Sarr v Saks Fifth Ave. LLC
2016 NY Slip Op 31751(U)
September 20, 2016
Supreme Court, New York County
Docket Number: 151303/2015
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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EL HADJI SARR,

Plaintiff,

Index Number: 151303/2015

- against -

Sequence Number: 001

SAKS FIFTH AVENUE LLC and MICHAEL WASHBURN,

Decision and Order

Defendants.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendants' motion, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits 1
Affirmation in Opposition - Exhibits 2
Reply Affirmation - Exhibits 3

The Instant Action

In this action, plaintiff, El Hadji Sarr, sues defendants, Saks Fifth Avenue LLC ("Saks"), his former employer, and Michael Washburn, his former supervisor, for discrimination and retaliation under the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"). The Court accepts plaintiff's allegations stated in the complaint as true.

On February 6, 2015, plaintiff e-filed a complaint alleging that defendants had violated the NYSHRL and NYCHRL. On April 3, 2015, defendants e-filed a verified answer denying the allegations set forth in the complaint. The parties engaged in, and apparently completed, discovery, and on November 30, 2015, plaintiff filed a note of issue. Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint. In support of the motion defendants submit, inter alia, deposition transcripts, Saks' dependability and attendance policies ("D&A policies"), Saks' performance improvement warnings, affidavits, and affirmations. Plaintiff opposes the motion, submitting, inter alia, affidavits and affirmations.

Discussion

I. Defendants are Entitled to Summary Judgment Dismissing Plaintiff's Discrimination Claim

Plaintiff's employment discrimination claims must be evaluated under a burden-shifting analysis. See Woodie v Azteca Intl. Corp., 60 AD3d 535, 535 (1st Dept 2009) ("A three-part analysis is required . . . Employee must first establish a prima facie case of discrimination. The burden then shifts to the employer to rebut the prima facie case with a legitimate reason, in which case the burden shifts back to the employee to show that the proffered reasons are pretextual"). Plaintiff possesses the initial burden to establish a *prima facie* case of discrimination by showing that: (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment; and (4) the termination occurred under circumstances giving rise to an inference of discrimination. See Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 (2004). If plaintiff satisfies this burden, the burden shifts to defendants, and if defendants set forth a legitimate, nondiscriminatory reason to support its employment decision, plaintiff must then show that defendant's alleged reasons were merely a pretext for discrimination by demonstrating "both that the stated reasons were false and that discrimination was the real reason." Id.

Construing the evidence in the light most favorable to the non-movant, this Court finds that plaintiff has established a *prima facie* case of discrimination, demonstrating that (1) he is Muslim and, thus, a member of a protected class; (2) he was qualified to hold the position, as he received numerous awards for his ability to open credit card accounts; (3) Saks terminated his employment on October 17, 2015; and (4) the termination may give rise to an *inference* of discrimination, as plaintiff alleges that other non-Muslim employees were not questioned about their religious beliefs and habits. See Reeves v Sanderson Plumbing Prod., Inc., 530 US 133, 134 (2000) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").

However, defendants have met their burden of setting forth a legitimate, nondiscriminatory reason to terminate plaintiff, to wit, plaintiff's violation of defendants' D&A policies. It is undisputed that defendants have D&A policies, requiring all employees to report to work on time and to give supervisors prior notice if it is necessary to be late or absent for any reason, which defendants provided to plaintiff in his Handbook and discussed during his training. The record reflects plaintiff's long history of leaving early or being absent without authorization: in a mere 5-week period in February and March of 2013, plaintiff was late to work 22 out of the 26 days and was absent three other days; from July 6-22, 2013, plaintiff left early 12 times; and between September 9-23, 2013, plaintiff arrived late on seven occasions and left before the scheduled end of his shift on 13 occasions. Despite receiving four separate warnings over the course of 10 months, plaintiff continued to violate Saks' D&A policies by repeatedly arriving late to work, leaving earlier than the end of his shift, and failing to give his supervisors prior notice of his absence. Saks has the right to maintain D&A policies as a business decision and to terminate plaintiff after giving him fair warning. See Baldwin v Cablevision Sys. Corp., 65 AD3d 961, 966 (1st Dept 2009) ("A court in an employment discrimination case should not sit as a super-personnel department that reexamines an entity's business decisions"). Plaintiff has failed to deny these allegations.

Plaintiff has also failed to demonstrate that defendants' proffered reasons for terminating him were merely pertextual. Plaintiff argues that defendant's articulated reasons for terminating him were merely pretext, based on (1) demeaning remarks allegedly made by Washburn, asking plaintiff why he needed to pray so much, telling other employees not to help plaintiff with his work, and commenting that " [Washburn will] fire you soon, because you Muslim" [sic]; and (2) the fact that non-Muslim employees were not reprimanded for their lack of dependability. The Court finds this argument unpersuasive; plaintiff has not presented sufficient, concrete evidence to support a finding that this treatment was religiously motivated, especially in light of the fact that plaintiff admits he was aware of defendants' D&A policies and deliberately violated them by continuing to be late or absent from work. See Dickerson v Health Mgmt. Corp. Of Am., 21 AD3d 326, 328 (1st Dept 2005) ("Even assuming that plaintiff was unfairly singled out . . . or that disparaging remarks were made about him, these facts, while offensive, do not negate defendant's evidence concerning his tardiness and absenteeism.").

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's discrimination claim.

II. Defendants are Entitled to Summary Judgment Dismissing Plaintiff's Retaliation Claim

Under the NYSHRL and NYCHRL, retaliation claims must be evaluated under a burden-shifting analysis as well. Plaintiff must first establish a *prima facie* case by showing: (1) participation in a protected activity; (2) plaintiff's employer was aware of the protected activity; (3) plaintiff suffered an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. If plaintiff satisfies this burden, defendant must set forth a legitimate, non-retaliatory reason for the adverse employment action. If defendant does so, plaintiff can prevail only if he can show that defendant's explanation is merely a pretext for retaliation. See Forrest v Jewish Guild for the Blind, supra at 313. Plaintiff can establish a *prima facie* case of causation by demonstrating at least one of the following: (a) that the retaliatory action happened close in time to the protected activity, (b) that others similarly situated to plaintiff were treated differently, or (c) with direct proof of discriminatory animus. See Jimenez v City of New York, 605 F Supp 2d 485, 528 (SDNY 2009) (plaintiff need not establish that alleged retaliation resulted in termination so long as retaliatory or discriminatory act was reasonably likely to deter person from engaging in protected activity); cf. Williams v New York City Hous. Auth,

supra ("[Plaintiff's] assignment to do field work and respond to tenant complaints did not represent a difference in treatment attributable to retaliation, since the record shows that other workers (who did not complain of discrimination) were given similar assignments").

Plaintiff has failed to demonstrate a causal connection between the protected activity–a complaint about Washburn's comments to Saks' human resources department–and his subsequent termination. The record demonstrates that defendants provided plaintiff four warnings that he was violating the D&A policies before terminating him. Defendants also provided other employees similarly situated to plaintiff the same warning and termination letters for violating Saks' D&A policies. Plaintiff is silent in the face of defendants' demonstrated and documented warnings to plaintiff, over several months prior to his ultimate termination, for the very same conduct that he was warned not to repeat. See Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 39 (1st Dept 2011) ("where a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent"). Thus, plaintiff fails to make out a *prima facie* case of retaliation.

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's retaliation claim.

III. Defendants are Entitled to Summary Judgment
Dismissing Plaintiff's Hostile Work Environment Claim

In order to prove a *prima facie* case for hostile work environment, plaintiff must prove, by a preponderance of the evidence, that the complained of conduct: (1) is objectively severe or pervasive; (2) creates an environment that plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of plaintiff's protected characteristic. See Forrest v Jewish Guild for the Blind, supra at 310; see also Patane v Clark, 508 F3d 106, 113 (2d Cir. 2007) ("Factors that a court might consider in assessing the totality of the circumstances include: (a) the frequency of the discriminatory conduct; (b) its severity; (c) whether it is threatening and humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance."). The NYCHRL standard is whether such conduct amounts to more than "petty slights and trivial inconveniences," which is a more liberal standard than the NYSHRL. See Williams v New York City Hous. Auth., supra at 80. However, even analyzing the instant action pursuant to the NYCHRL's lower standard, plaintiff still must prove that he was treated less well than other employees because of his protected status, and that the hostile conduct was directed at plaintiff because of his religion. See Chin v New York City Hous. Auth., supra.

Plaintiff has failed to set forth a *prima facie* case for a hostile work environment. Even though Washburn's questions and comments concerning plaintiff's praying habits were perhaps insensitive and offensive, in plaintiff's subjective opinion, plaintiff has not proffered evidence that defendants' conduct was more than "petty slights and trivial inconveniences." See Ferrer v New York State Div. Of Human Rights, 951 F.2d 59, 62 (2d Cir. 1992) (applying New York law) ("isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment"). Additionally, the record reflects that the two employees plaintiff contends were similarly situated to him and not disciplined for violating D&A policies, were in fact either disciplined or terminated pursuant to the D&A policies. For example, one employee, Akaya Sharon, who was not Muslim, received two warnings over a six-month period and was eventually terminated for arriving late on numerous occasions. The other employee, Miguel Baex, who is also not Muslim, was given a first warning because he was late or absent on numerous occasions; Baex resigned that same month. Plaintiff's other contention that employees who are part of a "million dollar club," a subset of employees who hit $1,00,000 in sales annually and allowed to create their own "perfect" schedules, is also unavailing; the record demonstrates that those employees were still required to work 40 hours a week and would have given the same warnings that plaintiff received had they violated the D&A policies. Considering the frequency, severity, offensiveness, and interference with plaintiff's work performance, this Court finds that plaintiff has not raised issues of material fact as to whether he was employed in a religiously hostile work environment.

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's hostile work environment claim.

Conclusion

Defendants' motion for summary judgment dismissing plaintiff's complaint is hereby granted in all respects and, accordingly, the clerk is hereby directed to enter a judgment of dismissal, with prejudice.

Dated: September 20, 2016

Arthur F. Engoron, J.S.C.