

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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JOHN FAWCETT,

Plaintiff,

- v -

FOX NEWS NETWORK, LLC, FOX CORPORATION, ANDREW NAPOLITANO, LARRY KUDLOW, LACHLAN MURDOCH, VIET DINH, GARY SCHREIER, SUZANNE SCOTT, JAY WALLACE, KEVIN LORD, DENISE COLLINS, STEPHANIE FREEMAN, JENNA STREM,

Defendants.

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INDEX NO. 157135/2021

MOTION DATE _____

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 101, 103, 139, 140, 145, 146, 161

were read on this motion to dismiss.

In this action, plaintiff seeks damages for alleged sexual harassment, gender discrimination, and retaliation. Defendant Napolitano moves for an order granting him summary dismissal of the causes of action against him. Plaintiff opposes.

I. FIRST AMENDED COMPLAINT (NYSCEF 3)

In his amended complaint, plaintiff sues defendants, his alleged employers, supervisors and/or coworkers, for various discriminatory and retaliatory acts. Only the allegations pertinent to this motion are set forth below.

Plaintiff was last employed as an associate producer for a Fox Business program hosted weekly by defendant Kudlow. Fox Business is a division of defendant Fox News Network, LLC (Fox News), which is a division of parent company, defendant Fox Corporation; they are headquartered in New York. Defendant Napolitano is a former legal analyst for Fox News.

Plaintiff began working for Fox Business in March 2019 as an entry-level production assistant. He met Napolitano in late September or early October 2019 while on an elevator going from the 20th floor to the lobby at Fox. Napolitano “stood awkwardly close to [him], stroked his arm, and asked who [he] worked for.” When plaintiff replied that he worked for Lou Dobbs, Napolitano asked if he was “looking for a new job” and told him that Dobbs had a horse farm in New Jersey and that he, Napolitano had a maple syrup farm in New Jersey. Napolitano then showed plaintiff his hands (“You see these hands?”) and looked at him “suggestively,” stating that although his hands look clean, “they get really dirty.” He then told plaintiff to visit his farm if he was ever in New Jersey or that he could visit him in his Manhattan apartment.

When plaintiff returned to his work area and told his co-workers about the encounter and how uncomfortable he felt, they laughed as “[i]t was common knowledge that [Napolitano] sexually harassed young men at Fox News, and it had even happened to one of [his] co-workers.”

II. CONTENTIONS

A. Napolitano (NYSCEF 95)

According to Napolitano, plaintiff’s claims against defendants generally arise from certain adverse employment actions allegedly taken against him in 2021, whereas the allegations as they pertain to him concern a single incident alleged to have occurred in 2019. He denies that the alleged incident has anything to do with the alleged adverse employment actions and contends that plaintiff is attempting to sensationalize his claims by setting forth irrelevant news articles, lawsuits, and frivolous and scandalous commentary about him that have no bearing on this litigation or connection with reality. In any event, Napolitano maintains, the single allegation concerning the incident between him and plaintiff has is not related to plaintiff’s complaints

about the other individual defendants and employer.

Moreover, given plaintiff's admission that his employer is Fox News and that he worked as a production assistant for a Fox Business program, Napolitano argues that he could only be held liable under the city and state laws if he had actually engaged in a discriminatory act, and that plaintiff alleges no facts that could sustain such liability. He also disputes the accusations and asks that they be stricken and given no weight on this motion.

Napolitano asserts that the conduct in which he allegedly engaged does not rise to the level of a discriminatory act as the NYCHRL, like Title VII and the NYSHRL, is not a general civility code. Thus, he argues, petty slights and trivial inconveniences, even if they cause a plaintiff's discomfort, are not actionable, nor is an isolated incident of unwelcome conduct. Even if true, the allegations against him constitute nothing more than petty slights on a single occasion, and there is no indication that the alleged conduct affected the terms or conditions of plaintiff's employment or suggest that the conduct had a discriminatory animus, which is essential to a gender discrimination cause of action. Op;l

Similarly, Napolitano observes that there is nothing in the complaint suggesting that he retaliated against plaintiff, or that he aided and abetted any discriminatory conduct or that any alleged adverse action involved him. Absent any other incidents relating to him or any contention that plaintiff suffered an adverse employment action as a result of the encounter, he asserts that there is no basis for liability.

B. Plaintiff (NYSCEF 101)

Plaintiff argues that Napolitano's motion is premature, and that dismissal of this claim must await a motion for summary judgment. He also clarifies his first amended complaint to the extent that he intended to assert a sexual harassment claim against Napolitano solely under the

NYCHRL; he thus withdraws his other claims against Napolitano.

