

LaBua v Parsons Brinckerhoff
2013 NY Slip Op 32610(U)
October 21, 2013
Supreme Court, Richmond County
Docket Number: 102720/10
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 3

Calendar No.: 2184-001

Index No.: 102720/10

JOSEPHINE LABUA,

Plaintiff,

against

DECISION
HON. JOSEPH J. MALTESE

PARSONS BRINCKERHOFF, PB AMERICAS, INC.,
JOYCE SALTHAMMER and EDMUND DEGENNARO,

Defendants.

The following papers numbered 1 to 3 were fully submitted on the 13th day of September, 2013:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants, with Supporting Papers, Exhibits and Memorandum of Law (dated July 1, 2013) _____	1
Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment, with Supporting Papers and Exhibits (dated August 9, 2013) _____	2
Reply Memorandum in Further Support of Defendants' Motion for Summary Judgment (dated September 4, 2013) _____	3

Upon the foregoing papers, defendants' motion for summary judgment is granted and the complaint is dismissed.¹

This action arises out of allegations of employment discrimination and harassment based upon age and race against plaintiff, a former employee of the corporate defendants. More specifically, plaintiff alleges that she has been the subject of discrimination in violation of New York City Administrative Code §8-101 *et seq.* and New York State Executive Law §296 *et seq.* In addition, plaintiff claims that she was subjected to retaliation, as her employment was terminated after she made a complaint against her supervisor. Claims of false imprisonment are also alleged.

¹The Court notes that defendants have failed to include among their motion papers copies of the pleadings as required by CPLR 3212(b).

To the extent relevant, plaintiff is a fifty-six year old, Caucasian female who began her employment with defendant Parsons Brinckerhoff and PB Americas, Inc. (collectively, hereinafter “Parsons”) in April of 1995. Individual defendant Joyce Salthammer was plaintiff’s immediate supervisor and the payroll manager at Parsons, who reported to co-defendant Edmund DeGennaro, Parson’s “vice president-manager”. According to plaintiff, defendant Salthammer “repeatedly told [her] that because [she] is white and over 50 that [she] is not going anywhere at [d]efendant Parsons”, and that she “should look for another job” (*see* Complaint, para 7; *see* Affidavit of Josephine Labua, para 5). Plaintiff further alleges that in April of 2008, defendant Salthammer told plaintiff “Parsons was only looking to hire young African American workers” (*id.* at 8; *see* Affidavit of Josephine Labua, para 6), and that “Salthammer was leaving [p]laintiff off of important e-mails and out of meetings because of [p]laintiff’s age, race, and color while... favoring Mr. Charles, a twenty-five year old African American, in the work place” (*id.* at 9-10; *see* Affidavit of Josephine Labua, para 10).

Plaintiff also alleges that in 2009, she “was never given a performance review and thus never given the chance to receive [a pay] raise”, and that she was “given unreasonable workloads and impossible deadlines in an effort to force her to leave her job” (*id.* at 11). In addition, she claims that on December 11, 2009, defendant DeGennaro took plaintiff into Salthammer’s office, “blocked the door” and proceeded to point “his fingers in her face while threatening and screaming”, allegedly placing plaintiff in “fear of imminent bodily harm” (*id.* at 14).

Finally, plaintiff claims to have made numerous complaints of age and race discrimination to Beth Erichson, the human resources manager for Parsons (*id.* at 15), *e.g.*, on September 2, 2010, when she purportedly complained that she was “being discriminated against because [she was] white and... over 50”, and that despite Salthammer’s alleged admission to having made discriminatory statements directed at plaintiff, Parsons took no remedial action (*id.*). It is undisputed that less than one month later, *i.e.*, on October 7, 2010, plaintiff was fired by Parsons (*id.* at 16), thereby concluding a two-and one-half year pattern of alleged discrimination.

In his affidavit in support of summary judgment, defendant DeGennaro attests that he, a white male born in 1961 (making him almost 50 years of age in 2010), was employed as the vice president of financial operations for Parsons from February of 2008 through April of 2013 (*see* Affidavit of Edmund DeGennaro, paras 2-4). In relevant part, he affirms that when co-defendant Salthammer, the payroll manager, advised him that she was planning to retire sometime in the near future, they immediately considered plaintiff, who held the title of assistant payroll supervisor, for the position (*id.* at 3-6). At that time, plaintiff was already the second most highly paid employee in the

department (id.). Salthammer agreed and proceeded to train plaintiff to be her successor (id. at 7-8). From that time forward, the payroll department was instructed to report to plaintiff instead of Salthammer on a day-to-day basis (id. at 11).

From June 2008 through June 2009, DeGennaro and Salthammer met with plaintiff on several occasions to discuss her work performance, which, based on her failure to complete work on time and perform her assigned tasks accurately, appeared to be deteriorating (id. at 13). During that same period, DeGennaro sent plaintiff to a two-day management course at Parson's expense (id. at 14), but following her return in July of 2009, DeGennaro was purportedly notified by Salthammer that the employees of the payroll department did not want to be supervised by plaintiff. As an alternative, some individuals even asked to be transferred (id. at 16). At this point, DeGennaro decided to discontinue plaintiff's supervisory training and assigned her to a special project in which she would handle the payroll system for a group of Parsons employees in Canada (id. at 18). DeGennaro further affirmed that although plaintiff was directed to complete certain spreadsheets for the Canada project by December 11, 2009, she failed to do so (id. at 19). On that date, DeGennaro allegedly asked plaintiff to meet him in Salthammer's office, where DeGennaro closed the door before reprimanding plaintiff in order to avoid any embarrassment in front of her co-workers (id. at 20). During this discussion, DeGennaro admitted that he expressed anger at plaintiff for lying about having completed the spreadsheets (id. at 21). Describing the room, DeGennaro affirmed that there was a desk between himself and plaintiff, and that the latter had never asked to leave the room (id. at 22). After the reprimand, which took approximately one minute, plaintiff was purportedly the first to exit (id. at 24).

On December 16, 2009, DeGennaro, Salthammer, plaintiff and Beth Erichsen (representing Parson's Human Resources Department) allegedly had a meeting at which plaintiff was removed from the Canada project and given a warning that her work performance needed to improve (id. at 25). As a result, in January of 2010, plaintiff was re-assigned to a non-supervisory position performing routine work (id. at 28). However, her salary was not reduced, and she continued to be the highest paid employee in the department other than Salthammer (id. at 29). On June 17, 2010, DeGennaro claimed to have directed plaintiff to give priority to several paycheck issues which had arisen, and asked that the task be completed quickly (id. at 30). However, when he inquired about the status of the project nearly three weeks later, i.e., on July 7, 2010, DeGennaro discovered that plaintiff had yet to complete the task (id. at 34). Plaintiff was given a 30-day warning to improve her work performance on September 2, 2010 (id. at 36), but between September 13, 2010 and October 2, 2010, it is claimed that Salthammer received seven separate complaints from employees in seven different cities that their direct deposit changes had not been processed for over a month and, in some instances, over two

months (*id.* at 37). As plaintiff was responsible for effectuating such changes, the decision to discharge plaintiff was made, effective October 7, 2010 (*id.* at 38). Finally, DeGennaro attests that the decision to discharge plaintiff had nothing to do with her race and age (*id.* at 40).

In further support, defendants have submitted an affidavit by Joyce Salthammer, whose averments are generally consistent with those made by DeGennaro. In it, Salthammer attests that she, a white female born in 1946 (which would make her approximately 64 years of age in 2010), was employed as the manager of the payroll department for Parsons from October of 1988 through June of 2012 (*see* Affidavit of Joyce Salthammer, paras 2-3). Plaintiff's direct supervisor, Salthammer attests that in August of 2009 plaintiff filed a false complaint with Erichsen in Human Resources claiming that Salthammer had told plaintiff about a year previously that her career "would never progress because she was old and white", and that Parsons "only wanted to promote young, black employees" (*id.* at 5, 17). Salthammer denied having made this statement to plaintiff, but admitted that there was a time when she had commented in plaintiff's presence on a news story, which she heard on the radio in which it was "reported that older women were sometimes the victims of employment discrimination" (*id.* at 18-19). She further attests that in October of 2009, after plaintiff had complained that Salthammer did not give her "sufficient independence in her work", she instructed plaintiff to begin reporting directly to DeGennaro (*id.* at 22). Following plaintiff's removal from the Canada project, Salthammer contends that plaintiff became "unproductive, inaccurate, and unpleasant to those around her" (*id.* at 28). Some of the inaccuracies noted by the affiant included plaintiff's misplacement of decimal points on certain financial records (*id.* at 32). Moreover, Salthammer stated that in September of 2010, after receiving numerous complaints from employees located in different cities that their direct deposit requests were not being processed, she reported same to DeGennaro (*id.* at 35-44; *see also* Defendants' Exhibit "B"). Among the complaints was one from an employee whose paycheck plaintiff had erroneously directed to be deposited into the bank account of a former employee (*id.* at 38). Finally, Salthammer attests that she never held plaintiff's age or race against her in any way, and maintains that plaintiff was discharged "because her work had been unsatisfactory for a period of more than two years, despite extensive attempts to help [her] improve" (*id.* at 48).

Additional support for dismissal is supplied in the form of an affidavit from Elizabeth ("Beth") Erichsen, a human resources executive for Parsons, who attests that she was unaware of any bias against either "whites" or older people at Parsons (*see* Affidavit of Elizabeth Erichsen, para 6). More specifically, Erichsen attests that at the time of plaintiff's termination, Parsons "employed more than 200 white women who were older than [plaintiff] and who were in pay grades higher than

[plaintiff's]" (*id.* at 18). She adds that "Joyce Salthammer and I were among [those] women" (*id.*).

The standards for recovery under the New York City and State Human Rights Laws (Administrative Code §8-101 *et seq.*; Executive Law §296 *et seq.*) are the same as the federal standards applied to claims under title VII of the Civil Rights Act of 1964 (*see Nelson v. HSBC Bank USA*, 41 AD3d 445, 446 [2nd Dept 2007]). Accordingly, in order to satisfy his or her burden of establishing a *prima facie* case of discrimination, a plaintiff must show that the adverse employment decision was motivated in some part by an impermissible reason (*id.*), and to meet this burden, must demonstrate that he or she (1) is a member of a protected class, (2) was qualified for the position, (3) was terminated from employment or suffered another type of adverse employment action, and (4) the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Furfero v. St. John's Univ*, 94 AD3d 695, 696 [2nd Dept 2012]; *Lambert v. Macy's E, Inc.*, 84 AD3d 744 [2nd Dept 2011]; *Dickerson v. Health Mgt Corp of Am*, 21 AD3d 326, 328 [1st Dept 2005]; *Singh v. State of NY Off of Real Prop Servs*, 40 AD3d 1354, 1355-1356 [3rd Dept 2007]).

Contrariwise, in order to establish its entitlement to summary judgment and dismissal of the complaint in a discrimination case, a defendant must demonstrate either plaintiff's failure to establish every material element of intentional discrimination claim, or, having offered legitimate, nondiscriminatory reasons for its actions, demonstrate the absence of any material issue of fact as to whether the proffered explanations are pretextual (*see Furfero v. St. John's Univ*, 94 AD3d at 697; *Morse v. Cowtan & Tout, Inc.*, 41 AD3d 563 [2nd Dept 2007]; *Johnson v. NYU Hosp Ctr*, 39 AD3d 817, 818 [2nd Dept 2007]; *Cesar v. Highland Care Ctr, Inc.*, 37 AD3d 393, 394 [2nd Dept 2007]; *DelPapa v. Queensborough Community Coll*, 27 AD3d 614 [2nd Dept 2006]). Here, defendants have submitted evidence in the form of plaintiff's performance evaluations and the affidavits of her respective supervisors in an effort to establish that she was terminated for substandard work performance, and that such reasons for her termination were not pretextual. In this regard, the Court notes that plaintiff's final 2010 appraisal review indicates that she received an overall rating of "does not meet expectations", and that it contained numerous negative comments such as "[t]ime management is still a problem. Her inability to stay current with the work load. Lacking organizational skills. Producing incomplete and sloppy work... complaints that new and/or changing direct deposit requests are not being processed timely" (*see Defendants' Exhibit "10"*).

In opposing dismissal, plaintiff asserts, *inter alia*, that younger African-Americans were being trained to take over her job assignments, and that while younger African-American employees were being given raises and bonuses, she did not receive an annual review or a raise in 2009 (*see* Affidavit of Josephine Labua, para 8). Plaintiff further maintains that while younger African-Americans were permitted to take continuing education classes in payroll administration, her requests for a like opportunity were denied (*id.* at 9). In the opinion of this Court, these essentially unsupported claims are insufficient to raise a triable issue of fact as to whether the reasons proffered by defendants were merely pretextual (*cf. Nettles v. LSG Sky Chefs*, 94 AD3d 726, 729 [2nd Dept 2012][proof of facts of disparate treatment sufficient to raise triable issue of pretextual defense to claimed employment discrimination]). Nor has plaintiff responded with any evidence rebutting defendants' claims or raising an issue of fact that defendants' proffered reasons are false, misleading or incomplete (*see Furfero v. St. John's Univ*, 94 AD3d at 697). Once movants have established their prima facie right to judgment as a matter of law, conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment (*see Dickerson v. Health Mgt Corp of Am*, 21 AD3d at 329).

