Lluberes et al v. City of Troy et al Doc. 76 Att. 12

2000 WL 423517
United States District Court, S.D. New York.

Gwenda LEWIS and Kathleen Corke, Plaintiffs,
v.
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Peter Senesi and Michael Chin, Defendants.

No. 97 CIV. 0607(PKL). | April 19, 2000.

Attorneys and Law Firms

Christopher E. Chang, Esq., New York.

Frank P. Gangemi, Esq., Gangemi & Gangemi, Brooklyn.

Thomas P. Higgins, Esq., Higgins & Trippett LLP, New York.

Daniel L. Saxe, Esq., Saady & Saxe, Tampa, FL.

Opinion

MEMORANDUM ORDER

LEISURE, District J.

***1** Plaintiffs Gwenda Lewis and Kathleen M. Corke bring this action against defendants Triborough Bridge and Tunnel Authority ("TBTA"), Peter Senesi, and Michael Chin. Plaintiffs allege sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the New York State Human Rights Law, N.Y. Exec. Law § 296 ("HRL"). In addition, Lewis claims that she was discriminated against on the basis of her race. Defendants TBTA and Senesi (the "moving defendants") now move, pursuant to Fed.R.Civ.P. 42(b), for separate trials of all claims asserted by Lewis based on allegations of misconduct by Chin. For the following reasons, the defendants' motion is denied.

BACKGROUND

The substantive facts and procedural history of this action have been set forth in greater detail in this Court's prior Opinion and Order, *Lewis v. Triborough Bridge & Tunnel Auth.,* 77 F.Supp.2d 376, 377-79 (S.D.N.Y.1999), and the Report and Recommendation of the Honorable James C. Francis, IV (the "Report"), dated December 10, 1998. The Court presumes general familiarity with both decisions.

On November 17, 1999, this Court granted in part the moving defendants' motion for summary judgment, dismissing claims of negligent supervision against TBTA, as well as claims of discrimination and retaliation under N.Y. Exec. Law § 296(1)(a) and 296(7) against Senesi. *See Lewis,* 77 F.Supp.2d at 384 & n. 10. The Court denied summary judgment, however, with respect to claims by both plaintiffs against Senesi under N.Y. Exec. Law § 296(6). *See id.* at 376-84. Left remaining, then, were seven claims by Lewis (four solely against TBTA, two against both TBTA and Chin, and the § 296(6) claim against TBTA, Chin, and Senesi) and six by Corke (five solely against TBTA, plus the § 296(6) claim against both TBTA and Senesi).

The parties dispute the extent to which Lewis's remaining claims overlap with Corke's. Both plaintiffs are employed by TBTA as toll collectors at the Manhattan Plaza of the Triborough Bridge in New York City. *See Lewis,* 77 F.Supp.2d at 377. Corke's claims are based predominantly on alleged acts of sexual harassment, purportedly committed in 1994 and 1995 by employees of Allside Service Corporation ("Allside"), an independent cleaning company contracted by TBTA, and the failure by TBTA and Senesi to respond to her complaints. *See id.* at 377-78. Lewis's claims also implicate Allside, yet arise primarily from alleged racial and sexual harassment by defendant Chin from 1991 through 1997. *See* Report at 6; Lewis Dep. at 56. Corke, on the other hand, does not allege any misconduct on behalf of Chin.

The moving defendants seek a separate trial for Lewis on her three claims against Chin and TBTA, pursuant to N.Y. Exec. Law §§ 296(1), 296(6), and 296(7), insofar as such claims are based on Chin's allegedly inappropriate conduct. They contend that Lewis's claims arise from events separate and unrelated to those that form the basis of Corke's claims. Plaintiffs object, arguing that all of the allegations in the Complaint are interrelated and connected to the central issue of TBTA's discrimination against plaintiffs and other TBTA employees, and thus reveal a pattern of discrimination. *See* Pl. Opp. Mem. at 7.

DISCUSSION

***2** Federal Rule of Civil Procedure 42(b) states:

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works.

Dockets.Justia.com

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, ... or of any separate issue or of any number of claims ... or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

The Second Circuit accords district courts broad discretion in determining whether to grant separate trials. *See Smith v. Lightning Bolt Prods., Inc.,* 861 F.2d 363, 370 (2d Cir.1988). Factors to be considered include: "(1) whether the issues sought to be tried separately are significantly different from one another; (2) whether the severable issues require the testimony of different witnesses and different documentary proof; (3) whether the party opposing the severance will be prejudiced if it is granted; and (4) whether the party requesting the severance will be prejudiced if it is not granted." *BD v. DeBuono,* Nos. 98 Civ. 910, 98 Civ. 972, 2000 WL 249115, at *5 (S.D.N.Y. Feb. 28, 2000); *see also Hatfield v. Herz,* 9 F.Supp.2d 368, 373 (S.D.N.Y.1998) (Leisure, J.). Severance requires the presence of only one of these conditions. *See Ricciuti v. New York City Transit Auth.,* 796 F.Supp. 84, 86 (S.D.N.Y.1992); *Ismail v. Cohen,* 706 F.Supp. 243, 251 (S.D.N.Y.1989), *aff'd,* 899 F.2d 183 (2d Cir.1990).

Notwithstanding these important considerations, "separate trials remain the exception rather than the rule, regardless of the nature of the action." *Monaghan v. SZS 33 Assocs.,* 827 F.Supp. 233, 245 (S.D.N.Y.1993), *rearg. denied,* 153 F.R.D. 60 (S.D.N.Y.1994). As the Supreme Court has recognized, "[i]n actions at law the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subjects of separate trials." *Miller v. American Bonding Co.,* 257 U.S. 304, 307 (1921); *see also Katsaros v. Cody,* 744 F.2d 270, 278 (2d Cir.1984). Accordingly, "the party moving for a separate trial has the burden of showing that [separate trials are] necessary to prevent prejudice or confusion, and to serve the ends of justice." *Buscemi v. Pepsico, Inc.,* 736 F.Supp. 1267, 1271 (S.D.N.Y.1990).

The moving defendants maintain that each of the aforementioned four factors warrants a separate trial of Lewis's claims insofar as they relate to Chin's misconduct. First, they argue that the allegations of Chin's improper behavior are substantively different from, and far broader in scope and duration than, the allegations regarding Senesi's mishandling of complaints regarding Allside. They emphasize that Lewis's allegations against Chin involve accusations of affirmative acts of race and sex discrimination, while the charges against Senesi pertain to Senesi's alleged failure or refusal to address complaints about Allside's employees.

***3** This assertion is flawed, however, in that the claims against Senesi do in fact relate to the allegations against Chin. For example, Lewis maintains that Senesi ignored her protestations about Chin's ongoing campaign of sexual harassment and "dismiss[ed] his conduct as merely disciplinary, not discriminatory, behavior." *Lewis,* 77 F.Supp.2d at 378. Furthermore, BTO Benevolent Association Union officer Neil Verton has testified that he communicated Lewis's complaints regarding Chin to both Senesi and TBTA EEO Chief Richard Smith, *see* Verton Dep. at 70-73, although her grievances were never addressed. As the Court recognized in its earlier decision, it is up to the jury to decide whether Senesi's failure to take adequate remedial measures in response to plaintiffs' complaints-including those against Chin-rose to the level of "actual participation" in the unlawful discrimination under N.Y. Exec. Law § 296(6). *Lewis,* 77 F.Supp.2d at 384. Thus, for a jury to determine whether Senesi's response to Lewis's situation was appropriate, it would have to hear evidence of Chin's alleged misbehavior.

Consequently, both plaintiffs allege that the same supervisor "aided and abetted" unlawful discrimination at TBTA, albeit based on conduct by different individuals. *Cf. Blesedell v. Mobil Oil Co .,* 708 F.Supp. 1408, 1422 (S.D.N.Y.1989) ("[M]ost significantly, all of the plaintiffs complain of sexually discriminatory actions by ... their supervisor for a nine-month period, in placing them on probation and in decreasing their performance ratings. Again, all three of the plaintiffs allege that they complained of this treatment and received no response. Thus, all of the plaintiffs allege that they had been injured by the same general policy of permitting discrimination against women."). It would be a waste of judicial resources to have to rehash factual issues regarding the timeliness and appropriateness of Senesi's response to such complaints in two separate proceedings before two different juries. *Compare Morris v. Northrop*

Grumman Corp., 37 F.Supp.2d 556, 581 (E.D.N.Y.1999) (granting separate trials where plaintiffs were in separate departments and had separate supervisors responsible for making the allegedly discriminatory decisions), *with Ward v. Johns Hopkins Univ.,* 861 F.Supp. 367, 378 (D.Md.1994) (denying severance where each plaintiff's case depended on allegations that the same supervisors had notice of sexual harassment, yet continuously failed to remedy it).

Second, the moving defendants note that the allegations pertaining to Chin will require testimony from completely different witnesses. For example, Louis Pignetti, a union representative who is also Corke's husband, is expected to testify regarding sexist remarks attributed to Senesi. Yet, his testimony will not in any way implicate defendant Chin. Likewise, TBTA's defense to Lewis's claims based on Chin's misconduct will likely have nothing to do with the allegations pertaining to Allside. *See* Def. Mem. at 7.

***4** Nevertheless, while Lewis's claims arising from her allegations against Chin will undoubtedly require a jury to consider many factual issues that seem unrelated from the allegations regarding Allside's employees, the entirety of the evidence offered to prove such claims will not be “wholly distinct.” *Vichare v. AMBAC Inc.,* 106 F.3d 457, 466 (2d Cir.1996). Nearly every trial involving multiple defendants will involve some separate issues of fact that call for testimony from different witnesses on entirely unrelated matters. The more appropriate question, which the moving defendants unsurprisingly ignore, is whether separate trials will require substantial overlap of witnesses or documentary proof. *See Pavone v. Gibbs,* No. CV 95-0033, 1997 WL 833472, at *1 (E.D.N.Y. Sept. 29, 1997); *Bowers v. Navistar Int'l Transp. Corp.,* No. 88 Civ. 8857, 1993 WL 159965, at *1 (S.D.N.Y. May 10, 1993) (Sotomayor, J.); *Barr v. Dramatists Guild, Inc.,* 573 F.Supp. 555, 561 (S.D.N.Y.1983); *cf. Hal Leonard Publ'g Corp. v. Future Generations, Inc.,* No. 93 Civ. 5290, 1994 WL 163987, at *4 (S.D.N.Y.1994) (granting separate trials upon finding that documentary evidence and witness testimony required to prove different legal claims would not substantially overlap). Separate trials for Lewis and Corke would certainly involve significant evidentiary overlap. By way of example, TBTA would likely call the same witnesses and introduce the same documents to explain the practices and procedures it employs in dealing with harassment complaints. Even if TBTA offered different witnesses in separate proceedings, their testimony would almost certainly be to the same effect. Likewise, were the Court to order separate trials, Senesi would likely have to testify in both to justify his handling of each plaintiff's complaints. [1]

Furthermore, unlike the majority of cases in which courts have deemed separate trials appropriate, *see, e.g., Amato v. City of Saratoga Springs,* 170 F.3d 311, 316 (2d Cir.1999); *Daniels v. Loizzo,* 178 F.R.D. 46, 48-49 (S.D.N.Y.1998); *Ricciuti,* 796 F.Supp. at 86-87, in the instant action, “the resolution of ... one issue will in no way limit or streamline the remaining issues.” *Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette Sec. Corps .,* No. 91 Civ.2050, 1999 WL 159889, at *2 (S.D.N.Y. Mar. 22, 1999) . [2] Hence, the “inefficiencies to all the parties that would result if two trials were held” would outweigh any convenience gained by extracting Lewis's claims against Chin. *Id.*.

With regard to the issue of prejudice, the moving defendants contend that while plaintiffs will not be hampered by separate trials, [3] a consolidated trial would cause Senesi undue prejudice. Specifically, they claim that evidence of Chin's misconduct would be inflammatory and may have a “spill-over” effect on Senesi and his defense strategy. Although they do not specify how such evidence might prejudice Senesi's defense, presumably they believe that remarks attributed to Chin, such as “I am the slave master and you are the slaves,” *Lewis,* 77 F.Supp.2d at 378 n. 4 (citing Compl. ¶ 16(a)), would contaminate the minds of jurors considering the liability of Senesi, Chin's supervisor, *see Ricciuti,* 796 F.Supp. at 86; *Ismail,* 706 F.Supp. at 251.

***5** Yet, while an unguided jury might improperly award money damages against Senesi solely on account of Chin's actions, any prejudice or confusion can be remedied by a carefully drafted jury instruction. *See New York v. Hendrickson Bros., Inc.,* 840 F.2d 1065, 1082-83 (2d Cir.1988); *Dayton,* 1999 WL 159889, at *2; *see also Agron v. Trustees of Columbia Univ.,* No. 88 Civ. 6294, 1997 WL 399667, at *3 n. 2 (S.D.N.Y. July 15, 1997) (“[T]he potential prejudice here is not substantially different from ‘the potential prejudice which is normally and customarily dealt with through an appropriate charge and curative instructions where necessary.” ') (quoting *Aldous v. Honda Motor Co.,* No. 94-CV-1090, 1996 WL 312189, at *2 (N.D.N.Y. May 30, 1996)). The Court has faith in the jury's ability to keep Lewis's claims separate from Corke's and to distinguish Chin's behavior from that of Senesi.

Finally, the Court notes that separate trials would be inappropriate given the broad nature of each plaintiff's hostile

work environment cause of action. *See* Compl. ¶¶ 20, 29. Despite factual differences in their respective claims, Lewis and Corke allege a similar pattern of sexual harassment that was exacerbated by their supervisor's continued indifference to their situation. Thus, their claims are sufficiently similar to justify joinder and obviate the need for separate trials. *See Streeter v. Joint Indus. Bd. of the Elec. Indus.,* 767 F.Supp. 520, 529 (S.D.N .Y.1991); *see also Puricelli v. CNA Ins. Co.,* 185 F.R.D. 139, 142-43 (N.D.N.Y.1999); *Fong v. Rego Park Nursing Home,* No. 95 Civ. 4445, 1996 WL 468660, at *3 (E.D.N.Y. Aug. 7, 1996); *Ward,* 861 F.Supp. at 378-79. Furthermore, in a hostile workplace case, the trier of fact must examine the totality of the circumstances, including evidence of harassment directed at employees other than the plaintiff. *See Schwapp v. Town of Avon,* 118 F.3d 106, 111-12 (2d Cir.1997); *Perry v. Ethan Allen, Inc.,* 115 F.3d 143, 150-51 (2d Cir.1997). Because the facts in this case suggest that the harassment at TBTA was not limited to these two women, *see* Compl. ¶¶ 16(b)-(f), 20, 23, 29, 32, it may be characterized as a "a pervasive or continuing pattern of conduct," *Perry,* 115 F.3d at 151. In separate trials, either plaintiff would be permitted to introduce evidence of harassment directed at the other to establish the existence of a hostile work environment on her own claim. Logically, then, since the evidence relating to both plaintiffs' allegations would be admissible at the trial of either's claims, it would not be in any way prejudicial to try the two plaintiffs' claims together. Accordingly, there is insufficient prejudice to warrant separate trials. *See Monaghan,* 827 F.Supp. at 246 ("[T]he fundamental presumption which favors the trial of all issues to a single jury and underlies the assumption of Rule 42(b) [is] that bifurcation ... is reserved for truly extraordinary situations of undue prejudice.").

CONCLUSION

***6** Because the Court concludes that a single proceeding in which both plaintiffs' allegations are addressed at the same time is the more appropriate course, the defendants' motion for separate trials is HEREBY DENIED. The parties are ordered to submit their proposed Pre-Trial Order to this Court within thirty days of the date of this Memorandum Order.

SO ORDERED.

Parallel Citations

88 Fair Empl.Prac.Cas. (BNA) 1759

Footnotes

1 The moving defendants suggest that evidence of Chin's misconduct "would have a chilling effect on Senesi's decision to testify on his own behalf," due to the likelihood that plaintiffs' counsel would subject Senesi to an aggressive cross-examination regarding Chin's behavior. Def. Mem. at 8. It is their contention that requiring Senesi to undergo cross-examination with regard to the Chin events would be "extremely unfair to Senesi." This odd assertion rings hollow, however, since Senesi has no right-constitutional or otherwise-to refrain from testifying in this case simply to avoid civil liability, embarrassment, or discomfort. *See United States v. Apfelbaum,* 445 U.S. 115, 125 (1980); *G.D. Searle & Co.v. Interstate Drug Exchange, Inc.,* 117 F.R.D. 495, 506 (E.D.N.Y.1987). Unless he can demonstrate that he is " 'confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination," ' *In re Corrugated Container Antitrust Litig.,* 644 F.2d 70, *74 (2d Cir.1981) (quoting *Apfelbaum,* 445 U.S. at 128), he may be called as a witness by the plaintiffs despite his reluctance to testify on his own behalf.

2 In fact, the majority of cases in which separate trials are granted for employers and employees involve 28 U.S.C. § 1983 claims, which require that the employee's personal liability be established before considering whether a *Monell* claim will lie against the municipal employer. *See Amato,* 170 F.3d at 320 ("Section 1983 actions are particularly well suited for bifurcation .... [I]f a plaintiff fails to show that a constitutional violation occurred in the suit against the individual official, the corresponding cause of action against the municipality will be mooted since a claim of negligent training is only actionable where some constitutional violation actually occurred."). Put simply, in a § 1983 action, the municipality's liability is derivative of the conduct and liability of its employee. By contrast, under the HRL, employer liability is a *predicate* for the imposition of liability against an individual employee. *See Lewis,* 77 F.Supp.2d at 382 n. 8; *see also DeWitt v. Lieberman,* 48 F.Supp.2d 280, 293 (S.D.N.Y.1999) ("[P]laintiff cannot prevail against [her supervisor] individually ... unless she can first establish the liability of [the employer]."). Hence, unlike the typical § 1983 case, a separate trial will not promote efficiency here, for it would neither dispose of any other charges nor establish a necessary element of any other claim.

3 The Court obviously recognizes that, notwithstanding the moving defendants' assertion that separate trials will not prejudice either plaintiff, in fact, Lewis may be prejudiced by having to endure the delay and expense of two separate trials. *See Dayton Monetary Assocs.,* 1999 WL 159889, at *2 ("[B]ecause having two trials would necessitate two sets of pretrial motions, two sets of pretrial

orders, two sets of jury charges, and the possibility of having to select two different juries, extracting this one issue out of the 'main' trial may in fact lead to greater delay and expense.").

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.