Wang v. New York State Dept. of Health

WANG v. NEW YORK STATE DEPT. OF HEALTH

2011 NY Slip Op 21380

DONNA L. N. WANG, Plaintiff, v. NEW YORK STATE DEPARTMENT OF HEALTH, Defendant.

1901-11.

Supreme Court, Albany County. Decided September 6, 2011.

Tully Rinckey PLLC, Michael W. Macomber, of counsel, 441 New Karner Road, Albany, New York 12305, Attorneys for Plaintiff.

Eric T. Schneiderman, Attorney General, Cathy Y. Sheehan, of counsel, The Capitol, Albany, NY 12224, Attorney for Defendant.

RICHARD M. PLATKIN, J.

Defendant New York State Department of Health ("DOH") moves pursuant to CPLR 3211(a)(2) and (7) seeking dismissal of the complaint filed by plaintiff Donna L.N. Wang.

BACKGROUND

Plaintiff has been employed by DOH since January 2001 as a healthcare surveyor. She also is a member of the United States Army Reserves and was ordered to active military duty in Spring 2008. Plaintiff returned to her employment with DOH in July 2008, at which point she alleges that she was subjected to significant changes to her work environment. Ms. Wang claims that she was assigned a greater volume of cases than other employees, assigned less desirable cases, and given less time than others to complete her work. Plaintiff further alleges that she was advised that her military duty might impact upon her ability to take vacation time. In addition, Ms. Wang alleges harassment at the hands of three co-workers, two of whom are (or were) her supervisors.

This hostile work environment allegedly led to plaintiff to treat with a physician, with complaints of anxiety, stress, and depression. In January 2010, plaintiff's physician removed her from work. Plaintiff filed a claim for worker's compensation based on the alleged harassment and retaliation. By decision dated November 1, 2010, the Workers' Compensation Board found that plaintiff was singled out, harassed, and retaliated against due to her military service.

DOH sent plaintiff a thirty-day (30) advance notice of termination on or about February 8,

2011. However, as of the date of the instant motion practice, DOH has not terminated plaintiff from employment. It appears instead that on or about May 2, 2011, subsequent to the commencement of this action, plaintiff returned to work at DOH in a different division performing different duties.

This action is brought pursuant to the Uniform Services Employment and Reemployment Rights Act ("USERRA") (38 USC § 4301, et seq.) and New York State Military Law § 242, seeking the following relief: an injunction restraining DOH from terminating plaintiff's employment; an order directing DOH to comply with USERRA; reinstatement of full benefits and seniority rights; compensation for lost wages; and an award of attorney fees and costs.

ANALYSIS

A. Counts I through VIII

DOH moves pursuant to CPLR 3211 (a) (2) to dismiss the first eight counts of the complaint alleging violations of USERRA, maintaining that Supreme Court lacks subject matter jurisdiction. DOH asserts that these claims are strictly for money damages and, therefore, must be heard in the New York State Court of Claims. In opposition to this branch of the motion, plaintiff argues that any money damages sought are merely incidental to the equitable relief that she properly seeks in Supreme Court.

"The Court of Claims has exclusive jurisdiction over actions for money damages against state agencies, departments, and employees acting in their official capacity in the exercise of governmental functions" (Dinerman v NYS Lottery, 58 A.D.3d 669 [2d Dept 2009]). "If the fundamental nature of a claim against the State is for monetary damages, the court can consider equitable relief incidental thereto . . . . However, if the primary relief sought by claimant is equitable in nature, the Court of Claims, at least in the absence of specific statutory authority, does not have subject matter jurisdiction" (Taylor v State of New York, 160 Misc.2d 120, 123 [Ct Cl 1994]). Thus, "the threshold question is whether the essential nature of [plaintiff's] claim is to recover money, or whether the monetary relief is incidental to the primary claim" (City of New York v State of New York, 46 A.D.3d 1168, 1171 [3d Dept 2007] [internal quotations omitted]).

As pertinent here, USERRA confers upon members of the military the right to return to their civilian employment following active duty and prohibits employers from discriminating or retaliating against employees on account of their military service (see generally 38 USC § 4311). The following relief is available under USERRA:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(id. § 4323[d] [1]). In addition, USERRA provides as follows:

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employers under this section.

(e) The court shall use, in any case where the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate full the rights or benefits of persons under this chapter.

(id. § 4323 [3] [e]).

Defendant acknowledges the availability of equitable relief under USERRA, but argues "that this type of relief is not applicable to the instant action" (Def. Memorandum of Law, p. 3). However, plaintiff's verified complaint does, in fact, seek "an order requiring compliance". Moreover, DOH's factual assertions regarding plaintiff's current employment status and the agency's compliance with USERRA are set forth in an affirmation of counsel that has not been shown to be based on personal knowledge (see Zuckerman v City of New York, 49 N.Y.2d 557, 563 [1980]). Accordingly, the Court cannot say as a matter of law in the context of a pre-answer motion to dismiss that plaintiff has no colorable claim to equitable relief.

The Court further concludes that Supreme Court has jurisdiction to hear and determine plaintiff's demand for lost wages and benefits suffered by reason of DOH's alleged failure to comply with USERRA, as well as her demand for attorney's fees, expert witness fees and other litigation expenses. In reaching this conclusion, the Court relies upon the substantial similarities between the remedies available under USERRA and those available under the State's "whistleblower" statutes. The prong of USERRA requiring an employer to "compensate the [military member] for any loss of wages or benefits suffered" (38 USC § 4323 [d] [1] [B]) is substantially similar to "the compensation for lost wages, benefits and other remuneration" authorized under Labor Law § 740 (5) (d), which is made applicable to public employers, including the State of New York, by Civil Service Law § 75-b. And the prong of USERRA authorizing a prevailing plaintiff to recover attorney's fees and other litigation expenses is substantially similar to Labor Law § 740 (5) (e), which authorizes "the payment by the employer of reasonable costs, disbursements, and attorney's fees."

In Taylor v State of New York (160 Misc.2d 120, 123 [Ct Cl 1994] [Bell, J.]), the Court of Claims explained that it lacked subject matter jurisdiction over whistleblower claims under Civil Service Law § 75-b, reasoning that "elements, including compensation for lost wages, benefits and seniority rights' are all equitable in nature, and, consistent therewith, the relief requested . . . is entirely equitable" (accord Keskin v. State of New York, 14 Misc.3d 547 [Ct Cl 2006] [Patti, J.]).1 This is in contrast to the New York State Human Rights Law, an anti-discrimination statute that authorizes plaintiffs to obtain compensatory damages (see Executive Law § 297 [4] [c] [iii] ["awarding of compensatory damages to the person aggrieved by such practice"]). This Court finds the reasoning of the cited Court of Claims decisions to be sound and persuasive.2

However, plaintiff's demand for liquidated damages, the subject of the eighth cause of action, falls outside the jurisdiction of Supreme Court. This branch of USERRA, which authorizes double damages upon a finding that the employer's actions were "willful", may be analogized to the similar liquidated damages provision of the Age Discrimination in Employment Act (29 USC § 626 [b]). The United States Supreme Court has characterized this type of damages to be punitive in nature (Trans World Airlines, Inc. v Thurston, 469 U.S. 111, 125 [1985]), and at least one federal district court has held that such a claim seeks a legal, rather than equitable, remedy (Duarte v Agilent Technologies, Inc., 366 F.Supp.2d 1036, 1037-1038 [D Colo 2005]). Based on the foregoing, the essential nature of plaintiff's eighth cause of action must be deemed a claim at law to recover money damages against the State that is not merely incidental to equitable relief. Accordingly, the eighth cause of action must be dismissed for lack of subject matter jurisdiction.3

B. Counts IX through XV

Under CPLR 3211 (a) (7), "the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (EBC 1, Inc. v Goldman, Sachs & Co., 5 N.Y.3d 11, 19 [2005]; see Leon v Martinez, 84 N.Y.2d 83, 87-88 [1994]; Berry v Ambulance Serv. of Fulton County, Inc., 39 A.D.3d 1123, 1124 [3d Dept 2007]). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see Leon, 84 NY2d at 87-88; see Brooks v Key Trust Co. Natl. Assn., 26 A.D.3d 628, 630 [3d Dept 2006], lv dismissed 6 N.Y.3d 891 [2006]). Furthermore, "[w]hile affidavits may be considered, . . . they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims" (Nonnon v City of New York, 9 N.Y.3d 825, 827 [2007]).

With respect to the tenth cause of action, DOH argues that any alleged loss of vacation or holiday privileges occurred after January of 2010 (Complaint, ¶ 28), more than two years after plaintiff's Spring 2008 military leave. On that basis, DOH asserts that the military service could not have been the cause of the claimed injury. The Court disagrees. The allegations of plaintiff's complaint must be accepted as true as this early stage of the case, and they are not so farfetched or "inherently incredible" as to be unworthy of acceptance (1455 Washington Ave. Assocs. v Rose & Kiernan, Inc., 260 A.D.2d 770, 771 [3d Dept 1999]).

However, the Court reaches a different conclusion with respect to count fourteen, which alleges that plaintiff was terminated from her position as of March 24, 2011 due to her military service. As the record flatly contradicts this allegation, this cause of action must be dismissed.

As to the remaining causes of action, DOH merely argues that plaintiff's allegations are "conclusory, incomplete, and vague to such a degree that they cannot state a cause of action". However, these claims specifically allege, among other things, that plaintiff was denied mileage reimbursement, removed from an "on-call" list, and given more work with shorter deadlines. As such, plaintiff has pleaded "the diminution of a public employee's employment rights by reason of the employee's absence pursuant to ordered military duty" (Hogan v New York State Office of Mental Health, 115 A.D.2d 638, 639 [2d Dept 1985]) and, therefore, stated claims under Military Law § 242.

CONCLUSION

Accordingly, it is

ORDERED

that defendant's motion to dismiss is granted to the extent that the eighth and fourteen causes of action are dismissed and denied in all other respects in accordance with the foregoing; and it is further

ORDERED

that within thirty (30) days from the date from the date of this Decision & Order, the parties shall either: (i) stipulate to a scheduling order with respect to disclosure and the filing of a note of issue, which shall be submitted to the Court for approval; or (ii) request a conference with the Court for the purpose of establishing a scheduling order.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to counsel for defendant for filing and service. All other papers are being transmitted to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.