New York Law Journal

Ajoku v. N.Y.S. Office of Temporary Disability Assistance

NYCHRL, NYSHRL Claims Severed and Dismissed, Hostile Work Environment Claim Remains

March, 30, 2020 | New York Law Journal

Docket

- **Practice Area:** Employment Litigation (https://www.law.com/topics/employment-litigation/)
- **Date filed:** 2020-02-20
- **Court:** Supreme Court, New York
- **Attorneys: for plaintiff:** ; **for defendant:**
- **Judge:** Justice Lynn Kotler
- **Case Number:** 159104/18

Case Digest Summary

Ex-OTDA employee Ajoku sued to recover for alleged discrimination, retaliation, and hostile work environment, claiming he suffered adverse acts due to his Nigerian national origin and his complaints regarding what he believed were improper governmental actions, including theft of time, among other things. Defendants moved to dismiss arguing the City Human Rights Law claims against individual defendants required dismissal as they possessed sovereign immunity, and Ajoku failed to state causes of action for discrimination, retaliation and hostile work environment under the State Human Rights Law. The court agreed that the NYCHRL claims must be dismissed as the complaint was devoid of any acts outside the individual defendant's official roles of hiring, supervising and terminating Ajoku. Also, while there were no facts alleged establishing OTDA or Contento condoned any discriminatory behavior based on Ajoku's Nigerian origin, dismissing the NYSHRL claims against them, it declined to dismiss Ajoku's hostile work environment claims as he alleged he was subjected to a sufficiently severe hostile work environment based on his Nigerian national origin.

Full Case Digest Text

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).__
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).__
Replying Affidavits NYSCEF DOC No(s).__

Plaintiff, a former employee of the New York State Office of Temporary Disability Assistance ("OTDA"), brings this action to recover for alleged unlawful discrimination, retaliation and a hostile work environment. Plaintiff alleges in his amended complaint that he "suffered adverse acts due to his Nigerian national origin, his complaints about what he reasonably believed to be improper governmental actions, such as theft of

time and the submission of falsified timesheets by his colleagues, his complaints of national origin discrimination and as acting as a supportive witness in an internal discrimination investigation." Defendants now move to dismiss pursuant to CPLR §3211[a][2] and [7]. Defendants argue: [1] plaintiff's New York City Human Rights Law ("NYCHRL") claims against the Individual Defendants should be dismissed because they possess sovereign immunity; [2] the New York Civil Service Law §75-b claim should have been brought in the Court of Claims; [3] Plaintiff has failed to state causes of action for discrimination, retaliation and hostile work environment under the New York State Human Rights Law ("NYSHRL"); and [4] Plaintiff has failed to state causes of action for aiding and abetting discrimination, retaliation and hostile work environment under the NYSHRL. Plaintiff opposes the motion. The court's decision follows.

The facts alleged in the complaint are as follows. Plaintiff is a black male of Nigerian national origin who immigrated to the United States approximately twenty-five years ago. Plaintiff asserts that he speaks with a distinct and recognizable Nigerian accent. Plaintiff began working for OTDA in April 2016. He was hired as a consultant and assigned to the Physical Standards and Safety or Physical Plants Unit ("PPU") on a provisional basis. In November 2017, plaintiff was permanently appointed to the consultant position after scoring 100 on the Civil Service List. Plaintiff was then placed on probation.

Plaintiff explains that as a consultant, he was "responsible for overseeing and monitoring the development of new homeless facilities, overall review of construction plans for new facilities and inspecting existing facilities for compliance to applicable laws and regulations relating to physical plant and safety issues." Plaintiff received satisfactory performance evaluations between April 2016 and April 2017.

Plaintiff alleges that defendant Thomas Dudley, his supervisor when he was first hired, "play[ed] favorites on the basis of national origin among the staff that he supervised and groom[ed] one particular employee, Clement Armogan, a Guyanese male…for the position." Specifically, Armogan was allowed to "attend interviews for prospective recruits, attend meetings with officials from other State agencies, and train new employees" unlike any other consultant. Plaintiff further claims that Armogan also had his reports extensively edited by Dudley.

As for plaintiff, he asserts that Dudley falsely told other OTDA employees that plaintiff would not "share the spotlight" and "was only 'good' in fire safety." Dudley and defendant Cora Humphreys allegedly commented "[a]t different points in time" that "there were too many Nigerians on the civil service list and too many Nigerians working at OTDA." He further notes an instance where Dudley and Humphreys they refused to pick a Nigerian from the consultant civil service list and left the position unfilled.

Plaintiff complained to a PPU manager named Mr. Soto about Dudley's behavior in November 2016 and February 2017. His complaints went unaddressed. In July 2017, Dudley gave plaintiff a "negative and skewed performance evaluation". Soto intervened but Dudley "merely removed some words [and] left in the unfounded criticisms about terminology." After a further objection from plaintiff, Dudley "jumped out of his chair and angrily told plaintiff…that upon [] Soto's retirement, 'some of you will not be here.'" Plaintiff claims that Dudley's "angry outburst" caused him to fear for his safety.

Thereafter, on July 10, 2017, plaintiff complained to defendant Patricia Walter-Johnson about Dudley's behavior and the evaluation. On July 11, 2017, plaintiff attended a meeting with Soto and union representative Patrick Villarruel, where Soto told plaintiff he would become plaintiff's new supervisor. Soto also claimed to plaintiff that he had received complaints from other mangers about plaintiff's work. Plaintiff denies ever receiving other complaints.

Thereafter, plaintiff complained in writing to both Contento and OTDA"s Bureau of Management Services about Dudley. He claimed, inter alia, that Dudley allowed two consultants that he supervised and favored "to pick which sites they wanted to inspect and came to work late and left early, thereby stealing time by submitting falsified timesheets."

Plaintiff claims that after the complaint, Dudley tried to frame plaintiff for wrongdoing in connection with a report he prepared. Plaintiff then submitting a complaint in connection with this issue to Human Resources. Shortly afterwards, Soto retired and Walter-Johnson became plaintiff's supervisor.

In or around September 2017, plaintiff participated in a separate investigation into a discrimination complaint filed by consultant Danielle King against Dudley. Specifically, plaintiff was interviewed by an Affirmative Action Administrator named Georgianna Martin wherein he told Martin that "on several

occasions he heard Dudley say that women were too temperamental, and he did not want women working in their unit." Dudley then allegedly overheard plaintiff state that "he told the truth when asked about Dudley's comments..."

In connection with plaintiff's July complaint, Dudley was investigated for "misconduct, time theft and falsified timesheets." Dudley was allegedly suspended for a week, as well as the two consultants. Contento and defendant Donna Frazier were allegedly "angered that plaintiff had implicated PPU employees in his July 11, 2017 complaint of theft time and unlawful activity." As a result, plaintiff claims that he was retaliated against. Specifically, he claims that Humphreys was improperly appointed to the position of Specials Assistant over plaintiff since plaintiff was a permanent employee and ranked higher on the Civil Service list.

Plaintiff claims that on October 30, 2017, he complained to Frazier that Humphreys' promotion was retaliatory and discriminatory since no announcement had been made. He also argued that Humphreys was not qualified for the position because she had not been a permanent employee for one year. Frazier allegedly responded by stating that no other OTDA consultant was qualified to be a supervisor. Frazier further stated:

Well it doesn't matter, Cheryl [CONTENTO] is aware of that, and Cora [HUMPHREYS] is who we want. I don't want anybody that's telling on other people's time in here, and the Deputy Commissioner doesn't want that either.

Thereafter, plaintiff claims that Frazier nitpicked his reports. He further alleges that Humphreys, Contento and Dudley "designed to frame plaintiff as incompetent and set him up for disciplinary action." They allegedly filed false reports about re-inspections of property plaintiff had previously inspected, changed plaintiff's performance evaluation, levied "incessant and unwarranted criticisms" and threats towards plaintiff and ultimately terminated him on September 14, 2018.

Meanwhile, plaintiff filed a complaint with the New York State Department of Labor that his superiors, including Humphreys and Frazier, were trying to frame him as incompetent. Humphreys then made false complaints that plaintiff was insubordinate. In April 2018, plaintiff was given an unsatisfactory performance evaluation by Humphreys. Plaintiff refused to sign same, claiming the Dudley should not have participated in the evaluation.

In May 2018, plaintiff obtained a doctor's note diagnosing him with tension headaches and anxiety. He claims that Humphreys' and Dudley's harassment caused him to suffer these and other "medical ailments". Plaintiff made a request for a reasonable accommodation in the form of removal from Humphreys' supervision. However, he was only granted two extra fifteen minute breaks and a headset to reduce noise. Humphreys further accused plaintiff of being late when he wasn't, of being absent without leave despite submitting the appropriate forms and threatened to bring false charges against him.

On September 14, 2018, plaintiff met with Walter-Johnson. Contento was present at the meeting as well. Plaintif was directed to sign an evaluation with "false allegations of poor performance." When plaintiff refused to do so, Contento handed him a letter immediately terminating his employment. Contento then followed plaintiff to his desk, told him not to take anything that was State property or forward any emails or documents to himself, walked him downstairs and took his State-issued identification. Plaintiff alleges that Contento's actions were contrary to OTDA policies and procedures.

DISCUSSION

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (id. citing Morone v. Morone, 50 NY2d 481 [1980]; Rovello v. Orofino Realty Co., 40 NY2d 633 [1976]). All but one of the individual defendants are also black but not of Nigerian national origin. Plaintiff reported directly to some of the individual defendants, who in turn reported to other individual defendants. Defendant Cheryl Contento is a white female of non-Nigerian national origin and from November 2017 to present, was OTDA's Deputy Commissioner of the Division of Shelter Oversight and Compliance.

Plaintiff asserts New York City Human Rights Law ("NYCHRL") and New York State Human Rights Law ("NYSHRL") claims against OTDA and Contento, and a Civil Service Law §75-b ("Section 75-b") whistleblower

claim against OTDA. He also asserts "aiding and abetting" claims against the Individual Defendants.

The court agrees with defendants that plaintiff's NYCHRL claims must be dismissed. Plaintiff argues that these claims survive to the extent that they are premised upon the individual defendants' personal acts as opposed to actions undertaken in her official capacity. Here, the complaint is devoid of any acts outside the individual defendant's official roles of hiring, supervising and terminating plaintiff. Therefore, this argument fails. Accordingly, plaintiff's NYCHRL claims are severed and dismissed.

Next, the court also agrees that the Court of Claims Act expressly divests this court of jurisdiction to entertain his Section 75-b claim. The Court of Claims Act §9[13] confers exclusive jurisdiction on the Court of Claims "for a retaliatory personnel action by its officers or employees pursuant to section seventy-five-b of the civil service law." While plaintiff points to a Supreme Court case wherein the State did not raise an argument that the court lacked jurisdiction, that fact is of no effect in this action, where the State is specifically raising a lack of subject matter jurisdiction argument. Accordingly, plaintiff's Section 75-b claim is also severed and dismissed.

Defendants next argue that the NYSHRL claims arising from national origin-based discrimination against OTDA and Contento should be dismissed. On this point the court also agrees. Plaintiff only alleges that Dudley and Humphreys made discriminatory comments about Nigerians. Beyond those claims there is no nexus between OTDA and/or Contento and the discriminatory behavior plaintiff claims that Dudley and Humphreys exhibited. There are simply no facts alleged which establish that OTDA or Contento encouraged, condoned or approved of any discriminatory behavior based upon plaintiff's Nigerian national origin. Accordingly, the national origin-based NYSHRL claims against OTDA and Contento are also severed and dismissed.

However, the court declines to dismiss plaintiff's hostile work environment claim against OTDA and Contento. A racially hostile work environment exists under the NYSHRL "[w]hen 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" (Forest, supra at 310 quoting Harris v. Forklift Sys., Inc., 510 US 17 [1993]). Contrary to defendants' contention, plaintiff has alleged both that he was subjected to a sufficiently severe hostile work environment based upon his Nigerian national origin. The complaint does not merely allege that plaintiff suffered a few insults. He claims that he was routinely improperly criticized, given negative performance appraisals, disfavored as compared to similarly situated, non-Nigerian coworkers and threatened with termination. The court further rejects defendants' characterization that plaintiff's allegations were merely "episodic."

Defendants' motion to dismiss plaintiff's retaliation claims against OTDA and Contento are also denied. To state a claim of retaliation under the NYSHRL, plaintiff must allege that he engaged in a protected activity, his employer was aware of his participation in such activity, plaintiff suffered an adverse employment action based upon the activity, and there is a causal connection between the protected activity and the adverse action (Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 313 [2004]). Here, plaintiff has certainly stated sufficient facts to survive defendant's motion to dismiss. He claims that after he made complaints about national origin-based discrimination and as a result, Dudley made false accusations in performance appraisals and to others, plaintiff was denied a promotion, he was given an unsatisfactory performance appraisal and threatened with disciplinary action.

The court rejects defendants' argument that plaintiff's employer, OTDA and/or Contento, cannot be imputed with knowledge of plaintiff's protected behavior. Plaintiff has described the numerous channels that he made his complaints through and at this stage his claims are sufficient to impute employer liability.

Finally, defendants' catch-all argument that the aiding and abetting claims must be dismissed because plaintiff has failed to allege employer liability under the NYSHRL is rejected except as to the extent that plaintiff has failed to allege sufficient facts to state a prima facie cause of action for national origin discrimination against the individual defendants.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted to the following extent: [1] plaintiff's NYCHRL claims are severed and dismissed; [2] plaintiff's New York Civil Service Law §75-b claim is severed and dismissed; [3]

plaintiff's NYSHRL claims arising from national origin discrimination are severed and dismissed; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days from service of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 31, 2020 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

So Ordered

Dated: February 20, 2020
