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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 117370/2008
GREEN, DAVID L.
vs
CONTINUUM HEALTH PARTNERS
Sequence Number : 001
SUMMARY

INDEX NO.
MOTION DATE 9/21/10
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

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In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 10/22/10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

DAVID L. GREEN,

Plaintiff,

-against-

CONTINUUM HEALTH PARTNERS, INC., ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,

Defendants.

----------X

Index №.: 117370/08
Motion seq.: 01

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a case involving allegations of sexual harassment at a hospital, defendants Continuum Health Partners, Inc. and St. Luke's-Roosevelt Hospital Center (the Hospital) move jointly for summary judgment pursuant to CPLR 3212, dismissing all claims against them.

Plaintiff David Green (Green) has been a part-time staffing assistant at St. Luke's Hospital, in New York, New York, since March 1992. Among other things, he is responsible for assisting the Hospital administrators with staffing nurses, nursing assistants, and clerks. Additionally, Green maintains overtime books which nursing attendants and clerks sign to indicate that they are available for overtime, and calls such staff when overtime work is available. Green has only received "excellent reviews" on performance evaluations since he began working at the Hospital 18 years ago (Green Deposition, at 178-179).

Non-party Helen Tavares (Tavares) worked at the Hospital from October 1986, when she was hired by the Hospital, until November 2008, when she was fired. Tavares, a nursing attendant, had no supervisory authority over Green during her tenure with the Hospital.

001

Green alleges that in December 2001, Tavares asked Green if he had feelings for her, and inquired about his relationship with another nurse at the Hospital, and told him that he could stay at her house if he did not feel like making the trip back to his own residence in New Jersey (Green Deposition, at 123).

On November 16, 2002, Tavares called Green and invited him to Thanksgiving dinner, and allegedly inquired about Green's romantic involvements, told him that she knew he had feelings for her, and described an incident in which Green had stood close to her, touched her breast, and whispered in her ear (*id.* at 133-138). Green testified that he declined the Thanksgiving invitation, told Tavares that his romantic involvements were none of her business, denied the whisper-and-touch incident, and advised Tavares that she was very sick and needed some help (*id.*).

The day after this conversation, November 17, 2002, Green first complained about Tavares's behavior to the Hospital's administration (*id.* at 143). On November 22, 2002, Green submitted a written complaint (*id.* at 147).

On January 3, 2003, Green alleges that Tavares called him again, to tell him that God gave her a vision of the two of them (*id.* at 166). Green testified that, at this point, he told Tavares that she was "a nasty, filthy, sick woman," and hung up the phone (*id.*). Green alleges that Tavares called back to describe the dream, but he prevented her from doing so by hanging up the phone again (*id.*).

On January 21, 2003, an employee from the Hospital's Labor Relations Department advised Green that she had spoken with Tavares and instructed her to limit her interaction with

Green to Hospital matters (*id.* at 176). Tavares interacted with Green only with respect to Hospital matters for the next nine months, but on November 4, 2003, Tavares allegedly called Green and told him that she knew he had feelings for her, and once again referred to the whisper-and-touch incident, this time asserting that Green did not remember his actions because he had had brain surgery (*id.* at 190-191). Green testified that he responded, "I don't care if they took my brain out, I would remember that, especially if it was with her, you know" (*id.* at 191).

On November 25, 2003, Green met with Labor Relations Analyst, Sumee Oh, who subsequently conducted an investigation whose results were inconclusive, as Green was not able to identify any direct witnesses and Tavares denied all of Green's claims (Oh Deposition, at 55). Just before dawn on January 25, 2004, Tavares came into Green's office, told him that God gave her a message for him, refused to leave, banged on his desk with her hand, was escorted out by a co-worker, returned, and only stopped talking to him when she noticed that he was holding a tape recorder (Green Deposition, at 222-226). After this incident, Green spoke with Oh again, and received a letter from Oh stating that she had spoken to Tavares and the incident would not happen again (*id.* at 254). Tavares called Green to tell him about her visions on February 22, 2004, May 17, 2004, and July 10, 2004 (*id.* at 259-260, 275-277, 280).

Green did not receive any romantic phone calls from Tavares during the period of July 11, 2004 through July 30, 2008 (*id.* at 517-524). Tavares only interacted with Green when she had to sign the overtime book in the nursing office where he worked, or on a handful of occasions when she spoke to Green about a request for overtime (*id.* at 521-522). On the occasions when Tavares signed the overtime book during these four years, Green testified that she would "flaunt" herself, by which he means that she appeared in his office, wearing various

hairstyles and clothing that, Green concluded, were specially deployed to allure him (*id.* at 519-522).

On July 31, 2008, Green found an envelope on his desk which had been left for him by Tavares (*id.* at 416). Without reading the documents within, Green copied them, and gave them to his supervisor (*id.* at 418). After an investigation into the incident, led by Labor Relations Analyst Janette Hicks, Tavares was suspended on October 23, 2008, and fired on November 19, 2008 (Hicks Affidavit, at 3).

While Green's attorney refers to the envelope Tavares dropped off for Green in July 2008 as a "sex package," it is titled "Bibliography," with a subheading "Topic: the vision is yet for an appointed time," and generally resembles a dream diary laced with scriptural quotations and explanatory notes (Tavares Letter, at 1-12). Tavares writes that she has "been praying for a husband for quite a while, and the Lord has [been] giving me this scripture and visions" (*id.*). Tavares describes waking up after having dreamed of Green during a break in the Coronary Care Unit of the Hospital, and telling a co-worker that she needed to stop sleeping there because she was "getting these dreams." The co-worker responded that what she had seen were not dreams but "live visions," after which Tavares viewed them as such, vowing to "obey God" (*id.* at 8).

Despite Green's attorney's characterization, there are only two overtly sexual references in the 12-page document. One of these describes a "vision" in which another nurse at the hospital is "on top of David wearing an aqua color bra, the color of the carpet in the nursing office" (*id.* at 7). The other describes the same nurse having sex with another man while Green climaxes "by looking at them," while Tavares stands by his side (*id.* at 8).

Green's first cause of action alleges that the Hospital is liable to him because it failed to prevent Tavares from sexually harassing him in violation of the New York State Human Rights Law (Executive Law § 290, *et seq.*) (the NYSHRL) and the New York City Human Right's Law (Administrative Code of the City of NY § 8-107) (the NYCHRL). The complaint's second cause of action is for intentional infliction of emotional distress. However, plaintiff opposes the Hospital's motion for summary judgment only with respect to the Hospital's liability under NYCHRL.

DISCUSSION

PLAINTIFF'S SEXUAL HARASSMENT CLAIMS UNDER NYCHRL

The Local Civil Rights Restoration Act of 2005 amended the NYSHRL (Local Law No. 85 [2005] [Restoration Act]). The Restoration Act explicitly provides that the NYCHRL is to be interpreted and applied independently of its state and federal counterparts:

> It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of [NYCHRL], viewing similarly worded provisions of federal and state civil rights laws as a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise

(Local Law 85 § 1). As to construction, the Restoration Act provides that:

> The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed*

(*id.* at § 7 [deleted language in brackets, new language emphasized]).

Interpreting the Restoration Act in the context of sexual harassment claims arising under the NYCHRL, the First Department recently held that, as in other terms and conditions cases, the primary issue for a trier of fact "is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his] gender" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]). *Williams* noted that the NYCHRL is not intended to operate as a "'general civility code'" (*id.* at 79, quoting *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 81 [1998]), and recognized an affirmative defense "whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" (*id.* at 80).

The Hospital argues that plaintiff's sexual harassment claims prior to December 30, 2005 are time-barred, since Green filed the complaint on December 30, 2008, and the limitations period for sexual harassment claims under both the NYCHRL and the NYSHRL is three years. The Hospital contends further that the court should not extend the limitations period because plaintiff cannot demonstrate a continuing violation, since there is a four-year gap between plaintiff's one timely allegation, in July 2008, and his other allegations.

Green argues that there was a continuing violation during the period between July 11,

2004 and July 30, 2008. Specifically, Green argues that, although Tavares did not communicate with Green except with respect to Hospital business during this period, and Green made no complaints to his supervisors about Tavares, a continuing violation existed through this period because Tavares was allowed to "flaunt" herself to Green while signing the overtime book in the office which he occupied.

The continuing violation doctrine developed in the context of discrimination cases arising under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, *et seq.*) (Title VII); where it is applicable, "the plaintiff is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period" (*Cornwell v Robinson*, 23 F3d 694, 704 [2d Cir 1994]). A continuing violation exists "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" (*id.*). The First Department has held that a 15-month interruption in an alleged pattern of discrimination breaks the continuity such that this doctrine is inapplicable (*Sirota v New York City Bd. of Educ.*, 283 AD2d 369, 370 [1st Dept 2001]).

Here, the continuing violation doctrine is inapplicable because there is a four-year period, between July 11, 2004 and July 30, 2008, in which Tavares did not communicate with Green about anything other than Hospital business. Her occasional appearance in the office he worked in to "flaunt" herself and sign the overtime book are, at most, trivial inconveniences. The fact that Tavares sometimes wore new clothes or hairstyles does not make her behavior during this period actionable. CPLR 214 (2) provides a three-year statute of limitations for an "action to recover upon a liability . . . imposed by statute." As the continuing violation doctrine is

inapplicable, Green's sexual harassment claims prior to December 30, 2005 are time-barred.

The Hospital argues further that *Williams* (61 AD3d 62, *supra*) is inapplicable, and that sexual harassment claims under the NYCHRL are to be governed by the narrower standard used in sexual harassment actions under Title VII and the NYSHRL. In support of this proposition, the Hospital cites to *Forrest v Jewish Guild for the Blind* (3 NY3d 295, 305 n 3 [2004]). The Hospital contends that, under this analysis, plaintiff fails to state a claim because the behavior he alleges is not "severe or pervasive" enough so as to create "an objectively hostile or abusive work environment" (*see Alfano v Costello*, 294 F3d 365, 374 [2d Cir 2002]).

The Hospital is incorrect as to *Williams's* applicability. *Williams* interpreted the Restoration Act, which was passed in 2005, the year after the Court of Appeals decided *Forrest*, the case on which the Hospital relies. *Williams* specifically held that, as a result of the Restoration Act, the NYCHRL "requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language" (61 AD3d at 66; *see also Winston v Verizon Services Corp.*, 633 F Supp 2d 42, 47-49 [SDNY 2009] [discussing the NYCHRL antidiscrimination standard in the wake of the Restoration Act and *Williams*]).

In the alternative, the Hospital argues that, if the court employs the standard articulated by *Williams*, then summary judgment is still appropriate since plaintiff's allegations spanning the period between July 11, 2004 and July 30, 2008 constitute petty slights and trivial inconveniences. Similarly, the Hospital contends that Tavares's behavior on July 31, 2008, in leaving the envelope for Green, constitutes a trivial inconvenience.

Green, on the other hand, argues that Tavares's behavior caused him more than a trivial inconvenience. Moreover, Green contends that Tavares's harassment would have been handled differently by the Hospital if she were a man, and Green was himself a woman.

Here, none of Tavares's interaction with Green between July 11, 2004 and July 30, 2008 rises above the level of petty slights or trivial inconveniences. However, the court cannot say as a matter of law that the envelope that Tavares left on Green's desk on July 31, 2008 did not rise above that level. The missive within the envelope did, at two points, envision Green's involvement in sexually explicit conduct. Moreover, the subtitle, "the vision is yet for an appointed time," along with the admixture of dreams, scriptural quotations, and biographical detail give the document a sense of foreboding. A reasonable recipient of this document may well conclude that it constitutes sexual harassment rather than a trivial inconvenience.

The Hospital contends, however, that Tavares's conduct cannot be imputed to it under the NYCHRL. Specifically, the Hospital argues that it took immediate and appropriate corrective action, and exercised reasonable diligence to prevent discriminatory conduct when it thoroughly investigated Green's sexual harassment allegations, and suspended and fired Tavares as a result of the investigation. Plaintiff never explicitly addresses this argument, although he does contend that the Hospital's response to Tavares's actions prior to running of the statutory period was inadequate.

The NYCHRL provides that an employer can be liable where:

> the employer knew of the employee's . . . discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; (an employer shall be deemed to have knowledge of . . .

> discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility) or the employer should have known of the employee's . . . discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct

(Administrative Code §§ 8-107 [13] [b] [2]; 8-107 [13] [b] [3]).

Here, there is only one act of discriminatory conduct before the court, Tavares's leaving the 12-page document for Green on July 31, 2008 (*see Williams*, 61 AD3d at 75 [explaining that under the NYCHRL, sexual harassment is one species of sex discrimination and that "[t]here is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions, and privileges of employment based, inter alia, on gender"], citing Administrative Code § 8-107 [1] [a]).

The Hospital conducted an investigation into this incident, and, as a result of that investigation, terminated Tavares's employment. It cannot be said, under these circumstances, that the Hospital acquiesced in Tavares's conduct or failed to take immediate and appropriate corrective action. There is no indication on the record that the incident would have been handled any differently had Green been a woman. As such, the Hospital did not discriminate against Green on the basis of his sex, and his claim under NYCHRL against the Hospital must be dismissed.

PLAINTIFF'S SEXUAL HARASSMENT CLAIMS UNDER NYSHRL

In *Brightman v Prison Health Servs., Inc.* (62 AD3d 472 [1st Dept 2009]), the Court held that, in light of *Williams*, if a plaintiff successfully states a claim under the NYSHRL, then "[a]

fortiori," he states a claim under the NYCHRL. The inverse of this proposition is that if a plaintiff fails to state a claim under the NYCHRL, then he necessarily also fails to state a claim under the narrower protections available under the NYSHRL. As such, Green's claim under the NYSHRL must be dismissed.

PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The complaint's second cause of action is for intentional infliction of emotional distress. The Hospital argues that its alleged behavior does not rise to a level actionable under this theory of liability. Green does not respond to this argument.

The tort of intentional infliction of emotional distress is available to parties who have been subjected to "conduct exceeding all bounds usually tolerated by decent society'" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978] [internal quotation marks and citation omitted]). In order to be actionable, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1st Dept 2005] [internal quotation marks and citation omitted]).

The actions of the Hospital clearly do not meet this high threshold. As such, plaintiff's claim for intentional infliction of emotional distress must be dismissed.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the

submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: October 22, 2010

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD