

Sanderson-Burgess v City of New York

2016 NY Slip Op 32007(U)

September 8, 2016

Supreme Court, Queens County

Docket Number: 700149/2011

Judge: Janice A. Taylor

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

-----x
LYNNE SANDERSON-BURGESS,
Plaintiff(s), Index No.: 700149/11
Motion Date: 4/19/16
Motion Cal. No.: 146, 148, 149
Motion Seq. No: 6, 7, 8

- against -

THE CITY OF NEW YORK , THE NEW YORK
CITY POLICE DEPARTMENT, FRANCIS BROWN,
SGT. SHARON SOLER, LT. JOHN MAHLAND,
CAPT. JAMIE DONNELLY aka CAPT. JAMES
DONNELLY, LT. MICHAEL DORN and EEO SGT.
"JANE" DESPAIGN as fictitious name of
real individual whose true identity is
unknown at the present time,

Defendant(s).
-----x

The following papers numbered 1 - 18 read on three motions, by defendant Francis Brown; by defendant Sgt. Sharon Soler; and by defendants The City of New York, The New York City Police Department, Lt. John Mahland, Capt. James Donnelly, Lt. Michael Dorn, and "Jane" Despaign, (collectively, the "City Defendants"), each seeking summary judgment, dismissing plaintiff's complaint, pursuant to CPLR § 3212.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law.....	5
Memorandum in Opposition.....	6
Reply Memorandum.....	7
Notice of Motion-Affirmation-Exhibits-Service.....	8 - 11
Memorandum of Law.....	12
Memorandum in Opposition.....	13
Reply Memorandum.....	14
Notice of Motion-Affirmation-Exhibits-Service.....	15 - 18

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

In this action seeking compensatory and punitive damages claiming, among other things, allegations of hostile work environment and employment discrimination based on gender, sexual harassment, retaliation, aiding and abetting, and negligence, defendants move for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has failed to state a cause of action or present evidence of retaliation by each moving defendant, in violation of either the New York State Human Rights Law ("NYSHRA") or the New York City Human Rights Law ("NYCHRL"). Defendant Brown also moved to sever and continue her cross-claim against defendant City of New York, seeking a defense and indemnification, pursuant to General Municipal Law § 50-k.

At the time of the alleged acts of discrimination, harassment and retaliation, plaintiff was a Case Management Nurse, employed by the New York City Police Department ("NYPD") at the Robert Thomas Health Care Facility, in Corona, Queens. Brown was similarly employed at said facility until May 2009. Soler was a Supervising Sergeant at said facility and plaintiff's immediate supervisor. Mahland was a Commanding Officer of the Medical Division of the NYPD and, as a Lieutenant, was Soler's supervisor. Donnelly was a Captain and a Commanding Officer of the Medical Division of the NYPD. Dorn was a Commanding Officer of the Employee Discipline Part of the Medical Division and Despaign was a supervisor of the NYPD Equal Opportunity Office.

Plaintiff contends she was subjected to sexual harassment by Brown and a resulting hostile work environment from January 2007 until June 2008. In her complaint, plaintiff alleges that Brown, during that period, "made offensive and sexually suggestive comments" to her about plaintiff's "need to show her more cleavage. . . need to wear high heels . . . need to wear floral skirts . . . need to wear white pants . . . pretty pink lipstick" and that plaintiff looked and smelled "delicious." At her deposition, plaintiff admitted that she perceived Brown's comments to be sexual in nature only "sometimes" and when asked, individually, whether she thought each such comment was "sexual," she answered "yes" only once, responding instead with "it was inappropriate," or "I did not like it," or it "was just very annoying." Additionally, plaintiff stated that Brown, on several occasions over the alleged eighteen-month period, inappropriately "touched," "rubbed," "grabbed," or "poked" plaintiff on the face, neck, arms, wrist, left thigh and hip, only some of which incidents plaintiff characterized as having been "sexual" in nature, and on each such occasion, plaintiff told Brown to stop touching her. According to plaintiff's deposition testimony, the last "touching" by Brown occurred in June 2008. Further, plaintiff claims she was subjected to retaliation by the Police Department and its defendant employees for her having

"rebuffed Brown's advances" or "filed a complaint against Brown." Said retaliation was allegedly in the form of, among other things, "an increased workload and number of assigned districts", assignments which should have been voluntary, a lack of overtime hours and requested leave, and the placement of a tape recorder under her desk, allegedly by Soler.

On the date of the last-alleged "touching" by Brown, on June 18, 2008, plaintiff reported the incident to Lt. Mahland, who reported it to his superior, fashioned a formal, internal complaint of sexual harassment and retaliation on behalf of plaintiff and against Brown, and forwarded it to the Police Department Office of Equal Employment Opportunity ("OEEO") on June 19, 2008. After an investigation by the OEEO, which included statements of the parties and of witnesses, a Findings and Recommendation was made, resulting in Brown being issued a Command Discipline, ordered to attend a training seminar, and transferred to a health care unit in the Bronx.

Plaintiff opposes the instant motions contending that she has viable causes of action on each of the above-stated grounds. Plaintiff alleges that defendants discriminated against her in violation of the provisions of the NYSHRL (see Executive Law § 290 et seq.) and of the NYCHRL (see Administrative Code of the City of New York §§ 8-101; 8-102; 8-107).

To establish a *prima facie* case of employment discrimination, petitioner was required to demonstrate that she was a member of a protected class, that she was qualified for her position, that she was terminated from employment or suffered another adverse employment action, and that the termination or other adverse action "occurred under circumstances giving rise to an inference of discriminatory motive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004]). An "adverse employment action" is one which constitutes a "materially adverse change in the terms and conditions of employment" (*Forrest*, 3 NY3d at 306).

Sexual harassment that results in a "hostile or abusive work environment" is prohibited as a form of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000 et seq. (*Meritor Savings Bank, FSB v Vinson*, 477 U.S. 57, 66 [1986]). A hostile work environment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest*, 3 NY3d at 310 [2004] quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]). The standard of proof for discrimination claims brought under NYSHRL, being identical to

that of Title VII, requires that harassment be "severe or pervasive" to be actionable (*Meritor Savings Bank, FSB*, 477 U.S. at 67; see *Margerum v City of Buffalo*, 24 NY3d 721 [2015]; *Clifford v County of Rockland*, 140 AD3d 1108 [2d Dept 2016]). In contrast, the provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-78 [2011]). The City statute is to be more broadly interpreted than similarly-worded federal or State anti-discrimination statutes (see *Zakrzewska v New School*, 14 NY3d 469 [2010]; *Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158 [2d Dept 2015]). However, "the broader purposes of the City HRL do not connote an intention that the law operate as a 'general civility code'" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79 [1st Dept 2009], quoting *Oncale v Sundowner Offshore Services*, 523 US 75, 81 [1998]).

Under both the NYSHRL and the NYCHRL, "there can be no claim for sexual discrimination, including that based on a hostile work environment, unless the plaintiff was treated differently because of her sex" (*Hernandez v Kaisman*, 103 AD3d 106, 111-112 [1st Dept 2012]; see *Oncale*, 523 US at 81). The State HRL forbids not only opposite-sex sexual harassment in the workplace, but same-sex sexual harassment as well (see *Oncale*, 523 US at 81; *State Div. Of Human Rights v Stoute*, 36 AD3d 257 [2d Dept 2006]). In the case at bar, the claimed sexual harassment is alleged to have been of the same-sex variety.

In order to establish gender-based harassment in a same-sex harassment case, plaintiff was required to claim that she was harassed because she was female; to allege that Brown was homosexual; to suggest that Brown was motivated by a general hostility to women in the workplace; and to proffer evidence that members of different genders were treated differently (see *Oncale*, 523 US at 81). Plaintiff has failed to raise and/or proffer evidence in admissible form applicable to any of these necessary contentions.

Additionally, a complaint claiming hostile work environment sexual harassment under the State HRL must allege conduct so severe or pervasive as to create a work environment which a reasonable person would consider hostile and abusive; must allege that the plaintiff subjectively perceived the workplace to be hostile; and it must indicate either a single incident of extraordinary severity, or a series of continuous and concerted incidents which altered the conditions of the working environment (see *Barnum v New York City Transit Auth.*, 62 AD3d 736 [2d Dept 2009]; *Beharry v Guzman*, 33 AD3d 742 [2d Dept 2006]). Among the circumstances to be

considered in establishing the existence of a sexually hostile work environment are "the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with (the plaintiff's) work performance" (*Minckler v United Parcel Serv., Inc.*, 132 AD3d 1186, 1187 [3d Dept 2015]).

In the case at bar, the alleged comments and actions of Brown could hardly be considered "severe," as plaintiff did not deem a significant number of them to have been sexual in nature. Additionally, the total alleged episodes of sexual harassment, even including those plaintiff did not consider "sexual," amounted to only a handful of occasions over an eighteen-month period. Incidents must be more than "episodic, they must be sufficiently continuous and concerted in order to be deemed pervasive ... [I]solated acts, unless very serious, do not meet the threshold of severity or pervasiveness" (*Perry v Ethan Allen, Inc.*, 115 F3d 143, 149 [2d Cir. 1997]; *Hernandez v Kaisman*, 103 AD3d 106 [1st 2012]). The complained-of behavior does not rise to the level of "severe and pervasive" for the purposes of a hostile environment claim under the State HRL. Consequently, plaintiff has failed to demonstrate the existence of an "adverse employment action," sufficient to deny defendants' motions for summary judgment, and to avoid dismissal of her lawsuit herein, pursuant to the State HRL.

