

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2012

Heard: November 6, 2012

Decided: February 19, 2013

Docket No. 12-187-cv

1 JEWANTA DESARDOUIN,

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3 Plaintiff-Appellant,

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5 v.

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7 CITY OF ROCHESTER, VINCENT McINTYRE, as Aider and Abettor,

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9 Defendants-Appellees.

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12 Before: NEWMAN, RAGGI, and LYNCH, Circuit Judges.

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14 Appeal from the December 16, 2011, judgment of the United States
15 District Court for the Western District of New York (Michael A.
16 Telesca, District Judge), dismissing, on motion for summary judgment,
17 a suit alleging discrimination and retaliation claims based on a
18 hostile work environment in violation of federal and state
19 discrimination laws.

20 Affirmed as to retaliation and state law claims, reversed as to
21 discrimination claims, and remanded.

22 Christina A. Agola, Rochester, N.Y., for
23 Plaintiff-Appellant.

24 Igor Shukoff, Rochester, N.Y., for
25 Defendants-Appellees.
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1 JON O. NEWMAN, Circuit Judge:

2 This appeal concerns the recurring issue of what circumstances
3 suffice to warrant a trial of a gender discrimination claim based on
4 an allegation of a hostile work environment. Plaintiff-Appellant
5 Jewanta Desardouin appeals from the December 16, 2011, judgment of the
6 United States District Court for the Western District of New York,
7 Michael Telesca, District Judge, granting summary judgment to
8 Defendants-Appellees Vincent McIntyre and the City of Rochester (the
9 "City"). Desardouin and others brought claims of a hostile work
10 environment based on gender under the Civil Rights Act of 1964, 42
11 U.S.C. § 2000e ("Title VII"), 42 U.S.C. § 1983, and the New York State
12 Human Rights Law, N.Y. Exec. Law § 290, et. seq. ("NYSHRL"), as well
13 as claims of retaliation under Title VII and the NYSHRL. We conclude
14 that Desardouin's claim of a hostile work environment suffices to
15 warrant a trial and therefore remand that portion of her case to the
16 District Court. In a summary order filed today, we affirm the
17 dismissal of the claims of the other plaintiffs.

18 Background

19 The following factual summary, drawn primarily from Desardouin's
20 affidavit, is presented, as required for the purposes of a summary
21 judgment ruling, in the light most favorable to the non-moving party.
22 See Jaegly v. Couch, 439 F.3d 149, 151 (2d Cir. 2006).

23 Desardouin began her employment with the City as a supervisory
24 security officer in February 1988. She was the only female supervisor
25 in the Security Operations department of the Rochester Police
26 Department. Desardouin reported to McIntyre, her supervisor.

1 She alleged that, starting in May 2007, McIntyre made "sexual
2 advances" toward her and one of her co-plaintiffs, Theresa Smith. On
3 a weekly basis, McIntyre told Desardouin that her husband was "not
4 taking care of [her] in bed." In a recorded statement at an
5 investigation by the Professional Standards Section ("PSS") of the
6 Rochester Police Department, she acknowledged that McIntyre's comments
7 stopped in June or July.

8 After witnessing McIntyre routinely harass her co-plaintiffs, she
9 arranged a meeting with Richard Vega, the Department's Officer of
10 Integrity, and reported McIntyre's harassing conduct. Vega told her
11 there was nothing he could do. In January 2008, she complained to the
12 PSS about McIntyre's conduct. On January 15, 2008, she filed a
13 complaint with the New York State Division of Human Rights.

14 In October or November of 2008, she submitted to PSS a recording
15 of McIntyre and Eric Cotton, another Security Supervisor, allegedly
16 discussing tampering with her computer and changing her schedule.

17 Desardouin filed her federal complaint on December 4, 2008. She
18 alleged that retaliation "continued" thereafter. Specifically, she
19 alleged that her computer was tampered with "whereby someone deleted
20 the incident reports on [her] system;" she was assigned additional
21 administrative tasks such as payroll reporting, preparing incident
22 reports, and data input, tasks that were not given to the two male
23 supervisors; and McIntyre changed her schedule on an "ad hoc" basis.

24 After Desardouin admitted that she had engaged in the
25 unauthorized recording of employees and that she initially had lied
26 about doing so, she was discharged in February 2009.

1 Discussion

2 I. Hostile Work Environment

3 Title VII prohibits an employer from discriminating on the basis
4 of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-
5 2(a)(1). A hostile work environment claim requires a plaintiff to
6 show that a workplace is "so severely permeated with discriminatory
7 intimidation, ridicule, and insult that the terms and conditions of
8 her employment were thereby altered." Alfano v. Costello, 294 F.3d
9 365, 373-74 (2d Cir. 2002) (citations omitted). The plaintiff must
10 also show "either that a single incident was extraordinarily severe,
11 or that a series of incidents were sufficiently continuous and
12 concerted to have altered the conditions of her working environment."
13 Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (internal
14 quotation marks omitted). If a plaintiff relies on a series of
15 incidents, they must be "more than episodic; they must be sufficiently
16 continuous and concerted in order to be deemed pervasive." Perry v.
17 Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997) (internal
18 quotation marks omitted). In determining whether the threshold has
19 been met, relevant factors include "the frequency of the
20 discriminatory conduct; its severity; whether it is physically
21 threatening or humiliating, or a mere offensive utterance; and whether
22 it unreasonably interferes with an employee's work performance."
23 Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). The
24 plaintiff must also subjectively perceive the environment to be
25 abusive. Id. at 22-23. Finally, "it is 'axiomatic' that in order to
26 establish a sex-based hostile work environment under Title VII, a

1 plaintiff must demonstrate that the conduct occurred because of her
2 sex." Alfano, 294 F.3d at 374 (citation omitted).

3 McIntyre's comments, though not presenting an obvious case of
4 hostile work environment, are sufficiently beyond the line drawn in
5 Harris to warrant a trial. The comments persisted on a weekly basis
6 over an interval that lasted at least two and perhaps three months.
7 Though not threatening, they were more than merely offensive. For a
8 male to say to a female employee under his supervision that her
9 husband was "not taking care of [her] in bed" is the sort of remark
10 that can readily be found to be a solicitation for sexual relations
11 coupled with a claim of sexual prowess and can just as readily be
12 found to have been perceived as such by the female employee. The
13 weekly repetition of such a remark over several weeks only served to
14 reenforce its offensive meaning and to make sexual intimidation,
15 ridicule, and insult a pervasive part of Desardouin's workplace,
16 effectively changing the terms and conditions of her employment. See
17 Alfano, 294 F.3d at 373. Indeed, Desardouin's affidavit stated that
18 she found McIntyre "threatening," and that he made "sexual advances"
19 toward her and another employee. The allegations of repeated
20 solicitation of sexual relations in a vulgar and humiliating manner
21 suffice to warrant a trial.

22 II. Section 1983 and NYSHRL Claims

23 Desardouin's claim of gender discrimination because of hostile
24 work environment also suffices under the Equal Protection Clause of
25 the Fourteenth Amendment. The District Court properly ruled that her
26 NYSHRL claim was barred on the basis of election of remedies, in view

1 of N.Y. Exec. Law § 297(9), which, with certain exceptions not
2 applicable here, precludes resort to courts after claims have been
3 filed with a local commission on human rights.

4 III. Retaliation Claims

5 The District Court properly determined that Desardouin's claims
6 of retaliation failed. As with all Title VII claims, an employer can
7 defeat a claim that it took an adverse employment action against an
8 employee by showing that it acted for a legitimate, non-discriminatory
9 reason. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802
10 (1973). The Defendants proffered as a reason for terminating
11 Desardouin her secret recordings of conversations of police officials.
12 As the District Court pointed out, making these recordings was a
13 felony and a violation of departmental policy. Desardouin's only
14 response to the proffer of this undisputed misconduct was that four
15 months had elapsed between her actions and her termination. Because
16 her misconduct reasonably required some time to investigate, the four-
17 month interval did not impair the legitimacy of the Defendants'
18 proffered reason for the termination. The retaliation claims were
19 properly dismissed.

20 Conclusion

21 The judgment of the District Court is reversed with respect to
22 Jewanta Desardouin's Title VII and section 1983 claims of gender
23 discrimination because of hostile work environment, and those claims
24 are remanded for trial. Dismissal of her retaliation claims and her
25 state law claims is affirmed.

26 Affirmed in part, reversed in part, and remanded.