

Colon v Unitec El. Co.
2023 NY Slip Op 35236(U)
April 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 707740/2022
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY

PART 35

Justice

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JOSHUA COLON,

Plaintiff,

Index No.: 707740/2022

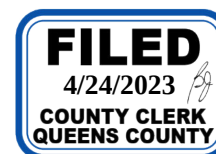
Mot. Date: Sep. 27, 2022

-against-

Mot. Seq.: 1

UNITEC ELEVATOR COMPANY,

Defendants



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The following papers read on this motion by defendant for an order, pursuant to CPLR 3211(a)(7), dismissing the second and fourth causes of action in plaintiff's complaint for failure to state a cause of action.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits	EF 7-8
Memorandum of Law in Support.....	EF 9
Memorandum of Law in Opposition	EF 12
Affirmation in Opposition-Exhibits.....	EF 13-14
Memorandum of Law in Reply.....	EF 15

Upon the foregoing papers, it is ordered that the motion by defendant is denied.

This is an action brought by the plaintiff, pursuant to New York State Human Rights Law, Executive Law § 296 *et seq* (NYSHRL) and the New York City Human Rights Law, New York City Administrative Code § 8-107 *et seq* (NYCHRL). Plaintiff alleges that he sustained injuries as a result of discrimination and retaliation on the basis of his race.

Defendant now moves for an order, pursuant to CPLR 3211(a)(7), dismissing the second and fourth causes of action in plaintiff's complaint for failure to state a cause of action. In his second cause of action, the plaintiff alleges retaliation in violation of NYSHRL and in his

fourth cause of action, he alleges that retaliation in violation of NYCHRL Defendant contends that the plaintiff, even after serving an amended complaint, has not stated a cause of action for a retaliation claim.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept. 1999]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]).

"To make a prima facie showing of retaliation under Executive Law 296, a claimant is required to show that (1) the claimant was engaged in protected activity, (2) the claimant's employer was aware that he or she participated in such activity, (3) the claimant suffered an adverse employment action based upon his or her activity, and (4) there was a causal connection between the protected activity and the adverse action"; *Clarson v City of Long Beach*, 133 AD3d 799, 800 [2d Dept. 2015] [internal citations omitted]).

According to the complaint and amended complaint, the plaintiff alleges that he started working for the defendant, on June 4, 2018, and was ultimately terminated, in December, 2018. He alleges that within weeks of starting work and throughout his employment, he was harassed by his coworkers and subjected to racial slurs such as "the bum ghetto kid from the Bronx," "spic," and "dirty kid from the Bronx.". Plaintiff alleges that his direct supervisor, "Donald", whose last name he does not know (Donald), and Michael Scotko (Michael), the Vice President of Modernization for defendant, were present and aware of this name calling and did nothing to stop it. Plaintiff also claims that, in August, 2018, while the plaintiff and his co-workers were eating lunch, another employee, when asked to do a task, allegedly said: "tell the nigger to do it, we know the spic won't do it", apparently referring to the plaintiff. Plaintiff alleges that Donald was present when this comment was made.

Plaintiff claims that: in September, 2018, he made two complaints to Donald about the racial slurs and that Donald dismissed the comments as “nothing”; and, in November, 2018, Donald and the plaintiff’s coworkers mocked him and “insinuated” that he smoked marijuana by regularly commenting that a room where he was working “smelled like weed”. Plaintiff further contends that: in November, 2018, he was assigned to make a delivery to a job site near the Lincoln Tunnel; and, upon his driving the truck to the loading dock, Donald approached the truck and began yelling “it smells like weed”; Donald took the keys to the truck and told him to go to headquarters and take a drug test; he was suspended without pay for one week pending the results of the drug test, which were negative; and, in December, 2018, he returned to work after the suspension, but after working for three days, he was notified by Donald and Michael that he was terminated, effective immediately.

Viewing the pleadings liberally, accepting the facts alleged as true and giving the plaintiff the benefit of every possible favorable inference, the plaintiff has stated a cause of action for retaliation. Plaintiff has alleged that he engaged in a “protected activity” by making complaints to Donald, in September of 2018, about the racial slurs and name calling (*see Valcarcel v First Quality Maintenance*, 41 Misc. 3d 1222(A), 2013 N.Y. Misc. LEXIS 4959, (Sup. Ct. Queens County Oct. 15, 2013, Bernice D. Siegal, J.S.C.). As Donald was plaintiff’s direct supervisor, and the person who ultimately terminated plaintiff, the plaintiff has sufficiently alleged that the defendant, his employer, was aware of the “protected activity” (*see Reed v A.W. Lawrence & Co Inc.*, 95 F3d 1170 2d Cir. 1996).

It is undisputed that the plaintiff was terminated and thus suffered an adverse employment action.

Regarding causation, “there is no bright line” to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the protected activity and an allegedly retaliatory action (*see Summa v Hofstra Univ.*, 708 F3d 115, 128 [2d Cir. 2013]. “The Second Circuit has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship,” (*see Jackson v N.Y. State Office of Mental Health*, 2012 U.S. Dist. Lexis 114531 (S.D.N.Y. 2012) “and has drawn different inferences about the causal

connection between protected activities and adverse employment actions based upon the facts regarding temporal proximity *that exist in a particular case*” (*Id.*) (emphasis added)(*see Collins v Indart-Etienne*, 59 Misc 3d 1026, 1054 (Sup. Ct. Kings County 2018)(four months sufficient to show causation); *Peytan v N.Y. City Law Dep’t*, 2015 U.S. Dist. LEXIS 53380 (S.D.N.Y 2015), generally, three months or less sufficient to demonstrate causation).

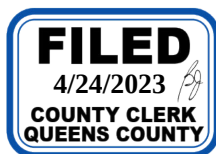
Under this particular case, at this phase in the litigation, the plaintiff has sufficiently alleged a causal connection between his complaints of September, 2018, and his termination, in December of 2018, especially when considering the events of November, 2018.

Accordingly, it is hereby,

ORDERED, that motion by the defendant is denied.

The foregoing constitutes the decision and order of this Court.

Dated: April 21, 2023



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.