SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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MICHAEL ROMAN,

Plaintiff,

- v -

CITY OF NEW YORK, TIM HOGAN, JUAN ARIAS

Defendant.

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INDEX NO. 161413/2021

MOTION DATE 11/18/2022

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, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Plaintiff commenced this action alleging violations of the New York State Human Rights Law: Executive Law § 296 et seq. ("State HRL"), The New York City Human Rights Law: N.Y.C. Administrative Code §§ 8-101, et seq. ("City HRL"), New York State Labor Laws §§ 200 and 210 ("Labor Law"), New York General Municipal Law § 92, and New York Executive Law § 63(12). Plaintiff contends that he was denied employment benefits on the basis of race, age, and in retaliation for protected complaints of unlawful conduct and discrimination. Plaintiff identifies as a Hispanic man that is over the age of 40.

Defendants, THE CITY OF NEW YORK ("The City"), TIM HOGAN ("Hogan") and JUAN ARIAS ("Arias"), (collectively, "Defendants") now move pursuant to CPLR §§ 3211(a)(2), (a)(7), and (a)(10), to dismiss the complaint in its entirety.

Background:

Plaintiff began his employment with the New York City Department of Buildings ("DOB") in April 2014 and was assigned to the Building Enforcement Safety Team since 2014 as a Level 1 employee. Plaintiff alleges that from 2014 to 2016 he applied for 19 promotional positions. Eventually, in 2016, plaintiff was chosen for the Emergency Response Unit ("ERU") and assigned to the night shift, where he was expected to work two 18-hour shifts per week. Plaintiff claims that despite working 18-hour shifts, he was forced to show 8-hour shifts on the City Time records. Plaintiff alleges that his supervisors, including Hogan and Arias were aware of this fact and concealed the true hours plaintiff was working.

It is plaintiff's contention that he has been denied various employment benefits including overtime, increases in pay, holiday/vacation pay, issuance of an Emergency Response Badge, being designated a Peace Officer or Special Patrolman, and promotions that he was either promised or entitled to. Plaintiff asserts that the denial of these benefits has been ongoing,

persistent, and continues to occur. Furthermore, plaintiff contends that this allegedly discriminatory denial of said benefits is due to discriminatory animus against him based upon his race and age, and that similarly situated non-Hispanic employees receive the same benefits that have been denied to the plaintiff.

On October 12, 2019, the plaintiff applied for two promotional positions within the DOB - Director of Construction Enforcement Inspection and Director of Special Inspection. Plaintiff interviewed for both positions. He alleges that his interviewers told him he had the most experience of any candidate, specifically that "no one has come in here with the amount of experience and resume that you have" (Complaint, pt. 47). Plaintiff claims the interviewers joked plaintiff was more qualified for their jobs than they were. Plaintiff contends that he met all of the qualifications listed for both positions. Plaintiff alleges that in the interview he was asked directly if he was up for the amount of work the position required – which plaintiff interpreted to be about his age. The position of Director of Special Enforcement was eventually given to an African American woman under the age of 40, whom plaintiff contends did not possess the requirements set forth in the description of the position. Specifically, she did not have an engineering or construction background. The Director of Construction Enforcement Inspection position was given to a Caucasian woman under the age of 40. Plaintiff asserts that she did not have the requirements set forth in the description of the position in that she had no construction experience whatsoever.

Plaintiff claims he is regularly subjected to harassment by defendant Arias, who allegedly pulls plaintiff into his office to berate him. Plaintiff claims that Arias regularly humiliates plaintiff in the Squad Room where he calls plaintiff "dumb" and "stupid" in front of his co-workers. Overtime is distributed by, or overseen by, Arias. Plaintiff contends that Arias regularly refuses to sign plaintiff's time sheet for overtime, the pattern of non-payment has continued for several years, and that this is differential treatment compared to the other non-Hispanic employees.

On June 29, 2021, plaintiff filed a complaint of discrimination with the City's Office of Equal Employment ("EEO") and further complained about his unpaid overtime. The EEO allegedly claimed they could not help and referred plaintiff to the DOB's Office of Labor Relations. Plaintiff claims that immediately after filing the complaint, his overtime was further cut in response to the filing. Plaintiff claims that following the EEO complaint, he was subjected to increased harassment and Arias refers to him as a "moron" and "idiot." Plaintiff alleges that this hostile work environment is unlawful retaliation for his complaints of discrimination and disparate treatment in the ERT Unit.

Motion to Dismiss Standard:

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiffs 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 [1994]). The inquiry is whether the proponent has a cause of action, not whether he has stated one (*Id.* quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, the court is not required to accept factual allegations that are plainly contradicted by documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Executive Law § 63 and General Municipal Law § 92:

Plaintiff has voluntarily withdrawn the causes of action asserted under New York Executive Law § 63 *et. seq* and New General Municipal Law § 92. Therefore, those claims are dismissed.

Labor Law §§ 200 and 210 Claims:

Defendants contends that plaintiffs Labor Law §§ 200 and 210 causes of action should be dismissed because the Labor Law expressly states the term "employer" shall not include a governmental agency (Labor Law 190[3]). Defendants contend that as the NYC Department of Buildings is a governmental agency and therefore does not qualify as an employer within the meaning of the Labor Law. The plaintiff conceded at oral argument that the defendants are correct. Since the City is not an employer within the meaning of the Labor Law, the plaintiff's Labor Law §§ 200 and 210 claims are dismissed.

CPLR § 3211(a)(10): Union as Necessary Party:

Defendants contend that the complaint should be dismissed as the plaintiff failed to join the plaintiff's union, Allied Building Inspectors, IUOE Local 211 ("Local 211"), as a necessary party. Pursuant to CPLR § 3211(a)(10), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the court should not proceed in the absence of a person who should be a party." CPLR § 1001(a) defines a party that should be joined as "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Further, CPLR § 1003 provides that "[n]onjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section... [p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared."

Defendants allege that the plaintiff, a member of the ERT Unit and employed by the DOB, is a member of, and was represented by Allied Building Inspectors, IUOE Local 211 ("Local 211"). Defendants contend that, as plaintiff is a member of the union – which bargained and contracted for the benefits of its members – if there is an issue with said benefits Local 211 is a necessary party. As such, the Memorandum of Agreement ("MOA") which is part of the Collective Bargaining Agreement ("CBA") between the DOB and Local 211, provides for the employment benefits of: working hours, annual leave, schedules, and sick leave of the union members. Defendants allege that as the union has not been joined, the complaint should be dismissed.

However, considering the wide range of alternatives short of dismissal available to a court, granting a motion pursuant to CPLR § 3211(a)(10) should be rare (238 Siegel's Prac. Rev. 2)

The MOA that the defendants provided in support of their position is from the year 1997. Plaintiff provided MOAs for the time periods of 2009-2017 and 2017-2021. Therefore, plaintiff correctly contends that the defendants have not provided support indicating that this MOA is still applicable. Furthermore, the MOAs supplied by plaintiff are silent as to the implicated employment benefits.

Therefore, at this stage of litigation, the defendants have not proven that Local 211 is a necessary party to this suit. It cannot be said that the union would be a party required for complete relief to be awarded, or that the union would be inequitably affected by a judgment in this action. Further, it has not been established that the union would a party necessary for the adjudication of plaintiff's State HRL and CITY HRL claims premised on the discriminatory and retaliatory conduct he suffered within the ERT Unit.

Accordingly, and considering that CPLR § 3211(a)(10) should only be used as a last resort, the motion to dismiss the complaint on this ground is denied.

City HRL/State HRL:

The defendants seek to dismiss plaintiff's claims under the New York State Human Rights Law ("State HRL") and the New York City Human Rights Law ("City HRL") both for failure to state a claim and under the Statute of Limitations.

The defendants contend that the facts plead by plaintiff are insufficient to show an inference that the alleged wrongful acts of the defendants were in any way motivated by, or related to, any protected characteristic such as plaintiff's age or race. Further, defendant contends that any wrongful acts were not sufficiently severe or pervasive to constitute a hostile work environment.

Race/Age Discrimination:

Plaintiff alleges that the defendants engaged in unlawful employment discrimination in violation of the City HRL and State HRL in that he was denied employment benefits and received disparate treatment on the basis of his race and age.

A plaintiff alleging discrimination in employment under the State HRL has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) they are a member of a protected class; (2) they were qualified to hold the position; (3) they were 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 (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also McDonnell Douglas Corp. v Green*, 411 US 792, 793, 93 S Ct 1817, 1820, 36 L Ed 2d 668 [1973], *holding mod by Hazen Paper Co. v Biggins*, 507 US 604, 113 S Ct 1701, 123 L Ed 2d 338 [1993]). New York courts look to federal law when determining claims under the New York State Human Rights Law (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795, 802 [Sup Ct New York County 1997]). However, for claims that accrue on or after the effective date of October 11, 2019[1], the provisions of the State HRL must be "construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal

[1] "The New York State Legislature passed several amendments to the NYSHRL in June 2019, the effect of which is to render the standard for claims closer to the standard under the NYCHRL. *See* A8421/S6577 (as amended by S6594/A8424). These amendments were signed into law by Governor Andrew Cuomo on or about August 12, 2019. Significantly, however, these amendments only apply to claims that accrue on or after the effective date of October 11, 2019" (*Wellner v Montefiore Med. Ctr.*, 2019 AD Cases 325592, 2019 WL 4081898 [SDNY Aug. 29, 2019]). The amendment did not change the text of the NYSHRL's operative provisions but amended the statute's construction providing that the articles should be liberally construed for the accomplishment of remedial purposes thereof (*Charles v City of New York*, 21 CIV. 5567 (JPC), 2023 WL 2752123, at *6 [SDNY Mar. 31, 2023]).

civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300).

Under the City HRL, a plaintiff only needs to demonstrate that they were treated less well because of their membership in a protected class (*Khwaja v Jobs to Move Am.*, 19 CIV. 7070 (JPC), 2021 WL 3911290, at *3 [SDNY Sept. 1, 2021]). To state a claim for discrimination, the plaintiff must only show differential treatment of any degree based on a discriminatory motive (*Gorokhovsky v New York City Hous. Auth.*, 552 Fed Appx 100, 102 [2d Cir 2014]).

Plaintiff has established that he is a member of protected class, Hispanic, and was qualified for his position. As to racial discrimination, plaintiff has sufficiently alleged differential treatment from similarly-situated employees outside his protected group, in the form of differences in pay, overtime, training opportunities, unequal work tasks, and more. Therefore, the defendants' motion to dismiss plaintiff's State HRL claims of discrimination based on race is denied.

The City HRL must be construed broadly in favor of discrimination plaintiffs (*see Albunio v City of New York*, 16 NY3d 472, 477 [2011]). It is proper to dismiss a claim under the City HRL only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* and mixed motive frameworks (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). The analysis set forth above regarding the State HRL is equally relevant under the more liberal City HRL analysis. Therefore, the defendants' motion to dismiss plaintiff's City HRL claims of discrimination based on race is denied.

Plaintiff additionally alleges that he was subject to age discrimination, specifically in the denial of two promotions on or after October 12, 2019. Plaintiff adequately alleges membership in a protected class, he is over 40, and has demonstrated that he was qualified for the two vacant positions in which he applied and interviewed. Plaintiff has alleged that in the interview, he was asked if "he was up for the amount of work that the position required" which plaintiff claims was suggestive of his age. Plaintiff has alleged that the positions were then filled by people that were less qualified and under the age of 40. Accordingly, plaintiff has adequately plead that he was treated less well or experienced differential treatment because of his age. Therefore, defendants' motion to dismiss plaintiff's claims of age discrimination is denied under both the State and City HRLs.

Retaliation:

Defendants contend that plaintiff's claims of retaliation should be dismissed as he has failed to demonstrate a causal connection between the alleged protective activity and the purported retaliatory acts.

Plaintiff has alleged that the defendants engaged in unlawful retaliation in violation of the State HRL and City HRL. For a retaliation claim under the City HRL, the plaintiff must show "(1) he or she engaged in a protected activity as that term is defined under the City HRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct" (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1004 [2d Dept 2021] *quoting Sanderson–Burgess v. City of New York,* 173 AD3d at 1235–1236, [2nd Dept. 2019]).

Plaintiff alleges that on June 29, 2019, he filed a complaint with the City's Office of Equal Employment. Plaintiff has further alleged that, despite his claim not being investigated, it was well known in the ERT Unit that he had filed this complaint. Plaintiff claims that he was subjected to retaliatory acts after filing the complaint – his overtime was further cut, Arias would not sign time sheets, and would refer to plaintiff as a "moron" and "idiot." It is possible that a jury could conclude that a person would be reasonably deterred from making a similar complaint, knowing that doing so would result in the denial of benefits or being subjected to similar treatment by supervisors (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 [1st Dept 2009]).

Defendants contend that plaintiff has not offered direct evidence of causation but instead relies on the temporal proximity of the events. Defendants allege that to establish causation using temporal proximity, the timing between the protected activity and the adverse employment action must be "very close" (*Clark County Sch. Dist. v Breeden*, 532 US 268, 273 [2001]). However, plaintiff asserts that the alleged retaliatory acts occurred immediately after the complaint was filed. Further, the temporal proximity coupled with the allegation of being referred to as a "moron" and "idiot" is sufficient at this stage to establish the inference of retaliatory intent (*Charles v City of New York*, 21 CIV. 5567 (JPC), 2023 WL 2752123, at *9 [SDNY Mar. 31, 2023]). As plaintiff has established a plausible claim of retaliation under the City HRL, and therefore the State HRL, defendants' motion to dismiss these claims is denied.

Hostile Work Environment:

Plaintiff alleges that as a result of this race-based differential treatment, he has been subjected to a hostile work environment. Under the City HRL, a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated "less well than other employees" because of the relevant characteristic *(Bilitch v New York City Health & Hospitals Corp.* 194 A.D.3d 999 (2nd Dept 2021) citing (*Reichman v City of New York*, 179 AD 3d 1115, 1118, 117 N.Y.S.3d 280 [internal quotation marks omitted]). The standards for hostile work environment and discrimination claims under the City HRL, and now the post-amendment State HRL, are identical in every respect (*Charles v City of New York*, 21 CIV. 5567 (JPC), 2023 WL 2752123, at *8 [SDNY Mar. 31, 2023]). As the plaintiff has plausibly demonstrated a claim of discrimination based on race, similarly the plaintiff has demonstrated a claim for a hostile work environment based on the same conduct. For the reasons discussed above, defendants' motion to dismiss plaintiff's claims for a hostile work environment are denied.

Statute of Limitations:

The statute of limitations for claims under both the State HRL and City HRL is three years (*see* CPLR 214 [2]; Administrative Code of City of NY § 8-502 [d]; *Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]; *Mejia v T.N. 888 Eighth Ave. LLC Co.*, 169 AD3d 613, 614 [1st Dept 2019]). Therefore, defendants contend that any claims arising prior to December 21, 2018, are time-barred. Plaintiff contends that only claims prior to May 7, 2018, would be barred by the statute of limitations because, on March 20, 2020, then-Governor Cuomo issued an Executive Order and subsequent extensions, which tolled the statute of limitations on claims until November 3, 2020. The subject executive orders constituted a toll of the deadlines (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021]; *see also Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022] ["The subject executive orders constituted a toll of the applicable statute of limitations"]). "A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the

relevant time period" (*Id.* [citations omitted]). Therefore, plaintiff correctly contends that only claims arising before May 7, 2018, would be barred.

Pre-limitation-period actions are not actionable unless they are joined to actionable conduct within the limitations period (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009]; *lv denied* 13 NY3d 702 [2009]). Therefore, to the extent that plaintiff's claims regard discrete acts occurring before May 7, 2018, they are time-barred (*Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). However, if the defendants' acts are part of a single continuing pattern of unlawful conduct extending into the limitations period, they are actionable (*see Williams, supra*; *see also Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-98 [1st Dept 2014]). In determining whether the complained of acts within and outside the statutory time constitute one actionable claim, a court should assess whether incidents and episodes are related (*McGullam v Cedar Graphics, Inc.*, 609 F3d 70, 77 [2d Cir 2010]). Furthermore, the plaintiff is not precluded from using the prior acts as background evidence in support of his timely claims (*see Petit v Dept. of Educ. of City of New York*, 177 AD3d 402, 404 [1st Dept 2019]; *Natl. R.R. Passenger Corp. v Morgan*, 536 US 101, 113, 122 S Ct 2061, 2072, 153 L Ed 2d 106 [2002]).

To the extent that acts occurring before May 7, 2018, are part of a single continuing pattern of unlawful conduct extending into the limitations period immediately preceding the filing of the complaint, the claims should not be dismissed (*see St. Jean Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016]).

Conclusion

For the reasons stated herein, it is hereby

ORDERED that the plaintiff's Labor Law §§ 200 and 210 causes of action are dismissed; and it is further

ORDERED that the plaintiff's claims under New York Executive Law § 63 *et. seq* and New General Municipal Law § 92 are dismissed; and it is further

ORDERED that any claims under the City or State Human Rights Laws which are for discrete acts that occurred before May 7, 2018, are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 103, 80 Centre Street, New York, New York, on July 5, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

4/28/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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