

**Iorio v Board of Educ. of the Brentwood Union Free
Sch. Dist.**

2024 NY Slip Op 35658(U)

December 9, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 615009/2019

Judge: Vincent J. Martorana

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SHORT FORM ORDER

INDEX No. 615009/2019CAL. No. 202301875COSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**PRESENT:**Hon. VINCENT J. MARTORANA
Justice of the Supreme CourtMOTION DATE 5/23/24ADJ. DATE 7/11/24

Mot. Seq. # 005 MotD

Mot. Seq. # 006 MotD

-----X
RALPH IORIO,

Plaintiff,

- against -

THE BOARD OF EDUCATION OF THE
BRENTWOOD UNION FREE SCHOOL
DISTRICT and MICHAEL DORIA,Defendants.
-----XTHE CHANDLER LAW FIRM, PLLC
Attorney for Plaintiff
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Attorney for Defendant Michael Doria
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Farmingdale, NY 11735

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant Brentwood Union Free School District dated April 16, 2024, and by defendant Michael Doria, dated April 17, 2024; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated May 24, 2024; Replying Affidavits and supporting papers by defendant Brentwood Union Free School District dated July 8, 2024; and by Michael Doria, dated July 10, 2024; Other Memoranda of Law; it is

ORDERED that these motions are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Board of Education of the Brentwood Union Free School District for summary judgment dismissing the complaint against it is granted to the extent indicated herein and is otherwise denied; and it is

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ORDERED that the motion by defendant Michael Doria seeking summary judgment dismissing the complaint against him is granted to the extent indicated herein and is otherwise denied.

Plaintiff Ralph Iorio commenced this action against his employer, defendant Brentwood Union Free School District, seeking damages for assault and battery, harassment, and the creation of a hostile work in violation of Executive Law § 296 ("the New York Human Rights law"). As ascertained from the pleadings, plaintiff alleges, inter alia, that on August 18, 2018, while working as a custodian assigned to the School District's Southwest Elementary School, he was attacked by his supervisor, head custodian, defendant Michael Doria. According to plaintiff, Doria took a fire extinguisher and sprayed him in the face while he was waxing the floor of the school's cafeteria, and that during the ensuing argument Doria called him names, including "a piece of shit [and] a spic." Plaintiff further alleged that prior to this incident, Doria singled him out for disparate treatment, assigned him extra or repetitive tasks, utilized racially based slurs to describe him, and boasted that a white canvas face mask hanging in the custodial office was a Ku Klu Klan face mask. Defendants joined issue, denying plaintiff's claims, and the School District asserted an indemnification cross claim against Doria.

By order dated March 24, 2021, the court (Ford., J.) denied pre-answer motions by defendants seeking dismissal of the complaint against them, finding, inter alia, that plaintiff's claims were not time barred, and that dismissal of the causes of action for assault and hostile work environment, including a request for dismissal based on the exclusivity provisions of the Workers' Compensation Law, prior to any discovery, was premature. Following a protracted period of discovery, plaintiff filed the note of issue and readiness on December 1, 2023.

The School District now moves for summary judgment dismissing the complaint against it on the grounds plaintiff's claims for assault, common law harassment, hostile work environment, and negligent hiring and retention are barred by the Workers' Compensation Law. The School District further argues that plaintiff's claim for negligent hiring and retention must fail, because it had no notice of Doria's propensity for the alleged conduct, and that it cannot be held vicariously liable for such conduct, as it was not done in furtherance of the School District's business or the scope of Doria's work. Doria also moves for summary judgment dismissing the complaint against him. Doria argues that he did not engage in conduct that subjected plaintiff to a hostile working environment, that the August 8, 2018 fire extinguisher incident was horseplay among several custodians that was not racially motivated, and that plaintiff's claims for damages related to his alleged injuries are barred by the Workers' Compensation Law. In support of their motions, defendants submit, inter alia, copies of the pleadings, transcripts of deposition testimony by the parties and nonparty witnesses, and an affidavit by school custodian, Edward Yeznach.

Plaintiff opposes both motions, arguing that the claims premised on Doria's conduct, including the August 8, 2018 assault with a fire extinguisher, are not barred by the Workers' Compensation Law because his conduct was intentional, personally motivated, outside the scope of his employment, and not in furtherance of the School District's business. Plaintiff also contends that the School District may be held liable for the creation of the hostile work environment to which he was subjected because they

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possessed actual notice of Doria's propensity to engage in the hostile and discriminatory conduct, which fostered the creation of such an environment.

At his examination before trial, plaintiff testified that on the day of incident he was working in the school's kitchen when Doria attacked him by spraying liquid from a fire extinguisher in his face. Plaintiff testified that during the attack Doria stated, "Its your fault, you're a spic," and "It's a joke, you spic." Plaintiff testified that when he objected and attempted to leave, Doria came after him requesting that he wait and speak with him before filing a complaint about the incident. Plaintiff testified that he was the only one Doria sprayed in the face, and that based on Doria's demeanor he believed that Doria's conduct was deliberate and motivated by racism. Plaintiff testified that he called the telephone number of his union representative, Scott Dimperio, and left a message complaining about the incident, and that he walked over to the office of the facilities manager, Miguel Cruz, to make a complaint about the incident. Plaintiff testified that he could not recall whether he told Cruz at the time he was making the complaint that Doria called him a "spic," or that he believed Doria's conduct was racially motivated. However, plaintiff testified that he had a meeting with Dimperio and Cruz shortly before the fire extinguisher incident at which he told them about Doria's continuous disrespectful and discriminatory behavior. Plaintiff testified that he believed Doria's conduct became even worse after his meeting with Cruz and Dimperio, and that the incident involving the fire extinguisher was retaliatory. Plaintiff testified that he believed that Doria was racist because, unlike the white custodians with whom he worked, Doria caused him and the other minority custodians under his supervision to perform excess and unnecessary work, singled them out for intensive inspections of their work, and cursed at them and spoke to them disrespectfully. He further testified that Doria's behavior was so overwhelming that he believed two of the minority custodians, namely Brittany Antoine and Chris St. Pierre, each filed complaints about Doria's combative and discriminatory behavior, and that Doria was openly displaying a KKK hood on the wall of the custodial office.

At his examination before trial, Scott Dimperio testified that he was plaintiff's union representative at the time of the incident. Dimperio testified that he received complaints by plaintiff and other minority custodians, including Brittany Antoine and Kenya Ramos, that Doria discriminated, harassed, and intimidated them. However, he testified that he believed that the complaints were not actions that could be grieved by the union, and that he advised those custodians to file complaints with the School District's Human Resource Department. Dimperio testified that prior to the fire extinguisher incident, he sent an email, dated May 17, 2018, to the School District's facilities' director, Jay Brown, and other School District employees, including the superintendent and deputy superintendent, detailing his receipt of complaints made about Doria's alleged pattern of discriminatory conduct against the minority employees under his supervision. Reading the contents of the email during his deposition, Dimperio testified that the email stated, among other things, that the custodians informed him that Doria left most of the day-shift work for the night time minority custodians to do; that Doria caused teachers friendly to him to make complaints about the night time custodians' work; that Doria's conduct was consistent with a coordinated effort to have the minority custodians, including plaintiff, moved to another school building, and that Doria's behavior since the time of their initial meeting with him and plaintiff appeared retaliatory. Dimperio testified that neither Brown nor any other of the School District's employees included as recipients of the email responded to him.

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During his examination before trial, Jay Brown testified that after a meeting with Scott Dimperio in May 2018 where Dimperio reported plaintiff's complaints against Doria, he did not conduct any further investigations into the allegations because he believed plaintiff was voluntarily taking on extra work and was not being mistreated by Doria. Brown testified that he ignored Dimperio's recommendation that Doria be punished and transferred, and that he did believe there was any discriminatory pattern to Doria's behavior. However, Brown testified that following the August 2018 incident, he disciplined Doria by filing a personnel incident report against him and suspending him without pay. Brown further testified that Doria was subsequently disciplined for an incident involving another minority custodian, Christopher St. Pierre, where it was reported that Doria aggressively pursued St. Pierre to his vehicle and threatened him. According to Brown, Doria was demoted, transferred to another school building, and given a "last chance" warning. Brown testified that despite multiple recommendations that Doria be fired, School District personnel above him decided that Doria should not be terminated.

At his examination before trial, Miguel Cruz, the School District's director of facilities, testified that although he was aware of the complaints against Doria, including the concerns contained in Dimperio's email, he never took any action because he doubted the validity of the claims, as none of the minority custodians ever came to him personally or filed official complaints with the Human Resource Department. Cruz testified that he believed Doria's explanation that the August 2018 incident where he sprayed plaintiff in the face with a fire extinguisher was employee horseplay, that he was disappointed plaintiff would not accept Doria's apology, and that he authorized plaintiff's transfer to another building only because plaintiff expressed his discomfort with continuing to work with Doria. However, Cruz testified that he recommended that Doria be terminated after his altercation with St. Pierre, because of the accumulated complaints and incidents involving claims of mistreatment and discrimination.

During her examination before trial, Brittany Antonie testified that she worked as a night-time custodian under Doria's supervision before she was transferred to another building due to complaints she filed against him. Antonie testified she believed that Doria mistreated her because of her gender and her race, that he openly singled out the minority custodians out for extra work, and that his discriminatory and abusive behavior against her was so bad that she tried to block out the memories of his conduct. Antonie testified that her complaints about Doria were initially ignored, that she came to believe complaining was pointless because Doria was favored by the school staff and management, and that she often was treated as the aggressor when she attempted to report his conduct.

At his examination before trial, Doria testified that he was engaged in horseplay when he sprayed plaintiff in the face with the fire extinguisher, that he and the custodians had a similar water balloon fight the year before, and that he never called plaintiff a "spic" or used any other racial slur to describe any of the minority custodians. Doria testified that plaintiff never complained of unfair treatment, that plaintiff inexplicably performed the additional tasks without asking for help, and that the other allegations of discrimination and racist behavior by him mentioned in the Dimperio email were false. Doria testified that he was disciplined, suspended, and transferred to another school building despite his denial of the claims against him.

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The affidavit by nonparty witness Edward Yeznach states, in relevant part, that he witnessed the August 2018 incident in question between plaintiff and Doria, that Doria was joking as he sprayed plaintiff and other custodial staff during the same incident, and that he never heard Doria address any racial slur toward plaintiff or any other member of the custodial staff.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the court grants the branch of defendants' motions seeking dismissal of plaintiff's claim based on negligent hiring and retention, as it well established that negligence claims by an employee against his or her coemployee or employer are barred by the exclusivity provisions of the Workers' Compensation Law (*see Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 795 NYS2d 16 [1st Dept 2005]; *Conde v Yeshiva Univ.*, 16 AD3d 185, 792 NYS2d 387 [1st Dept 2005]).

Inasmuch as plaintiff's assault and battery claims against the School District are predicated on the theory of respondeat superior, the School District established, prima facie, that such claims are barred by the exclusivity provisions of the Workers' Compensation Law (*see Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543, 429 NYS2d 622 [1980]; *Jones v State*, 96 AD2d 105, 105, 468 NYS2d 223 [4th Dept 1983]). Notably, "where one employee assaults another and the act was neither instigated nor authorized by the employer, the employer will not be found liable in an action for damages under respondeat superior [because] the offending employee's conduct, although intended by him, may be found accidental as to the employer and therefore compensable under workers' compensation with the result that the injured employee's common-law action is barred by the exclusivity provision" (*Jones v State*, 96 AD2d 105, 105, 468 NYS2d 223; *see Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543, 429 NYS2d 622). Instead, to recover against his or her employer for his injuries under the intentional tort exception to the Workers' Compensation Law, the employee must establish that the assault by the coemployee was directed by the employer or committed at the employer's instigation (*see Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 795 NYS2d 16 [1st Dept 2005]; *Randall v Tod-Nik Audiology, Inc.*, 270 AD2d 38, 704 NYS2d 228 [1st Dept 2000]). Therefore, where, as in this case, the School District submitted undisputed evidence that it neither directed or instigated Doria's alleged assault of plaintiff, and plaintiff failed to raise a triable issue in response, the branch of its motion seeking dismissal of those claims is granted.

