

**Currid v City of New York**

2024 NY Slip Op 30222(U)

January 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 521903/2023

Judge: Gina Abadi

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At an IAS Term, City Part 22, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9<sup>th</sup> day of January 2024.

P R E S E N T:

HON. GINA ABADI,  
J.S.C.

MICHAEL CURRID,

Plaintiff,

Index No.: 521903/2023

Motion Seq: 1 & 2

-against-

DECISION/ORDER/  
JUDGMENT

THE CITY OF NEW YORK, THE FIRE  
DEPARTMENT OF THE CITY OF NEW YORK,  
THE NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE,  
and "JOHN DOES" 1-10,

Defendants.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	<u>2 - 9, 12-21</u>
Opposing Affidavits (Affirmations).....	<u>12 - 21</u>
Reply Affidavits (Affirmations).....	<u>22</u>
Other.....	

Upon the foregoing papers, defendants City of New York (City), Fire Department of the City of New York (FDNY) and New York City Department of Health and Mental Hygiene (DOHMH) move for an order, pursuant to CPLR § 3211 (a) (7), dismissing the complaint of plaintiff Michael Currid. Plaintiff cross-moves for an order, pursuant to CPLR § 3205 (a), granting leave to serve an amended complaint.

Plaintiff, a former FDNY firefighter, commenced this action to recover damages allegedly resulting from the denial of a religious accommodation to the City's COVID-19 vaccine mandate. According to the verified complaint, plaintiff served with the FDNY from about 1998 through April 19, 2022. On or around October 27, 2021, following the issuance of the COVID-19 vaccine mandate for City employees, plaintiff applied for a religious accommodation. Plaintiff alleges that on November 15, 2021, he submitted supporting documentation via email to the FDNY EEO and the FDNY EEO Supervisor which included letters from his parish priest and his children's CCD coordinator. Plaintiff states that the religious accommodation request was denied on January 6, 2022 and his appeal of this determination was denied on March 17, 2022.

Plaintiff alleges, upon information and belief, that defendants predetermined the denial of the accommodation because of his Christian faith, that at no point did any member of defendants speak to plaintiff about a reasonable accommodation and that the FDNY did not engage plaintiff in a cooperative dialogue. Plaintiff alleges that he was told that his employment with the FDNY would end if he refused to take the COVID vaccine even though plaintiff was prepared to accept numerous accommodations, including masking and weekly testing.

In the verified complaint, plaintiff sets forth causes of action under the New York State Human Rights Law (State HRL)(Executive Law § 296) and New York City Human Rights Law (City HRL) (Administrative Code [AC] § 8-107) for religious discrimination (First); Failure to Engage in Cooperative Dialogue under AC § 8-107 (28) (Second); Declaratory Judgment (Third); Violation of the Free Exercise Clause of the New York

State Constitution (Fourth); Intentional Infliction of Emotional Distress (Fifth); Aiding Abetting Compelling and Coercing violation of the City HRL (Sixth); Breach of Contract-Constructive Termination (Seventh); and for Attorneys' Fees (Eighth).

### **Defendants' Motion to Dismiss**

In considering a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83, 88 (1994); *Meyer v North Shore-Long Is. Jewish Health SYS., Inc.*, 137 AD3d 880, 880-881 (2d Dept 2016); *Ceeal v Leader*, 74 AD3d 1180, 1181 (2d Dept 2010). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *Garber v Board of Trustees of State Univ. of NY*, 38 AD3d 833, 834 (2d Dept 2007), quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999). CPLR § 3013, states that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Thus, conclusory allegations will not suffice. *See DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 239 (2d Dept 1984); *Fowler v American Lawyer Media*, 306 AD2d 113, 113 (1st Dept 2003); *Shariff v Murray*, 33 AD3d 688 (2d Dept 2006). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted. *Schuckman Realty v Marine Midland Bank, N.A.*, 244 AD2d 400,

401 (2d Dept 1997); *O’Riordan v Suffolk Ch., Local No. 852, Civ. Serv. Empls. Assn.*, 95 AD2d 800, 800 (2d Dept 1983).

As an initial matter, this action must be dismissed against the FDNY and DOHMH since City agencies are not legally cognizable entities and therefore not proper parties. NY City Charter § 396; *see Barerra v City of New York*, 47 Misc 3d 1028, 1030 (Sup Ct, Queens County 2015).

To state a cause of action for discrimination under the State HRL, “a plaintiff must plead facts that would tend to show (1) that he or she was a member of a protected class, (2) that he or she ... suffered an adverse employment action, (3) that he or she was qualified to hold the position for which he or she . . . suffered [the] adverse employment action, and (4) that the . . . adverse employment action occurred under circumstances giving rise to an inference of . . . discrimination.” *Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1119 (2d Dept 2016); *see Chiara v Town of New Castle*, 126 AD3d 111, 119-120 (2d Dept 2015), *lv dismissed* 26 NY3d 945 (2015).

In a religious accommodation case under the State HRL, a plaintiff must show that “(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.” *Bowles v New York City Trans. Auth.*, 285 Fed Appx 812, 813 (2d Cir 2008), quoting *Philbrook v Ansonia Bd. of Educ.*, 757 F 2d 476, 481 (2d Cir 1985). Similarly, to state a religious accommodation case under the City HRL, a plaintiff must allege that “(1) he [or she] has a bona fide religious belief that conflicts with an employment requirement; (2) he [or she]

informed the employer of his [or her] belief; and (3) he [or she] was disciplined for failure to comply with the conflicting employment requirement.” *Price v Cushman & Wakefield, Inc.*, 829 F Supp 2d 201, 222 (SDNY 2011).

In his verified complaint, plaintiff does not set factual allegations regarding a conflict between the vaccine mandate and his bona fide religious beliefs. Further, while plaintiff alleges that he was threatened with termination in the event he failed to receive the vaccine, there is no allegation that plaintiff was actually terminated or otherwise disciplined. Rather, it is not in dispute that plaintiff retired from service. Plaintiff’s contention that his retirement amounts to a constructive discharge or termination is unavailing since plaintiff does not allege facts showing that the FDNY “deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.” *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 (1st Dept 2010).

As a result, plaintiff’s first cause of action under the State and City HRL and seventh cause of action sounding in constructive termination/discharge are dismissed.

The City HRL makes it an “unlawful discriminatory practice for an employer . . . to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation,” including a religious accommodation. AC § 8-107(28)(a). Plaintiff has not alleged facts, beyond legal conclusions, that the City’s process for resolving requests for accommodations to the vaccine mandate, and in particular plaintiff’s request, fell short of the requirements of the City HRL regarding cooperative dialogue. The City’s process was found to be rational

by the Appellate Division, First Department (*Matter of Marsteller v City of New York*, 217 AD3d 543 [1st Dept 2023]) and plaintiff has not alleged facts showing that, under his particular circumstances, the City HRL required “a more robust or individualized dialogue than the process he received.” *Id.* at 545. While, in his verified complaint, plaintiff states in conclusory fashion that “[a]t no point did any member of the Defendants ever speak to Plaintiff about a reasonable accommodation” and that “[a]t no point did any member of the FDNY engage the Plaintiff in a cooperative dialogue,” he also alleges that he did, in fact, apply for a religious accommodation, which was denied on January 6, 2022, and filed an appeal of the FDNY’s decision, which was denied on March 17, 2022. As such, plaintiff fails to state a cognizable claim based upon the cooperative dialogue provisions of the City HRL. Accordingly, the second cause of action is dismissed.

Plaintiff also fails to state a cognizable cause of action under the Free Exercise Clause of the New York State Constitution. A cause of action for a violation of the New York State Constitution arises only where it is necessary to ensure the full realization of the claimant’s constitutional rights. *See Brown v State of New York*, 89 NY2d 172, 186 (1996); *Martinez v City of Schenectady*, 97 NY2d 78, 83-84 (2001). Here, invocation of a constitutional tort cause of action is unnecessary as plaintiff had alternative avenues of redress available, including a private right of action under the State and City HRL. Insofar as a cause of action for religious discrimination may be brought under the State and City HRL, recognition of a separate state constitutional claim is neither necessary nor appropriate to ensure the full realization of a person’s religious rights, because the alleged

wrongs are redressable under an alternative remedy. *See Lyles v State*, 2 AD3d 694, 695 (2d Dept 2003), *aff'd* 3 NY3d 396 (2004).

Accordingly, plaintiff's fourth cause of action is dismissed.

"In order to state a cause of action to recover damages for intentional infliction of emotional distress, the pleading must allege 'conduct [that] has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Ratto v Oliva*, 195 AD3d 870, 873 (2d Dept 2021), quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983). Accepting as true the allegations in the verified complaint, the conduct constituting the gravamen of plaintiff's action was the wrongful denial of a religious accommodation to the COVID-19 vaccine mandate. Even if the City's denial of the accommodation was held or deemed irrational, such conduct alone clearly does not satisfy the rigorous "outrageous," "extreme," "atrocious" and "intolerable" standard required to state a claim for intentional infliction of emotional distress.

As a result, plaintiff's fifth cause of action is dismissed.

To assert a claim for aiding and abetting, plaintiff must allege (1) the existence of an underlying tort; (2) the defendant's actual knowledge of the underlying tort; and (3) the defendant's provision of substantial assistance in the commission of the underlying tort. *See Markowitz v Friedman*, 144 AD3d 993, 996 (2d Dept 2016); *In re Woodson*, 136 AD3d 691, 693 (2d Dept 2016); *Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1017 (2d Dept 2011). Because plaintiff has not stated a cognizable cause of action for

discrimination, there is no underlying tort and therefore no viable claims for aiding, abetting and/or coercing.

Accordingly, plaintiff's sixth cause of action is dismissed.

Pursuant to CPLR § 3001, "[t]he supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy." To constitute a "justiciable controversy," there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect. *See Downe v Rothman*, 215 AD2d 716 (2d Dept 1995); *Playtogs Factory Outlet, Inc. v Orange County*, 51 AD2d 772 (2d Dept 1976); *De Veau v Braisted*, 5 AD2d 603 (2d Dept 1958), *affd* 5 NY2d 236 (1959), *affd* 363 US 144 (1960). As plaintiff is no longer employed with the FDNY, having retired, and the COVID-19 vaccine mandate required for City employees has since been rescinded, there is no present controversy between the parties regarding the vaccine mandate and/or plaintiff's rights as an FDNY employee. *See New York City Mun. Labor Comm. v Adams*, --- AD3d ---, 2023 NY Slip Op 06316 (1st Dept 2023) (petition seeking declaratory and injunctive relief against respondents' determination to exclude City employees from the repeal of the COVID-19 vaccination requirement for other employees, effective November 1, 2022, rendered moot because the vaccination mandate for City employees was rescinded in February 2023). As a result, the third cause of action for a declaratory judgment is dismissed.

Finally, while a prevailing plaintiff may be awarded attorneys' fees under the State and City HRL (*see* Executive Law § 297 [10]; AC § 8-502 [g]), a claim for attorneys'

fees may not be maintained as a separate cause of action. *See La Porta v Alacra, Inc.*, 142 AD3d 851, 853 (1st Dept 2016). At any rate, as there are no remaining viable causes of action in the verified complaint and, as addressed below, the proposed amendments to the verified complaint are without merit, plaintiff cannot be deemed a prevailing party. Accordingly, plaintiff's eighth cause of action is dismissed.

### **Plaintiff's Cross Motion to Amend**

In his proposed amended verified complaint, plaintiff seeks to add as a defendant Chief Assistant Corporation Counsel for Employment Policy and Litigation, Eric J. Eichenholtz, who plaintiff alleges was responsible for overseeing the Law Department's Labor and Employment Law, Workers' Compensation and E-Discovery Divisions, and provided legal advice and counsel to City agencies and officials in employment matters. Plaintiff alleges that Eichenholtz employed the wrong accommodation standard to "discriminatorily deny plaintiff's religious accommodation request," and based thereon, plaintiff seeks to add causes of action for violation of the Equal Protection Clause of the New York State Constitution and a cause of action under the City HRL alleging disparate treatment and impact.

"Generally, the decision to allow a party to amend a pleading is a discretionary matter for the trial court." *Derago v Ko*, 189 AD3d 1352, 1353 (2d Dept 2020); *see Krichmar v Krichmar*, 42 NY2d 858, 860 (1977); *R. & G. Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685, 687 (2d Dept 2018). "Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party, the motion should be denied where the proposed amendment is palpably insufficient or

patently devoid of merit.” *Strunk v Paterson*, 145 AD3d 700, 701 (2d Dept 2016) (citation omitted); see *Derago*, 189 AD3d at 1354.

As previously addressed, a cause of action for a violation of the New York State Constitution arises only where it is necessary to ensure the full realization of the claimant’s constitutional rights (see *Brown*, 89 NY2d at 186; *Martinez*, 97 NY2d at 83-84) and here, invocation of a constitutional tort cause of action is unnecessary as alternative avenues of redress were available, including a private right of action under the State and City HRL.

In order to demonstrate disparate impact under the City HRL, a plaintiff need not establish that she or he was subjected to a materially adverse change to terms and conditions of employment, but only that she or he was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic. See *Golston-Green v City of New York*, 184 AD3d 24, 38 (2d Dept 2020). In his proposed cause of action, plaintiff alleges in broad and conclusory terms that “[d]efendants created a discriminatory system which intentionally used the wrong legal standard as to fire as many Christians as possible.” However, there are no specific facts alleged showing that any group aside from those adhering to plaintiff’s creed were allowed religious accommodations to the vaccine mandate or were otherwise treated more favorably by the FDNY and City during the accommodation review and appeals process.

Because the proposed amendments are patently devoid of merit, plaintiff’s cross motion to amend the verified complaint is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the verified complaint pursuant to CPLR § 3211 (a) (7) is granted; and it is further

ORDERED that plaintiff's motion for leave to serve an amended verified complaint is denied; and it is further

ORDERED that the verified complaint is hereby dismissed.

The foregoing constitutes the decision, order, and judgment of the court.

ENTER:



HON. GINA ABADI  
J.S.C.

HON. GINA ABADI  
J.S.C.

2024 JAN 12 A 11:07  
KINGS COUNTY CLERK  
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