

Ramirez v City of New York
2024 NY Slip Op 35487(U)
April 9, 2024
Supreme Court, Bronx County
Docket Number: Index No. 803547/2023E
Judge: Mitchell J. Danziger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33**-----X
KERVELIN RAMIREZ,**Index №. 803547/2023E****-against-****Hon. Mitchell J. Danziger**-----X
THE CITY OF NEW YORK, et. al.,**Justice Supreme Court**

The following papers were read on this motion (Seq. No. 1) to dismiss noticed for July 5, 2023, and submitted on November 30, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 4-15, 17
Notice of Cross-Motion, Affirmation in Opposition/Support and Exhibits	NYSCEF Doc. # 19-21
Affirmation in Opposition and Support	NYSCEF Doc. # 23
Reply Affirmation	NYSCEF Doc. # 24

Motion by defendants, the City of New York and Salvatore Marchese, ("City"), seeking to dismiss plaintiff's complaint pursuant to CPLR §§3211(a)(1), and 3211(a)(7) on the grounds that plaintiff's complaint is contradictory to documentary evidence and fails to state a cause of action and cross-motion by plaintiff for an order pursuant to CPLR §3025(b), granting plaintiff leave to file an amended complaint, are decided as follows:

Plaintiff's complaint alleges following causes of action: 1) sex/gender discrimination in violation of New York State Executive Law §296; 2) sex/gender discrimination hostile work environment in violation of New York State Executive Law §296; 3) retaliation in violation of New York State Executive Law §296; 4) sex/gender discrimination in violation of New York City Administrative Code §8-107; 5) sex/gender discrimination hostile work environment in violation of New York City Administrative Code §8-107; 6) retaliation in violation of New York City Administrative Code §8-107; 7) sex/gender discrimination strict liability in violation of New York City Administrative Code §8-107(13)(b); 8) sex/gender discrimination hostile work environment in violation of New York City Administrative Code §8-107(13)(b); and 9) retaliation strict liability in violation of New York City Administrative Code §8-107(13)(b).

Plaintiff alleges among other things, that she was discriminated against on the basis of her sex and gender. She also alleges she was subject to a hostile work environment and that she was retaliated against. Plaintiff was a police officer with the New York City Police Department prior to her retirement in 2022. Plaintiff's firearm was stolen from her which resulted in plaintiff being placed on performance monitoring prior to her transfer to Training District 11 in December of 2019. In September of 2020, defendant, Marchese, became the Commanding Officer of Transit District 11. Plaintiff alleges that under defendant, Marchese, female police officers earned less than their male counterparts. Plaintiff was given less overtime, even as compared to male officers with less time on the job than her. Plaintiff and the other women in her District were not assigned a motor vehicle at roll call. Women were not permitted to change their schedules or assignments or overtime. The male officers were given their choice of

overtime assignments and the women were forced to take what was left. After plaintiff was out of work with Covid-19 in December of 2021, her assignment was changed by defendant, Marchese contrary to NYPD policy. As a result of this new assignment, plaintiff could not earn overtime. Plaintiff filed a formal complaint with the NYPD Office of Equal Employment Opportunity on January 31, 2022. Plaintiff alleges as a result she was stripped of all overtime and was given posts to work alone in retaliation. Plaintiff alleges she retired as a result of this treatment which amounts to constructive discharge.

The City moves to dismiss plaintiff's complaint and submits that plaintiff's complaint contradicts documentary evidence. The City submits that plaintiff was not denied overtime, but rather was on restricted duty, limited duty and chose not to work her terminal leave time and as a result of those things was not eligible for overtime as a result. The City further contends that plaintiff has failed to state a claim under the New York State Human Rights Law ("SHRL") and the New York City Human Rights Law ("CHRL").

Plaintiff opposes the City's motion and cross-moves to amend her complaint. Plaintiff submits that none of the documentary evidence submitted by the City is dispositive of plaintiff's claims and under the notice pleadings standard, plaintiff has adequately pled her claims for gender discrimination, hostile work environment, constructive discharge, and retaliation. Plaintiff asserts that she did not pled failure to accommodate.

