Shirazi v New York Univ.
2017 NY Slip Op 32013(U)
September 25, 2017
Supreme Court, New York County
Docket Number: 161303/2014
Judge: Erika M. Edwards

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

PARI SHIRAZI,

Plaintiffs,

-against-

NEW YORK UNIVERSITY, DAVID MCLAUGHLIN, and JOE JULIANO,

Defendants.

Index No.: 161303/2014

DECISION/ORDER

Motion Sequence 001

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/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Pari Shirazi ("Plaintiff") brought this action against Defendants New York University ("NYU"), David McLaughlin ("McLaughlin") and Joe Juliano ("Juliano") (collectively "Defendants") for claims of discrimination based on religion, race, national origin, disability and retaliation under New York State Human Rights Act ("NYSHRA") and New York City Human Rights Act ("NYCHRA") and negligent infliction of emotional distress.

Defendants' pre-Answer motion to dismiss Plaintiff's complaint is made pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7). Defendants primarily argue that Plaintiff's claims are barred by res judicata based on this court's previous dismissal of Plaintiff's prior actions, Plaintiff's allegations of conduct which occurred over three years prior to the filing of this action are time-barred and Plaintiff failed to state a cause of action for negligent infliction of emotional distress, since it is barred by the exclusivity provisions of Workers' Compensation Law.

For the reasons set forth herein, the court grants Defendants' motion to dismiss in part and dismisses Plaintiff's Third, Fourth and Seventh Causes of Action for disability discrimination under NYSHRL and NYCHRL and negligent infliction of emotional distress and denies Defendants' motion to dismiss Plaintiff's remaining claims.

At all relevant times, Plaintiff and Defendants McLaughlin and Juliano were employees of NYU. Plaintiff, who is a Muslim woman of Iranian decent and who speaks English with a foreign accent, worked for NYU for about thirty (30) years. In 2007, she became President of

Tisch Asia, which was a new facility abroad under NYU's Tisch School of the Arts, and she was an Associate Arts Professor. Defendant McLaughlin is the Provost of Tisch School of the Arts and Vice Chairman of the Board of Directors of Tisch Asia. Defendant Juliano is the Vice Provost and Associate Vice Chancellor for Strategic Planning of NYU.

Plaintiff alleges in substance that Defendants discriminated against her based on her religion, race and national origin and created a hostile work environment. She also alleges that she was discriminated against because of a disability based on her serious medical condition which developed from stress because of her professional and personal responsibilities which left her exhausted and ill. Plaintiff alleges that she developed this condition after her sister became ill with cancer and passed away in 2005. Plaintiff had cared for her sister until her death and provided financial support for her sister's two daughters. Plaintiff further alleges that Defendants rejected her reasonable requests for accommodation of her disabilities and retaliated against her in 2008 by denying her requests for a leave of absence/sabbatical, extended vacation, additional personal assistance and reduced travel responsibilities. Although Defendants were responsive to her request for a reduction in duties, Plaintiff claims it was insufficient.

Plaintiff further alleges that Defendants McLaughlin and Juliano made several offensive discriminatory comments toward her about her Muslim faith, her Iranian and Middle Eastern background and her accent. Plaintiff complained to her supervisor and Defendants escalated their discriminatory treatment of Plaintiff and retaliated against her by rejecting her proposals to strengthen Tisch Asia with no rational basis, mistreating her, belittling her and, in 2010, failing to promote her. Additionally, Defendants McLaughlin and Juliano falsely accused Plaintiff of embezzling $20 million from Tisch School of the Arts/Tisch Asia, mismanagement and other misconduct. Such acts ultimately led to Plaintiff's removal from teaching in February 2011, her removal as President of Tisch Asia on November 15, 2011, and her removal from the faculty in June 2012.

In September 2012, Plaintiff filed an Article 78 proceeding alleging defamation and breach of contract against NYU, Juliano and other NYU officers and a separate complaint based on breach of contract, defamation and other claims against NYU. This court consolidated both actions and subsequently dismissed it in April 2014. Plaintiff appealed and while the appeal was pending, Plaintiff filed the instant complaint on November 13, 2014. The parties stipulated to stay Defendants' instant motion in 2015. The Appellate Division First Department reversed this court's dismissal and reinstated the majority of Plaintiff's claims. As such, Defendants' withdrew their argument that Plaintiff's complaint should be dismissed based on res judicata since it was now moot. Additionally, during oral argument, Plaintiff withdrew her Seventh Cause of Action for negligent infliction of emotional distress.

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept

1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is warranted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

Under NYSHRL and NYCHRL it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in compensation or in the terms, conditions or privileges of employment, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status (*see* Executive Law § 296 [1][a]; Administrative Code § 8-107 [1][a]).

Disability is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (NYC Admin Code § 8-102[16][a]). To establish a case of disability discrimination under the more lenient NYCHRL the plaintiff "must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006]). Under the NYCHRL, an employer's failure to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known" by the employer is a form of discrimination (NYC Admin Code § 8-107 [15][a]). In any case involving the need for reasonable accommodation, it is an affirmative defense that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question" (NYC Admin Code § 8-107 [15][b]). A reasonable accommodation means "such accommodation that can be made that shall not cause undue hardship in the conduct of the" employer's business and the employer has the burden of proving undue hardship (NYC Admin Code § 8-102[18]; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013] [internal quotation marks and citation omitted]).

The statutes also prohibit an employer from retaliating against an employee who has opposed or complained of unlawful discriminatory practices (*see* Executive Law § 296 [7]; Administrative Code § 8-107 [7]; 42 USC § 2000e-3 [a]). To establish a successful claim for unlawful retaliation, a plaintiff must show that 1) plaintiff engaged in a protected activity, 2) plaintiff's employer was aware that plaintiff participated in such activity, 3) plaintiff suffered an adverse employment action based upon plaintiff's activity and 4) there was a causal connection between the protected activity and the adverse action.

The standards for recovery under 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 [1st Dept 2009]).

If plaintiff makes this prima facie showing, then the burden 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, then 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 NYCHRL must be construed more liberally than NYSHRL, 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., Inc.*, 92 AD3d 29, 34 [1st Dept 2011]). Courts have continued to apply the analytical framework set forth 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]. 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 v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012], *quoting Aulicino v New York City Dept. of Homeless Servs.*, 580 F3d 73, 80 [2d Cir 2009]).

Pursuant to CPLR 214(2), there is a three-year statute of limitations on statutory claims (CPLR 214[2]). However, the court can go beyond the three-year period to determine liability in hostile environment claims if the conduct is of a continuous nature and at least one discriminatory act falls within the statute of limitations (*AMTRAK v Morgan*, 536 US 101, 117 [2002]). A "continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" (*Cornwall v Robinson*, 23 F3d 694, 704 [2d Cir 1994]). A properly pled continuing violation claim entitles a plaintiff to allege all conduct that was a part of that violation, even conduct that occurred outside of the limitations period (*id.*). The First Department adopted the Second Circuit's continuing violation doctrine for discrimination claims brought under statutes like NYSHRL and NYCHRL (*see Kent v The Papert Co., Inc.*, 309 AD2d 234, 241 [1st Dept 2003]; *Walsh v Covenant House*, 244 AD2d 214, 215 [1st Dept 1997]).

Defendants argue in substance that the majority of Plaintiff's claims of Defendants' discriminatory conduct are time-barred because they occurred prior to November 13, 2011, which is three years prior to the date Plaintiff filed this complaint. Plaintiff argues in substance that all of her claims are timely because of the continuing violation doctrine and the hostile work environment are all part of a pattern of discrimination occurring over several years.

In applying these standards to the facts of our case, the court grants Defendants' motion to dismiss Plaintiff's disability discrimination involving Defendants' rejection of Plaintiff's reasonable requests for accommodation of her disabilities under her Third and Fourth Causes of Action. The court determines that they are barred by the three-year statute of limitations and that Plaintiff failed to link these allegations to a continuing pattern of discrimination. Plaintiff's claims of Defendants' failure to make reasonable accommodation occurred well before November, 2011. Plaintiff's medical condition allegedly developed from the stress of caring for her nieces and overwhelming work responsibilities. Plaintiff's sister passed away in 2005, Plaintiff became President of Tisch Asia in 2007 and Defendants' alleged denials of her requests for extended leave and reduction of responsibilities appear to have occurred in or around 2008. Plaintiff failed to sufficiently allege a continuing pattern of disability discrimination and failed to link any of the alleged conduct which occurred within the statute of limitations to her disability. As such, the court dismisses Plaintiff's Third and Fourth Causes of Action.

When accepting all facts as alleged in the complaint as true and according Plaintiff the benefit of every possible inference, the court denies dismissal of Plaintiff's First, Second, Fifth and Sixth Causes of Action for discrimination based on religion, race, national origin and retaliation under NYSHRL and NYCHRL. The court determines that Plaintiff has sufficiently pled that such claims are part of a continuing violation and long-term pattern of discrimination which extended past the three-year statute of limitations period. Additionally, Plaintiff sufficiently pled that at least one discriminatory act, including her removal as President of Tisch Asia and ultimate removal from the NYU faculty both fell within the statute of limitations.

Finally, Plaintiff withdrew her Seventh Cause of Action for Negligent Infliction of Emotional Distress and the court agrees with Defendants that dismissal of this claim on the merits is warranted.

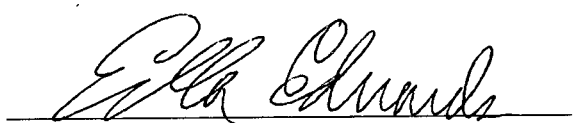
As such, it is hereby

ORDERED that Defendants New York University's, David McLaughlin's and Joe Juliano's motion to dismiss Plaintiff Pari Shirazi's complaint is granted in part and the court dismisses the Third, Fourth and Seventh Causes of Action, but denies dismissal of the First, Second, Fifth and Sixth Causes of Action in Plaintiff Pari Shirazi's complaint; and it is further

ORDERED that Defendants New York University, David McLaughlin and Joe Juliano are directed to file and serve their Answer within twenty (20) days of the date of this order; and it is further

ORDERED that the parties must appear for a preliminary conference on December 7, 2017, at 9:30 a.m., in Part 47, located in Room 320, at 80 Centre Street, New York, New York.

Date: September 25, 2017



HON. ERIKA M. EDWARDS