

Manns v New York State Dept. of Fin. Servs.

2023 NY Slip Op 33602(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 160479/2022

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8

Deidre Manns

INDEX NO. 160479/2022

- v -

MOT. DATE

New York State Department of Financial Services

MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

Plaintiff Deidre Manns, a black woman, has brought this action for race and gender-based discrimination and retaliation against her former employer, the New York State Department of Financial Services (“DFS”). DFS now moves preanswer to dismiss the action to CPLR § 3211(a)(7). Plaintiff opposes the motion. For the reasons that follow, the motion is denied.

The following facts are asserted in the complaint. In February 2016, the Criminal Investigative Unit of DFS’s Consumer Protection and Financial Enforcement Division hired Manns as a Financial Fraud Investigator. Prior to being hired at DFS, Manns had twenty years of experience as a Fraud Investigator for the New York City Human Resources Administration Department of Social Services. Within weeks of her hire, the FBI’s Health Care Task Force chose Manns as the only DFS Investigator to join the task force. Manns alleges that during her tenure at DFS, her performance reviews were consistently “satisfactory” and included praise of her work. Despite these alleged positive performance reviews, she was terminated in 2022 for “*inter alia* unauthorized access to confidential law enforcement databases for personal use.”

During her time as part of the FBI Health Care Task Force, Manns alleges that she was harassed and discriminated against by four individuals: one coworker and three supervisors. The coworker was named Arthur Masinski (“Masinski”) and he worked as a Senior Investigator in the unit. The supervisors were Deputy Chief Joseph Medina (“Medina”), Deputy Chief August D’Aureli (“D’Aureli”) and Deputy Chief Ralph Burch (“Burch”).

Manns asserts that “almost as soon as she began her position at DFS,” Masinski began subjecting her to racist and sexist verbal attacks. Manns does not provide exact dates that these verbal attacks began. She states generally that Masinski would target her “nearly every day she was in the office.”

Dated: October 16, 2023



HON. LYNN R. KOTLER, J.S.C.

1. Check one:

 CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

 GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

 SETTLE ORDER SUBMIT ORDER DO NOT POST

 FIDUCIARY APPOINTMENT REFERENCE

She asserts that Masinski made statements including that he missed the “good old days” when the HCTF only hired retired police officers, regularly called Manns “stupid,” “bitch,” and “black bitch” to her face and in front of her coworkers and used male pronouns to refer to her.

Plaintiff cites two specific incidents in which she involved supervisors to deal with Masinski’s behavior without any real consequence. In early 2018, Manns asserts that she was eating lunch when Masinski yelled out at her “what’s this bitch doing now!” referring to Manns. Plaintiff immediately complained to supervisor Medina who instructed a subordinate to speak with Masinski about his conduct but did not discipline him. In June 2018, Manns was in the lunchroom talking with a coworker when Masinski turned to her and said “shut up, bitch.” Manns states that she asked him not to call her a bitch, but that Masinski continued to do so. Supervisor D’Aureli was sitting in the lunchroom when this incident took place. Manns later spoke with D’Aureli about the incident. D’Aureli assured her that he would have a conversation with Masinski, but no formal discipline occurred and the behavior continued.

Allegedly, beginning in Spring 2018, Medina also started harassing Manns by deliberately withholding videotapes of an undercover investigation that Manns was assigned to “in an effort to make her look incompetent.” Manns was assigned to write the reports on these tapes, but instead Medina wrote the reports and submitted them, bypassing Manns with the “[intention] to make her look like she had failed to do her job.” The District Attorney’s office was unable to use the reports written by Medina, as they had to be written by the agent who made the recordings. Therefore, Manns had to duplicate the work, and was forced to come into the DFS office to do so. She was the only DFS investigator who was required to come to the office to complete her reports.

After this incident, in mid-2018, Manns alleges that D’Aureli also began harassing Manns by constantly surveilling her work, openly complaining to her coworkers that she was doing a poor job and waiting until she had finished multiple reports before telling her to redo them without informing her as to why the reports were deficient. On or about August 21, 2018, Manns was called into a meeting with DFS director Orlando during which she complained of D’Aureli’s conduct. Director Orlando acknowledged the complaint and assured Manns that he would speak with D’Aureli, but D’Aureli’s conduct continued.

Simultaneously, in or around 2018, plaintiff applied for and was denied two positions, one as an investigator and one as an assistant chief of investigations. Manns asserts generally that she was qualified for both positions and that she was not promoted due to her race and/or gender.

In or around April 2019, Deputy Chief Joseph Edwards announced his retirement and recommended Manns as his replacement. Instead, in June 2019, DFS selected Burch, a white man, to replace Edwards even though he had not been recommended by Edwards, had less supervisory and investigative experience than Manns, and had no experience writing or editing undercover reports, a stated requirement of the position.

Manns alleges that once he was promoted, Burch began harassing Manns as well. He required her to travel to DFS headquarters to complete her undercover reports every Monday, something that her white male colleagues were not required to do. Manns also alleges that Burch made her rewrite an investigative report that she has completed in 2016, three years earlier, even though Burch’s predecessor, Deputy Chief Edwards, had already reviewed and approved of the report.

Manns alleges that on December 17, 2019, Burch required Manns to work during her sick leave. Plaintiff ultimately filed charges of discrimination with the EEOC based on her treatment at DFS. On or about March 12, 2020, while the EEOC complaint was ongoing, DFS Director of Labor Relations, April P. Lambert, sent Manns a Notice of Discipline stating that she was suspended immediately without pay for violating the DFS policy on conducting unauthorized searches using the DFS data portal. Manns states that no such policy existed. On June 16, 2021, Manns filed charges of discrimination, retaliation and harassment with the New York State Division of Human Rights (“DHR”), claiming that the suspension was in retaliation for her having filed the EEOC charges.

Less than two weeks later, on June 29, 2021, DFS suspended Manns again without pay and recommended termination. Manns claims that the charges were unfounded. On December 23, 2021, an arbitrator restored Manns to the payroll pending resolution of the June 29, 2021 suspension. On December 28, 2021, DFS suspended Manns again without pay. On April 25, 2022, the DHR found probable cause existed to “believe that the Respondent has engaged in or is engaging in the unlawful discriminatory practice complained of.” The arbitrator presiding over Manns’ grievance ultimately ruled in favor of DFS and Manns was terminated.

This action then ensued. In her complaint, plaintiff alleges five causes of action in violation of the New York State Human Rights Law, Exec Law § 296 *et seq* (the “NYSHRL”): race discrimination, gender discrimination, racial harassment, gender-based harassment and retaliation.

Parties’ arguments

DFS argues that plaintiff’s claims relating to Masinski should be dismissed because plaintiff has failed to allege that DFS condoned or failed to act with regards to Masinski’s 2018 actions and Masinski’s 2020 act of locking plaintiff out of the lunchroom amounts to nothing more than a petty slight or trivial inconvenience. With regards to Medina and D’Aureli, DFS asserts that their alleged conduct did not give rise to an inference of discrimination and is otherwise conclusory.

DFS contends that plaintiff’s hostile work environment claims should be dismissed because all but the 2020 lunchroom incident occurred before the 2019 amendments to the NYSHLR and the allegations fail to establish the “severe” and “pervasive” standard.

With regards to plaintiff’s discrimination claims, DFS asserts that plaintiff has failed to allege sufficient facts to state a claim for failure to promote or disparate treatment by Burch. Finally, DFS argues that plaintiff’s retaliation claim should be dismissed based on the doctrine of collateral estoppel in connection with the underlying arbitration and alternatively, plaintiff’s suspension or termination did not occur under circumstances giving rise to the inference of a retaliatory animus and the temporal proximity between plaintiff’s protected activity and the adverse acts is too great to sustain the claim.

In opposition to the motion, plaintiff maintains that she has adequately alleged all five causes of action. She argues that she was not promoted to the role of acting Deputy Chief in favor of a less qualified white man and plaintiff is not required to prove that she applied for a position that DFS never posted.

With regards to her harassment claims, plaintiff maintains that she has alleged sufficient facts to satisfy either standard of the NYSHRL. In any event, plaintiff contends that the last act of harassment occurred post-2019 amendment and since plaintiff’s claim accrued on the last discriminatory act, the amended pleading standard applies to these claims. Plaintiff otherwise argues that DFS is liable

because she alleged her supervisors engaged in harassing and discriminatory conduct and DFS “did nothing to stop” the harassment plaintiff experienced.

As for the retaliation claim, plaintiff maintains that she is not collaterally estopped from bringing this claim here because the arbitrator did not decide the issue of whether DFS’ disciplinary actions were discriminatory or retaliatory. She also asserts that there is a sufficient temporal proximity between filing the EEOC charge and plaintiff’s suspension and termination.

DISCUSSION

Pursuant to CPLR § 3211(a)(7), a party may move to dismiss one or more causes of action asserted on the ground that the pleading fails to state a cause of action. 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 (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). “Nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Abramovitz v. Paragon Sporting Goods Co.*, 202 AD2d 206 [1994]). A motion to dismiss must be denied if “from the pleadings’ four corners, ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law’” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002] quoting *Polonetsky v. Better Homes Depot*, 97 NY2d 46 [2001]).

A *prima facie* case of discrimination requires a showing by the plaintiff that: [1] she is a member of a protected class; [2] she was qualified to hold the position; [3] she 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 v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who must prove that the reason being offered is a pretext, and therefore false.

The NYSHRL forbids employers from engaging in a discriminatory practice :

because of an individual’s... race... [or] sex... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Exec. Law § 296 [1][a]

On a failure to promote claim, plaintiff must demonstrate that she was part of a protected class, she was qualified for the position in question, she was denied the position, and that the denial occurred under circumstances giving rise to the inference of discrimination (*Sogg v. American Airlines, Inc.*, 193 AD2s 153 [1st Dept 1993]). There is no dispute here that plaintiff has adequately alleged the first two elements of her failure to promote claim in connection with the 2019 position. Contrary to DFS’ contention, plaintiff has adequately alleged the balance of this claim. As plaintiff’s counsel points out, plaintiff is not required to show that she applied for a job that DFS did not post and plaintiff’s allegations are otherwise sufficient to establish that she demonstrated interest in the position, to wit, she applied for two different promotions previously and plaintiff was recommended by a supervisor to fill the position in

an email to Director Orlando and Deputy Director Angelo Carbone. Therefore, plaintiff's first two causes of action premised upon a failure to promote claim survive defendant's motion to dismiss.

The court now turns to plaintiff's harassment and hostile work environment claims, which overlap each other and are contained within plaintiff's first through fourth causes of action. The 2019 amendment to the NYSHRL took effect in October 2019, lowered the standard of a hostile work environment claim. Prior to the 2019 amendments to the NYSHRL, the employee was required to plead that the harassment was "severe" and "pervasive" (*see i.e. Maiurana v. Cantor Fitzgerald Secs.*, 2021 WL 76410 [SDNY 2021]). Plaintiff's counsel argues that since the last hostile act in the workplace occurred after the 2019 amendment, plaintiff's claims should be analyzed under the post-2019 amendment standard. The court agrees.

"[I]f a plaintiff has experienced a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it" (*Hudson v. Western New York Bics Div.*, 73 Fed Appx 525 [2d Cir 2003] *quoting Fitzgerald v. Henderson*, 251 F3d 345 [2d Cir 2001]). Contrary to defense counsel's contention, the conduct plaintiff complains of is all part of the same practice and policy of discrimination. Therefore, plaintiff's harassment and hostile work environment claims accrued after the 2019 amendment to the NYSHRL became effective and thus plaintiff's claims will be analyzed under the post-2019 amendment standard.

Following the 2019 amendment to the NYSHLR, in order to establish a hostile work environment, plaintiff need only show that the harassment "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories" (Exec Law § 296[1][h]). Whereas, the employer can raise an affirmative defense that the "harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." (*Id.*) Here, the court finds that plaintiff's allegations easily meet her burden to defeat defendant's motion. Accordingly, the motion to dismiss plaintiff's first through fourth causes of action premised upon an unlawful harassment and hostile work environment.

To state a claim of retaliation under the NYSHRL, plaintiff must allege that she engaged in a protected activity, her employer was aware of his participation in such activity, plaintiff suffered an adverse employment action based upon the activity, and 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]). Here, plaintiff has certainly stated sufficient facts to survive defendant's motion to dismiss. She claims that after she filed NYSDHR and EEOC complaints, she was suspended and ultimately terminated. The court rejects DFS' argument that plaintiff has failed to allege a causal connection between her protected activities and the adverse action. Plaintiff claims that no disciplinary action was taken against her until after she filed an EEOC charge. Further, DFS allegedly sought plaintiff's termination two weeks after she filed a NYSDHR complaint. These allegations when read in the most favorable light to plaintiff are sufficient to survive DFS' motion to dismiss.

Finally, DFS' collateral estoppel argument is rejected. The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]). Collateral estoppel applies when "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [internal quotation marks and citation omitted], rearg denied 25 NY3d 1193 [2015]).

"[C]ollateral estoppel, a flexible doctrine, should not be mechanically applied just because some of its formal prerequisites, like identity of parties, identity of issues, a final and valid prior judgment and a full and fair opportunity to litigate the prior determination, may be present" (*Jeffreys v Griffin*, 1 NY3d 34, 41 [2003], quoting *People v Roselle*, 84 NY2d 350, 357 [1994]).

"[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] [internal quotation marks and citation omitted]). DFS has not met its burden on this prong of its motion. Indeed, the word retaliation was stated once in the underlying arbitration decision, in reference to plaintiff's own characterization of her conflict with Burch, and it is otherwise clear that the arbitrator did not decide the issue of retaliation as this issue was not even submitted to the arbitrator.

Accordingly, it is hereby

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

ORDERED the DFS shall answer the complaint within 30 days; and it is further

ORDERED that the parties in the above captioned matter are hereby directed to submit a proposed Preliminary Conference order on consent on or before December 1, 2023.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11:

Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.


All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at:

<https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf>

Proposed preliminary conference orders must be filed on NYSCEF. If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: October 16, 2023
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.