Cross-Motion to Amend the Complaint

Plaintiff seeks leave of the Court to amend her complaint to add additional facts that plead with greater detail, her discrimination claims, which the Court grants. The City argues the amendments are futile. The Court notes that permitting plaintiff to amend her complaint does not prejudice the City. A party may amend his pleading at any time by leave of Court and leave shall be freely given upon terms as may be just. (CPLR §3025(b)).

City's Motion to Dismiss

On a motion to dismiss pursuant to CPLR §3211 (a)(1), the documentary evidence relied on must definitely dispose of Plaintiff's claim (*Bronxville Knolls v. Webster Town Center Partnership*, 221 A.D.2d 248, 248 [1st Dept. 1996]). Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. "If the court does not find their submissions 'documentary' it will have to deny the motion." (See Siegel, Practices Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 20-22.). A self-serving affidavit from a defendant attesting no such work has ever been performed is insufficient documentary evidence (*Tsimerman v. Janoff*, 40 A.D.3d 242, 835 N.Y.S.2d 146, [1st Dept, 2007]). Here, the City has failed to meet this standard. None of the documentary evidence submitted by the City utterly refutes or completely negates plaintiff's allegations nor does it conclusively establish a defense to plaintiff's asserted claims as a matter of law. The existence of these documents which describe policies and procedures do not negate or refute plaintiff's allegations that she did not, for example, receive overtime. These documents do not prove or disprove any action taken as against or in favor of the plaintiff. Further, the evidence as submitted is not authenticated or in admissible form. As such, the portion of the City's motion seeking dismissal of plaintiff's complaint pursuant to CPLR §3211(a)(1), is denied.

When considering a pre-answer motion to dismiss the complaint for failure to state a cause of action, a court must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. (*Chanko v Am. Broadcasting Companies Inc.*, 27 NY3d 46, 52 [2016]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 [2002], quoting, *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54, 760 N.E.2d 1274 [2001]). The procedural posture of a pre-answer motion to dismiss, requires that the court limit its inquiry to the legal sufficiency of plaintiff's claim and, "merely examine the adequacy of the pleadings and not assess the sufficiency of the parties' evidence" (*Davis v. Boenheim*, 24 N.Y. 3d 262 [2014]).

Employment discrimination cases are generally reviewed under a particularly relaxed notice pleading standard. (*Vig v. N.Y. Hairspray Co., L.P.*, 67 A.D.3d 140, 145 [1st Dept. 2009]). 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. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514-15 (2002). In considering a motion to dismiss for failure to state a cause of action, the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference, and strive to determine only whether the facts alleged fit within any cognizable legal theory. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

To state a claim under the SHRL, a plaintiff must state a prima facie cause of action for employment discrimination by pleading that (1) they are members of a protected class; 2) they are qualified to hold the position; 3) they suffered an adverse employment action; and 4) the adverse action occurred under circumstances giving rise to an inference of discrimination. (*Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CJO*, 6 N.Y.3d 265 [2006]). To state a discrimination claim under the CHRL, a plaintiff must allege "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was treated differently or worse than other employees, and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination." (*Harrington v. City of New York*, 157 A.D.3d 582 [1st Dept. 2018]). While the "burden of establishing a prima facie case of discrimination is 'not onerous,'" (*Bennett v. Health Mgt. Sys. Inc.*, 92 A.D.3d 29, 35 [1st Dept. 2011] quoting *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S.248, 23 [1981]), failing to plead discriminatory animus of the defendant is fatal to a discrimination claim under the NYCHRL. (*Toth v. N.Y. City Dept. of Citywide Admin. Servs.*, 119 A.D.3d 431, 431 [1st Dept. 2014]). The plaintiff must, at a minimum, demonstrate that the circumstances surrounding the adverse employment action give rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004). Under the CHRL, the plaintiff must show that "he was treated differently from others in a way that was more than trivial, insubstantial, or petty." *Armstrong v. Metro. Trans. Auth.*, 2014 U.S. Dist. LEXIS 121159 (S.D.N.Y. Aug. 28, 2014). Under the SHRL and

CHRL, plaintiff can adduce facts sufficient to plead discriminatory animus by showing that similarly situated comparators were treated differently. (*Whitfield-Ortiz v. Department of Educ. of City of New York*, 116 A.D.3d 580 [1st Dept. 2014]). As of August 12, 2019, for conduct that occurred as of the amendment, claims under the SHRL and the CHRL are to be analyzed under the same standard. In terms of an adverse employment action, plaintiff must plead events that were more than petty slights and trivial inconveniences. (*Alshami v. City of University of New York*, 162 N.Y.S.3d 720 [1st Dept. 2022])

Here, plaintiff pleads that she is a woman (a protected class) and she performed her job in a satisfactory or above satisfactory manner. Plaintiff pleads that she earned as much as \$18,477 less than similarly situated male comparators in 2020. She was denied employment benefits that were given to male officers. She was given less desirable assignments and denied her choice of overtime. In addition, plaintiff pleads that women officers on limited duty were treated differently than their male counterparts in the same situation. In applying the liberal pleading standards, the Court finds that plaintiff has sufficiently plead her discrimination claims. As such, the portion of the City's motion seeking dismissal of plaintiff's sex/gender discrimination claims is denied.

To support a claim for a hostile work environment under the CHRL, a plaintiff must show that he or she was treated less well than other employees because of his protected status and is subject to more than "petty slights and trivial inconveniences." *Chin v. New York City Hous. Auth.*, 106 A.D.3d 443 [1st Dept. 2013]). In applying the liberal pleading standard, plaintiff has sufficiently pleaded her hostile work environment claims. Here, plaintiff has alleged that she was denied overtime, was forced off her squad, was improperly placed on restricted duty, forced to work "punishment posts" without a partner, and was given less days off. Whether a plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 [2005]). The portion of the City's motion seeking to dismiss plaintiff's hostile work environment claims is denied.

The Court finds plaintiff has sufficiently pleaded a claim for constructive discharge. A constructive discharge claim is when an employee alleges that the employer, rather than directly discharging the individual, has intentionally created an intolerable work atmosphere that forces the employee to quit involuntarily. (*Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 [2d Cir. 2000]). Recently, in *Bond v. New York City Health & Hosps. Corp.*, 215 A.D.3d 469 (1st Dept. 2023), the First Department found that plaintiff's allegations of a hostile work environment and reduced work assignments raised an issue of fact as to whether defendant "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." (quoting, *Polidori v. Societe Generale Groupe*, 39 A.D.3d 404 [1st Dept. 2007]). Here, as set forth above, in light of the liberal pleading standards afforded these claims and viewing plaintiff's pleadings in the light most favorable to plaintiff, plaintiff has sufficiently pleaded that her retirement may have constituted a constructive discharge under the facts as alleged.

Lastly, a plaintiff alleging retaliation in violation of the SHRL must show that 1) he or she engaged in a protected activity by opposing conduct prohibited thereunder; 2) the defendant was aware of that activity; 3) he or

she suffered an adverse action based upon his or her activity; and 4) there was a causal connection between the protected activity and the adverse action. (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 [2004]). To make out a claim for retaliation under the CHRL, a plaintiff must show that 1) he or she engaged in a protected activity as that term is defined under the CHRL, 2) his or her employer was aware that he or she participated in such activity; 3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity; and 4) there is a causal connection between the protected activity and the alleged retaliatory conduct. (*Sanderson-Burgess v. City of New York*, 173 A.D.3d 123 [2nd Dept. 2019]). Based upon plaintiff's pleadings, she alleges that after she made a formal complaint, she was stripped of overtime, assigned punishment posts, and was stripped of a partner. As such, plaintiff has sufficiently given the defendants "fair notice" of the nature of her claims and their grounds, as "fair notice is all that is required to survive at the pleadings stage." (*Petit v. Department of Educ. of the City of New York*, 177 A.D.3d 402 [1st Dept. 2019]).

Based on the foregoing, the City's motion denied and plaintiff's cross-motion to amend her pleadings is granted. The plaintiff is permitted to file and serve the proposed amended complaint annexed as Ex. A to her cross-motion within 30 days of this order. Plaintiff shall serve a copy of this order with notice of entry upon the defendants within 30 days of its filing on NYSCEF.

This constitutes the decision and order of the Court.

Dated:

4/9/21



Hon. _____

Mitchell J. Danziger, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |