Amendola v City of New York
2024 NY Slip Op 31699(U)
May 6, 2024
Supreme Court, Kings County
Docket Number: Index No. 501349/2023
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 thereof at 360 Adams St., Brooklyn, New York, on the 6th day of May, 2024.

PRESENT:
HON. GINA ABADI,
J.S.C.

DANIELLE AMENDOLA,
Plaintiff,
-against-

THE CITY OF NEW YORK AND
DR. LEON EISIKOWITZ, INDIVIDUALLY,

Defendants.

Index No.: 501349/2023
Motion Seq: 3

DECISION AND ORDER

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

Papers	NYSCEF Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	21-31
Opposing Affidavits (Affirmations)	33-34
Reply Affidavits (Affirmations)	35-37
Plaintiff's Surreply	40
Defendants' Sur-Surreply	41

Upon the foregoing cited papers, and after oral argument, in this action to recover damages under the New York City Human Rights Law ("City HRL"), defendants City of New York (the "City") and Dr. Leon Eisikowitz, individually ("Dr. Eisikowitz" and collectively with the City, "defendants"), jointly move, pre-answer, for an order, pursuant to CPLR §§ 3211 (a) (5) and (7), dismissing the entirety of the amended complaint, dated October 18, 2023 ("Amended Complaint" or "AC") of plaintiff Danielle Amendola ("plaintiff"). While generally opposing defendants' motion, plaintiff does not object to the

dismissal, as time-barred under CPLR § 3211 (a) (5), of the portion of the Amended Complaint which is predicated on the alleged acts/omissions which preceded May 30, 2019.[1] This leaves for the Court's consideration the viability of plaintiff's claims under CPLR § 3211 (a) (7), insofar as such claims accrued on and after May 30, 2019 ("limitations period").

Summary[2]

Plaintiff served with the NYPD as a full-time, non-probationary police officer from January 8, 2014 to July 12, 2023 (for a total of approximately 9½ years). From June 17, 2019 to July 12, 2023, she was assigned to the 73rd precinct in the East New York section of Brooklyn, New York. Her one-way commute to the 73rd precinct from her home in Nassau County was 55 to 75 minutes one way.

On January 28, 2020, plaintiff underwent spinal fusion surgery at the L5-S1 level for a non-LOD injury. On October 1, 2020, she returned to her command at the 73rd precinct. On October 19, 2020, she was seen by defendant Dr. Eisikowitz who, after reviewing her post-operative condition, placed her on restricted duty; namely, no patrol or enforcement (whether in an RMP or on foot); no contact with prisoners; and no physical labor (such as lifting heavy items in excess of 15 pounds, prolonged sitting, standing, climbing stairs, and delivery/pick-up of mail). On November 30, 2020, plaintiff submitted

[1] Memorandum of Law in Opposition to Defendants['] Motion to Dismiss Plaintiff's [Amended] Complaint, dated Feb. 23, 202[4], Point I (NYSCEF Doc No. 33).

[2] The Court assumes the parties' familiarity with the underlying facts, procedural history, and the issues presented, to which the Court refers only as necessary to explain its decision. *See e.g. Longe v City of NY*, 802 Fed Appx 635, 636 (2d Cir 2020).

to the Reasonable Accommodation Unit (the "RA Unit") of the NYPD's Equal Employment Opportunity Division ("EEOD") her request for reasonable accommodation ("RA") on account of her post-operative orthopedic disabilities. She proposed that her RA take the form of her temporary transfer to another NYPD command that was within a 30-minute one-way commute from her home. She explained that her commute to her then-current NYPD command at the 73rd precinct caused her to suffer severe numbness in her legs and had put a strain on her back. Plaintiff's RA request was cosigned by her supervising sergeant as "recommending approval," and was supported by accompanying medical documentation.

On January 19, 2021, the RA Unit, after conferral with the NYPD's Medical Division, "recommended a transfer[] of [plaintiff] to a closer command due to her medical condition." For reasons to be explored in discovery, however, the RA Unit's recommendation was not co-signed by its Team Leader until March 16, 2021.

Meanwhile, plaintiff, on March 3, 2021, withdrew her RA request, explaining that she was then "being accommodated by [her] precinct." The following day, March 4, 2021, the EEOD "administratively closed [her] request" for RA.

Plaintiff alleges that following her submission of an RA request on November 30, 2020, as well as following her withdrawal of it on March 3, 2021, she was told that: (1) "the NYPD could not accommodate her and that the 'accommodated' position, if one did arise, could be worse [for her] than her current assignment [at the 73rd precinct]"; (2) "there were no positions [at the NYPD] where she could be accommodated [at]"; (3) "she would be terminated based on her disability"; and (4) "she should resign." (AC, ¶¶ 94, 105, 195,

197). According to plaintiff, she withdrew her RA request "out of fear that the [d]efendants would further retaliate against her." (AC, ¶ 104).

After withdrawing her RA request, plaintiff continued on restricted duty at the 73rd precinct until July 14, 2021. The 73rd precinct accommodated plaintiff by permitting her, while at work, to lie down on a cot in the back of the precinct. (AC, ¶¶ 97-98).

On July 14, 2021, plaintiff returned to full duty at the 73rd precinct. She remained on full duty at the 73rd precinct for the ensuing 12 months until July 9, 2022. According to plaintiff, "[p]rior to returning to full duty, [she] was threatened on a monthly basis with termination due to her disability if she did not return to full duty." (AC, ¶ 112). Further, after returning to full duty, plaintiff "received notice that she could transfer to a different command," which "transfer [if accepted] would have caused [her] to travel further to work that the . . . [commute] she had to the 73rd [p]recinct." (AC, ¶¶ 126-127).

Without an accommodation at work, plaintiff suffered "numbness in her back and neck if she [wore] her gun belt for prolonged periods of time," and she "regularly [suffered from] shooting pain in her neck[,] which [was] debilitating." (AC, ¶¶ 126-127). "Despite being disabled, [p]laintiff was able to perform the essential functions of her employment with reasonable accommodation." (AC, ¶ 191).

Eventually, plaintiff was forced to retire from the NYPD on July 12, 2023 because of defendants' alleged failure to accommodate her orthopedic disabilities. (AC, ¶¶ 154, 206).

Plaintiff's causes of action, as pleaded in the Amended Complaint, cluster into four general groups: (1) failure to provide reasonable accommodation and failure to engage in

a cooperative dialogue (Count IV); (2) disability discrimination, hostile work environment, and unlawful retaliation (Counts I, II, and V, respectively); (3) supervisory liability of the City based on alleged violations of City HRL § 8-107 (13) (b) by Dr. Eisikowitz (Counts III and VI);[3] and (4) general liability for damages under City HRL § 8-502 (a) (Count VII). The Amended Complaint further demands an award of punitive damages as against both defendants.

Standard of Review

Employment discrimination claims under the City HRL are reviewed under a notice pleading standard, in which "a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citations and quotation marks omitted). Further, on a motion pursuant to CPLR § 3211 (a) (7) to dismiss for failure to state a cause of action, "the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1272 (2d Dept 2019) (internal quotation marks omitted).

[3] Although Counts III and VI name both defendants, the cited statute imposes liability only on the employer (rather than also on the employee) for discriminatory conduct by an employee, agent, or independent contractor, and does not extend to employees, such as Dr. Eisikowitz.

Discussion

1. Failure to Provide Reasonable Accommodation/Failure to Engage in Cooperative Dialogue

Plaintiff has sufficiently pleaded that defendants failed to accommodate her disability under the City HRL. The Amended Complaint adequately alleges that defendants were aware of plaintiff's orthopedic disabilities, but that they failed to engage her in a good-faith interactive process to assess her needs and to seriously consider (rather than merely review on paper) her request for a shorter commute to work. *See Aykac v City of NY*, 221 AD3d 494, 495 (1st Dept 2023); *Estate of Benitez v City of NY*, 193 AD3d 42, 47-49 (1st Dept 2021). These allegations, coupled with plaintiff's allegation that she would have continued serving with NYPD if her request for reasonable accommodation was actually granted (rather than merely on paper), are sufficient to state a cognizable claim for failure to accommodate her disability and to engage in a cooperative dialogue under the City HRL. *See Aykac*, 221 AD3d at 495; *Watson v Emblem Health Servs.*, 158 AD3d 179, 182 (1st Dept 2018).

2. Disability Discrimination, Hostile Work Environment, and Unlawful Retaliation

Accepting the facts as alleged in the Amended Complaint as true, and affording plaintiff the benefit of every possible favorable inference, plaintiff sufficiently alleges disparate treatment under circumstances giving rise to an inference of discrimination based on her disability, a hostile work environment, and retaliation in violation of the City HRL. *See Perez v Y&M Transp. Corp.*, 219 AD3d 1449, 1451 (2d Dept 2023); *Ayers v Bloomberg, L.P.*, 203 AD3d 872, 874 (2d Dept 2022); *Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1004 (2d Dept 2021); *Golston-Green v City of NY*, 184

AD3d 24, 42 (2d Dept 2020); *Brown v City of NY*, Sup Ct, Kings County, June 15, 2023, Abadi, J., index No. 508124/22, NYSCEF Doc No. 41).

3. <u>Supervisory Liability Based on Alleged Violations of City HRL § 8-107(13)(b)</u>

City HRL § 8-107(13)(b) provides that "[a]n employer shall be liable for an unlawful discriminatory practice based upon the [proscribed] conduct of an employee or agent . . . only where: (1) [t]he employee or agent exercised managerial or supervisory responsibility; or (2) [t]he employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or (3) [t]he employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct." *See generally Zakrzewska v New School*, 14 NY3d 469, 478-479 (2010), *modified on other grounds by Police Benevolent Assn. of City of NY, Inc. v City of NY*, 40 NY3d 417 (2023).

Here, however, the Amended Complaint is devoid of any factual allegations that Dr. Eisikowitz possessed or exercised managerial or supervisory responsibility over plaintiff or anyone else. Relatedly, the Amended Complaint has failed to allege any facts to show that the City knew or should have known about Dr. Eisikowitz's alleged misconduct or that plaintiff complained to anyone about him. *See Lum v Consolidated Edison Co. of NY, Inc.*, 2021 NY Slip Op 32318(U), *4 (Sup Ct, NY County 2021), *affd as modified* 209 AD3d 434 (1st Dept 2022); *see also Russell v New York Univ.*, 204 AD3d

577, 579 (1st Dept 2022). Plaintiff's allegation (in AC, ¶¶ 9-10) that Dr. Eisikowitz, as "a Deputy Surgeon," was "five ranks higher than [p]laintiff" within NYPD is insufficient to satisfy this requirement. *See Greenidge v City of NY*, 2023 NY Slip Op 33506(U), *7 (Sup Ct, NY County 2023).

4. General Liability for Damages Under City HRL § 8-502(a)

Plaintiff's final cause of action for violation of City HRL § 8-502 (a) ("Civil Action by Persons Aggrieved by Unlawful Discriminatory Practices) does not exist separately from the causes of action brought under the City HRL. *See Girard v Vnu, Inc.*, 2004 NY Slip Op 30396 (U), *10 (Sup Ct, NY County 2004).

Plaintiff's demand for punitive damages as against the City (in the "Wherefore" clause, ¶ "c.") is contrary to the prevailing law. *See Krohn v New York City Police Dept.*, 2 NY3d 329, 338 (2004).

Conclusion

Accordingly, it is

ORDERED that defendants' pre-answer motion to dismiss is *granted to the extent* that:

(1) all of plaintiff's causes of action, *insofar as they are predicated on the alleged acts/omissions which preceded May 30, 2019*, are dismissed as time-barred under CPLR § 3211 (a) (5);

(2) plaintiff's causes of action sounding in: (i) strict liability in alleged violation of City HRL § 8-107 (13) (b) as predicated on disability discrimination and, separately, on retaliation; and (ii) alleged violation of City HRL § 8-502 (a) (as pleaded in Counts III and

VI, as well as in Count VII of the Amended Complaint, respectively), are each dismissed for failure to state a claim under CPLR § 3211 (a) (7); and

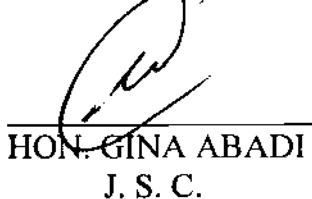
(3) plaintiff's demand for punitive damages as against the City is stricken; and the remainder of defendants' motion is denied; and it is further

ORDERED that, pursuant to CPLR § 3211(f), defendants shall answer the extant portions of the Amended Complaint within ten (10) calendar days after electronic service of this Decision and Order with notice of entry by plaintiff's counsel on the Corporation Counsel; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the Corporation Counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision and Order of this Court.

ENTER,



HON. GINA ABADI
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