

Davis v City of New York
2024 NY Slip Op 35723(U)
October 1, 2024
Supreme Court, Bronx County
Docket Number: Index No. 813520/2023E
Judge: Mitchell J. Danziger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33**

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CHERRELLE DAVIS,

Index №. 813520/2023E

-against-

Hon. Mitchell J. Danziger

CITY OF NEW YORK,

Justice Supreme Court

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The following papers were read on this motion (Seq. No. 3) to dismiss noticed for May 22, 2024 and submitted on June 27, 2024

Notice of Motion - Affirmation and Exhibits. Memo of Law	NYSCEF Doc. # 25-28
Notice of Cross-Motion, Memo in Opposition/Support and Exhibits	NYSCEF Doc. # 31-34
Memo of Law and Affidavit in Reply to Motion and Exhibits	NYSCEF Doc. # 36-41
Memo of Law in Reply to Cross-Motion and Exhibits	NYSCEF Doc. # 42-44

Motion by defendant, the City of New York, ("City"), seeking to dismiss plaintiff's complaint pursuant to CPLR §§3211(a)(1), and 3211(a)(7) 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) disability discrimination in violation of New York City Administrative Code §8-107; 2) disability discrimination hostile work environment in violation of New York City Administrative Code §8-107; 3) disability discrimination failure to engage in cooperative dialogue in violation of New York City Administrative Code §8-107; 4) retaliation in violation of New York City Administrative Code §8-107; 5) disability discrimination strict liability in violation of New York City Administrative Code §8-107(13)(b); 6) retaliation strict liability in violation of New York City Administrative Code §8-107(13)(b); and 7) violation of New York City Administrative Code §8-502(a).

Plaintiff alleges among other things, that she was discriminated against on the basis of disability. She alleges she was subject to a hostile work environment and retaliated against. According to her complaint, plaintiff started as a corrections officer with the New York City Department of Corrections ("DOC") on January 17, 2008. She was diagnosed with Covid-19 on March 17, 2020 while working in the Manhattan Court Section after making contact with a female inmate who had Covid-19. Plaintiff developed a lung condition from Covid-19 which required hospitalization and the use of an asthma pump post-discharge. She became disabled from this complication and other ailments. In June of 2020, plaintiff met with DOC doctors at the Headquarter Medical Division. She remained out of work for some time after this meeting due to diminished lung capacity. In early 2021, plaintiff went back to work on Medically Modified 3 (MM3). She was not to have prisoner contact. However, she alleges her supervisors insisted she have prisoner contact and ignored her accommodation. She required an oxygen tank. This angered her supervisors. As a result, plaintiff alleges she was not accommodated with the exception of 90 days and was forced to have prisoner contact. DOC refused to participate in

cooperative dialogue. She was placed out of work on sick leave due to her oxygen tank. In July of 2022, she had no choice but to retire from DOC.

The City moves to dismiss plaintiff's complaint and submits that plaintiff's complaint fails to state a claim of disability discrimination under City law, fails to state a claim for failure to accommodate or failure to engage in cooperative dialogue, for hostile work environment under City law, for retaliation under City law, for constructive discharge, and fails to state a claim for vicarious liability for unlawful discriminatory conduct.

Plaintiff opposes the City's motion and cross-moves to amend her complaint. Plaintiff submits that under the notice pleadings standard, plaintiff has adequately pled her claims for disability discrimination, hostile work environment, failure to accommodate, and retaliation.

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

As an initial matter, plaintiff does not address the portion of the City's motion seeking to dismiss her claim pursuant to New York City Human Rights Law §8-107(B). As such, to the extent that plaintiff's Complaint and/or Amended Complaint states such a claim, said claim is dismissed.

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. The City attaches plaintiff's attendance records to this motion which do not utterly refute or completely negate plaintiff's allegations nor does it conclusively establish a defense to plaintiff's asserted claims as a matter of law. 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 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).

"Section 8-107(1)(a) of the NYCHRL makes it an unlawful discriminatory practice for an employer to discriminate in terms of conditions of employment or discharge an employee because of disability." (*Watson v. Emblem Health Servs.*, 158 A.D.3d 179 [1st Dept. 2018]). 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 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]). 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, contrary to defendant's assertions, the amended complaint adequately states a claim for disability discrimination under the CHRL. Plaintiff alleges she is disabled and she excelled at her job as a corrections

officer. In her amended complaint, plaintiff pleads that she was treated in a less favorable way as a result of her disability and gives specific comparator information. Plaintiff pleads that she was denied overtime due to her disability and was denied promotions and transfers. In applying the very 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 and caregiver discrimination claims is denied.

To support a claim for a hostile work environment under the CHRL, a plaintiff must show that she was treated less well than other employees because of her 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. Plaintiff, in her amended complaint, has alleged Here, plaintiff has alleged that she has been denied accommodations, overtime, promotion and was forced to perform work that could cause her harm. 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.

To state a claim for constructive discharge, a plaintiff must allege facts that show that defendant "deliberately created working conditions so intolerable, difficult, or unpleasant that a reasonable person would have felt compelled to resign." (*Polidori v. Societe Generale Groupe*, 39 A.D.3d 404 [1st Dept. 2007]). Plaintiff alleged that despite her repeated attempts requesting that her accommodation be honored, she was forced to work in conditions that were dangerous for her disability. She was forced to have prisoner contact, which she alleges was the way that she got sick to begin with. As a result, under the liberal notice pleading standards, plaintiff has sufficiently alleged facts that support her allegation. The portion of the City's motion seeking to dismiss plaintiff's constructive discharge claim is denied.

To state a claim for failure to accommodate under the CHRL, a plaintiff must plead that: 1) plaintiff has a disability under the relevant statute; 2) the employer had notice of plaintiff's disability; 3) with reasonable accommodations, plaintiff could have performed the essential functions of her job; and 4) the employer refused to make such accommodations. (*Dellegrazie v. City of New York*, No. 153116/2019, 2020 N.Y. Misc. LEXIS 15994 [Sup. Ct. N.Y. Cty. Nov. 23, 2020] citing, *Romanello v. Shiseido Cosmetics Am. Ltd.*, 2002 US Dist. LEXIS 18538 [S.D.N.Y. Sep. 30, 2002]). A disability is defined by section 8-102(16)(a) of the CHRL as "any physical, medical, mental, or psychological impairment." Section 8-107(15)(a) of the CHRL provides that an employer has an obligation to "make a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job...provided that the disability is known or should have been known by the [employer]." Plaintiff has sufficiently pleaded her failure to accommodate claim in that she pleaded she has a disability, her employer was on notice of said disability, she requested an accommodation, could have conducted her job with said accommodation, she was refused her accommodation for all but 90 days and her

employer failed to engage in cooperative dialogue. The portion of the City's motion seeking to dismiss plaintiff's failure to accommodate/failure to engage in cooperative dialogue is denied.

Lastly, to establish a claim for retaliation under the CHRL, a plaintiff must show that 1) she engages in a protective activity as that term is defined under the CHRL; 2) her employer was aware that she participated in such activity; 3) her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protective 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 1233 [2d Dept. 2019]). The request to accommodate is a protected activity (see Local Laws of the City of New York for the Year 2019- section 8-107 (7)(v)). Plaintiff alleges she made several requests for her accommodation to be honored. Each time she was forced to work under conditions that were unsafe for her disability. Further, plaintiff alleges she was denied overtime opportunities and promotions as a result. The portion of the City's motion seeking to dismiss plaintiff's retaliation claim is denied.

Based on the foregoing, the City's motion is granted in part and denied in part and plaintiff's cross-motion to amend her pleadings is granted. The plaintiff is permitted to file and serve the 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.

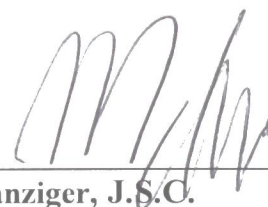
This constitutes the decision and order of the Court.

Dated:

10/1/24

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 |