Mitzner v Royal Bank of Can.
2017 NY Slip Op 31071(U)
May 16, 2017
Supreme Court, New York County
Docket Number: 160195/14
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47
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LAUREN MITZNER,

Plaintiff,

-against-

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, ANDREW SCHWATRZ, and DOUGLAS COLANDREA

Defendants.

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DECISION and ORDER

Index No.: 160195/14

Motion Seq. 003

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Exhibits Annexed	1
Answering Affidavits/Affirmations/Exhibits Annexed	2
Reply Affidavits/Affirmations/Exhibits Annexed	3

ERIKA M. EDWARDS, J.:

Plaintiff Lauren Mitzner ("Mitzner") initiated this action for employment discrimination against her employer Royal Bank of Canada ("RBC"), RBC Capital Markets LLC ("Capital") and her supervisors Andrew Schwartz ("Schwartz") and Douglas Colandrea ("Colandrea") based on alleged unequal treatment as a result of her gender and other discriminatory practices as a result of her pregnancies during her employment. Defendants moved for summary judgment seeking dismissal of Plaintiff's case in its entirety.

For the reasons set forth herein, Defendants' motion for summary judgment is ***denied***.

Defendants argue in substance that Plaintiff failed to establish a *prima facie* case for

employment discrimination because she fails to show a single adverse employment action that she endured and Plaintiff is unable to provide evidence demonstrating circumstances giving rise to an inference of discrimination. More specifically, Defendants argue in substance that despite receiving low ratings in her peer review, Plaintiff was promoted to Director over her similarly ranked male co-workers which may be deemed contrary to any allegations of discrimination. Defendants further argue in substance that Plaintiff received the highest bonus compensation as compared to her similarly ranked male co-workers during her employment. Finally, Defendants argue in substance that Plaintiff's claim for constructive termination fails as a matter of law because Plaintiff voluntarily left her employment.

In opposition to Defendants' motion, Plaintiff alleges that she began working for Defendant RBC in 2009 as a Vice President of Credit Sales and became a Director of Sales in 2014. Plaintiff argues in substance that during her employment, she repeatedly experienced discrimination because of her gender which increased as a result of her two maternity leaves. In particular, Plaintiff alleges that she was routinely assigned inferior and less lucrative accounts than those assigned to her male co-workers. Additionally, Plaintiff argues in substance that after announcing her pregnancies and upcoming maternity leaves, her supervisors took accounts away from her and either replaced the accounts with inferior accounts or did not replace the accounts at all. Moreover, Plaintiff argues in substance that as a result of losing accounts, receiving inferior accounts and being unable to cultivate the inferior accounts in the same manner as the more lucrative ones, she was constructively terminated because she was left with virtually nothing to do.

Summary Judgment

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to

demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In applying these principles to the facts in this case, the court finds that Plaintiff raised sufficient questions of fact regarding alleged discriminatory treatment to warrant denial of Defendants' motion for summary judgment.

Gender Discrimination Under NYSHRL and NYCHRL

Under the New York State Human Resources Law ("NYSHRL") and the New York City Human Right Law ("NYCHRL"), it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and privileges of employment, because of an individual's sex or gender (*see* Executive Law § 296 [1][a]; Administrative Code § 8-107 [1][a]). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices (*see* Executive Law § 296 [7]; Administrative Code § 8-107 [7]; 42 USC § 2000e-3 [a]).

The standards for recovery under the NYSHRL and NYCHRL are both analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 U.S. 792 [1973]; *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson*, 6 NY3d at 270, citing *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Forrest*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965, 888 N.Y.S.2d 1 [1st Dept 2009]).

If plaintiff makes this prima facie showing, the burden then shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory, reason for its employment decision. If the employer articulates a legitimate, non-discriminatory basis for its decision, the burden shifts back to the plaintiff "to prove that the

legitimate reasons proffered by defendant were merely a pretext for discrimination" (*Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 253, [1981]).

While the NYCHRL must be construed more liberally than the NYSHRL, and claims under NYCHRL must be independently analyzed (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *Bennett v Health Mgt. Sys.*, 92 AD3d 29, 34), courts have continued to apply the analytical framework set out in *McDonnell Douglas* to NYCHRL claims (*see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 [2d Dept 2013]; *Gordon v Kadet*, 95 AD3d 606, 606-607 [1st Dept 2012]; *Koester v New York Blood Ctr.*, 55 AD3d 447, 448 [1st Dept 2008]. As applied to the NYCHRL, however, the burden shifting framework was modified by the First Department in *Bennett*, to the extent that on a motion for summary judgment, when a defendant offers evidence of a nondiscriminatory basis for its actions, a court need not decide whether plaintiff has made a prima facie case (*see Bennett*, 92 AD3d at 39-40). Instead, the burden then shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory, reason for its employment decision (*id.* at 45; *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113-114 [1st Dept 2012]; *Furfero v St. John's Univ.*, 94 AD3d 695, 697 [2d Dept 2012]).

Courts subsequently have held that NYCHRL claims must "be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases" (*see Melman*, 98 AD3d at 113; *Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 [1st Dept 2014]; *Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 [1st Dept 2012]). Therefore, when a defendant has produced evidence of a legitimate reason for its action, "[t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the

defendant was motivated at least in part by discrimination." (*Bennett*, 92 AD3d at 39; *Melman*, 98 AD3d at 127).

A plaintiff may prevail "in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision, or that the action was 'more likely than not based in whole or in part on discrimination" (*Melman,* 98 AD3d at 127, *quoting Aulicino v New York City Dept. of Homeless Servs.*, 580 F3d 73, 80 [2d Cir 2009]).

In the present case, Plaintiff met her initial burden of establishing a *prima facie* showing of discrimination under *McDonnell Douglas* by (1) being a member of a protected class as a woman; (2) showing she was qualified for the position held by providing peer reviews that noted she was a qualified employee who should have had more accounts assigned to her; (3) showing she was constructively terminated or suffered adverse employment action by repeatedly having her accounts taken away without comparable replacements of her more lucrative accounts unlike those assigned to her male co-workers; and (4) the adverse employment action of repeatedly taking and reallocating her accounts without replacements after her pregnancy announcements gave rise to an inference of discrimination.

Upon Plaintiff making her *prima facie* showing of discrimination, the burden then shifts to Defendants to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory reason for its employment decision. As such, Defendants contend that the alleged discriminatory actions in allocating accounts were not discriminatory. Defendants further contend that accounts were routinely redistributed among the sales team and Plaintiff was not singled out due to her gender or pregnancy status when her accounts were reallocated. However, the evidence shows that the majority of Plaintiff's accounts were taken away after she notified her

supervisors of her upcoming maternity leave. Additionally, despite being told that she would get more viable accounts upon her return, Plaintiff continued to have accounts stripped away. However, when Plaintiff received new accounts, these accounts were far less profitable than the accounts she previously maintained.

In response to Defendants' arguments regarding its non-discriminatory practice of assigning and reallocating accounts, Plaintiff submitted an Affidavit and deposition testimony from a former female employee who, during the course of her tenure with RBC, experienced similar treatment alleged by Plaintiff. Through their testimonies and their affidavits, both women recounted that they never received the same types of accounts that were given to their male counterparts. It is also asserted that despite her positions as Vice President and Director, Plaintiff was given accounts that were typically given to junior members of the sales team, not someone with Plaintiff's high level of experience. Plaintiff contends that her remaining accounts were not as productive or as profitable as the accounts she maintained prior to her pregnancy and leave. As such, her earning potential declined as compared to her male counterparts. Although, Plaintiff articulated her concerns about the number of accounts and the types of accounts she maintained, she was told to work with what she was given. Plaintiff alleges that due to the lack of productivity of the accounts she was assigned, her position was essentially eviscerated and she was constructively terminated.

Defendants further argue that despite negative peer review and the reallocation of accounts, Plaintiff was promoted in 2014 to Director of Sales over equally or more qualified male co-workers. Moreover, Defendants contend that Plaintiff did not suffer loss in compensation as a result of the reallocation of her accounts and Plaintiff continued to receive higher compensation than her male co-workers.

Upon review of the evidence submitted, several material issues of fact remain to be tried, including, but not necessarily limited to whether Plaintiff suffered an adverse employment action and if so, whether it occurred under circumstances giving rise to an inference of discrimination; whether Plaintiff was constructively terminated; and whether the manner in which Plaintiff's accounts were reallocated was the result of gender discrimination or for a legitimate non-discriminatory reason.

Furthermore, the parties disagree on the manner in which Plaintiff's complaints regarding her disparate treatment were handled. On approximately four occasions, Plaintiff made complaints to either someone in Human Resources or directly to her supervisors. It appears that no person with whom Plaintiff lodged her complaints conducted an investigation to address the issues of her alleged discrimination. Furthermore, there is conflicting deposition testimony from employees of RBC as to whether Plaintiff's formal complaints were elevated up the chain of command. As indicated, in the evidence provided by both parties, it appears that Plaintiff's repeated complaints of alleged discriminatory practices as a result of her gender or pregnancy status were both wholly and partially ignored and never appropriately addressed or resolved.

As there were never any investigations conducted in connection with Plaintiff's complaints, RBC neither concluded nor notified plaintiff of possible non-discriminatory reasons for the removal of her accounts. Plaintiff argues in her opposition that RBC only responded to her complaints after she initiated the current litigation. Therefore, a triable issue of fact remains whether the removal and reallocation of Plaintiff's accounts were a result of gender discrimination and other discriminatory practices in connection with Plaintiff's pregnancy status.

Despite alleging non-discriminatory reasons for the removal and reallocation of Plaintiff's accounts and failure to reassign comparable accounts, Plaintiff has offered sufficient evidence to

raise questions of whether the alleged unlawful discrimination was one of the motivating factors for the adverse employment actions, or that the adverse employment actions were more likely based in whole or in part on discrimination. Therefore, for the reasons set forth above, the court ***denies*** Defendants' motion for summary judgment dismissal of all claims.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of Defendants Royal Bank of Canada, RBC Capital Markets LLC, Andrew Schwartz and Douglas Colandrea is ***denied***; and it is further

ORDERED that the parties appear for a compliance conference on August 17, 2017, at 9:30 a.m. in Part 47, Room 320, located in 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: May 16, 2017

HON. ERIKA M. EDWARDS