Similarly, plaintiff has failed to raise a triable issue of fact in opposition to defendants' prima facie showing that she was not discharged in retaliation for her claim of employment discrimination. To make out a viable claim of unlawful retaliatory discharge, a plaintiff must demonstrate (1) engagement in a protected activity; (2) the employer's awareness of his or her participation in that activity; (3) an adverse employment action based on that activity; and (4) a causal connection between the protected activity and the adverse action taken by the employer (*see Cesar v. Highland Care Ctr, Inc.*, 37 AD3d at 394). On the other hand, a defendant moving for summary dismissal of a retaliation claim, must demonstrate that the plaintiff cannot make out a prima facie claim of retaliatory discharge or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether defendants' explanations are pretextual (*see Brightman v. Prison Health Serv, Inc.*, 108 AD3d 739,740-741 [2nd Dept 2013]). Although plaintiff in such a case is not required to prove his or her claim in order to defeat a summary judgment motion, once the defendant has satisfied its initial burden, the plaintiff must submit evidentiary facts or materials to rebut defendants' prima facie showing and demonstrate the existence of a triable issue of fact (*id.* at 741).

Here, the Court finds that plaintiff has failed to raise a triable issue in opposition to defendants' prima facie showing that she was not terminated in retaliation for her complaint of discrimination (*see Johnson v. NYU Hosps Ctr*, 39 AD3d at 817; *Cesar v. Highland Care Ctr, Inc.*, 37 AD3d at 394). Nor has plaintiff presented sufficient evidence to raise a triable issue on the question of whether (1) the facially legitimate reasons for her discharge were pretextual in nature,

or (2) defendants were motivated, at least in part, by an impermissible motive (*see Brightman v. Prison Health Serv, Inc.*, 108 AD3d 739 at 741; *Morse v. Cowtan & Tout, Inc.*, 41 AD3d at 563-564; *Cesar v. Highland Care Ctr, Inc.*, 37 AD3d at 394; *DelPapa v. Queensborough Community Coll*, 27 AD3d at 614; *Best v. Peninsula NY Hotel Mgt*, 309 AD2d 524 [1st Dept 2003]; *cf. Nelson v. HSBC Bank USA*, 41 AD3d at 446-447). To the contrary, defendants have presented prima facie evidence that plaintiff was terminated for legitimate, nonretaliatory reasons, i.e., her failure to complete work in a timely manner and her uncooperative behavior towards her colleagues and upper management, which plaintiff has failed to rebut with evidence that defendants' claims were false, contrived or pretextual in nature (*see Dickerson v. Health Mgt Corp*, 21 AD3d at 328; *Singh v. State of NY Off of Real Prop Servs*, 40 AD3d at 1357).

Turning, finally, to her claim of false imprisonment, a plaintiff must show that (1) defendant intended to confine her, (2) plaintiff was conscious of the confinement, (3) he or she did not consent, and (4) the confinement was not otherwise privileged (*see Arrington v. Liz Claiborne, Inc*, 260 AD2d 267 [1st Dept 1999]). At her deposition, plaintiff testified that on December 11, 2009, DeGennaro "ordered her to get into [Salthammer's] office", and that he entered immediately after her (*see* EBT of Plaintiff, pp 235-236). Plaintiff further testified that he "was blocking the door" and "jabbing his finger in [her] face... threatening [her]" (*id.* at 239-240). Although plaintiff does not recall if the door was locked, she claimed that she did not attempt to leave because she "was scared to death" as "[DeGennaro] kept threatening [her] to get [her work] finished" (*id.* at 237-238). Admittedly, plaintiff did not scream or otherwise attempt to obtain assistance (*id.* at 239-240). Assuming *arguendo* the veracity of plaintiff's version of events, the Court finds that plaintiff has failed to satisfy either the first and second elements of the tort of false imprisonment as a matter of law (*see Arrington v. Liz Claiborne, Inc*, 260 AD2d at 267). As a result, defendants' motion for summary judgment should be granted. Plaintiff's allegations of fear did not constitute the detaining force necessary to establish the tort of false imprisonment (*id.* at 267-268; *see Petty v. North Gen Hosp*, 1 AD3d 288 [1st Dept 2003]).

Accordingly, it is hereby:

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

Dated: October 21, 2013

Joseph J. Maltese
Justice of the Supreme Court