Bayley v City of New York

2013 NY Slip Op 33473(U)

December 19, 2013

Supreme Court, New York County

Docket Number: 402624-2008

Judge: Margaret A. Chan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/7/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART 52

Justice

Index Number : 402624/2008
BAYLEY, JEWEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo & J | No(s). 1-2

Answering Affidavits — Exhibits | No(s). 3-4

Replying Affidavits | No(s). 5

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION DETERMINED PURSUANT TO
ANNEXED DECISION AND ORDER

FILED

DEC 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/19/13

HON. MARGARET A. CHAN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 52

JEWEL BAYLEY,

Plaintiff,

-against-

CITY OF NEW YORK; RAYMOND W. KELLY, AS POLICE COMMISSIONER; NELDRA M. ZEIGLER, AS DEPUTY COMMISSIONER, OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY; LJUBOMIR BELUSIC, AS CAPTAIN, PATROL BOROUGH BROOKLYN SOUTH; THOMAS KLEIN, AS CAPTAIN, RETIRED; JAMES SCALA,

Defendants.

Index Number: 402624-2008

DECISION/ORDER

HON. MARGARET CHAN

Justice, Supreme Court

FILED

DEC 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff brought the instant action against defendants asserting claims of racial discrimination, retaliation and hostile work environment in violation of State and City Human Rights Laws (*see* Executive Law § 296 *et seq.*, and Administrative Code of the City of New York § 8-107 *et seq.*, respectively). Plaintiff's suit initially included claims of discriminatory acts which occurred prior to and including December 31, 2003. An order by another Justice of this court granted defendants' partial summary judgment (*see* J. Kern, Decision and Order 3/9/2010) dismissing claims stemming from acts that occurred prior to and including December 31, 2003. The court found those claims were barred here because of the settlement of a class action lawsuit involving claims of racial discrimination to which plaintiff was a party ("the LOA settlement"). The court also dismissed claims that accrued prior to January 16, 2005, pursuant to the relevant statute of limitations. Defendants made the instant motion for summary judgment against plaintiff's remaining claims of racial discrimination for acts that accrued on or after January 16, 2005, retaliation, and a hostile work environment. Plaintiff submitted opposition to the instant motion.

The relevant facts are as follows: Plaintiff, an African-American woman, was an employee of the New York City Police Department ("NYPD"). She began her employment with the NYPD in July 2001, and was assigned to Transit Bureau District ("TBD") No. 4 in March 2002. Plaintiff received consecutive below-average annual performance evaluations for the years 2003, 2004 and 2005. In 2004 plaintiff was served with a copy of Department Charges and Specifications (the "2004 Charges and Specifications") for acts of misconduct occurring in 2003 and 2004. After a disciplinary hearing regarding those charges, an Assistant Deputy Commissioner - Trials ("ADC") found plaintiff guilty of all of the charges brought against her but one. The recommendation of the ADC was forfeiture of ten (10) vacation days. This penalty was accepted by the Police Commissioner in December 2005. That same month, plaintiff was administratively transferred to the 41st Precinct. Also in 2005, plaintiff was placed into the Performance Monitoring Program ("PMP").

Plaintiff was served with additional charges and specifications in early 2006 for acts occurring in 2004 and 2005 (the "2005 Charges and Specifications"). Another disciplinary hearing was held. The presiding ADC issued a report finding plaintiff guilty of all of the four (4) charges brought against her. The ADC found: (1) on October 21, 2004, plaintiff failed to properly store active and completed activity logs in her locker; (2) she failed to produce records in compliance with an order on January 21, 2005; (3) she failed to safeguard her NYPD shield which she reported lost on or about June 25, 2005; and (4) on October 8, 2005, she reported fifteen (15) minutes late for a tour of duty (see Defts' Mot, Exh CC). The ADC recommended a penalty of forfeiture of twenty (20) vacation days (*id.*). That penalty was accepted by the Police Commissioner in April 2007. Despite any disciplinary record, plaintiff was promoted to Sargent in 2009.

Plaintiff first contacted the NYPD's Office of Equal Employment Opportunity ("EEO") in July 2003 to make a complaint against her then supervisor, Lieutenant Callaghan. The EEO found that the complaint did not articulate any employment discrimination after an investigation (*see* Defts Mot, Exh II). Similarly, after an incident in September 2003 regarding another supervisor, Captain Giantasio, the EEO found that the complaint also failed to articulate any employment discrimination (*see id*; Defts Mot, Exh JJ). In December 2003, Captain Van Glahn contacted EEO and claimed that plaintiff made a claim of retaliation against him. Plaintiff also directly complained of discrimination by Captain Van Glahn to EEO. In March 2004, plaintiff made a complaint to the EEO against Lieutenant Labela. The complaint charged that Lieutenant Labela tampered with plaintiff's locker. EEO conducted an investigation into the complaints against Captain Van Glahn and Lieutenant Labela. EEO issued a ten (10) page report that summarized interviews with plaintiff, Captain Van Glahn, Lieutenant Labela and five other NYPD officers. The report found, in essence, that Captain Van Glahn's actions were not discriminatory; rather, they were in compliance with department guidelines (*see* Defts Mot, Exh II, pp 9-10). The EEO found that plaintiff's allegations against Lieutenant Labela were not credible. The EEO recommended that the complaints against Captain Van Glahn and Lieutenant Labela be closed as "EXONERATED" (*id* at 10).

In December 2007, plaintiff filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("USEEOC"). The USEEOC found that the Charge was not timely filed and dismissed it (*see* Defts Mot, Exh OO and Exh PP).

In a cause of action invoking protections under both the State and City Human Rights Laws a plaintiff must assert that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action was due to circumstances that could be deemed discriminatory (*see* Executive Law § 296 *et seq.*; Admin. Code § 8-107 *et seq.*; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Once plaintiff satisfies this burden, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the adverse action taken (*Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of ADL–CIO*, 6 NY3d 265, 270 [2006]). If defendants produce such evidence, plaintiff must then show that the reason given is pretext for discrimination (*see Ferrante v American Lung Ass'n*, 90 NY2d 629–630 [1997]).

First addressing plaintiff's claim that placement in the PMP was discriminatory, the defendants argued that the placement was not an adverse employment action as it did not materially alter the terms of plaintiff's employment. The only change that plaintiff alleged was that the PMP placement prevented her from transferring to another division, however plaintiff conceded she never made such a request (*see* Pltf's Opp, Exh A, p 93)[1]. Plaintiff added that she never made such a request because she believed it would be denied (*id.*). Plaintiff also stated in her deposition testimony that she was comfortable in her assignment and did not wish to be reassigned (*see* Pltf's Opp, Exh A, p 102).

To be considered adverse, an employment action must materially change the "terms and conditions of employment" (*see Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314 [1st Dept 2005]). Examples often include termination of employment, a demotion, a decrease in salary, diminished responsibilities, or a less prominent title (*see id*; *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000]). The PMP had no impact, adverse or otherwise, on plaintiff; her job responsibilities remained status quo. Indeed, in an Article 78 proceeding brought by the Patrolmen's Benevolent Association against the New York City Board of Collective Bargaining, the First Department upheld an administrative determination that rejected the claim that placement in the PMP constituted discipline (*see Patrolmen's Benev. Ass'n of the City of New York, Inc. v New York City Board of Collective Bargaining*, 38 AD3d 482 [1st Dept 2007]).

As placement in the PMP did not even rise to the level of a mere inconvenience, it is not actionable here. It should be noted that plaintiff's counsel attempted to cast the PMP as disproportionally used against minority officers and cited various statistics. However, it is unclear how plaintiff gleaned that information and the exhibit improperly proffered without any foundation did not on its face support counsel's assertions (*see* Pltf's Opp, Exh L).

Turning to plaintiff's administrative transfer in December 2005, defendants proffered that the non-discriminatory reason for her administrative transfer was due to plaintiff's disciplinary record (*see* Defts' Mot, Exh NN). As defendants have presented a non-discriminatory reason, the burden shifts to plaintiff to show the reason is pretextual (*see Ferrante v American Lung Ass'n*, 90 NY2d 629). "This may be accomplished when it is 'shown both that the reason was false, and that discrimination was the real reason' "(*id* at 630, *quoting St. Mary's Honor Center v Hicks*, 509 US 502, 515 [1993][emphasis omitted]). The Court of Appeals explained that to defeat a summary judgment motion, plaintiff must show the existence of a triable issue of fact by indicating that the employer's reason for the action is not credible and that more likely than not the employee's protected status is the true reason for the action (*id* at 630, *citing Criley v Delta Air Lines*, 119 F3d 102 [2d Cir. 1997]).

Plaintiff argued that conversations with her supervisors indicated a discriminatory intent. Plaintiff alleged a platoon commander in the 41st Precinct said that he was told to raise her PMP monitoring level

---

[1] Defendants submission stated that plaintiff's deposition was annexed as its Exhibit L. However, defendant's motion had an Exhibit tab for Exhibit L, but there was nothing attached there. The Court reviewed the portions of plaintiff's deposition testimony provided by plaintiff in her opposition at Exhibit A.

without a basis. Besides the hearsay nature of this statement, it does not suggest any racial animus. Upon plaintiff's inquiry into her administrative transfer, the Deputy Inspector, acting as head of the PMP, stated "We can transfer you anywhere. We won." Plaintiff inferred that to mean that she was being retaliated against for her participation in the LOA settlement which was completed one month prior to the statement being made.

Even if assuming that these statements were racially motivated, they did not give way to an adverse employment action necessary to invoke the protections of the State and City Human Rights Law. Plaintiff failed to show that the administrative transfer in December 2005 from the Transit Bureau to the 41st Precinct was an adverse employment action. Plaintiff's main complaint about the transfer was that she was not retrained at the 41st PCT as was required by NYPD guidelines. Plaintiff failed to cite to those guidelines or indicate whether or not she requested retraining. Failure to provide retraining does not meet the standard for an adverse employment action (*see Messinger v Girl Scouts of the U.S.A., supra*; *Galabya v New York City Bd. of Educ., supra*). Therefore, as the administrative transfer was not an adverse employment action, plaintiff's claim of discrimination related to it is dismissed.

Plaintiff also alleged that the 2005 Charges and Specifications were made in retaliation for her contact with the EEO. An employer is prohibited from retaliating against an employee for opposing discriminatory practices (*see* Executive Law § 296(7); *see Forrest v Jewish Guild for the Blind,* 3 NY3d 295). To sustain such a claim, a plaintiff must show that: (1) she has engaged in a protected activity; (2) the employer was aware that she participated in this activity; (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action (*id.*).

Defendants stated that the 2005 Charges and Specifications were not requested to be brought against plaintiff until May 16, 2005 –more than a year after her most recent complaint in March 2004 to EEO. Defendants argued that there was no temporal proximity between that March 2004 EEO complaint and the 2005 Charges and Specifications to infer a causal connection between the them. Plaintiff's opposition failed, even generally, to address that the 2005 Charges and Specifications were made in retaliation for plaintiff's EEO complaints. Considering the totality of the circumstances, there is nothing in the record here to suggest that the 2005 Charges and Specifications were prompted against plaintiff in retaliation for any of plaintiff's EEO complaints. Therefore, plaintiff's retaliation claim concerning the 2005 Charges and Specifications is dismissed.

Defendants are also granted summary judgment on plaintiff's claim that the 2005 Charges and Specifications were discriminatory. Plaintiff argued that she was under greater scrutiny than white officers; she claimed that similar infractions by white officers were more routinely ignored. However, there was no evidence proffered that these charges were levied against plaintiff unfairly or based on racial animus. Nor was there any evidence to support plaintiff's claim that white officers' infractions were routinely overlooked. Defendants proffered the findings of the ADC who conducted a thorough investigation that substantiated the charges against plaintiff.

Finally, as to the hostile work environment claim, a hostile work environment is one that is permeated with "discriminatory intimidation, ridicule, and insult" that are "sufficiently severe or pervasive to alter the conditions of employment" (*see Forrest v Jewish Guild for the Blind, supra, citing Harris v Forklift Sys., Inc.*, 510 US 17, 21-23 [1993]). Whether a workplace should be viewed as hostile or abusive can only be determined by considering the totality of the circumstances (*id.*). A hostile work environment culminates "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own" (*Khalil v State*, 17 Misc3d 777 [Sup Ct, NY Cty 2007] *quoting National R.R. Passenger Corp. v Morgan,* 536 US 101, 115 [2002] [internal quotations omitted]). There is no evidence here that plaintiff's workplace was permeated with such ongoing discriminatory acts. Therefore, plaintiff's hostile work environment claim is dismissed.

Accordingly, defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed.

This constitutes the decision and order of the court.

Dated: December 19, 2013

Margaret A. Chan , *J.S.C.*

FILED

DEC 27 2013

COUNTY CLERK'S OFFICE
NEW YORK