policies regarding whether it interviews a complainant and whether it provides a copy of its final determination or recommendation to a respondent, and to the application of a "zero tolerance" sexual harassment policy. Plaintiff further alleges that the complaint alleges facts to infer there is no reasonable basis for plaintiff and E.A. to be subject to different standards governing discipline in the context of sexual harassment and with respect to the conduct alleged. Plaintiff further argues that his interview with the AG's investigation into Governor Cuomo was a protected activity and that he alleges a causal nexus between the activity and the termination because the investigation into plaintiff was initiated just days after the release of the AG's report.

DISCUSSION

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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . . are not entitled to such consideration" (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 20161 [internal quotation

marks and citations omitted]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Gender Discrimination

A plaintiff states a claim of discrimination under the NYSHRL by alleging: (1) that he or she is a member of a protected class; (2) that he or she was qualified for the position; (3) he or she was subjected to an adverse employment action; and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

"A showing of disparate treatment — that is, a showing that an employer treated plaintiff less favorably than a similarly situated employee outside his protected group — is a recognized method of raising an inference of discrimination for the purposes of making out a prima facie case" (*Ruiz v Cnty. of Rockland*, 609 F3d 486, 493 [2d Cir 2010], quoting *Mandell v Cty. of Suffolk*, 316 F3d 368, 379 [2d Cir 2003]). To show an inference of discrimination through the more favorable treatment of employees not in the protected group, there must be "a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases," such that "the comparator must be similarly situated to the plaintiff in all material respects" (*Abdul–Hakeem v Parkinson*, 523 F Appx 19, 21 [2d Cir 2013], quoting *Ruiz*, 609 F3d at 493]; *see also Carris v First Student, Inc.*, 682 F Appx 30, 32 [2d Cir 2017] ["To support a minimal inference of discrimination, a plaintiff may allege disparate treatment by showing the more favorable treatment of employees not in the protected group, who are similarly situated in all material respects"]).

What facts establish similarity in "all material respects" varies from case to case, but the inquiry generally rests on whether the plaintiff and the putative comparator "were subject to the same workplace standards" (*Brown v Daikin Am. Inc.*, 756 F3d 219, 230 [2d Cir 2014]). "An employee is similarly situated to co-employees if they were (1) 'subject to the same performance evaluation and discipline standards' and (2) 'engaged in comparable conduct' " (*Ruiz*, 609 F3d at 493–494, quoting *Graham v Long Island R.R.*, 230 F3d 34, 40 [2d Cir 2000]). A plaintiff need not show that she and the putative comparator are identical, but rather that there is a "reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases" (*Ruiz*, 609 F3d at 494, quoting *Graham*, 230 F3d at 40).

Initially the Court rejects defendant's argument that plaintiff and E.A. were not similarly situated on the basis that they each had different titles within the Office of the Governor of New York State. The essence of plaintiff's allegations of disparate treatment claim stem from plaintiff's claim that both plaintiff and E.A. were subject to the identical "zero-tolerance policy" for sexual harassment, yet only plaintiff was investigated and disciplined. Thus, the complaint adequately alleges that both plaintiff and E.A. were similarly situated to the extent that they were both subject to the Executive Board's sexual harassment and discipline policy.

However, plaintiff fails to allege facts that he was similarly situated to E.A. in all respects and that E.A. was treated more favorably. Plaintiff alleges that he was investigated and

terminated because of a complaint against him concerning his August 3, 2021 comments to E.A. As defendant argues, plaintiff did not file a complaint against E.A., and thus there was no basis to investigate E.A.'s comments directed toward plaintiff or a basis to discipline E.A. Thus, while the sexual harassment policy is applied to both plaintiff and E.A., the relevant inquiry is whether plaintiff alleges facts indicating that he and E.A. were similarly situated as a result of the implementation of the policy against their respective actions. As there was no complaint made against E.A. for her alleged actions, it cannot be said that plaintiff and E.A. were "similarly situated in all respects" (*Shumway v United Parcel Service, Inc.*, 118 F3d 60, 64 [2d Cir 1997]). As there are no other factual allegations demonstrating a discriminatory intent, the branch of defendant's motion to dismiss plaintiff's claim for gender discrimination under the NYSHRL is granted.

Retaliation

A plaintiff alleging retaliation in violation of NYSHRL must allege that: "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295. 313 [2004]) "In the context of a case of unlawful retaliation, an adverse employment action is one which might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (*Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1016, [2d Dept 2017]).

"[T]o establish the last element of a prima facie case of retaliation, [plaintiff] must show that the allegedly adverse actions occurred in circumstances from which a reasonable jury could infer retaliatory intent. [The Second Circuit has] held that a close temporal relationship between a plaintiff's participation in protected activity and [a defendant's] adverse actions can be sufficient to establish causation" (*Treglia v Town of Manlius*, 313 F3d 713, 720 [2d Cir 2002]).

Here, the alleged adverse employment action—plaintiff's termination of employment—which occurred, latest, on August 25, 2021, is too far removed from the alleged protected activity, the AG's April 1, 2021 interview of plaintiff, as more than four months elapsed between the interview and the alleged retaliatory termination (*see Baldwin v Cablevision Sys. Corp.*, 888 NYS2d 1, 6 [1st Dept 2009] [four months between protected act and alleged retaliatory action was "not temporally proximate enough to satisfy the causality element of plaintiff's retaliation claim" under the Human Rights Law]; *Stoddard v Eastman Kodak Co.*, 309 F Appx 475, 480 [2d Cir 2009] [finding no causal connection where "the protected activity took place two months prior to the alleged adverse action, and where there is nothing other than that temporal proximity invoked to establish a retaliatory intent, the causal relationship is not established"]; *Buchanan v City of New York*, 556 F Supp 3d 346, 368 [SD NY 2021] [four months too attenuated to support a causal connection]; *Ulrich v Soft Drink, Brewery Workers & Delivery Emps., Indus. Emps., Warehousemen, Helpers & Miscellaneous Workers, Greater New York & Vicinity, Loc. Union No. 812*, 425 F Supp 3d 234, 240–241 [SD NY 2019] [four months too attenuated]).

The balance of plaintiff's allegations also do not support a causal connection. Specifically, plaintiff's allegation that the causal nexus is strengthened by the rushed

investigation, the failure to follow GOER policies, including most notably GOER's failure to furnish plaintiff with a final determination/recommendation, and the severity of the outcome weighed against the conduct, do not establish the requisite causal nexus or retaliatory animus required to state a claim for retaliations under the NYSHRL.

As plaintiff does not alleges facts aside from the alleged temporal proximity to support his allegation of a retaliatory animus, the four-month period from the protected activity to the adverse employment action is "simply too attenuated" to establish a causal connection through temporal proximity alone (*Brown v City of New York*, 622 F Appx 19, 20 [2d Cir 2015], citing *Williams v. City of New York*, No. 11 Civ. 9679[CM], 2012 WL 3245448, at *11 [SD NY Aug. 8, 2012] ["The passage of even two or three months is sufficient to negate any inference of causation when no other basis to infer retaliation is alleged"]). Thus, the branch of defendant's motion to dismiss plaintiff's claim for retaliation under the NYSHRL is granted.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff within ten days of entry.

This constitutes the decision and order of the Court.

1/13/2023
DATE

DAKOTA D. RAMSEUR, 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