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May 18, 2011

Judge John Gleeson
United States District Judge
United States District Court, Eastern District of New York
225 Cadman Plaza
Brooklyn, N.Y. 11201

Re: Tabatha Bronstein v. The City of New York, et al., Docket No.: 10 cv 4659 (JG)(ALC)

Dear Judge Gleeson:

A motion to dismiss is used to test the legal sufficiency of the claims for relief set forth in the complaint. *See* Ryder v. Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774 (2d Cir. 1984). In deciding a motion to dismiss under Rule 12 (b)(6), this Court "accepts all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in plaintiff's favor." Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Management LLC, 595 F.3d 86, 91 (2d Cir. 2010). "In order to survive a motion to dismiss under Rule 12 (b)(6), a complaint must allege a plausible set of facts sufficient 'to raise a right of relief above the speculative level.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007); accord Ashcroft v. Iqbal, ---U.S. ----, 129 S.Ct. 1937, 1949-50 (2009)). In other words, a complaint must contain factual allegations to support the legal conclusions and the factual allegations must "plausibly give rise to an entitlement to relief." Iqbal, 129 S.Ct. at 1950. 2d Cir. 2002)). Therefore, in considering such a motion to dismiss, "[t]he appropriate inquiry is not whether a Plaintiff is likely to prevail, but whether he is entitled to offer evidence to support his claims." Id. at 237. (quoting Fernandez v. Chertoff, 471 F.3d 45, 51 (2d Cir. 2006)).

Here, a fair reading of plaintiff's complaint alleging gender discrimination, hostile work environment, retaliation, and abuse of authority contains sufficient facts at the time of filing to give Defendants' THE CITY OF NEW YORK; MICHAEL OSGOOD; RONALD LYNCH; PATRICK RODRIGO and CHRISTOPHER MIRRO fair notice of her plausible claims and to defend against those claims. It is expected that through discovery plaintiff will be able to further bolster her plausible claims.

Therefore, since plaintiff has stated plausible claims consistent with the rule, the Court

must deny Defendants' THE CITY OF NEW YORK; MICHAEL OSGOOD; RONALD LYNCH; PATRICK RODRIGO and CHRISTOPHER MIRRO'S Motion to Dismiss for failure to state a claim.

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 (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). Plaintiff commenced this action on October 12, 2010 and filed an amended complaint on April 20, 2011. Accordingly, her Section 1983, NYSHRL, and NYCHRL claims based on conduct that occurred before October 12, 2007, are time-barred unless plaintiff can successfully invoke an exception to the limitations period.

The continuing-violation exception is most often invoked by plaintiffs' alleging claims under Title VII, but it is also applied by courts in employment discrimination cases brought under Section 1983, and under the NYSHRL and NYCHRL. *See, e.g.,* Washington v. County of Rockland, 373 F.3d 310, 317-318 (2d Cir. 2004) (in the context of Section 1983 claims); Drew v. Plaza Constr. Corp., 2010 WL 446088, at *7 (S.D.N.Y.2010)(NYSHRL and NYCHRL).

Under the continuing-violation doctrine, "if a plaintiff has experienced a continuous practice and policy of discrimination, ... the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *See* Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001). "To bring a claim within the continuing violation exception, a plaintiff must at the very least allege that one act of discrimination in furtherance of the ongoing policy occurred within the limitations period." *See* Patterson v. County of Oneida, 375 F.3d 206, 220 (2d Cir. 2004). The standard for applying the continuing-violation doctrine to claims under the NYSHRL and the NYCHRL is also governed by *Morgan. See, e.g.,* Bartman v. Shenker, 786 N.Y.S.2d 696, 702 (N.Y.Sup.Ct.2004) (applying the Supreme Court's decision in *Morgan* to determine whether the continuing-violation doctrine saved plaintiff's otherwise untimely hostile work environment and discrimination claims under the NYSHRL and the NYCHRL); *accord* Sculerati v. N.Y. Univ., 2003 WL 21262371, at *3 (N.Y.Sup.Ct. May 16, 2003)(same); *see also* Lu v. Chase Inv. Services Corp., 2009 WL 4670922, at *7 (E.D.N.Y.2009) (same).

Both plaintiff's Title VII claims and her claims for gender discrimination under Section 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 employment 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)(in the context of a NYSHRL claim); *see also* Pilgrim v. McGraw–Hill Cos., 599 F.Supp.2d 462, 468 (S.D.N.Y.2009) (in the context of a NYCHRL claim).

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).

To establish a hostile work environment claim under Title VII, Section 1983, and the NYSHRL, plaintiff must show that her workplace was "permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)(quotation marks and citations omitted); Patterson v. County of Oneida, 375 F.3d 206, 227 (2d Cir.2004); *see also* Kumaga v. New York City School Constr. Auth., 2010 WL 1444513, at *8 (N.Y.Sup.Ct. Apr. 2, 2010)(NYSHRL); Forrest v. Jewish Guild for Blind, 3 N.Y.3d 295, 305, 310–11, (N.Y. 2004)(applying standard for NYSHRL). Plaintiff must demonstrate not only that she found the environment offensive, but that a reasonable person also would have found the environment to be hostile or abusive. Harris, 510 U.S. 17, 21–22.

The standard for maintaining a hostile work environment claim is lower under the NYCHRL. "The New York City Human Rights Law was intended to be more protective than the state and federal counterpart." Farrugia v. N. Shore Univ. Hosp., 820 N.Y.S.2d 718, 724 (N.Y.Sup.Ct. 2006). The NYCHRL imposes liability for harassing conduct that does not qualify as "severe or pervasive," and "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." Williams v. New York City Hous. Auth., 872 N.Y.S.2d 27, 38 (N.Y.App.Div. 2009)(citing Farrugia, 820 N.Y.S.2d at 725). Nonetheless, even under the NYCHRL, "'petty, slight, or trivial inconvenience[s]' are not actionable." Kumuaga, 2010 WL 1444513, at *14 (quoting Williams, 872 N.Y.S.2d at 38).

To establish a prima facie case of retaliation, plaintiff must show that "(1) [she] participated in a protected activity, (2) the defendant[s] knew of the protected activity; (3) [she] experienced an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action." Jackson v. N.Y. City Transit, 348 Fed.Appx. 666, 669 (2d Cir.2009) (citation omitted). The burden of making this showing is "minimal." *See* Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005).

Here, plaintiff has stated plausible claims of gender discrimination. Defendants' THE CITY OF NEW YORK; MICHAEL OSGOOD; RONALD LYNCH; PATRICK RODRIGO and CHRISTOPHER MIRRO'S vigorously argues in a consistent manner that plaintiff is essentially a "complainer." Plaintiff as a tenured employee complains that she was subjected to a hostile work environment due to her gender and retaliated against because she complained. Plaintiff alleges that

she was subjected to unfair job assignments, psychological assessments, misconduct investigations, unfair evaluations, unsanctioned group meetings where Defendants' MICHAEL OSGOOD; RONALD LYNCH, PATRICK RODRIGO and CHRISTOPHER MIRRO would call her "suicidal" etc., as well as other impediments to the terms and conditions of employment because she complained about her treatment. Plaintiff alleges despite her complaints to the Psychological Services Unit, Labor Relations, former Chief of Detective George F. Brown, Deputy Chief Nikunen and her union Defendant THE CITY OF NEW YORK failed to adequately investigate her allegations and failed to protect her rights as an employee in the workplace.

Therefore, since plaintiff has stated plausible claims of gender discrimination, hostile work environment, retaliation, and abuse of authority consistent with the rule, the Court must deny Defendants' THE CITY OF NEW YORK; MICHAEL OSGOOD; RONALD LYNCH; PATRICK RODRIGO and CHRISTOPHER MIRRO'S Motion to Dismiss for failure to state a claim.

Respectfully submitted,

By: _____
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