

**Smyth v City of New York**

2023 NY Slip Op 34266(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 157294/2017

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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ROBERT SMYTH,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, RICCARDO CARRONE, EDWARD O'DONNELL,

Defendants.

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INDEX NO. 157294/2017

MOTION DATE 11/01/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, defendants' motion for summary judgment is granted, in part, to the extent set forth below.

In this action, plaintiff asserts claims against the City of New York (the "City"), the New York City Department of Citywide Administrative Services ("DCAS") and DCAS employees Riccardo Carrone and Edward O'Donnell, asserting claims under Administrative Code §8-107 (the New York City Human Rights Law, or "NYCHRL") for employment discrimination based on his disability, age, and perceived sexual orientation and for retaliation.

FACTUAL BACKGROUND

In July 2011, plaintiff resigned from his position as a stationary engineer for the New York City Department of Parks (the "Parks Department") as disciplinary charges were pending against him. In connection with his resignation, plaintiff entered into a Stipulation of Settlement with the

Parks Department (the “Settlement Stipulation”) which provided, inter alia, that plaintiff would receive a lump-sum payment from the Parks Department (accounting for his outstanding time and leave) in exchange for his resignation and agreement not to contest the time he served on suspension (See NYSCEF Doc. No. 133 [Settlement Stipulation at ¶3]).

This Settlement Stipulation further provided that:

“This Stipulation shall not be offered in evidence or introduced for any other purpose, in any other forum, including but not limited to judicial, administrative, arbitration proceedings, except for the purposes of enforcing the obligations contained herein or as evidence in any future proceedings related to Respondent’s employment brought against, by, or on behalf of Respondent.”

(Id. at ¶4 [emphasis added]).

In 2013, plaintiff was hired by DCAS as a Stationary Engineer in its Division of Buildings and Grounds. In applying for this position, plaintiff completed and signed a “City of New York Comprehensive Personnel Document” in which he stated that he had never resigned from a job to avoid termination or disciplinary action.

*Plaintiff’s Deposition Testimony*

During his employment at DCAS, plaintiff filed three grievances with his union, Local 30 Operating Engineers Union, about unequal overtime distribution that deprived him of overtime, the performance of stationary engineer work by oilers, which also deprived him of overtime, and the transfer of employees in violation of proper procedure (See NYSCEF Doc No. 106).

Plaintiff worked for DCAS at five different locations prior to his termination in February 2016: two buildings on Adams Street, a location on Schermerhorn Street, 31 Chambers Street, and Arthur Avenue in the Bronx. Plaintiff testified that, in retaliation for his complaints and grievances, he was transferred from the location on Schermerhorn Street to 31 Chambers Street on or about

June 2014. This transfer led to a longer commute, by train, in which plaintiff had to stand, aggravating his back and shoulder problems. As a result, he submitted requests for medical accommodations, including requesting a parking spot so he could avoid standing on the train for hours, which were not granted.

While plaintiff worked at 31 Chambers Street, plaintiff's supervisor, Riccardo Carrone, made sexually charged comments regarding plaintiff's clothing, including asking plaintiff whether he had a girlfriend and why he was single as well as about his sexual activities and "genital configuration." On or about November 28, 2014, Carrone told plaintiff that he would write plaintiff up if plaintiff did not permit Carrone to perform oral sex on him.

In June 2015, plaintiff was transferred to Arthur Avenue in the Bronx, without parking, in a building with no staff and no equipment and that was often referred to as a "rubber room." Plaintiff's salary decreased with each of five transfers because he was constantly transferred to downgraded jobs by O'Donnell.

Plaintiff testified that, at some unspecified date, plaintiff spoke to an unidentified woman with an unknown job title at DCAS about the "disparaging treatment" he received from "various people" (NYSCEF Doc. No. 105 [Smyth EBT at pp. 55-56]). He spoke with her between four and six times but did not recall when these conversations occurred or what was discussed at any specific interaction (Id.).

When asked to identify the basis for his belief that these transfers, write-ups, out-of-title work, and unpaid overtime were based on his disability, perceived sexual orientation, and age, plaintiff responded that "it couldn't be anything else" and that all of these acts were the result of an "attitude" towards him that could "be assigned to anything, sexuality, age, limitations ...

whatever it may be” (NYSCEF Doc. No. 105 [Smyth EBT at p. 103]). He also noted that he was the “butt of jokes” about his “situation of marriage [and] social life, various things” by younger coworkers (Id. at pp. 110-114). Finally, he testified that he believed DCAS did not want older employees because younger employees were more “flexible” and did not stand up for themselves (Id. at p. 111).

*Testimony of Tinamarie Cintron*

Tinamarie Cintron, an investigator for the City of New York, testified that she conducted two investigations of plaintiff, arising out of complaints in February and July 2015 that supervisors were unable to locate plaintiff during his shift (and that, on one of these occasions, he had responded with profanity when confronted about his absence). After her investigation, Cintron substantiated both of the claims against plaintiff. Cintron was not aware during these investigations that plaintiff had made any EEO complaints involving O’Donnell or Carrone or that he had made any other complaints. Her notes reflected that plaintiff had, at some point, made a request for accommodation to Belinda French.

*Testimony of Shameka Overton*

Shameka Overton, Deputy Commissioner of Administration of DCAS testified that plaintiff’s personnel file was reviewed during the course of the 2015 investigations of plaintiff, and it was discovered that while applying to DCAS, he had not disclosed that he left his employment at the Parks Department in the face of pending disciplinary action. At the time of these investigations, Overton was not aware of any allegations by plaintiff regarding discriminatory conduct towards him based on his actual or perceived sexual orientation by supervisors at DCAS or any accommodation requests.

*Testimony of Kevin Williams*

Kevin Williams, Senior Director of Investigations at DCAS, similarly testified that during these investigation he was not aware of any union grievances filed or requests for accommodation by plaintiff, or any knowledge of claims of sexual orientation discrimination by plaintiff.

*Testimony of Boughner*

John Boughner, a DCAS investigator, testified that he had previously conducted a “fingerprint screening” of plaintiff when he began his employment with DCAS, without conducting a full background investigation. He was also involved in the “reopened” investigation of plaintiff in August 2015, which would have been ordered by Kevin Williams or Deputy Director Caroline Smith. As part of this investigation he was sent the Settlement Stipulation in an email from Williams in a discovery package from human resources.

It is undisputed that, on or about February 3, 2016, DCAS informed plaintiff that his employment was terminated due to the intentional misstatements concerning his prior employment at the Parks Department in the “City of New York Comprehensive Personnel Document” form completed in connection with his DCAS application (See NYSCEF Doc. No. 115 [Notice of Personnel Action]). Plaintiff commenced this action on August 15, 2017. The Note of Issue was filed on January 29, 2022.

The City now moves for summary judgment, arguing that that plaintiff has not made out a prima facie on employment discrimination claim because his misstatement on his “City of New York Comprehensive Personnel Document” rendered him unqualified for the position and that, in any event, he has not established that he suffered any adverse employment action. The City also argues that plaintiff’s evidence has not established a prima facie case for retaliation because he

fails to establish that he engaged in any protected activity or that defendants were aware of such protected activity and, in any event, that the City has established that it had a legitimate non-discriminatory and non-retaliatory reason for his termination.

In opposition, plaintiff argues that he has satisfied all of the elements of his discrimination claims and, that, as to his retaliation claim, the defendants' retaliatory motive is demonstrated by defendants' use of the Settlement Stipulation in its investigation of plaintiff, in violation of the Settlement Stipulation's confidentiality provision. He also asserts that this investigation initially concluded that plaintiff could not be terminated but that this determination was inappropriately and incorrectly altered, citing an email exchange between Kevin Williams and Shameka Boyer Overton, in which Williams wrote:

I've attached a quick synopsis from my Admin. investigator John Boughner with regard to the Smyth case. This one appears to be headed south as our only recourse would be to call him in with regard to his failure to disclose his Parks disciplinary history. Based on our discussion with PARKS and DCAS Legal, we can see this case through to the end but the end result will eventually lead to Mr. Smyth being found qualified ...

