Ashe v City of New York
2023 NY Slip Op 35094(U)
September 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 705817/23
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Victor Ashe,

Plaintiff,

- against -

The City of New York, New York City Health and Hospital Corporation, Michael Millinek, Juan Checo, Sixto Valentin and Kubrot Hristof,

Defendant.

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Index Number: 705817/23

Motion Date: 9/18/23

Motion Seq. No.: 1

The following papers numbered E8-E17 & E24 read on this motion by Defendants, The City of New York and New York City Health and Hospitals Corporation, for an order to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	E8-14
Affirmation in Opposition	E15-17
Reply	E24

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, The City of New York and New York City Health and Hospitals Corporation, for an order to dismiss is granted.

Plaintiff is employed as a Lieutenant at Elmhurst Hospital in

Queens County. Plaintiff commenced this action, alleging claims for, inter alia, hostile work environment, from 2018 to the present.

At the outset, the Court notes that on September 15, 2023 and during the pendency of the motion, Plaintiff filed an Amended Complaint labeled "Plaintiff's First Amended Complaint as of Right." The complaint appears to add a cause of action for intentional infliction of emotional distress. As of the date of this order, Defendants have not served their answer, and thus, issue has not been joined. Accordingly, Plaintiff's amended complaint filed without leave of Court is permissible pursuant to CPLR 3025(a). The following decision solely addresses the causes of action contained in the original complaint.

The following delineates a series of events which give rise to Plaintiff's claims set forth in the complaint. Beginning in 2018, Plaintiff alleges that the Defendants created and/or maintained a hostile work environment directed against him in the following manner: a) failed to provide him with pension benefits and failed to promote him and instead promoted less qualified individuals, b) Plaintiff alleges that Defendant Lieutenant Sixto Valentin complained when Plaintiff used cleaning supplies at the workplace to defend against COVID-19. Valentin and Detective Gerard Cutolo refused to wear masks around Plaintiff and would cough in his presence. The forgoing conduct was "ratified" by the Defendants. Defendants refused to provide Plaintiff with his own office, free from the "contaminated environment," c) the Defendants retaliated against Plaintiff and isolated him in the workplace after he "rendered aid and comfort" to Police Office Iana Isaacs, who was called a "monkey" by Defendant Kubrat Hristof, d) Defendant Hristof and Captain Fraser Jr. made unjustified EEOC complaints against Plaintiff, which were subsequently dismissed, and e) Defendant Valentin called Plaintiff a "n****r" and Caucasian officers were provided privileges and benefits denied to Plaintiff and other African Americans.

A motion to dismiss for failure to state a cause of action under CPLR §3211(a)(7) addresses merely the sufficiency of the pleadings. On a motion to dismiss pursuant to CPLR §3211(a)(7), the Court must "afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts alleged as alleged fit within any cognizable legal theory" (see Davidoff v. Kaplan, 2023 N.Y. App. Div. LEXIS 3488 [2d Dept. 2023]). The Court is mandated to liberally construe

the pleadings and determine whether they contain "some recognizable form of any cause of action known to our law," no matter how "inartistically drawn and indefinite in places" (see Dulberg v. Mock, 1 N.Y.2d 54 [1956]). Here, while the complaint solely lists a cause of action for hostile work environment and violation of section 295 of New York Executive Law, the Court is mandated to liberally construe the complaint. In doing so, there appear to be causes of action under the New York State Human Rights Law (SHRL) and New York City Human Rights Law (CHRL) for not only hostile work environment, but also for failure to promote, discrimination, and retaliation.

The City moves for an order dismissing the cause of action on the following grounds: a) that the City of New York is an improper party to this suit, b) that Plaintiff's claims are time-barred under the relevant statues, and c) that Plaintiff has failed to state a claim under the New York State Human Rights Law.

Claims against the City of New York.

Movants argue that the City of New York is not a proper party to this suit and, thus, the complaint must be dismissed against it. The HHC is a separate and distinct legal entity from the City (see McKinney's Uncons Laws of NY §7384[1], §7385[5], §7401 [4]; New York City Health and Hospitals Corporation Act §4 (1), § 5 (5), § 20 (4) (L 1969, ch 1016, §1)]; Binyard v. City of New York, 151 A.D. 2d 712 [2d Dept 1989]). Although the City owns the municipal hospital buildings, it has no control over the operation of these facilities and, therefore, no liability can attach to it for claims which occur at such facilities (see Brown v. City of New York, 264 A.D.2d 493 [2d Dept 1999]; Pollock v. City of New York, 145 A.D.2d 550 [2d Dept 1988]).

Accordingly, the motion is granted and the complaint is dismissed with respect to the City of New York.

Time-Barred Claims

The City argues that any claims which accrued prior to March 17, 2020 are time barred by the statute of limitations. Actions for discrimination under the SHRL and CHRL are governed by a three year statute of limitations (see Mejia v. T.N. 888 Eighth Ave. LLC Co., 169 A.D.3d 613 [2d Dept. 2019]). Plaintiff's complaint was served on or about March 17, 2023. Accordingly, any claims alleged which predate March 17, 2020 are time-barred by the statute of limitations. Plaintiff does not appear to dispute the forgoing and

merely argues that the complaint provides that the discrimination, which purportedly began in 2018, is ongoing.

Accordingly, the motion is granted and the complaint is dismissed with respect to all causes of action under the SHRL and CHRL which pre-date March 17, 2020.

Discrimination

To assert a claim for discrimination under the SHRL, a plaintiff must allege: 1) he or she is a member of a protected class, 2) he or she was qualified to hold the position, 3) he or she suffered an adverse employment action, and 4) the adverse action occurred under circumstances giving rise to an inference of discrimination (see Reichman v. City of New York, 179 A.D.3d 1115 [2d Dept. 2020]).

The evidence on this record establishes that Plaintiff did not suffer any material adverse change in the terms or conditions of his employment so as to raise a triable issue of fact as to whether he was discriminated against on the basis of his race or gender (see Galabya v. New York City Bd. of Educ., 202 F.3d 636 [2d Cir. 2000]). Indeed, there is no evidence on this record linking the actions complained of to prejudice or animus against Plaintiff on the basis of his membership of a protected class as a person of color.

The CHRL is construed more broadly in favor of plaintiffs (see Lefort v. Kingsbrook Jewish Med. Ctr., 203 A.D.3d 708 [2d Dept. 2022]). Plaintiffs need only show "adverse employment action . . . motivated by racial or ethnic animus, even in part (see Williams v. New York City Tr. Auth., 171 A.D.3d 990 [2d Dept. 2019]). Indeed, while Plaintiff is a member of a protected class, he has failed to allege that any action taken against him was motivated by his membership in a protected class.

The Court reiterates, that while Plaintiff clearly alleges that Defendant Valentin called him a "n****r," and that Caucasian officers were provided privileges and benefits denied to African Americans, he does not adequately plead the elements of discrimination. Specifically, Plaintiff does not discern how he was treated differently nor does he link the disparate treatment to his membership of a protected class. Conclusory allegations are insufficient, Plaintiff is required to plead with specificity, and he failed to do so here (see Polite v. Marquis Marriot Hotel, 195

A.D.3d 965 [2d Dept. 2021]; Johnson v. Department of Educ. of City of N.Y., 158 A.D.3d 744 [2d Dept. 2018]; Murphy v. Department of Educ. of the City of N.Y., 155 A.D.3d 637 [2d Dept. 2017]).

Accordingly, the motion is granted and the complaint is dismissed with respect to the causes of action alleging discrimination.

Failure to Promote

To assert a claim for failure to promote under either the CHRL or the SHRL, Plaintiff must allege that 1) he is a member of a protected class, 2) his job performance was satisfactory, 3) he applied for and was denied promotion to a position for which he was qualified, and 4) the position remained open (see Porter v. N.Y. State DMV, 78 Fed. Appx. 166 [2d Cir 2003]. Here, the complaint merely states that Plaintiff did not receive his pension benefits and Plaintiff, "who was qualified, promotion, and they in fact promoted to those positions individuals who were less qualified than plaintiff, resulting in economic and other benefits to plaintiff." Thus, Plaintiff failed to satisfy the test set forth above. There is no allegation that Plaintiff's job performance was satisfactory, that he applied for a promotion, that he was denied a promotion, or that the position remained open. At best, Plaintiff alleges he was denied a promotion and a less qualified individual obtained the position, which similarly fails the test set forth above.

Accordingly, the motion is granted and the complaint is dismissed with respect to the cause of action alleging failure to promote.

Hostile Work Environment

To assert a claim for hostile work environment under the SHRL, Plaintiff must allege that the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abuse working environment (see Croci v. Town of Haverstraw, 146 A.D.3d 748 [2d Dept. 2017]; Reaves v. New York City Dept. Of Educ, 2020 N.Y. Misc. LEXIS 3626 [N.Y. Sup. Ct., Qns. Cty. 2020]).

The CHRL is construed more broadly. A plaintiff need only allege that he or she was treated "less well than other employees"

because of her membership in a protected class (see Reaves, 2020 N.Y. Misc. LEXIS 3626 at 10).

The record on this motion establishes that, viewing the evidence in a light most favorable to Plaintiff and crediting as true Plaintiff's factual allegations, the alleged conduct was not sufficiently severe or pervasive so as to raise any issue of fact as to whether Plaintiff's rights under the SHRL or CHRL were violated (see Harris v Forklift Sys., Inc., 510 U.S. 17 [1993]; Schwapp v Town of Avon, 118 F.3d 106 [2d Cir 1997]; Hernandez v Kaisman, 103 A.D.3d 106 [1st Dept 2012]; Barnum v New York City Transit Auth, 62 A.D.3d 736 [2d Dept 2009]). As noted above, Plaintiff failed to link any of the alleged discrimination to his membership to a protected class. While the allegation that Defendant Valentin called Plaintiff a "n****r" is reprehensible, it is not actionable under a hostile work environment claim (see Snell v. Suffolk County, 782 F.2d 1094 [2d Cir. 1986]). Instead, there must be an evidence of or an allegation of a "steady barrage of opprobrious racial comments" (see Schwapp v. Town of Avon, 118 F.3d 106 [2d Cir. 1997]). Plaintiff has failed to show, or even allege, that the remarks rose to this requisite level.

The incident regarding the COVID-19 disinfectants and subsequent denial of a separate office do not constitute sufficiently pervasive or severe conduct so as to have created a hostile work environment actionable under either the State or City Human Rights Law (see Golston-Green v. City of New York, 184 A.D.3d 24 [2d Dept. 2020].

Finally, the incident regarding the alleged unjustified EEOC complaints do not constitute sufficiently pervasive or severe conduct so as to have created a hostile work environment actionable under either the State or City Human Rights Law (see Golston-Green, 184 A.D.3d 24). Plaintiff fails to make allegations with this regard with any specificity and instead makes bare and conclusory allegations, of which are insufficient to survive a motion to dismiss pursuant to CPLR 3211(a)(7) (see Polite, 195 A.D.3d at 967).

Accordingly, the motion is granted and the complaint is dismissed with respect to the cause of action alleging hostile work environment.

Retaliation Claim:

To assert a claim for retaliation under the SHRL, a plaintiff must allege that he or she 1) engaged in a protected activity, 2) her employer was aware that he or she participated in such activity, 3) he or she suffered an adverse employment action based upon her activity, and 4) there is a casual connection between the protected activity and the adverse action" (see Quinn v. Green Tree Credit Corp., 159 F.3d 759 [2d Dir. 1998]; Reaves, 2020 N.Y. Misc. LEXIS 3626). A protected activity can be described as one "opposing or complaining about unlawful discrimination (see Forrest, 3 N.Y.3d at 313).

The complaint does not allege that Plaintiff was at any time engaged in a protected activity. Similarly, Plaintiff fails to allege he suffered any adverse employment action as a result of engaging in a protected activity so as to raise a triable issue of fact concerning his claim of retaliation (see Forrest, 3 NY 3d 295; EEOC v Bloomberg L.P., 967 F. Supp. 2d 816 [S.D.N.Y. 2013]). Plaintiff's conclusory statement that he was "retaliated against" with respect to his consolation of Officer Isaacs is insufficient to survive a motion to dismiss pursuant to CPLR 3211(a)(7) (see Polite, 195 A.D.3d at 967).

The CHRL is construed more broadly in favor of plaintiffs. Plaintiff is only required to show that "something happened that was reasonably likely to deter a person from engaging in a protected activity" rather than an adverse employment action (see Jadallah v. New York City Dep't of Educ., 2023 U.S. Dist. LEXIS 670 [E.D.N.Y. 2023]). Here, Plaintiff failed to state a CHRL retaliation claim for the same reason he failed to state a SHRL retaliation claim. Namely, Plaintiff failed to allege that he suffered some adverse action that was linked to a retaliatory motive (see id.).

Accordingly, the complaint is dismissed with respect to the cause of action alleging retaliation.

Individually Named Defendants

Defendants argue that the claims should be dismissed as against the individually named Defendants. The NYSHRL permits individual liability for discrimination, "but only if the individual qualifies as an employer or aided and abetted the unlawful discriminatory acts of others" (see Craven v. City of New York, 2023 U.S. Dist. LEXIS 72835 [S.D.N.Y. 2023]). An "employer"

under NYSHRL is limited to individuals with "ownership interest," or supervisors who have the authority to hire and fire employees (see id.). By contrast, the NYCHRL provides a "broader basis for direct individual liability" (see id.). However, under both the SHRL and the CHRL, the individual must have "actively participated" in the conduct that gave rise to the claims. Here, Plaintiff failed to state a cause of action with regard to the individually named defendants. There is no allegation that any of the individually named defendants have either supervisory titles or an "ownership interest." Similarly, there is no allegation, of which can survive a motion pursuant to CPLR 3211(a)(7) that any of the individuals aided or abetted unlawful discriminatory acts of others, as explained supra.

Accordingly, the complaint is dismissed with respect to the causes of action against the individually named defendants.

Accordingly, upon the forgoing, the motion is granted and the action is dismissed in its entirety

Dated: September 21, 2023

KEVIN J. KERRIGAN,,J.S.C.