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Subject: Activity in Case 1:09-cv-02544-BMC-VVP Delgado v. The City of New York et al Letter

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U.S. District Court

Eastern District of New York

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Case Name: Delgado v. The City of New York et al
Case Number: 1:09-cv-02544-BMC-VVP
Filer: Luis Delgado
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Docket Text:
Letter *Opposition to Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI'S Leave to Move for Summary Judgment* by Luis Delgado (Sanders, Eric)

1:09-cv-02544-BMC-VVP Notice has been electronically mailed to:

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September 3, 2011

Honorable Brian M. Cogan
United States District Judge
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: Luis Delgado v. City of New York, et al., Docket No.: 09 cv 2544 (BMC)(VVP)

Dear Judge Cogan:

The plaintiff is in receipt of Defendants' CITY; RAFAEL PINEIRO; CHARLES V. CAMPISI and ROBERT J. GIANNELLI'S letter requesting a pre-motion conference to seek leave to move for summary judgment pursuant to Fed.R.Civ.P. 56. As discussed below there are so many issues of fact in dispute that only a jury can resolve.

Plaintiff is a dark skinned Puerto Rican male tenured civil service police officer employed with the Police Department City of New York and while employed he was subjected to racial discrimination, a hostile work environment and retaliation because he complained about his treatment. Specifically, plaintiff was arrested in or around June 11, 2004, for allegedly sodomizing a minor (Hispanic Male) through anal sex without a condom. Based upon that arrest, plaintiff was immediately suspended under the authority of Defendants' CHARLES V. CAMPISI (Caucasian Male) and former First Deputy Commissioner George A. Grasso (Caucasian Male). Plaintiff spent several days in the custody of the New York City Department of Correction. Upon return from suspension, plaintiff was transferred to the Quartermaster Section on modified assignment performing non-enforcement duties such as manual unskilled labor and custodial duties. When plaintiff was initially assigned to the Quartermaster Section he was subjected to constant supervision with other employees' snickering because he was portrayed as a sexual deviate in the newspapers as well as within the Department. Plaintiff continues to perform in this assignment without incident. The arrest was made by Internal Affairs Bureau Group No.: 22 (Caucasian Male investigator's) after an assessment by the Bronx District Attorney's Office (Caucasian Female Attorney. Shortly thereafter, the First Deputy Commissioner through the Department Advocate's Office initiated parallel disciplinary charges against him. The Employee Management Division a subordinate command of Defendant RAFAEL PINEIRO (Light Skinned Cuban Male) then on paper allegedly began to monitor plaintiff's performance in the workplace. Prior to this incident, plaintiff was an employee in

good standing waiting to be promoted to the position of Sergeant.

At the time of the arrest, the Internal Affairs Bureau as well as the Bronx District Attorney's Office already knew that plaintiff had an alibi that clearly placed him in another area of the park on the cell phone with his mother in law but, they ignored the lead. The Internal Affairs Bureau as well as the Bronx District Attorney's Office already knew that based upon the statements of the alleged complainant victim and his mother (Hispanic Female) that plaintiff did not sodomize him. The Internal Affairs Bureau and the Bronx District Attorney's Office already knew that the complainant victim already underwent at least two extensive medical examinations including one invasive examination and the results were negative for any sexual contact or bodily fluids connected to the plaintiff. The Internal Affairs Bureau and the Bronx District Attorney already knew that the alleged eyewitness claimed plaintiff sodomized the alleged complainant victim without a condom yet the defendants' collectively continue to this day to argue, that he may have used a condom. The Internal Affairs Bureau and the Bronx District Attorney's Office already knew that was not true because there was no semen found on the oral, penile, anal swabs or the clothing from the alleged complainant victim nor any amylase found on the penile swabs nor any Polydimethylsiloxane (PDMS), a chemical used in condom lubricants detected on the anal swab. The same negative results were obtained from the plaintiff's clothing. The defendants' collectively to this day continue to argue that the Bronx District Attorney's Office dismissed the case against plaintiff because the alleged complainant victim failed to cooperate when they already knew that the complainant victim and his mother cooperated with them a number of times despite being mistreated. Additionally, the Internal Affairs Bureau as well as the Bronx District Attorney's Office already knew that other than the subjective show up on the day of plaintiff's arrest, the alleged eyewitness did not specifically identify the plaintiff as committing any offense against the alleged complaint victim. Moreover, the plaintiff was placed in a photo lineup and was not identified by the complaint victim as committing any offense against him. Meanwhile, if you read every worksheet in the Internal Affairs Bureau case folder the investigators' writes as if the complainant victim specifically identified behavior that can be attributed to the plaintiff. The Bronx District Attorney suggested to the Internal Affairs Bureau to reinvestigate this case to ensure that the alleged eyewitness account is correct. There was no such confirmatory investigation performed by the Internal Affairs Bureau. In an attempt to further support their circular reasoning the Internal Affairs Bureau investigators' even reported plaintiff to the New York State Child Abuse and Maltreated Register although there was no legal basis to do so. Defendants' already knew that the Bronx District Attorney's Office dismissed this case after determining that there was NO EVIDENCE to connect the plaintiff to any crime. After the Department Trial failed for the same circular reasoning by defendants' the plaintiff was cleared of any wrongdoing related to any sexual related offenses. Defendants' CITY; RAFAEL PINEIRO; and CHARLES V. CAMPISI then placed plaintiff on Level III Performance Monitoring, the highest level of monitoring despite being cleared of the sex related offenses and no prior disciplinary history.

a. Plaintiff's Claims Are Not Time-Barred

Plaintiff's claims under Section 1983, the NYSHRL, and the NYCHRL are subject to a three-year statute of limitations. *See* Owens v. Okure, 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (applying three-year statute of limitations to Section 1983 claims); Kassner

v. 2nd Avenue Delicatessen Inc., 496 F.3d 229, 238 (2d Cir.2007) (applying three-year statute of limitations to claims under the NYSHRL and the NYCHRL); Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir.1997) (three-year statute of limitations for NYSHRL claims); N.Y. C.P.L.R. § 214(2) (NYSHRL claims); N.Y.C. Admin. Code § 8–502(d) (NYCHRL claims). Claims under Section 1981 are subject to a four-year statute of limitations period. *See* White v. City of New York, 2010 WL 2697054, at *2 (S.D.N.Y.2010). However, under the continuing violations doctrine, a court and jury may consider "the entire time period of the hostile environment" in determining liability. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed. 2d 106 (2002). Evidence of earlier discriminatory conduct may constitute relevant "background evidence in support of a timely claim," *Id.* at 113, 122 S.Ct. 2061; *accord* Bonner v. Guccione, 178 F.3d 581, 599 (2d Cir.1999) (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977)). Thus, under the three year statute of limitations any claims alleged before June 12, 2006 is not time- barred. As well as under the four year statute of limitations any claims before June 12, 2005 is not time-barred.

Plaintiff filed his original complaint on June 12, 2009 and an amended complaint on September 26, 2009. The defendants' through the Department Advocate's Office with testimony and evidence provided by the Internal Affairs Bureau Group No.: 22 a subordinate command of Defendant CHARLES V. CAMPISI commenced a Department Trial on January 18, 19, June 20, July 24 and August 2, 2006, where they offered the same circular reasoning as in the criminal matter. Although the alleged eyewitness and complainant victim were not present during the actual Department Trial, the alleged eyewitness did provide testimony to the Trial Commissioner, Department Advocate and Respondent counsel at a separate hearing on June 8, 2006, which was evaluated and used to formulate the Trial Commissioner's Final Recommendation to clear plaintiff of all sex related offenses on September 13, 2006. The Trial Commissioner expressed serious reservations about the credibility of the alleged eyewitness. The Trial Commissioner Recommendation also evaluated hearsay evidence from the alleged complainant victim, the testimony from a clinical forensic psychological expert hired by the Department as well as a host of other Department witnesses. On November 6, 2006 Police Commissioner Raymond W. Kelly adopted the Trial Commissioner's Final Recommendations. During the interim, plaintiff was passed over for promotion to Sergeant on June 30, 2006 and completely removed from the civil service list. The defendants' continued with this circular reasoning up to this day. Throughout the entire time period, to this day, defendants' completely ignored plaintiff's complaints of discrimination which he first reported back on October 5, 2004 to Deputy Inspector Donna Jones a subordinate of Defendant RAFAEL PINEIRO which she absolutely denies. Meanwhile, he was subjected to stares and funny looks because he is being labeled as a sexual deviate. Defendants' again completely ignored his complaints of discrimination which he reported back on August 2, 2007 to Deputy Inspector Donna Jones a subordinate of Defendant RAFAEL PINEIRO which she absolutely denies. That same day, since being ignored by Deputy Inspector Donna Jones plaintiff reported his allegations of discrimination directly to the Office of Equal Employment Opportunity, they responded by closing his complaint as an inquiry only referring him to the union. To this day, the behaviors of the Defendants' RAFAEL PINEIRO and CHARLES V. CAMPISI as well as other employees assigned to the Internal Affairs Bureau have never been investigated.

b. Plaintiff Can Establish Issues of Fact in Dispute That He Was Subjected to Discrimination, Harassment and a Hostile Work Environment Based Upon His Race

Plaintiff claims for race discrimination under Sections 1981 and 1983 are analyzed under the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Ruiz v. County of Rockland, 609 F.3d 486 (2d Cir. 2010)). Claims of race discrimination under the NYSHRL and NYCHRL are analyzed under the same McDonnell Douglas framework. *See, e.g., Spiegel v. Schulmann*, 604 F.3d 72, 80 (2d Cir.2010). Title VII makes it unlawful for an employer "to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2002-2(a)(1).

To establish a *prima facie* case of race discrimination under Title VII, a plaintiff must show (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) that the adverse employment action took place under circumstances giving rise to the inference of discrimination. Ruiz, 609 F.3d at 492. Title VII suits often require a court or jury to consider whether an employer's response to an allegation of discrimination *itself* constitutes evidence of discrimination or liability for discrimination.

When employees complain of Title VII violations, for example, employers "can be held liable ... if [they do] not fulfill [their] duty to take reasonable steps to remedy the [violation]." Sassman v. Gamache, 566 F.3d 307, 314 (2d Cir. 2009)(quoting Torres v. Pisano, 116 F.3d 625, 638 (2d Cir. 1997); *see also* Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2d Cir. 1998)("An employer that has knowledge of a hostile work environment has a duty to take reasonable steps to remedy it.")) The failure to of an employer to conduct an adequate investigation or to undertake an appropriate response can constitute evidence in support of a Title VII plaintiff's allegations. Id. at 315. In the Title VII context, "an employer must consider not only the behavior of the alleged offender, but also the response, if any, of its managers." Id. at 315. (quoting Malik v. Carrier Corp, 202 F.3d 97, 106 (2d Cir. 2000).

Here, plaintiff clearly alleges in the amended complaint filed on September 26, 2009 in ¶¶15-15, 41-47, 50-57 that there was NO LEGAL BASIS for his arrest. Plaintiff clearly alleges throughout the amended complaint and can establish through the use of defendants' own documents, corroborated through deposition testimony that clearly establishes that the Internal Affairs Bureau Group No.: 22 investigation was not only flawed but, supported by Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI without even bothering to ensure that plaintiff's employment and civil rights were protected. Throughout the course of the investigation up until this day, the Internal Affairs Bureau supported by Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI continue with their circular reasoning labeling plaintiff a serial sexual deviate despite numerous objective investigative leads that clearly establishes otherwise. Their collective obsession with proving the negative led to a number of dead-end criminal and internal misconduct investigations across state and county lines. Despite Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI'S best efforts to support their circular reasoning, plaintiff was still cleared of any wrongdoing. Their obsession with

proving the negative led to the complaint victim and his mother being mistreated by the police resulting in a complaint that the Department did not even bother to fully investigate. Moreover, defendants' have engaged in similar conduct with three other cases (One Hispanic Male, One African-American Male and One Caucasian Male). The Hispanic Male was accused of Rape but, restored back to full duty because the charges were dropped the other males are still on modified duty. Certainly, based upon the handling of the aforementioned Rape case, plaintiff should have been restored back to full duty without any restrictions. Based on defendants' own data, 75% of similarly situated employees were minority police officers who were criminally cleared but, still remained on modified duty. Moreover, defendants' have no clear way to analyze and cull the data to evaluate how other similarly situated cases are handled. Their obsession with proving the negative resulted in plaintiff's ability to be promoted to Sergeant forever gone. Their obsession with proving the negative has resulted in plaintiff feeling that his career is over thus, will file for retirement, the difference in salary and benefits forever lost due to their conduct.

Therefore, plaintiff can establish issues of fact in dispute that race played a factor in Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISIS'S decisions.

In order to establish a hostile work environment claim, a plaintiff "must show that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of his employment were thereby altered." *See* Fincher v. Depository Trust, 604 F.3d 712 (2d Cir. 2010)(quoting Alfano v. Costello, 294 F.3d 365, 373-74 (2d Cir. 2002); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (plaintiff must demonstrate an "abusive working environment" (internal quotation marks omitted)). "A hostile working environment is shown when the incidents of harassment occur either in concert or with a regularity that can reasonably be termed pervasive." Id, at 724. (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987); *accord* Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000). "[T]he plaintiff must show more than a few isolated incidents of racial enmity," Id, at 724. (quoting Williams v. County of Westchester, 171 F.3d 98, 100-01 (2d Cir. 1999) (*per curiam*) (internal quotation marks omitted), although a hostile work environment can also be established through evidence of a single incident of harassment that is "extraordinarily severe" Id, at 724

Here, certainly based upon the totality of the circumstances raised, a reasonable juror could conclude that plaintiff was subjected to a hostile work environment.

Therefore, plaintiff can establish issues of fact in dispute that he was subjected to a hostile work environment by Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI.

c. Plaintiff Can Establish a Prima Facie Case of Retaliation

Plaintiff can establish that Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI took adverse actions against him because he complained to Defendant CITY thorough its agents Deputy Inspector Donna Jones and the Office of Equal Employment Opportunity about the manner in which his investigation was handled, being passed over for the position of

Sergeant, removed from the promotion list, placed on Level III Performance Monitoring and remaining on modified duty.

d. Plaintiff Can Establish That He Was Discriminated Against in Violation of the Equal Protection Clause

For the reasons outlined in b., plaintiff can establish that his equal protection rights were violated.

e. Plaintiff Can Establish That He Was Denied His Right to Due Process.

For the reasons outlined in b., plaintiff can establish that his due process rights were violated.

f. Plaintiff Can Establish A Monell Claim Against Defendant CITY

For the reasons outlined in b., plaintiff can establish that Defendant CITY does engage in a policy and practice of violating minority police officers due process rights to have their cases fairly evaluated free of discriminatory animus.

g. Individual Defendants' RAFAEL PINEIRO and CHARLES V. CAMPISI Are Not Entitled to Qualifed Immunity

Government officials performing discretionary functions are entitled to qualified immunity from federal constitutional claims as long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. Dolson v. Village of Washingtonville, 382 F.Supp.2d 598, 601 (S.D.N.Y.). The question to be answered is whether a reasonable Government [official], confronted with the facts as alleged by [Plaintiff], could reasonably have believed that [their] actions did not violate some settled right. Id. at 601. (quoting Stephenson v. John Doe, Detective, 332 F.3d 68 (2d Cir. 2003)).

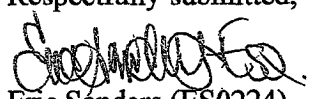
A [D]efendants' assertion that the plaintiff's constitutional rights were not violated, or that his version of events is wrong does not go to the question of whether the [official][is] entitled to qualified immunity. Id. at 601. Therefore, it is no defense to a claim of qualified immunity that [D]efendants' did not do what the plaintiff said [they] did.

Here Defendants' RAFAEL PINEIRO and CHARLES V. CAMPISI claim that an individual defendants' employment decisions concerning plaintiff are clearly not established rights of which defendants' reasonably should have been aware. Other than offering bold denials and feigning any responsibility, they never specifically address how the alleged discharge of their official duties entitles them to qualified immunity.

Therefore, as in Dolan, the court must find that Defendants' RAFAEL PINEIRO and CHARLES V. CAMPISI are not entitled to qualified immunity.

For the foregoing reasons Defendants' CITY; RAFAEL PINEIRO and CHARLES V. CAMPISI'S motion for summary judgment would be pointless as there are so many issues of facts in dispute that only a jury can resolve.

Respectfully submitted,



Eric Sanders (ES0224)

ES/es