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Conversely, Doria failed to establish his prima facie entitlement to summary judgment dismissing the assault and battery claims against him, as he failed to eliminate significant triable issue from the case as to whether he intentionally sprayed plaintiff in the face with the fire extinguisher during the course of his employment and, if so, whether his conduct was so severe and excessive that it cannot reasonably be regarded as mere horseplay and is barred by the Workers Compensation Law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Although employee claims against an employer or coemployee for injuries sustained during horseplay or frivolous activities between coemployees during lulls in work activities are barred by the Workers Compensation Law (*see Maines v Cronomer Valley Fire Dept., Inc.*, 50 NY2d 535, 429 NYS2d 622 [1980]; *Christey v Gelyon*, 88 AD2d 769, 451 NYS2d 947 [4th Dept 1982]), claims for injuries sustained when the coemployee's acts are outside the scope of his or her employment, such as where the injuries occur because the alleged horseplay was either severe or excessive, will be denied the protection of the exclusivity provisions of the statute (*see Tarasiuk v Levoritz*, 216 AD3d 1031, 189 NYS3d 681 [2d Dept 2023]; *Shumway v Kelley*, 60 AD3d 1457, 876 NYS2d 299 [4th Dept 2009]; *Cloutier v Longo*, 288 AD2d 942, 732 NYS2d 813 [4th Dept 2001]).

Turning to the branch of defendants' motions seeking dismissal of the hostile work environment claim, pursuant to Executive Law § 296, "[a] hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Morse v Cowtan & Tout, Inc.*, 41 AD3d 563, 564, 838 NYS2d 162 [2d Dept 2007]). "The allegedly abusive conduct must not only have altered the conditions of employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an objectively hostile or abusive environment—one that a reasonable person would find to be so" (*Nettles v LSG Sky Chefs*, 94 AD3d 726, 730, 941 NYS2d 643 [2d Dept 2012], quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310, 786 NYS2d 382 [2004]). To determine whether a hostile work environment exists, a court must consider all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance (*Reichman v City of New York*, 179 AD3d 1115, 1118, 117 NYS3d 280 [2d Dept 2020], *lv to appeal denied*, 36 NY3d 904, 160 NE3d 1280 [2021]). "An employer may be held accountable for an employee's discriminatory acts where 'the employer became a party to it by encouraging, condoning or approving it.' The acquiescence or failure to take appropriate action in response to an awareness of discriminatory conduct may constitute condonation on behalf of the employer (*Grand Union Co. v Mercado*, 263 AD2d 923, 923, 694 NYS2d 524 [3d Dept 1999], quoting *Matter of Totem Taxi v State Human Rights Appeal Bd.*, 65 NY2d 300, 491 NYS2d 293 [1985]).

Here, a review of defendants' own submissions, including the deposition testimony by the party and nonparty witnesses discussed above, raise significant triable issues as to whether Doria intentionally engaged in severe and pervasive discriminatory conduct toward plaintiff and other minority coemployees during the course of his employment and, if so, whether the School District condoned such conduct when it received notice of Doria's conduct and repeatedly failed to take appropriate action in response (*see Matter of Totem Taxi v State Human Rights Appeal Bd.*, 65 NY2d 300, 491 NYS2d 293 [1985];

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Grand Union Co. v Mercado, 263 AD2d 923, 923, 694 NYS2d 524 [3d Dept 1999]). Notably, plaintiff and nonparty witness Antoine both testified that Doria engaged in discriminatory intimidation, ridicule, and insult that was so severe that they requested transfers to other school buildings in order to continue their employment with the School District. Both witnesses testified that Doria's abusive conduct was persistent, and was objectively and subjectively threatening and humiliating. According to plaintiff and Antoine, Doria's behavior was so severe and pervasive that all of the minority custodians under his supervision made repeated complaints against him, including a complaint that finally resulted in Doria's demotion and transfer to another school building. Indeed, Dimperio testified that his interviews with the minority custodians and school staff alike led him to believe that Doria was engaged in a pattern of discrimination designed to force the minority custodians from the school buildings under his supervision. Additionally, Dimperio and Cruz both testified that School District senior personnel, including the deputy superintendent and senior superintendent, were made aware of Doria's conduct, that they received multiple recommendations that Doria be removed from employment because of the frequency and severity of his conduct, and that those recommendations were inexplicably ignored. Therefore, the branch of defendants' motions seeking summary judgment dismissing the discrimination and hostile work environment claim against them are denied.

Dated: December 9, 2024



VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION