SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

----------X

SUMIT CHOWDHARY,

Plaintiff,

- v -

AT LAST SPORTSWEAR, INC.,SUNIL AHUJA

Defendant.

INDEX NO. 154450/2022

MOTION DATE 07/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 10, 11, 12

were read on this motion to/for DISMISS.

In this action alleging violations of the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL), as well as common law negligence, defendants At Last Sportswear, Inc. ("At Last") and Sunil Ahuja (collectively "Defendants") move for an order dismissing the Complaint in its entirety, entering judgment on their behalf, and granting costs, fees, and disbursements pursuant to CPLR 3211(a)(7) and Section 740 of the Labor Law. Plaintiff Sumit Chowdhary opposes the motion.

Chowdhary alleges that he moved from India to the United States in 2013 to work as Director of Production and Sourcing for At Last. He maintains that he was initially on a B-1/B-2 visa and was converted to H-1B status in January 2015, in which he remained pending the filing of his green card petition. His H-1B visa was allegedly extended in September 2017 through September 2020. At all relevant times, Chowdhary was employed by At Last in its Manhattan office. Ahuja is the Chief Executive Officer of At Last.

This action arises out of Defendants' purported negligence in preparing certain materials for Chowdhary's green card application. Chowdhary allegedly communicated with At Last's immigration attorney in January 2020 via email. He contends that he responded promptly and with all necessary information to the attorney's requests. After this step, Chowdhary contends that "everything else that needed to be submitted was [At Last's] responsibility" and that At Last explicitly communicated to him that it had started the green card process (NYSCEF Doc. No. 1, Complaint ¶ 30-32). He specifically alleges that it was At Last's responsibility to:

> draft a description of the job it seeks to fill with the foreign worker; set the minimum requirements for the position; apply for a prevailing wage determination from the [Department of Labor]; and conduct advertising and recruitment to establish that there is no interested U.S. citizen or permanent resident who meets the minimum requirements for the position

(Complaint ¶ 21). He further contends that At Last should have started this process in March 2020 as this was within six months of the expiration of his H-1B visa, could have requested a six month extension in September 2020, and should have been working on his green card paperwork or otherwise notified him that it would not be going forward with the application during the period from March 2020 through March 2021.

After Chowdhary's consultations with the attorney in January 2020, At Last allegedly informed him that it had commenced the green card process, for which an extension was allegedly given in September 2020. However, despite his efforts to follow up with At Last about the status of the application, Chowdhary was informed at some point after March 2021 that the company "was not sure of what was happening with his application" and that it would investigate his status (Complaint ¶ 39). He maintains that no follow up conversations were had and that he was not informed that his employment was at risk. At Last allegedly told Chowdhary

to speak to an immigration attorney in June 2021 about his status, as his H-1B visa had expired in September 2020 and the green card application was not complete.

During these consultations, Chowdhary was informed that the time to apply for a green card had expired. One attorney allegedly told Chowdhary that he could attempt to file the first step of the application, the permanent labor certification, late with explanations for the delay, but that he would have to speak to an At Last representative to proceed. Chowdhary claims that he relayed this information to Ahuja on July 2, 2021 and followed up five days later requesting that Ahuja provide available times for a conference call with the immigration attorney. However, At Last informed Chowdhary on July 7, 2021 that it was not interested in pursuing his green card application. At this point, Chowdhary maintains that his H1-B visa had expired, along with extensions and grace periods for his green card application.

On August 11, 2021, At Last terminated Chowdhary's employment. He states that the reason given for his termination was "restructuring" but contends that this was pretextual as he was replaced by two new hires. He alleges that instead he was fired because of the "unlawful presence" in the United States owing to the expiration of his visa and his employer's failure to proceed with his green card application.

Chowdhary commenced this action on May 24, 2022. His Complaint asserts five causes of action: common law negligence, citizenship discrimination under the NYSHRL, retaliation under the NYSHRL, citizenship discrimination under the NYCHRL, and retaliation under the NYCHRL. Defendants filed the instant motion to dismiss the Complaint in its entirety on July 21, 2022.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts

alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory" (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). "A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law" (*id.*). However, "factual allegations which fail to state a viable cause of action" or "that consist of bare legal conclusions . . . are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

Defendants first move to dismiss Chowdhary's negligence cause of action against them, arguing that he fails to allege that they owed any duty to him. They contend that Chowdhary's two theories of negligence – that they breached a duty to him to complete portions of his green card application, or that they were under a duty to discharge him earlier than they did so that he could have avoided accruing unlawful status – must fail because he has not alleged that either duty was created by any employment contract between himself and Defendants. In opposition, Chowdhary argues that Defendants assumed these duties when they informed him of their intent to sponsor his green card application and repeatedly informed him that they were working on the relevant paperwork for the application.

To state a cause of action for negligence, a plaintiff must allege that it was owed a duty by the defendant, that the defendant breached the duty, and that the breach proximately caused an injury (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]). "The threshold question in any negligence action is" whether the defendant owes "a legally recognized duty of care to [the] plaintiff" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015] [internal quotations and citations omitted]).

Here, Chowdhary's Complaint fails to sufficiently plead facts in support of his negligence cause of action as it does not set forth anything more than conclusory allegations that Defendants owed him a duty relating to his green card application. The Complaint does not allege that Defendants were party to an employment contract with Chowdhary that required them to sponsor his green card application, nor does it allege that Chowdary and Defendants entered a subsequent agreement to this effect. Although the Complaint alleges that the Defendants commenced this process, it does not assert any facts that would indicate a continuing duty on Defendants' part to continue with the application. Having found that Chowdhary only presents conclusory allegations as to Defendants' duty to him, the Court finds that he fails to state a cause of action for negligence and accordingly dismisses this claim.

Defendants next seek dismissal of Chowdhary's citizenship discrimination claims under the NYCHRL. A plaintiff states a claim for employment discrimination under the NYCHRL by pleading facts sufficient to support a prima facie case that the plaintiff (1) is a member of a protected class, (2) was qualified to hold their position, (3) was treated differently than other employees, and (4) that the employer's adverse action or differential treatment occurred in circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). The NYCHRL specifically forbids employment discrimination based on the "immigration or citizenship status of any person" (NYC Administrative Code § 8-107[1][a]).

The Court finds that Chowdhary fails to state a cause of action for citizenship discrimination under the NYCHRL. Although Chowdhary alleges that he is a member of a protected class and was qualified to hold his position, he fails to sufficiently plead that his termination occurred in circumstances giving rise to an inference of discrimination. His

Complaint alleges that he was terminated after he "had lost the ability to work lawfully" in the United States following the expiration of his H1-B visa eleven months prior. Furthermore, the Complaint does not allege that Chowdhary was subject to any other differential treatment based on his status as a noncitizen.

Next, Defendants move to dismiss Chowdhary's NYCHRL retaliation cause of action, arguing that he fails to sufficiently allege that he engaged in a protected activity. Chowdhary contends that his Complaint does allege protected activity, in the form of communications with Defendants regarding his "frustration at the Company's inaction which had resulted in Plaintiff losing his ability to remain in the United States lawfully" (NYSCEF Doc. No. 10 at 10-11).

A plaintiff sufficiently pleads a prima facie case for retaliation under the NYCHRL by pleading facts alleging that (1) the plaintiff engaged in a protected activity, (2) the employer was aware of the protected activity, (3) the employer took an action that disadvantaged the plaintiff, and (4) there was a causal connection between the protected activity and the adverse or disadvantageous action (*Harrington*, 157 AD3d at 585; *Forrest*, 3 NY3d at 312-313). "Protected activity" encompasses complaints to an employer about disparate treatment resulting from a plaintiff's protected characteristics (*Forrest*, 308 AD2d at 558).

Here, the Court finds that Chowdhary fails to state a cause of action for retaliation because his Complaint does not allege that he engaged in any conduct that could fairly be classified as protected activity. The Complaint does not indicate that he made any complaints to Defendants about disparate treatment based on his citizenship or immigration status. His allegations that Defendants failed to provide certain documentation for his green card application, and his questioning them of their purported delays and inactivity, are not colorable as complaints about disparate treatment or other protected activity, as no discriminatory animus

or differential treatment is alleged in connection with Defendants' failure to follow through with the green card process.

In his moving papers, Chowdhary states that he has withdrawn his discrimination and retaliation claims under the NYSHRL, therefore the branches of the motion seeking to dismiss those causes of action are moot.

According, it is hereby:

ORDERED that the motion is granted; and it is further

ORDERED that the action is dismissed.

7/21/2023
DATE

LORI S. SATTLER, 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