Santiago v Bernard F. Dowd, Inc.
2017 NY Slip Op 30791(U)
April 18, 2017
Supreme Court, New York County
Docket Number: 160442/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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RICHARD SANTIAGO,

Plaintiff,

-against-

BERNARD F. DOWD, INC.,

Defendant.

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Index No. 160442/13

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

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For defendant:
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By notice of motion, defendant moves pursuant to CPLR 3212 for an order granting it summary dismissal of plaintiff's claim that defendant created a hostile work environment on the basis of sex in violation of the New York City Human Rights Law (Administrative Code of the City of New York § 8-107 *et seq.*) (NYC HRL). Plaintiff opposes.

I. BACKGROUND

A. Plaintiff's allegations

At a deposition, plaintiff testified as follows: In 1996, he commenced working as an intern funeral director with defendant at an annual salary of approximately $32,000. Approximately one year later, he became a licensed funeral director with defendant, where he served in that capacity until approximately 2006, when he became a manager of a funeral home that had been acquired by defendant's principal and sole shareholder, nonparty Bernard Dowd.

In addition to his duties as a funeral director, plaintiff supervised other employees, and received regular raises except for a period from 2004 to 2008. (NYSCEF 41).

Plaintiff worked with Dowd on a daily basis, along with three other funeral directors, of whom one was female, Janine Carbone. Plaintiff performed most of the embalming; Dowd regularly examined his work. At his deposition, plaintiff testified to conduct engaged in by Dowd that never failed to result in his discomfort and thereby created a hostile work environment:

(1) Dowd would look at the genitalia of male corpses.

(2) Whenever plaintiff put his hands in his pockets, Dowd would ask if he were playing "pocket pool."

(3) Dowd would often say that the size of one's thumb indicates the size of one's penis, and would assert that plaintiff must have been "Irish from the waste [sic] down."

(4) Plaintiff was told that Dowd had once commented on another employee's erection after kissing his girlfriend outside the funeral home.

(5) A pastor once told plaintiff that he was relieved not to be with Dowd because all Dowd talked about was penises.

(6) Dowd commented on the attractiveness of other males and paid undue attention to younger male pallbearers.

(7) Whenever plaintiff attempted to change his clothing within the small closet outside the embalming preparation room, and heard Dowd approach on his way to the room, plaintiff would try to squeeze himself into the closet, whereupon Dowd would open the door, look at him, and indicate that there was no need for him to change in the closet because he was "not going to

look," or did not want to look at his "little peanut." Plaintiff did not talk to Dowd about it beyond asking that he look away, because it was uncomfortable to do so and he feared that Dowd would assign him yard work outside of the funeral home.

(8) Plaintiff would avoid walking into Dowd's office because Dowd would stare at his crotch.

(9) In 1996, 1998, 1999, and 2004, whenever a corpse with large genitalia was in the prep room, Dowd would comment on it.

(10) In 1998, Dowd told plaintiff about his attempts to have children, and described in graphic detail how a doctor had harvested his sperm to measure his sperm count.

(11) In 2002, Dowd told plaintiff that he had to pull the skin back on a corpse's uncircumcised penis to clean it, which according to plaintiff, was not usually done when embalming a corpse.

(12) Plaintiff recounted that in 2003 or 2004, when another employee had mentioned, in Dowd's presence, that Dowd had used the word penis 34 times within two minutes, Dowd laughed in response.

(13) In 2005 or 2006, Dowd told plaintiff about a discussion he had had with a contractor about a male sexual feature, and then asked plaintiff if he shared that feature with the contractor.

(14) In 2008, while plaintiff appreciated that Dowd had offered to embalm his father, plaintiff felt it necessary to instruct other employees not to allow Dowd to be alone with his father's body.

(15) In 2009, Dowd told plaintiff that if he wanted to have a boy child, he should take his wife "from behind." (NYSCEF 41).

In plaintiff's opinion, Dowd is a closeted homosexual, whose comments to him and the other male employees was constant and daily, "like breathing." (*Id.*). He described Dowd as abusive to the point where plaintiff felt that he had to leave to avoid physically hurting him. Plaintiff considered Carbone, who worked for defendant for 21 years, the "buffer" between him and Dowd. Thus, when she left for another position in 2012, and feeling that he could not remain in Dowd's employ without her, he sought new employment. He was then earning $94,000 annually. He left defendant's employ in November 2012 and commenced working for another funeral home, earning the same annual salary. Plaintiff acknowledged having attended Dowd family functions and helping Dowd fix items in his home. (*Id.*).

B. Procedural background

Plaintiff commenced this action on or about November 10, 2013. (NYSCEF 39). Defendant efiled its answer on August 29, 2014. (NYSCEF 40).

II. CONTENTIONS

Defendant observes that, absent any allegation of sexual touching, propositioning, or romantic overture, plaintiff's allegations amount to nothing more than trivial and subjective complaints by an apparently homophobic individual, and argues that there is no evidence that defendant treated plaintiff worse than other male employees. He also maintains that those allegations based on conduct occurring before November 2010, or more than three years before plaintiff commenced this action, are time-barred, and thus, does not address that conduct. Moreover, given his promotions and regular raises, defendant observes that plaintiff's career was not hindered, and asserts that plaintiff cannot show that Dowd was homosexual and/or motivated in his conduct toward him by sexual desire, that Dowd was generally hostile to males in the

workplace, or that he treated members of the sexes differently. (NYSCEF 44).

In opposition, plaintiff argues that Dowd directed sexual comments only at male employees, which shows that Dowd treated the sexes differently. These comments, plaintiff asserts, were made daily and incessantly throughout plaintiff's years of employment, and despite plaintiff's complaints. Plaintiff also maintains that Dowd is a homosexual whose conduct was motivated by sexual desire, and that defendant's accusation that he is homophobic is baseless, as it incorrectly attributes to him homophobic statements made by his colleagues. Plaintiff also maintains that Dowd's conduct constitutes a single, continuing violation of the law, and that it evidences a hostile working environment based on sex, which comes within the NYC HRL. (NYSCEF 46).

III. ANALYSIS

A. Statute of limitations

Plaintiff's action, filed on or about November 10, 2013, is based on allegations that date back to 1996, when he was first employed by defendant. As the pertinent limitations period is three years (Admin. Code § 8-502[d]; *Herrington v Metro N. Commuter R. Co.*, 118 AD3d 544, 544 [1st Dept 2014]), I must determine whether those allegations relating to Dowd's conduct before November 10, 2010, are time-barred, which depends on whether plaintiff adequately alleges a single continuing pattern of unlawful conduct extending into the limitations period (*St. Jean Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2014], citing *Ferraro v N.Y. City Dept. of Educ.*, 115 AD3d 497, 497-98 [1st Dept 2014]; *James v City of New York*, 144 AD3d 466, 467 [1st Dept 2016]; *Williams*, 61 AD3d at 72).

Having described a constant, unrelenting, and daily barrage of offensive comments, so

frequent as to be "like breathing," commencing from the beginning of his employment with defendant and lasting until his resignation in November 2012, plaintiff sufficiently alleges a single continuing pattern of conduct. (*See Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023(A) [Sup Ct, New York County 2004] [35 instances of racial discrimination constitute single, continuing pattern]).

B. Summary judgment standard

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues that require a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]). In evaluating such a motion, the evidence must be viewed in the "light most favorable to the opponent of the motion." (*O'Brien v Port Authority of New York and New Jersey*, NY3d , 2017 NY Slip Op 02466 [2017]).

C. New York City Human Rights Law

The NYC HRL prohibits discrimination "in terms, conditions or privileges of employment" on the basis of gender (Admin. Code § 8-107[a]), and provides that a hostile work environment based on such discrimination exists where a plaintiff is "treated less well than other employees because of her gender" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009], *lv denied*, 13 NY3d 702; *Matter of Phillips v Manhattan & Bronx Surface Tr.*

Operating Auth., 132 AD3d 149, 156 [1st Dept 2015], *lv denied*, 27 NY3d 901, citing *Williams*, *supra*). Upon a determination that a plaintiff was treated less well because of her gender, the relevant question becomes whether a reasonable person would find that the alleged discriminatory conduct constitutes more than "petty slights and trivial inconveniences." (*Buchwald v Silverman Shin & Byrne PLLC*, AD3d , 2017 NY Slip Op 02955 [1st Dept 2017], quoting *Williams*, *supra*, 61 AD3d at 80).

The determination as to whether discriminatory conduct constitutes more than "petty slights and trivial inconveniences" depends on the "totality of the circumstances" and the "overall context" in which the conduct occurs. (*Hernandez v Kaisman*, 103 AD3d 106, 112 [1st Dept 2012]); *Gonzalez v EVG, Inc.*, 123 AD3d 486, 487 [1st Dept 2014], quoting *Hernandez*, *supra*]). Some of the factors to be considered include:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

(*Harris v Forklift Systems, Inc.*, 510 US 17, 23 [1993]; *Hernandez*, 103 AD3d at 111). Only those cases that are "truly insubstantial" fall outside the scope of this standard. (*Williams*, 61 AD3d at 80; *Hernandez*, 103 AD3d at 112).

Here, while defendant asserts that Dowd's comments constitute petty slights and trivial inconveniences, defendant does not address the totality of the circumstances and overall context of Dowd's conduct which, notwithstanding the alleged homosexuality or homophobia of either party, resulted in plaintiff's exposure to a constant barrage of sexual commentary solely

referencing male genitalia within the confines of a funeral home. Such comments cannot be found to be truly insubstantial as a matter of law. (*See Williams*, 61 AD3d at 80; *Hernandez*, 103 AD3d at 114-15 [dissemination of emails containing mildly offensive sexual media content violated NYC HRL]; *Borbon v Area 145, Inc.*, 2015 WL 10551270, *8 n [Sup Ct, New York County 2015] [summary dismissal denied where movant's conclusory assertion lacked merit]). *cf. Buchwald*, 2017 NY Slip Op 02955 [that supervisor called plaintiff "nut," "nutjob," and "lunatic" approximately ten times over five months deemed "petty slights or trivial inconveniences"]; *Russo v New York Presbyterian*, 972 F Supp 2d 429, 450-51 [ED NY 2013] [isolated incidents of harassment not actionable under city law]). That plaintiff suffered no adverse career impact is not dispositive. (*See Williams*, 61 AD3d at 79 [NYC HRL gender discrimination analysis focuses on unequal treatment, not "tangible conduct" such as hiring or firing]; *Wixon v Broadway Regency Rest., LLC*, 2013 NY Slip Op 30145[U] [Sup Ct, New York County 2013] [allegations that plaintiff suffered discriminatory conduct and resigned due to conduct "sufficient to set forth viable cause of action for sexual discrimination" under NYC HRL]). Thus, whether Dowd's conduct constitutes gallows humor and typical locker room banter, or some form of sexual solicitation, is best decided by a jury.

A claim of a hostile work environment based on same-sex gender discrimination is likewise actionable (*Nacinovich v Tullet & Tokoyo Forex Inc.*, 1998 WL 1050971, *3 [Sup Ct, New York County 1998], citing *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 78-79 [1998] [sustaining same under federal law]), including claims brought by one male against another (*Arcuri v Kirkland*, 113 AD3d 912, 914 [3d Dept 2014] [state Human Rights Law protects male plaintiff from gender harassment by male supervisor], citing *Oncale*, *supra*;

Nacinovich, 1998 WL 1050971, *at* *3 [NYC HRL protects male plaintiff from sexual harassment by male supervisor]). To demonstrate the existence of same-sex discrimination within a mixed-sex workplace, the plaintiff may offer, *inter alia*, evidence that men and women were treated differently. (*Oncale*, 523 US at 78-79 [evidence that sexes treated differently in mixed-sex workplace supports same-sex harassment claim under Title VII]; *see also Brennan v Metropolitan Opera Ass'n, Inc.*, 284 AD2d 66, 73 [1st Dept 2001] [comparative evidence may support sexual-orientation discrimination claim in mixed-sexual orientation workplace], citing *Oncale, supra*).

Here, defendant offers no evidence that Dowd directed his comments to Carbone, and even if he had, plaintiff testified that Dowd directed his comments to males only, thereby raising a triable issue. (*See Brennan*, 284 AD2d at 73 [comparative evidence may take form of testimony]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that counsel shall appear for a pre-trial conference at 80 Centre Street, Room 279, on Wednesday, May 31, 2017, at 3:30 pm.

ENTER:

Barbara Jaffe, JSC

DATED: April 18, 2017
New York, New York