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

PRESENT: JOAN A. MADDEN PART 11
Justice

Hasbrouch, Ardsow

Plaintiff,

-v-

Edmiston & Co, Inc.

Defendant.

INDEX NO. 150407/13

MOTION DATE 4-1-13

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	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 is decided in accordance with the annexed Memorandum Decision + Order.

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

HON. JOAN A. MADDEN
J.S.C.

Dated: December 16 2013

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

ELIZABETH HASBROUCK ANDERSON,
Plaintiff,

-against-

EDMISTON & COMPANY, INC.,
Defendant,

Index No.: 150407/2013

Joan A. Madden, J.

In this employment discrimination action based on gender, defendant Edmiston & Company, Inc. ("Edmiston") moves for an order dismissing the complaint against it pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff Elizabeth Anderson ("Anderson") opposes the motion, which is denied.

Background

Except as otherwise indicated, the following summary of facts is based on the allegations in the complaint which, for the purposes of this motion, must be accepted as true.

Anderson began her term of employment with Edmiston in July 2008, as a Charter Assistant, was given greater duties and responsibilities in 2009, and reported to her supervisor at Edmiston, Robert Shepherd ("Shepherd"), for the entirety of her employment, which lasted until November 8, 2013. Shepherd was made Director/President of the New York Office, reporting directly to the owner of the company, and was given partner status in 2011. Complaint ¶ 4-8.

During the course of her employment at Edmiston, Anderson was subjected to certain remarks by Shepherd that implied his disrespect for women and belief that they are not comparable to men in professional settings. Among these remarks were that if Anderson "messed up one more time" he was "going to spank [her]." Id. ¶ 9. He also told her, in reference to Edmiston, "[y]ou have to understand that this is a very sexist organization" and that he personally did not believe that women were suited for leadership roles. Id. Shepherd

repeatedly called Anderson a "good girl" even after she requested he stop this behavior. He also openly told Anderson that he thought another woman employed at Edmiston was a "c--t". Id.

Shepherd also referred to a former assistant of his, Eleanor Bloodworth ("Bloodworth") as a "C-U-Next-Tuesday" and remarked to Anderson that Bloodworth was smart for using her sexuality to bolster her career, indicating to Anderson that Shepherd believed that this was the only way for women to advance themselves professionally. Id. Shepherd regularly disparaged women around him with such terms as, "that f--king woman" or "that stupid woman" but did not respond similarly when frustrated with his male colleagues. Id. Shepherd also made it clear that he valued a receptionist who was attractive over one who was professionally qualified and became enraged when he discovered that a receptionist that he had hired had a 3-year old daughter because he believed she would not be able to perform her job as a mother and said that she would not have been hired if he knew that she had a daughter. Id.

While on a marketing conference call, on October 18, 2012, in which Anderson had to ask to be included, she was in Shepherd's presence while he told another male individual that all of the women working in yacht charter are so "stupid" and "unable to make a deal" and that he (Shepherd) ends up doing all of their work and that the women should really all just "lie down and spread their legs for [him]." Id. ¶'s 10, 13.

This last incident was especially upsetting to Anderson who contacted Shepherd, first by email, to express her distress over his latest remark. Id. ¶'s 14, 15. Shepherd told Anderson that he was sorry for hurting her feelings but refused to acknowledge the wrongful nature of his conduct, which only reaffirmed for Anderson his discriminatory beliefs. Id. ¶ 16.

Eventually, over lunch on November 1, 2012, Anderson told Shepherd that his blatant misogyny made for an impossible work environment. She requested that she be transferred to

Edmiston's London office. Id. ¶'s 17, 18. Shepherd responded to this request by telling Anderson that if she cannot handle the way he speaks then they should not work together and that she was "stupid" for thinking that the London office would be any better because they are "just as sexist, if not worse." Id. ¶ 19.

Shepherd told Anderson on November 2, 2012, that although the London office would have been open to her transfer, the company simply couldn't afford such a change in staff. Again, Shepherd reiterated his previous remark about the London office being just as sexist and told Anderson that the misogyny was just something that she would have to deal with, which Anderson perceived as further confirmation that Edmiston is a degrading place for women to work. Id. ¶ 21.

Anderson was then contacted by David Hudson ("Hudson") who told her that the London office had no room. He also reiterated Shepherd's point about the London office being just as negative a workplace for women as the New York branch. Anderson was thereafter "terminated" on November 8, 2012. Id. ¶'s 25-27.

Following her termination, Anderson commenced this action in which she asserts two causes of action under the New York City Human Rights Law ("NYCRL"). The first cause of action alleges gender discrimination and hostile work environment based on gender in violation of § 8-107(1)(a)[1] of the Administrative Code of the City of New York, while the second cause of action alleges retaliation in violation of § 8-107(7) of the Administrative Code.[2]

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[1] Section 8-107(1)(a) provides, in part, that "[i]t shall be unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the...gender...of any person to discriminate against such a person in compensation or in terms, conditions or privileges of employment."

[2] Section 8-107(7) provides, in relevant, part that "[i]t shall be lawful discriminatory practice for any person to engage in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (I) opposed any practice forbidden under this chapter...

Instead of answering the complaint, Edmiston now moves to dismiss it, arguing that the complaint fails to allege sufficient facts to show that Anderson was subjected to a hostile work environment or was discriminated against as a result to her gender at any time during the course of her employment with Edmiston, or retaliated against for protected conduct.

Specifically, Edmiston argues with respect to the hostile work environment claim that Anderson's complaints regarding Shepherd's alleged conduct do not amount to "more than petty slights of trivial inconveniences," (citing Williams v. New York City Hous. Auth. (61 A.D.3d 62, 79 -80 (1st Dep't 2009), lv denied 13 NY3d 702 (2009)), and thus her claim is insufficient to state a cause of action. Defendant also argues that Shepherd's alleged comments are "merely offensive utterances" and that sexually explicit remarks do not give rise a claim for hostile work environment.

With respect to the claim for gender discrimination, defendant argues that the complaint does not sufficiently allege that plaintiff suffered an adverse employment action motivated by gender. In particular, defendant argues that Anderson never suffered an adverse employment action as the nature of her "termination" was ambiguous, particularly as Anderson was promoted during her time with the company. Defendant also argues that its failure to accommodate her transfer to London as not being disruptive enough to be considered an adverse employment action, and that the complaint, which uses the passive voice in connection with the allegations related to Anderson's termination, does not sufficiently allege that Anderson was fired. Defendant also points out that Anderson never complained to anyone in the company or human resources department – or file a complaint with the New York State Division of Human Rights – about Shepherd's sexism, except to Shepherd himself. Defendant cites to a voicemail attached

to the complaint in Exhibit B, wherein Anderson is provided with a severance offer that Edmiston maintains is a negotiation and not a firing.

Discussion

On a motion to dismiss a pleading for legal insufficiency pursuant to CPLR 3211(a)(7), the court "accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory." Morone v. Morone, 50 N.Y.2d 481, 484 (1980) (citation omitted). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314, 326 (2002). "The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned, which taken together, manifest any cognizable action at law, a motion to dismiss will fail." Harris v. The China Club Late Night Management Inc., 72 A.D. 3d 608, 609 (1st Dept. 2010). Moreover, "employment discrimination cases are themselves generally reviewed under the notice pleading standards...[s]o that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but only given 'fair notice." Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 145 (1st Dep't 2009), lv denied, 19 N.Y. 3d (2012).

Under this standard, the complaint is sufficient to state causes of action under the NYCHRL for gender discrimination, hostile work environment and retailiation. The Restoration Act amended NYCHRL 8-130 to provide that the NYCHRL's provisions

> "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 comparable-worded to provision of this title, have been so construed."

Restoration Act §7.

[* 7]

The First Department has interpreted the Restoration Act as "explicitly requir[ing] an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language." Williams v. New York City Hous. Auth., 61 A.D.3d at 66. Moreover, following the passage of the Restoration Act of 2005, the First Department held that as the City Council amended the law to be broader than its federal and state counterparts, a plaintiff pleading gender discrimination need only establish that "she has been treated less well because of her gender." Id., 78. Under this standard, the first cause of action is sufficient to state a claim for discrimination based on gender which resulted in plaintiff's termination.

As for the claim for gender discrimination based on hostile work environment, it is well settled that sexual harassment which results in a hostile or abusive work environment constitutes a violation of the human rights laws. See Meritor Sav. Bank, FSB v Vinson, 477 U.S. 57, 64-65 (1986); Williams v New York City Hous. Auth., 61 A.D.3d at 75. "Proving the existence of a hostile work environment involves a showing of both 'objective and subjective elements: the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive.'" Feingold v. State of New York, 366 F.3d 138, 150 (2nd Cir 2004) (quoting Alfano v. Costello, 294 F.3d 365, 374 [2nd Cir 2002] and Harris v. Forklift Systems, Inc. supra at 21); accord Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 311 (2004). The factors considered include the "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 [the] employee's work performance." Feingold v. State of New York, supra at 150 (quoting Harris v. Forklift Systems, Inc., supra at 23). Although a "mild, isolated incident does not make a work environment hostile, the test is whether 'the harassment is of such quality or quantity that

a reasonable employee would find the conditions of her employment altered for the worse.'" Feingold v. State of New York, supra at 150 (quoting Terry v, Ashcroft, 366 F.3d 128, 148 [2nd Cir 2003]).

Under this standard, the complaint is sufficient to state a cause of action for gender discrimination based on a hostile work environment. Taking the allegations in the complaint as true, Shepherd's alleged actions and words, which were offensive, pervasive and derogatory and directed at plaintiff based on her gender, created a work environment that alienated Anderson and drove her to seek reassignment. When her reassignment could not be arranged events transpired that eventually led to her termination. Under these circumstances, it cannot be said that the events and remarks described in the constituted nothing more than, "petty slights and trivial inconveniences." Williams v. New York City Hous. Auth. 61 A.D.3d at 79. Moreover, at this early stage of the action, it is premature to determine whether plaintiff's termination was motivated and caused by Shepherd's reputed animus toward women, and the atmosphere of the defendant company as a whole.

The complaint is also sufficient to state a claim for retaliation. As the First Department has written, "no challenged conduct may be deemed non-retaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'" Id. at 71. Here, the allegations in the complaint are sufficient to allege that plaintiff suffered adverse employment action, including termination, based on her complaints about Shepherd's sexist comments and discriminatory treatment of her based on her gender.

Finally, defendant's request to dismiss the plaintiff's request for punitive damages is denied. It is well settled that the New York City Human Rights Law permits recovery of punitive

damages for discriminatory conduct. Administrative Code § 502(a); Walsh v. Covenant House, 244 A.D.2d 214, 215 (1st Dep't 1997). Moreover, the allegations here, including that Edmiston knew about and tolerated Shepherd's blatant sexual harassment and discriminatory conduct for years, and that Anderson's complaints about such conduct resulted in Anderson's termination are sufficient, at this early stage of the action, to support a request for punitive damages.

Conclusion

In view of the above, it is

ORDERED that Edmiston's motion to dismiss is denied; and it is further

ORDERED that Edmiston shall file an answer to the complaint within 30 days of the entry of this decision and order; and it is further

ORDERED that the parties shall appear at a preliminary conference on February 13, 2014 at 9:30 am, in Part 11, Room 351, 60 Centre Street, New York, NY.

Dated: December 16, 2013

J.S.C

HON. JOAN A. MADDEN
J.S.C.