UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SPENCER MARIN,

Plaintiff,

v. 17 Civ. 5488 (VEC)

QUINN EMANUEL URQUHART & SULLIVAN, LLP,

Oral Argument

Defendants.

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New York, N.Y.
March 9, 2018
2:00 p.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

JOSEPH & KIRSCHENBAUM LLP
Attorneys for Plaintiff
BY: LUCAS C. BUZZARD
D. MAIMON KIRSCHENBAUM

QUINN EMANUEL URQUHART & SULLIVAN LLP
Attorneys for Defendant
BY: MARC L. GREENWALD
MARINA E. OLEVSKY

(Case called)

MR. BUZZARD: Good afternoon, your Honor, Lucas Buzzard and Maimon Kirschenbaum for the plaintiff.

MR. GREENWALD: Marc Greenwald and Marina Olevsky, Quinn Emanuel Urquhart & Sullivan on behalf of defendant. Good afternoon.

THE COURT: Good afternoon. Please be seated, everybody.

Mr. Greenwald, right?

MR. GREENWALD: Yes.

THE COURT: This is your motion.

MR. GREENWALD: Yes, it is. Thank you, your Honor.

The question on the hostile work environment question for the Court is does the complaint allege that the workplace was permeated with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive to alter Mr. Marin's conditions of employment.

There is a subjective standard and an objective standard. This complaint does not meet the objective standard that the workplace was permeated, that the conditions of employment was altered, or that the discriminatory conduct that's alleged was either severe or pervasive. It's clearly not pervasive, your Honor. There is one joke alleged and then a couple of what even the defense counsel calls racially neutral comments in a short amount of time. It simply does not

meet the pervasive standard in this circuit.

The question is, does one use of the N word as a joke directed not at the plaintiff, but at someone else, at a friend, at a dinner, is that sufficiently severe to alter the conditions of employment?

And while there are cases that do -- they don't hold, but they intimate that one use of the N word directed at the plaintiff in a hostile aggressive way could potentially meet that standard, there is simply no case and it would undermine the standard to hold that one use of the N word as a joke at a dinner to someone else.

THE COURT: Throughout reading your papers I was baffled by the description of this as a joke. I just don't understand the humor. I don't understand how someone thought it was humorous. I don't understand why Quinn Emanuel is taking the position that it was a joke.

MR. GREENWALD: The reason we are, your Honor, we don't find it humorous and we don't think it's a good joke. But paragraph 22 of the complaint, where the plaintiff cites his own e-mail complaining about this, he referred to it as a joke. So he wrote to Ms. Cruz CC'g his supervisors in New York that he did not appreciate the N word joke. That's his words. I'm not characterizing it. We don't like it and we wish it had never been said.

But even he perceived it at the time as a joke and

it's accurately reflected in the complaint. Therefore, in this case, with the facts that are alleged in this complaint, even if he proved that the unappreciated N word joke was said at a dinner, that simply is not severe enough to change the plaintiff's conditions of employment. It simply does not meet the hostile work environment standard set out in the *Littlejohn* case, in the other cases in this circuit.

The racially neutral comments, they are racially neutral on their face and we don't have much context for them. But asking someone's parents' names is not discriminatory in and of itself. Asking in this time of Black Lives Matters, if someone had been in jail, may be an expression of solidarity rather than racial animus. It's impossible to know. But it simply doesn't indicate that the workplace was permeated with hostile or intimidation or ridicule or insult.

Without that, what they have alleged here simply does not rise to the level within the circuit of a hostile work environment.

Unless the Court has any questions, I'll move onto the retaliation claim. The retaliation claim also fails because the plaintiff fails to allege a materially adverse employment outcome. There is simply nothing. Courts in this circuit have held repeatedly that a transfer is simply not a materially adverse employment outcome and that is the allegation about being asked to return to New York.

Then looking at the allegations, it is clear they are grasping at straws, that the plaintiff was required to attend a meeting with other floater secretaries at which the rules for floater secretaries were described. That can't be materially adverse. The inclusion in the complaint of that demonstrates that there is really no materially adverse employment outcome, that the plaintiff was asked to be at his desk to receive packages. That's not materially adverse. That's what secretaries do. That he was given arduous time-consuming tasks? That's what secretaries do.

And without an allegation that he sought overtime, the allegation that he never was asked to do overtime doesn't really explain anything. It's not materially adverse. There is nothing in this complaint that describes any materially adverse employment action as a result of his complaint about what happened in San Jose.

Unless the Court has further questions.

THE COURT: Who is arguing for the plaintiff?

MR. BUZZARD: Mr. Buzzard, your Honor.

I will begin with the hostile work environment. We are here on a motion to dismiss, which I'm sure everyone understands.

While Mr. Greenwald has accurately stated the standard for prevailing on a hostile work environment claim, on a motion to dismiss the question is whether the complaint alleges enough

facts that a reasonable person in Mr. Marin's position would find the conditions of his employment altered for the worse. I simply don't see how that could not be the case here.

The question in this context looks at the totality of the circumstances, the whole picture. We have to look at everything that transpired from the time he arrived in San Jose to the time when he was sent packing after he complained about this incident.

The complaint alleges numerous comments aside from the N word joke that were made repeatedly, frequently over a three-week period. That includes the comments that he was not black enough and was not really black.

And in connection with those comments, which was conveniently left out of Mr. Greenwald's summary, were the statements -- to me left out was the connection. The complaint alleges a clear connection between those comments which explicitly referenced Mr. Marin's race and the additional comments about whether he had ever been arrested or what his parents' names were. That alleges a clear connection between the race-based comments and these race-neutral comments.

The Second Circuit has repeatedly, over and over and over again, stated that facially neutral comments can play into the entirety of a hostile environment, especially when they are alleged in connection with explicit race-based comments that were uttered frequently and repeatedly over a period of three

weeks. This is leaving aside the N word comment, which I'll deal with it separately.

Ms. Cruz also made repeated references and homophobic comments about whether he was gay and calling him a fairy. To be very clear, we are not alleging a sexual orientation claim, but, again --

THE COURT: Good. I thought I had missed something.

MR. BUZZARD: Again, the Second Circuit has been repeatedly clear that harassment based on other protected characteristics can play in and amplify harassment based on the protective characteristics of which a plaintiff is complaining. It goes into the totality of the hostile environment. Those comments are direct evidence of the fact that the working environment, which is what we are looking at, was permeated with harassment. It may be of a different type, but it is hostile and it does play into the analysis as a whole.

Finally, we get to the N word comment, the N word joke. Really, I don't think it matters whether Mr. Marin perceived it as a joke or not. The fact is it was uttered by a supervisor in his presence and in the presence of all her other employees.

The Second Circuit has repeatedly, over and over and over again, stated that there is no single act that can more quickly alter the conditions of the work environment for the worse than the use of the N word by a supervisor in the

presence of her inferiors. That makes perfect sense. As soon as that word is uttered, something changes. The employee knows that their supervisor perceives them and everyone else like them as inferior, and how that cannot alter the conditions of the work environment I simply do not understand.

From that point onward, any employee who is black would know that the supervisor may not treat them the same way as people of other races, may think that they are inferior, may take actions against them based on their race. That word is so loaded that it simply cannot be said that it's a tasteless pun or harmless comment. It has a history in this country and it is simply unacceptable for a supervisor, especially, to use, in the presence of her subordinate, which is the way that the Second Circuit frames it.

Finally, when he goes in and complains to her, his supervisor, about that comment, and about everything else that she had said to him over the course of the last three weeks, she immediately sends him packing back to New York. That is a part of the hostile work environment. That is part and parcel of the working environment under which he was operating.

And the humiliation of being taken off a case, the fact that he was deprived of a month or two of overtime, that he was earning substantial quantities of while he was in San Jose, and the fact that it is an inherently humiliating act to be sent home in the middle of a case, and that is part and

parcel of it.

If your Honor has any questions about hostile work environment. I think I've covered it.

With respect to the retaliation, I just alluded to it. In the very meeting where he complained about this conduct, his supervisor sent him packing back to New York. How that is not retaliation boggles me.

THE COURT: It would presumably dissuade a similarly situated employee from complaining in the future.

MR. BUZZARD: Of course. That is the standard. Material adversity in the retaliation standard is exactly what your Honor just stated, not whether there has been a complete alteration of the conditions of the work environment. But the deprivation of overtime would meet that heightened standard that is applied to the substantive discrimination claims. We have cited cases in our papers to support that. The one I'm thinking of right now is *Little*.

After he gets back he complains again and is subjected to a series of additional facts, the most prominent being that he was passed over for a permanent secretary position with an attorney group, including a partner. That's significant. Not all attorney groups, the complaint alleges, are created equal. The ones with partners, the legal secretaries can receive overtime because partners can approve of the overtime, whereas no other attorneys can.

The fact that he was passed over for that position, the complaint alleged he was the most senior person, the person who was supposed to fill that position. It's based on seniority and someone who is less senior than him was given the position. That would dissuade a reasonable legal secretary from complaining about discrimination.

The heightened scrutiny, based on time records that he was told were not submitted, the fact that he was given long arduous tasks. It's not just a long arduous task. It's the fact that he, unlike other legal secretaries, was not afforded the opportunity of overtime to complete those tasks, so he had to complete them in the regular working hours, and I think that's a key point. All of those together, and they must be viewed together, would dissuade a reasonable employee from making complaints about discrimination.

THE COURT: Thank you.

Anything further, Mr. Greenwald?

MR. GREENWALD: Just briefly, your Honor.

For the retaliation being sent back when one complains about a hostile work environment in one location, to go back to one's original location, we submit, would not dissuade anyone.

THE COURT: It's humiliating. No? It's been a long time since I've been a team member of a litigation team in another city where people are working long hours. But if you

are an hourly worker you are chalking up a lot of overtime. To me, being sent away essentially is the sort of thing, it seems to me, that would dissuade a reasonable employee from complaining. It tells you that there are costs, namely, you just got knocked off a team that you were doing well on or you thought you were doing well on, at least you were doing well financially on.

MR. GREENWALD: Stepping back a second, I do want to say for the record, I do think the facts, if we have to get to discovery, will show that that's not what happened here.

Nevertheless, what is alleged here is, simply, the trial was coming to an end.

THE COURT: It's just happenstance that he got sent back right after he complained?

MR. GREENWALD: The conversation was about him going back, which he complained is what happened here. Again, there is no connection. His job was as a legal secretary at Quinn Emanuel in New York, and all he did was return to his job as a legal secretary at Quinn Emanuel in New York at the same salary with the same position. He does not allege a single act of any kind of racial animus or even race-based comment after that.

THE COURT: Your position is that, taken out of this context, an associate is on a trial team, the associate believes that she is being sexually harassed, she complains about it and she is removed from the trial team and sent back

to New York, that that is not retaliation?

MR. GREENWALD: It depends on the context, your Honor. But if the judge says, I want that lawyer in this courtroom, the male partner, the harasser, and then the --

THE COURT: Don't bring the judge into this. The judge had nothing to do with this.

This is, a partner is accused of harassing -- maybe it's not even a partner. The associate accuses other associate of sexually harassing her, and the answer is to remove her from the trial team and send her back to New York.

Don't you think that would discourage another associate from complaining?

MR. GREENWALD: Perhaps.

THE COURT: If it's perhaps, that gets you past 12(b)(6).

MR. GREENWALD: I didn't finish my sentence. When someone complains, the firm needs to investigate. Taking a person out of a position where they allege they are being harassed or there is racial animus may well be appropriate and it is certainly plausible that that's an appropriate way to respond.

Until you find out if the allegation is true, it's not retaliatory to take somebody out of a position where they say they are uncomfortable and then find out what happened and make sure that they are treated the same as everyone else and that

there is no penalty for having complained.

And there was no penalty. The idea that he was given arduous tasks, everyone is given arduous tasks. It's hard work to be a secretary at Quinn Emanuel, just like it's hard work to be a lawyer at Quinn Emanuel. There was no retaliation here. And taking Mr. Marin out of that situation, when he complained to the person he said was harassing him, it can't be retaliation, nor can it be the actual racial animus.

Until the firm does an investigation, knows what happened, Ms. Cruz denied having used the N word. It says it right here in the complaint. It's not retaliation to take him out of a position where he felt uncomfortable. That's our position, your Honor.

THE COURT: I'm prepared to rule on the defendant's motion to dismiss. I find this to be a close case, but the motion is denied.

I will start with the plaintiff's claim for hostile work environment. Plaintiff alleges that his supervisor, Ms. Cruz, made numerous offensive racial comments during his work on a trial team in San Jose. Among other remarks, Cruz allegedly told plaintiff that he was not black enough and not really black. She also allegedly asked plaintiff whether he had ever been arrested. This conduct allegedly culminated at a March 24, 2014 dinner where Cruz allegedly called another black employee the N word in front of plaintiff.

These allegations are sufficient to state a claim for hostile work environment. Far from being a single isolated instance, as defendant claims, the use of the N word was the end of a continuous course of conduct. Importantly, the stream of offensive comments allegedly came from plaintiff's supervisor.

The Second Circuit has held more than once that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racially epithet, such as nigger, by a supervisor in the presence of his subordinates." That's *Rivera v. Rochester Genesee Regional Transportation Authority*, 743 F.3d 11, 24.

For these reasons, as I've indicated, I was surprised, notwithstanding the complaint, the defendant has attempted to cast the use of the N word as a poor attempt at humor or a bad pun. Remarks such as those are unacceptable in a civilized conversation. When they happen in a workplace, particularly when they come from a supervisor, not only are they unacceptable, they can be a basis for civil liability.

That is not to say that this claim will be able to survive summary judgment. The amended complaint does not allege offensive racial conduct outside of plaintiff's three-week trial to San Jose. I'm somewhat skeptical that the plaintiff will be able to prove that the complained-of conduct

was sufficiently pervasive to survive a summary judgment motion, although I do find it survives a motion to dismiss. In short, the amended complaint states a claim for hostile work environment, but just barely.

Turning to plaintiff's retaliation claim, plaintiff alleges that he was kicked off the San Jose trial team and sent back to New York shortly after complaining about Cruz's racial remarks. This alone is sufficient to state a claim for retaliation at this stage. The dismissal from the San Jose trial team allegedly deprived plaintiff of a valuable prestigious assignment and of substantial overtime compensation.

At this stage those facts are sufficient to show an adverse employment action taken in retaliation for protected activity. That said, if Quinn Emanuel is right and this is just separating the two employees, it may well not survive summary judgment.

For all of these reasons, I am denying defendant's motion to dismiss. I want to caution everybody, though, that the allegations in the complaint are just that, they are allegations. Time will tell whether plaintiff's claims can withstand summary judgment or trial. For now plaintiff states a plausible claim.

I think I had stayed discovery. That means I need to enter a case management plan.

MR. BUZZARD: I believe the defense needs to answer.

THE COURT: The defense has to answer, fine. The answer, as I tell everyone, is the least interesting part of civil litigation.

Do the parties consent to proceeding in the future before a magistrate judge for all purposes?

MR. GREENWALD: We do not, your Honor.

MR. BUZZARD: No, your Honor.

THE COURT: Except for amendments that are permitted by 15(a)(1) and this Court's individual practices, amended pleadings may not be filed and additional parties may not be joined except with leave of the Court. Any motion to amend or to join additional parties shall be filed within 30 days of this order.

Is there any reason why you can't get your initial disclosures done within 14 days?

MR. GREENWALD: No, your Honor.

MR. BUZZARD: No, your Honor.

THE COURT: Is the plaintiff claiming anything other than garden-variety emotional distress?

MR. BUZZARD: I would have to speak to my client, your Honor. I don't believe so.

THE COURT: Do you know whether he has been treated?

MR. BUZZARD: He has not been treated, but I just wanted to clarify and make sure.

THE COURT: Make sure. If you are claiming anything other than garden-variety emotional distress, your HIPAA releases are due in 14 days. Please make sure you have all of the releases.

How long do the parties think it's going to take for discovery in this case? It's a fairly constrained set of facts, but I don't want what you've got in terms of e-discovery.

MR. BUZZARD: Ninety days I think would be fine.

THE COURT: Ninety days is enough. Both parties think so?

MR. GREENWALD: Yes, your Honor.

THE COURT: That's a firm deadline. That takes you to June 8.

In order to make that, that means you need to get together, meet, plan and schedule. You are going to start running into summer vacations, so make sure you know when you want to do what so you don't come to me on June 1 and tell me somebody that's really important who needs to be deposed is on vacation. Get on their calendar so that everything can be done by June 8.

Try to work out your discovery disputes between you. If you can't work them out, get on the phone. 99 percent of the time I can resolve it on the phone without needing anybody to write anything. Try to work them out between you. If you

can't work out your discovery disputes, don't let them fester to the point that you can't make the June 8 deadline.

Is there going to be any expert discovery in this case?

MR. BUZZARD: Not on plaintiff's end, your Honor.

MR. GREENWALD: I don't anticipate expert discovery, but I need to think about it.

THE COURT: I am going to put a date in just in case, which would be two months later, so August 10, but I tend to agree that that seems unlikely.

Did you make a demand for a jury trial?

MR. BUZZARD: Yes, your Honor.

THE COURT: Are the parties interested in talking settlement?

MR. GREENWALD: We are always available to talk settlement, your Honor.

THE COURT: I'll ask you again after you've done your fact discovery. If during the course of fact discovery one of the other of you sees something that leads you to believe that perhaps it would be a good time to talk settlement with the help of a third party, I can refer you either to the mediation program or to your assigned magistrate, who is Magistrate Judge Pitman if you would like a settlement conference. As a matter of policy, I only do that if both parties want. Write me a joint letter if you are in that boat, and I'll give you a

referral.

I'll see you again after you have completed your fact discovery. That will be on June 8. At that time we will talk about whether the defendant wants to make a motion for summary judgment or whether I should set a trial date. That will be June 8 at 10:00 across the hall.

Anything further from the plaintiff?

MR. BUZZARD: No, your Honor. Thank you.

THE COURT: Anything further from the defendant?

MR. GREENWALD: Just one small thing. I'm not seeking reconsideration at all. There was a factual timeline mistaken in the Court's decision which is just that the N word comment came on, I believe, the plaintiff's second day in San Jose and the other comments came afterwards. The complaint is written not in that order, but those are the dates.

THE COURT: I don't think that affects my view, but thank you for that.

Thank you all. I'll see you in June.

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