According to plaintiff, he satisfies the requirements of setting forth a claim of sexual harassment pursuant to the NYCHRL, as he alleges that he belongs to a protected group, that he was subjected to unwanted sexual harassment, and that the harassment was based on his sex. He denies that he must demonstrate that the harassment was severe or pervasive, or that it constituted an abusive working environment. He maintains that Napolitano engaged in unwanted touching while he made sexual overtures to him, which he characterizes as unwanted gender-based conduct.

C. Reply (NYSCEF 103)

Napolitano reiterates his arguments.

III. ANALYSIS

In arguing that sexual harassment constitutes an affirmative defense that cannot be the subject of a motion to dismiss pursuant to CPLR 3211(a)(7), plaintiff misinterprets *Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 (1st Dept 2009), *lv denied*, 13 NY3d 1702 (2009). In *Williams*, the Court expressed a preference that affirmative defenses presenting “borderline situations” be decided by juries. Thus, where the facts asserted by the defendant in support of an affirmative defense do not present a borderline situation, it may be decided as a matter of law. As *Williams* is controlling precedent in this department, the other decisions cited by plaintiff are of no moment. (*See also Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18 [1st Dept 2014] [granting CPLR 3211 motion to dismiss NYCHRL sexual harassment claim]). As plaintiff fails to allege or demonstrate that Napolitano’s conduct here presents a borderline situation, this motion may be decided as a matter of law.

In *Priore v New York Yankees*, the Court dismissed the plaintiff’s NYCHRL claims

against individual defendants-employees, finding that an individual employee may be held liable for a discriminatory practice only if the employee acted with or on behalf of the employer, i.e., if acting in an agency or supervisory capacity, and that the NYCHRL was “not intended to afford a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment.” (307 AD2d 67, 74 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]).

Fatal to plaintiff’s claim is the undisputed fact that Napolitano’s alleged conduct toward him is entirely unrelated to plaintiff’s employment with Fox, and plaintiff does not claim otherwise. Plaintiff’s willingness to withdraw his employment discrimination and retaliation claims against Napolitano underscores the fact that his claim against Napolitano is based solely on the one incident, which happened to occur in the workplace but otherwise has no relation to plaintiff’s work. Thus, absent an allegation that Napolitano had an agency or supervisory relationship with plaintiff, he may not be held liable for the alleged sexual harassment under the NYCHRL.

Moreover, the encounter between plaintiff and Napolitano was brief and trivial, similar to those at issue in *Williams*, wherein the Court dismissed a NYCHRL sexual harassment claim arising from an allegation that the plaintiff’s supervisor allegedly told her, after she had requested a place at work to take a shower, that “[she] can take a shower at my house.” (61 AD3d at 30; *see also Kim*, 120 AD3d at 36 [dismissing harassment claim under NYCHRL as reasonable person would consider offending conduct no more than “petty slights and trivial inconveniences”]).

Plaintiff’s assertion that that Napolitano “did more” than the defendant in *Kaplan v New York City Dept. of Health and Mental Hygiene*, 142 AD3d 1050, 1051 (2d Dept 2016), borders

on the frivolous as the defendant in *Kaplan* was alleged to have engaged in an overtly sexual act in the plaintiff’s presence, whereas there was nothing overtly sexual about Napolitano’s conduct. Consequently, regardless of the discomfort that plaintiff allegedly felt as a result of his encounter with Napolitano, the alleged facts, viewed individually and collectively, do not constitute evidence that Napolitano was motivated by sexual desire.

For all of these reasons, Napolitano sustains his burden of demonstrating that the cause of action for sexual harassment is legally insufficient.

IV. CONCLUSION

Given this result, and plaintiff’s representation that he “does not wish to assert retaliation, ‘aiding and abetting,’ or NYSHRL claims” against Napolitano, this action is dismissed in its entirety as against Napolitano. Nor need plaintiff’s sur-reply be considered as Napolitano did not raise a new issue in his reply brief. Rather, he only cited an additional case in support. That plaintiff failed to address the issue in his opposition does not constitute grounds for submitting a sur-reply.

Accordingly, it is hereby

ORDERED, that defendant Andrew Napolitano’s motion to dismiss is granted, and the complaint is severed and dismissed as against said defendant, and the clerk is directed to enter judgment accordingly.

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2/14/2022
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: