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United States District Court,
S.D. New York.

LATINO OFFICERS ASSOCIATION, INC., et al.,
Plaintiffs,
v.
THE CITY OF NEW YORK, et al., Defendants.

No. 99 Civ.9568 LAK. | June 17, 2003.

Latino police officer brought discrimination action against city police department and others, alleging that he was penalized more heavily than white officers in comparable circumstances for his off-duty interference with investigation, that department retaliated against him for filing complaint with the Equal Employment Opportunity Commission (EEOC) by assigning him to swimming pool duty, and hostile work environment and disparate treatment. Defendants moved for summary judgment. The District Court, Kaplan, held that: (1) genuine issues of material fact precluded summary judgment in hostile work environment and retaliation claims, and (2) removal of flyers did not constitute adverse employment action for purpose of disparate treatment claim.

Motion granted in part, and denied in part.

Opinion

ORDER

KAPLAN, J.

***1** Defendants move for partial summary judgment dismissing aspects of the claims of plaintiff Clifford Muniz.

The second amended complaint makes two specific allegations relating to Muniz. First, it contends that he was penalized more heavily than white officers in comparable circumstances for an April 7, 1998 incident in which he allegedly interfered, while off-duty, with on-duty police officers investigating an alleged assault. Sec. Am. Cpt. ¶ 119. Second, it suggests that the NYPD retaliated against him for filing an EEOC complaint by assigning him to swimming pool duty on or about July 1, 1999. *Id.* ¶¶ 120–21. Muniz, however, is included also in broad allegations elsewhere in the complaint that plaintiffs generally were subjected to a hostile work environment, subjected to disparate treatment in the NYPD internal disciplinary process, and subjected to retaliation for complaining about these and other matters.

Defendants argue that Muniz's claims—to the extent they are based on (a) removal of Latino Officers Association flyers from bulletin boards at the 26th Precinct, (b) the contention that the discipline imposed upon him in respect of the April 7, 1998 incident was retaliatory, (c) the swimming pool duty assignment, and (d) a claim of a hostile work environment—should be dismissed. The removal of the flyers, in defendants' view, was not an adverse employment action. There is no evidence of causation with respect to the disciplinary disposition or the swimming pool assignment because plaintiff has failed to adduce evidence that the decision makers knew of the EEOC complaint. The swimming pool duty assignment in any case, they say, was not an adverse employment action. Finally, they contend that the removal of the flyers is insufficient to make out a hostile work environment because it did not materially change the work environment.

Defendants' motion is ill-supported and, in most respects, premature.

[1] To begin with, defendants have failed to establish that the only basis for Muniz's hostile work environment claim is the removal of the flyers at the 26th Precinct. The complaint includes him in much broader allegations. They therefore have failed to establish that there is no dispute as to any material facts and that they are entitled to judgment on this claim even assuming that they are correct in asserting that the removal of the flyers *alone* would be insufficient to make out a legally sufficient hostile work environment claim.

[2] The aspect of the motion addressed to the retaliation claims involving the disciplinary disposition and the swimming pool assignment also fail. For one thing, there is evidence from which a trier could find that former Commissioner Safir, who approved the disposition in the disciplinary matter, knew of Muniz's EEOC complaint, thus raising a genuine issue of material fact as to causation.[1] In any case, this aspect of the motion is premature. Plaintiffs claim that there is a pattern and practice of using the disciplinary system to retaliate against officers who make complaints such as these. If they prevail on the pattern and practice phase of the trial, the burden will be on the defendants to disprove causation. *See Latino Officers Ass'n, Inc. v. City of New York,* 209 F.R.D. 79, 86–87 (S.D.N.Y.2002).

[1] Contrary to defendants' contention (Reply Mem. 6–7), the fact that Muniz testified at his deposition to his belief that the trial commissioner was the retaliator does not foreclose this argument now. While a witness will

not be permitted to walk away from his or her own deposition testimony on a matter as to which he claimed personal knowledge in order to defeat a motion for summary judgment, that is not the situation here. The fact that Muniz speculated on one occasion that one actor bore a retaliatory motive does not foreclose his counsel from seeking to impose liability based on evidence that another actor had such a motive.

***2** [3] The only aspect of the motion that has merit is the contention that the removal of the flyers in the 26th Precinct was not an adverse employment action and therefore not a proper subject of a disparate treatment claim.[2] An adverse employment action is "a materially adverse change in the terms and conditions of employment." *Torres v. Pisano,* 116 F.3d 625, 640 (2d Cir.1997) (quoting *McKenney v. New York City Off–Track Betting Corp.,* 903 F.Supp. 619, 623 (1995) (internal quotation marks omitted)). The Court is satisfied that the removal of the flyers was not an adverse employment action. *See, e.g., Mario v. P & C Food Markets, Inc.,* 313 F.3d 758, 767 (2d Cir.2002) (expressing doubt that even denial of benefits would constitute an adverse employment action).[3]

[2] This does not affect the question whether the removal of the flyers is relevant to the hostile work environment claim.

[3] Defendants' contention that the swimming pool assignment was not an adverse employment action, while perhaps weighty, is insufficient to warrant the entry of summary judgment on this aspect of the claim. *See, e.g., De la Cruz v. New York City Human Res. Admin.,* 82 F.3d 16, 21 (2d Cir.1996).

The Court notes also that plaintiffs, in responding to this argument, rely heavily on *Signer v. Tuffey,* No. 02–7102, 2003 WL 1240611 (2d Cir. Mar.18, 2003). (Pl.Mem.30) *Signer* is an unpublished summary order which states on its face that it "may not be cited as precedential authority to this or any other court." Plaintiffs' reliance on it therefore violated that legend as well as 2d Cir. R. § 0.23. Moreover, their failure to disclose the nature of the case they cited was improper. The Court trusts there will be no repetition.

Accordingly, defendants' motion for partial summary judgment dismissing aspects of the complaint as to plaintiff Muniz [docket item 81] is granted to the extent that Muniz's disparate treatment claim with respect to the removal of the flyers at the 26th Precinct is dismissed. The motion is denied in all other respects.

SO ORDERED.