Boyer Overton responded

I read John's synopsis and think we're confusing the issues. We're not focused on the specifics of the Parks Stipulation. Our focus is that he lied on the comprehensive personnel document.

Williams then responded:

We will call Mr. Smyth in for a face to face interview and get a statement from him regarding his failure to be forthcoming on the CPD-B.

(NYSCEF Doc. No. 127).

## DISCUSSION

As a threshold matter, defendants' motion for summary judgment dismissing claims against DCAS is granted without opposition (See NYC Charter §396). Defendants' motion for summary judgment is also granted as to plaintiff's claims for age discrimination, disability discrimination, and retaliation but denied as to his claim for discrimination based on his perceived sexual orientation<sup>1</sup>.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

In assessing the instant motion, the Court applies the burden-shifting analysis developed in McDonnell Douglas Corp. v Green, 411 US 792 (1973). Under this analysis, plaintiff bears the initial burden to establish a prima facie<sup>2</sup> case of discrimination after which "the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its

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<sup>1</sup> To the extent plaintiff, in opposition, references a hostile work environment claim, no such claim was ever pled. In any event, such a claim would be duplicative of his discrimination claim based on harassment due to his perceived sexual orientation claim (See Hernandez v City of New York, 2016 NY Slip Op 30641[U], 19 [Sup Ct, Kings County 2016] ["hostile work environment claims here must be dismissed as duplicative of the discrimination claims given that liability under the hostile work environment claims is premised on the same factual allegations and theory of liability as the discrimination claims"]).

<sup>2</sup> In this context, "prima facie" denotes plaintiff's de minimis burden to establish facts sufficient to create a "legally mandatory, rebuttable presumption," rather than the "more traditional meaning of describing plaintiff's burden of setting forth sufficient evidence to go before the trier of fact" (Melman v Montefiore Med. Ctr., 98 AD3d 107, 122-23 [1st Dept 2012] quoting Sogg v American Airlines, 193 AD2d 153, 162 [1st Dept 1993]).

employment actions” (Ciulla v Xerox Corp., 70 Misc 3d 1205(A) [Sup Ct, NY County 2021] internal citations omitted). If the defendant meets this burden, summary judgment is warranted unless plaintiff raises “an issue as to whether the action was motivated at least in part by ... discrimination” (Id. quoting Melman v Montefiore Med. Ctr., 98 AD3d 107, 127 [1st Dept 2012]). A plaintiff “may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive,” or “leave unchallenged one or more of the defendant’s proffered reasons for its actions ... [as long as it] show[s] that discrimination was just one of the motivations for the conduct” (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 38-39 [1st Dept 2011]). “[E]vidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial—as with proof of any other fact” (Id. at 40-41).

Accordingly, the City bears the burden here to “demonstrate either the plaintiff’s failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for the challenged actions, the absence of a triable issue of fact as to whether the explanations were pretextual” (McDonald v The City of New York, 2020 NY Slip Op 34384[U], 8-9 [Sup Ct, Kings County 2020] [internal citations omitted]). Here, the City argues that plaintiff has failed to establish every element of his prima facie claim for discrimination under the NYCHRL.

#### *Perceived Sexual Orientation Discrimination*

To make out a prima facie claim for sexual orientation discrimination, plaintiff must show that he was treated less favorably than other employees because of his sexual orientation (Zimmer v Warner Bros. Pictures, Inc., 56 Misc 3d 1208(A) [Sup Ct, NY County 2016] [internal citations omitted]). Though the NYCHRL requires more than “incivility, discourtesy, or disrespect” plaintiff need not establish that discriminatory remarks were “severe” or “pervasive” (Id.).

Here, plaintiff's testimony as to Carrone's sexually-charged inquiries as well as his demand that plaintiff permit him to perform oral sex or be written-up raises an issue of fact as to whether he was treated less well than other employees because of his sexual orientation (See Crookendale v New York City Health and Hosps. Corp., 175 AD3d 1132, 1132 [1st Dept 2019] ["plaintiff sufficiently described being touched and complimented inappropriately to permit a jury reasonably to find that she was treated 'less well' than her male colleagues because of her gender and that the conduct complained of was neither petty nor trivial"]; Rivera v United Parcel Serv., Inc., 148 AD3d 574, 574-75 [1st Dept 2017] [evidence that "supervisor repeatedly made gross and highly offensive sexually-charged remarks to plaintiff, including in front of plaintiff's subordinates, causing them to lose respect for plaintiff and fueling rumors about her proclivity to engage in workplace affairs" supported jury's finding that defendant engaged in gender discrimination under NYCHRL]). Contrary to defendants' arguments in reply, the fact that plaintiff testified that he did not respond to Carrone's inquiries or his demand to perform oral sex does not reduce this sexual harassment to petty slights or trivial inconveniences. Accordingly, that branch of the City's motion for summary judgment dismissing claim for discrimination based on perceived sexual orientation is denied.

*Disability and Age Discrimination*

To satisfy his prima facie case for age and disability discrimination under the NYCHRL, plaintiff must prove that he is a member of a protected class, that he was qualified to hold the position, that he suffered a disadvantageous action—i.e., was treated less well than others—and that this treatment occurred under circumstances giving rise to an inference of discrimination (See Reichman v City of New York, 179 AD3d 1115, 1116-17 [2d Dept 2020] [internal citations omitted]).

Plaintiff has satisfied the first three of these requirements. There is no dispute that he is a member of a protected class. The Court also concludes he was qualified for his position. Although the City notes that plaintiff's failure to accurately complete the "City of New York Comprehensive Personnel Document" renders him "disqualified" under Civil Service Law §50(4), this statute grants a municipal service commission, such as DCAS, the discretion to disqualify an applicant or appointment "who has intentionally made a false statement of any material fact in his application (CSL §50[4]) and is not germane to the relevant inquiry, i.e., whether plaintiff could reasonably perform the essential functions of a stationary engineer (Bellamy v City of New York, 14 AD3d 462, 463 [1st Dept 2005]; see also Thompson v City of New York, 50 Misc 3d 1202(A) [Sup Ct, NY County 2015]). Plaintiff has also alleged that defendants' actions were disadvantageous to him, insofar as he was repeatedly transferred, leading to lower wages, was forced to do unpaid work and out-of-title work and was denied overtime granted to others (See e.g., Santiago-Mendez v City of New York, 136 AD3d 428, 429 [1st Dept 2016]).

Ultimately, however, there is nothing in the record to establish that these disadvantageous acts occurred under circumstances permitting an inference of discrimination based on his age or disability. Although plaintiff's burden to establish such an inference on his prima facie case is low, such that dismissal based on the absence of any such inference is necessarily "rare" (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 40 n 11 [1st Dept 2011]), plaintiff has still failed to do so.

"Discriminatory motivation may be inferred from, among other things, invidious comments about others in the employee's protected group, or the more favorable treatment of employees not in the protected group" (Trinidad v Mary Manning Walsh Nursing Home Co., Inc., 2019 NY Slip Op 31706[U], 15 [Sup Ct, NY County 2019] quoting Mazzeo v Mnuchin, 751 Fed Appx 13, 14 [2d Cir 2018]). Here, plaintiff offers no evidence to permit an inference under either

of these categories. To the extent he asserts, baldly, that other DCAS employees received overtime that he was not granted, plaintiff fails to identify these individuals let alone offer evidence suggesting that they were similarly-situated comparators. In addition, plaintiff's testimony that he believed the transfers, unpaid overtime, and out-of-title work were motivated by his age or disability because "it couldn't be anything else" has no probative value—a plaintiff's "feelings and perceptions of being discriminated against are not evidence of discrimination" (Ciulla v Xerox Corp., 70 Misc 3d 1205(A) [Sup Ct 2021] quoting Basso v Earthlink, Inc., 157 AD3d 428, 430 [1st Dept 2018]). Accordingly, defendants' motion for summary judgment is granted as to these claims and they are hereby dismissed (See Golston-Green v City of New York, 184 AD3d 24, 39 [2d Dept 2020]).

#### *Retaliation*

Defendants' motion is also granted as to plaintiff's retaliation claim. To establish a prima facie claim for retaliation under the NYCHRL, plaintiff must prove that: (i) he has engaged in protected activity (i.e., "opposing or complaining about unlawful discrimination"); (ii) his employer was aware that he participated in such activity; (iii) he suffered an adverse employment action based upon his activity; and (iv) 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's grievances do not qualify as protected activity. These grievances are, on their face, unrelated to any discriminatory conduct by defendants and "[f]iling a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the" NYCHRL (See Pezhman v. City of New York, 47 A.D.3d 493, 494 [1st Dept 2008] [internal citations omitted]). Neither was any request plaintiff may have made for a reasonable accommodation a protected activity (See Witchard v Montefiore Med. Ctr., 103

AD3d 596 [1st Dept 2013] lv denied 22 NY3d 854 [2013]). Finally, even assuming, for the sake of argument, that plaintiff's conversation with an unnamed person—presumably Belinda French—about “disparaging treatment” was a protected activity, he fails to establish a causal connection between his complaint and any subsequent transfers, write ups, and eventual termination, given his failure to remember when these conversations took place (See Keller v Loews Corp., 22 Misc 3d 1139(A) [Sup Ct, NY County 2009] affd as mod., 69 AD3d 451 [1st Dept 2010]).

Even ignoring the foregoing, defendants have established a non-retaliatory reason for plaintiff's termination, i.e., plaintiff's undisputed misstatements in his DCAS employment application (See Godbolt v Verizon New York Inc., 115 AD3d 493, 494 [1st Dept 2014] [“defendant explained that it terminated plaintiff because he failed to disclose his prior criminal convictions on his employment applications, which plaintiff admitted”]). Plaintiff has failed to meet his burden to establish that this reason was pretextual. As an initial matter, “[t]he fact that the investigation, which initially was focused on claims ... [that plaintiff was absent] at work, found evidence of unrelated criminal convictions did not render the investigation unreasonable or improper” (Godbolt v Verizon New York Inc., 115 AD3d 493, 494 [1st Dept 2014]).

Plaintiff asserts, incorrectly, that he was found qualified twice but that second qualification was reversed out of retaliatory animus. However, the record reflects that, at the time plaintiff was hired by the City on February 13, 2013, only an initial fingerprint check was performed that would not have revealed plaintiff's misstatements in his job application. Moreover, contrary to his claim, the record evidence shows that the 2015 investigation ended in only one outcome, with plaintiff being found unqualified for making false statements on his application. Contrary to plaintiff's contention, the email colloquy between Williams and Overton while this investigation was

ongoing does not support a contrary conclusion or otherwise establish malicious or retaliatory intent.

Finally, plaintiff's argument that defendants relied upon the Settlement Stipulation in their investigation in blatant disregard of its confidentiality provisions is entirely undercut by the actual terms of the Settlement Stipulation. Paragraph 4 of the Settlement Stipulation only prohibits it from being "offered in evidence or introduced for any other purpose" in certain "proceeding" or "forum." As such, it cannot reasonably be construed as prohibiting its release between City agencies or precluding its review by DCAS investigators in the course of a DCAS investigation (See People v Perez, 27 Misc 3d 880, 887-88 [Sup Ct, Bronx County 2010] ["the investigation of suspected intoxicated driving by the police, in the field or at the intoxicated driver testing facility, is not a judicial, quasi-judicial or even an administrative proceeding"]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's retaliation claim is granted and it is hereby dismissed.

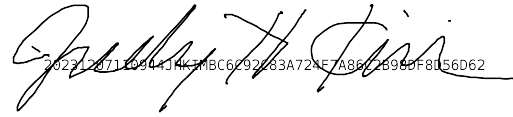
In light of the foregoing, it is

**ORDERED** that defendants' motion for summary judgment is granted, in part, to the extent that plaintiff's claims under Administrative Code §8-107 for discrimination based on age, discrimination based on disability, and retaliation are hereby dismissed, and otherwise denied; and it is further

**ORDERED** that within fifteen days of the date of this decision and order counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon defendant as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “Efiling” page on this Court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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12/7/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE