Brutus v Kelch
2024 NY Slip Op 34771(U)
February 7, 2024
Supreme Court, Kings County
Docket Number: Index No. 516411/2023
Judge: Gina Abadi

At an IAS Term, City Part 7 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 7th day of February, 2024.

PRESENT:

HON. GINA ABADI,
J.S.C.

JEAN BRUTUS,

Plaintiff,

-against-

EUGENIA KELCH and THERESA DAVIS, in their individual and official capacities,

Defendants.

Index No: 516411/2023
Motion Seq: 1

DECISION, ORDER AND JUDGMENT

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	3-8
Opposing Affidavits (Affirmations)	12
Reply Affidavits (Affirmations)	14

Upon a careful review of the entirety of the foregoing cited papers, the Decision, Order, and Judgment on this motion is as follows:

Defendants Principal Eugenia Kelch ("Kelch") and Assistant Principal Theresa Davis ("Davis"; collectively with Kelch, "defendants"), in their individual and official capacities, jointly move, pre-answer, for an order dismissing the entirety of the complaint, dated June 5, 2023 (the "complaint), of plaintiff Jean Brutus ("plaintiff"), for (among other reasons) failure to state a claim under CPLR § 3211(a)(7). Plaintiff, in opposing

defendants' motion, does not address their contention that his breach of contract claim, as predicated on the alleged violation of the collective bargaining agreement, is not viable. Accordingly, plaintiff's breach of contract claim, as pleaded in ¶¶ 2-3 of the complaint, is deemed abandoned. *See e.g. Harsch v City of NY*, 78 AD3d 781, 783 (2d Dept 2010).

Background

Plaintiff is (and, for the past 20 years, has been) a tenured Guidance Counselor at the LIFE Academy High School for Film & Music in Brooklyn, New York (the "high school"). Complaint, ¶¶ 9, 16. Plaintiff is a male of Haitian origin. *Id.*, ¶ 10. Defendant Kelch and defendant Davis are the principal and assistant principal, respectively, at the high school. *Id.*, ¶¶ 11-12. Plaintiff's disciplinary problems allegedly began in 2016 when defendant Kelch joined the high school as the principal and began targeting him as a "male . . . and someone born in Haiti." *Id.*, ¶¶ 17-18. According to the complaint (in ¶ 20 thereof), Kelch was "obsessed with [plaintiff's] salary which she stated was 'too high' and had made it very difficult for [her] to hire new staff at [the high school]." In an attempt "to get rid of [plaintiff and] to make way for Kelch to be able to hire less experienced, low-pay staff at [the high school]," she "hired Phara Vincent, a much younger, less experienced, non-Haitian female [as a] Guidance Counselor" ("Vincent") to be responsible for the caseload for the 11th and 12th grades and to be "assigned. . . Per Session duties and benefits." *Id.*, ¶¶ 22, 26, 60 (capitalization omitted). Unlike Vincent, however, plaintiff had not been receiving "Per Session duties and benefits" for the preceding five years; instead, he has been "assigned . . . to updating transcripts and planning interviews for [the] 9th through 12th

grades," as well as "to greet[ing] parents of over-the-counter students, and work[ing] with foreign transcripts." *Id.*, ¶¶ 25, 61-62.

Concurrently, defendant Davis was assigning plaintiff "job duties with deadlines which [she] knew or had reason to know, could not be accomplished by anyone in light of [his] daily regular job duties as a Guidance Counselor." *Id.*, ¶ 46. Whenever plaintiff could not meet those "unreasonable deadlines set by Davis," the latter "would charge [him] with insubordination; she would issue disciplinary letters to file or impose any other form of discipline which caught her fancy." *Id.*, ¶¶ 47-48 (capitalization omitted). As a result, plaintiff had "to spend an inordinate amount of time grieving, through his labor union, [Davis's] trumped-up disciplinary charges and issues which [, in turn,] have had a negative impact on [his] work." *Id.*, ¶ 49.

At one point, Kelch and Davis asked plaintiff *not* to associate with Candace Butts ("Butts"), a paraprofessional who was then working at the high school. *Id.*, ¶¶ 52, 55. Plaintiff and Butts were simply friends at work. "Sometimes . . . Butts would come to [plaintiff's] office during [her] lunch break . . . simply to spend her free period lunch break [with him]." *Id.*, ¶ 53. Kelch and Davis, however, resented plaintiff's association with Butts: not only did they allegedly fire Butts, but they also "charged [plaintiff] with insubordination." *Id.*, ¶ 55.[1] According to the complaint (in ¶ 56 thereof), defendants'

[1] By amended complaint, dated March 27, 2017, Butts (represented by the same counsel who is currently representing plaintiff in this action) commenced a federal district court action against the New York City Department of Education alleging a multitude of claims, none of which, however, related to the alleged interruption of her work association with plaintiff. *See Butts v New York City* (footnote continued)

alleged firing of Butts and their disciplining of plaintiff for associating with her "violate[d] [his] right to freedom of association guaranteed under the United States Constitution, as well as [violated his] responsibility to 'assist students with social [and] emotional needs during [the] students' lunch period.'"

Next, plaintiff took up the matter of defendants' aversion of him with the New York City Office of Equal Opportunity ("OEO"). *Id.*, ¶ 31. In February 2022, he filed a complaint against defendants with the OEO on the basis of age, national origin, and criminal arrest (the details of the latter are not disclosed in the complaint). *Id.*, ¶ 31. The status of plaintiff's February 2022 complaint with the OEO is likewise not disclosed in the complaint.

Thereafter, plaintiff received an unsatisfactory job performance rating for the 2021-2022 school year which ended June 2022. *Id.*, ¶ 39. Next, plaintiff's work hours were changed from 9 am to 4 pm to 8 am to 3:45 pm Monday through Friday. *Id.*, ¶¶ 40-41. Two disciplinary letters to file (as of April 24, 2023) were the last straw for plaintiff who had already been experiencing "a lot of anxiety and dread" at work. *Id.*, ¶¶ 38, 45. According to the complaint (in ¶ 34 thereof), "[t]here is hardly any month that goes by without defendants giving [plaintiff] some disciplinary treatment, including letters to file and summons[es] to disciplinary meetings requiring [his] union representation." Plaintiff is still working at the high school as the tenured Guidance Counselor.

Dept. of Educ., 2018 WL 4725263, *4 (ED NY 2018). The overwhelming majority of her amended complaint was dismissed at the pre-answer stage by the federal district court's Memorandum & Order, dated September 18, 2018. *Id.*

On June 6, 2023, plaintiff commenced the instant action asserting four causes of action under two statutory schemes: (1) the New York City Human Rights Law (NYC Administrative Code, § 8-101, et seq.) ("NYCHRL"); and (2) the United States Constitution, together with 28 USC §§ 1981, 1983, and 1985 (collectively, "federal law") (Complaint, ¶ 1). Plaintiff's four causes of action under the NYCHRL and/or federal law (as applicable) sound in: (1) a violation of associational rights and the creation and/or perpetuation of a hostile work environment; (2) national-origin discrimination; (3) gender discrimination; and (4) unlawful retaliation. Complaint, First to Fourth Causes of Action, respectively, ¶¶ 63-76. In lieu of an answer, defendants have served the instant motion to dismiss. On January 31, 2024, the Court reserved decision on the motion.[2]

Discussion

Under the relevant statutory scheme – whether under the NYCHRL or under the federal law – the complaint fails to allege facts providing a minimal support or an inference – aside from its conclusory and vague allegations – that defendants (either individually or collectively): (1) discriminated against plaintiff on the basis of his national origin and/or gender; (2) created and perpetuated for him a hostile work environment that was motivated by the same discriminatory animus; and/or (3) unlawfully retaliated against him because of his February 2022 complaint to the OEO. *See Acala v Mintz Levin Cohn Ferris Glovsky*

[2] Previously, the Court dismissed, on default, plaintiff's prior action, commenced on November 30, 2022, against the Department of Education of City of New York and the Board of Education of City of New York under Index No. 534907/2022. *See* Decision & Order, dated May 24, 2023, entered at NYSCEF Doc No. 20 in the prior action. To date, the effectiveness of the prior order remains undisturbed.

& Popeo, P.C., 222 AD3d 706 (2d Dept 2023); *Ayers v Bloomberg, L.P.*, 203 AD3d 872, 874 (2d Dept 2022); *Polite v Marquis Marriot Hotel*, 195 AD3d 965, 967 (2d Dept 2021); *Garrido v Klainberg*, 2020 WL 1082566, *4 (SD NY 2020); *Gonzalez v City of NY*, 377 F Supp 3d 273, 297 (SD NY 2019); *Askin v Department of Educ. of City of NY*, 110 AD3d 621, 622 (1st Dept 2013); *Idehen v Teachers Coll. Columbia Univ.*, 2014 NY Slip Op 32936(U) (Sup Ct, NY County 2014), *affd for reasons stated below* 140 AD3d 402 (1st Dept 2016); *see generally Bermudez v City of NY*, 783 F Supp 2d 560, 581 (SD NY 2011) (the complaint "is nothing more than the recitation of a false syllogism: (1) I am (insert name of a protected class); (2) something bad happened to me at work; (3) therefore, it happened because I am (insert name of protected class).").

The various "hostile" and "retaliatory" interactions stemmed from plaintiff's personal conflict, not discrimination, with defendants. *See Clarke v New York City Dept. of Educ.*, 2021 WL 123358, *6 (ED NY 2021). "[E]ven excessive criticism [which was not the case here] is generally insufficient to support a claim of a pervasive or severe hostile work environment." *Mohan v City of NY*, 2018 WL 3711821, *14 (SD NY 2018) (internal quotation marks omitted). Next, plaintiff and Vincent are not "similarly situated" for purposes of his discrimination claims. *See Garrido v NYC Dept. of Educ.*, 2018 WL 1664793, *6 (SD NY 2018). Lastly, the allegations underpinning plaintiff's First Amendment/freedom of association claim do not establish a constitutionally protected intimate relationship to state a cause of action. *See Gallagher v Bd. of Educ. of E. Hampton Union Free School Dist.*, 2017 WL 8813134, *8 (ED NY 2017), *report & recommendation*

adopted as modified on other grounds 2018 WL 798882 (ED NY 2018); *Richardson-Holness v Alexander*, 161 F Supp 3d 170, 178 (ED NY 2015).

In light of the foregoing determination, defendants' remaining contentions have been rendered academic.

Conclusion

Accordingly, it is

ORDERED that the branch of defendants' motion which is for dismissal of the complaint for failure to state a claim under CPLR § 3211(a)(7) is *granted*, and the remainder of their motion is denied as academic; and it is further

ORDERED that the complaint is *dismissed in its entirety* as against both defendants without costs or disbursements; and it is further

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

The foregoing constitutes the Decision, Order, and Judgment of this Court.

ENTER,

HON. GINA ABADI
J. S. C.

J.S.C.

KINGS COUNTY CLERK
FILED
2024 FEB -9 A 10:29