A hostile work environment claim under the City HRL does not require proof that the complained-of conduct was "severe and pervasive," but rather that plaintiff has been treated less well than other employees because of her gender (see *Nelson v HSBC Bank USA*, 87 AD3d 995 [2011]; *Williams v New York City Hous. Auth.*, 61 AD3d 62). In the case at bar, plaintiff's allegations can reasonably be interpreted by a trier of fact to be no more than "petty slights and trivial inconveniences," which, while offensive, do not rise to an actionable level under the City HRL (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009]). As such, plaintiff has failed to demonstrate that "[c]onsidering the totality of the circumstances ... the broad remedial purposes of the City HRL would be countermanded by dismissal of the claim" (*Hernandez v Kaisman*, 103 AD3d 106, 115 [1st Dept 2012]; see *Gonzalez v EVG, Inc.*, 123 AD3d 486 [1st Dept 2014]).

Correspondingly, the branches of the motions seeking summary judgment dismissing plaintiff's causes of action alleging "aiding and abetting" and "retaliation," are granted. To establish a claim for retaliation, plaintiff must demonstrate, *inter alia*, that the employer took an "adverse employment action," and that plaintiff was engaged in a "protected activity", under Executive Law §296(7) or Administrative Code §8-107(7). "An employee engages in a

'protected activity' by 'opposing or complaining about unlawful discrimination'" (*Clarson v City of Long Beach*, 132 AD3d 799, 800 [2d Dept 2015], quoting *Forrest*, 3 NY3d at 313; see *Borawski v Abulafia*, 140 AD3d 817 [2d Dept 2016]). As there has been no proof of "unlawful discrimination" in this matter, plaintiff has failed to demonstrate her engagement in a "protected activity."

Plaintiff's complaint contains a "Fourth Cause of Action for Negligence, Carelessness and Recklessness" and a "Ninth Cause of Action for Negligent Infliction of Emotional Distress," both of which contain language alleging the elements of a cause of action for intentional infliction of emotional distress, e.g., "purposeful" conduct, which is "outrageous," "extreme," and "beyond all possible bounds of decency" (fourth cause of action) and "extreme and outrageous conduct" and "willful, wanton and intentional or reckless acts and/or omissions" (ninth cause of action). Plaintiff has failed to rebut defendants' entitlement to summary judgment on a cause of action for intentional infliction of emotional distress because, accepting all of the allegations of defendants' conduct as true, and giving plaintiff the benefit of every possible favorable inference, "the defendants' conduct was not so extreme or outrageous as to satisfy" that element of the cause of action (*Petkewicz v Dutchess County Dept. Of Community & Family Services*, 137 AD3d 990, 991 [2d Dept 2016]; see *Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]).

Plaintiff has also failed to sustain her cause of action for negligent infliction of emotional distress. Contrary to defendant's arguments, extreme and outrageous conduct is not an essential element of this cause of action (*Taggart v Costabile*, 131 AD3d 243). However, a cause of action for negligent infliction of emotional distress requires a breach of a duty of care resulting directly, not consequentially, in emotional harm, and a showing that the claim "possesses some guarantee of genuineness" (*Ferrara v Galluchio*, 5 NY2d 16, 21 [1958]; see *Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1 [2008]). The courts have opined that the necessary "guarantee of genuineness," where there was no contemporaneous physical injury and the particular type of negligence was not recognized as an assurance of genuineness, generally required that the breach of duty owed directly to plaintiff must have either endangered the plaintiff's physical safety or have caused plaintiff to reasonably fear for her physical safety (see *Kennedy v McKesson Co.*, 58 NY2d 500 [1983]; *Taggart v Costabile*, 131 AD3d 243). Plaintiff has failed to demonstrate that any breach of duty on the part of defendants herein endangered, or caused plaintiff to fear for her physical safety.

The branch of defendant Brown's motion seeking severance of her cross-claim to recover the costs of her defense of this action against The City of New York is granted without opposition, pursuant to CPLR § 603.

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, defendants' motions for summary judgment against plaintiff are granted, and the complaint herein is dismissed. The branch of defendant Brown's motion seeking severance of her cross-claim to recover the costs of her defense against The City of New York is granted.

Dated: September 8, 2016



JANICE A. TAYLOR, J.S.C.

FILED
SEP: 21 2016
COUNTY CLERK
QUEENS COUNTY