Mondesir v North Shore-LIJ Health Sys.
2018 NY Slip Op 31101(U)
June 4, 2018
Supreme Court, New York County
Docket Number: 1550572/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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YAMILEE MONDESIR,

Plaintiff,

-against-

NORTH SHORE-LIJ HEALTH SYSTEM, RACHAEL TABERSHAW, Individually, and ALBERINA BALIDEMIC, Individually,

Defendants.

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Index No. 1550572/2017
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by defendants for summary judgment is granted.

Background

Plaintiff began working as practice secretary for defendants North Shore-LIJ Health System ("North Shore") in July 2013 until she was terminated in October 2013. Defendants Tabershaw and Balidemic were plaintiff's supervisors. Balidemic was plaintiff's direct supervisor beginning in September 2013 and Balidemic reported to Tabershaw. Plaintiff contends that she was consistently racially discriminated against by defendant Balidemic. Balidemic purportedly called plaintiff "girl" at least two or three times.

Plaintiff contends she was offended by the use of the word "girl" due to the historical use of "girl" as a negative reference to black women. Plaintiff argues that she told Balidemic not to refer to her with that nickname and Balidemic allegedly laughed and refused to apologize. Plaintiff alleges that Balidemic did not refer to non-black female employees as "girl."

During a staff meeting on September 6, 2013, plaintiff complained about being called

"girl" and claims her supervisors did not take her seriously. Plaintiff alleges that defendants Tabershaw and Balidemic began a retaliatory campaign against her that included decreasing her job responsibilities. Plaintiff claims that the office environment rapidly deteriorated in September and October 2013, especially after Mr. Marin Gonzales was hired. Plaintiff was terminated on October 18, 2013. Plaintiff contends that she would not have been fired if she had not complained about being called "girl."

In August 2014, plaintiff commenced a lawsuit in federal court alleging racial discrimination. In November 2016, Judge Koetl of the Southern District of New York granted defendants' motion for summary judgment and dismissed plaintiff's federal claims. However, Judge Koetl declined to exercise supplemental jurisdiction over plaintiff's New York City Human Rights Law ("NYCHRL") claims, thereby permitting plaintiff to bring the instant action.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of New York, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"We have consistently held that the standards for recovery under the New York Human Rights Law are in nearly all instances identical to Title VII and other federal law" (*Margerum v City of Buffalo*, 24 NY3d 721, 731, 5 NYS3d 336 [2015]). However, claims under the NYCHRL are treated differently from federal and state HRL claims. "For [NYCHRL] liability, therefore, the primary issue for a trier of fact in harassment cases . . . is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80, 872 NYS2d 27 [1st Dept 2009]).

Collateral Estoppel

"Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (*Clifford v County of Rockland*, 140 AD3d 1108, 1110, 35 NYS3d 211 [2d Dept 2016]).

Defendants claim that Judge Koetl's decision bars plaintiff from bringing any of her claims in the instant action. That argument fails because Judge Koetl found that "New York courts should be given the opportunity to develop" the NYCHRL and declined to exercise supplemental jurisdiction over plaintiff's NYCHRL causes of action (NYSCEF Doc. No. 59).

Judge Koetl did not make any findings while applying the lower standard under the NYCHRL. Therefore, this Court must analyze whether defendants are entitled to summary judgment dismissing the claims brought under the NYCHRL.

Hostile Work Environment

Plaintiff's first cause of action is brought pursuant to the Administrative Code of City of New York 8-107(1) which provides that:

> "It shall be unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status of any person: (1) To represent that any employment or position is not available when in fact it is available; (2) To refuse to hire or employ or to bar or to discharge from employment such person; or (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment."

The initial question for this Court is whether Balidemic's references to plaintiff as "girl" suggest racial animus. Plaintiff insists that it does and defendants contend it had nothing to do with plaintiff's race. Plaintiff does not cite a single case in which the word "girl" was used to support a claim of hostile work environment on the basis of racial discrimination or any secondary sources exploring the historical use of the world girl to refer to black women.

This Court was unable to find a New York case exploring whether the term "girl" can support a claim of a hostile work environment based on racial discrimination. However, at least

one federal court has found that using the phrase "girl" was not evidence of racial animus in the context of a hostile work environment claim (*see Bird v Regents of New Mexico State Univ.*, 2011 WL 13077615 [D NM 2011] [granting summary judgment dismissing a hostile work environment claim based on race where a supervisor called plaintiff, who was from India and of Asian ancestry, "hey girl" on five occasions over two years and making a comment about plaintiff's appearance]).

Plaintiff offers a parallel between being called "girl" and the use of the word "boy" in racial discrimination cases. The Supreme Court of the United States held that although the use of the word boy "will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous" (*Ash v Tyson Foods, Inc.*, 546 US 454, 456, 126 SCt 1195 [2006]). While the Court is unable to assume that the use of the world girl is analogous to the use of the word boy, the Supreme Court's view is instructive in this matter. Thus, the Court declines to find that the use of the word "girl" can never be actionable as the basis for a discrimination claim.

The Court also recognizes that although the standard under the NYCHRL is much lower than claims brought under federal or state statutes, that does not mean that every offensive comment supports an actionable claim. "[W]hile the City HRL has been structured to emphasize the vindication of civil rights over shortcuts that reduce litigation volume, we recognize that the broader purposes of the City HRL do not connote an intention that the law operate as a general

civility code" (*Williams*, 61 AD3d at 79). The NYCHRL permits plaintiffs to pursue complaints based on conduct "that falls between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other" (*id.* at 80).

As an initial matter the Court observes that the word girl, upon first glance, does not automatically connote racial animosity. It certainly suggests disrespect in this context, especially when referring to an experienced professional such as plaintiff. Plaintiff claims that Balidemic called her girl several times– "at least three times in person and at least twice in an e-mail to several staff members" (NYSCEF Doc. No. 19 at 23).

However, these few instances do not establish a hostile work environment based on racial animus– it amounts to petty slights from an immature supervisor. With respect to the emails, as noted by Judge Koetl, "The emails are benign, and nothing about the context of the emails suggest that they were racially derogatory. Indeed, it would be a stretch to categorize any one of these emails as even a 'mere offensive utterance'" (NYSCEF Doc. No. 59 at 9).

There is simply not enough in this record to support plaintiff's claim of a hostile work environment based on racial discrimination even under the lower NYCHRL standard. Plaintiff's subjective interpretation of being referred to as "girl" is not supported by anything that could raise an issue of fact concerning Balidemic's racial animus. And there is nothing to suggest that these isolated comments negatively affected the conditions of plaintiff's employment. Simply put, the circumstances of this case lead to the conclusion that while Balidemic and plaintiff did not get along, their disagreement did not rise to the level of a hostile work environment motivated by racial antagonism. Rather, the deposition testimony suggests that plaintiff felt disrespected as an accomplished professional.

And, as the First Department emphasized in *Williams*, "[W]e assure employers that summary judgment will still be available where they can provide that the alleged discriminatory conduct does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences" (*Williams*, 61 AD3d at 80). This is not a borderline situation– it is a case where plaintiff did not like being called a certain name that she found disrespectful. That is a trivial inconvenience not evidence of a hostile work environment based on race.

Retaliation

The Administrative Code provides that:

> "It shall be an unlawful discriminatory practice for any person engaged 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, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity" (Admin Code of City of New York § 8-107 [7]).

"To establish a retaliation claim under the City HRL, a plaintiff must make out a *prima facie* case that: (1) he participated in a protected activity known to the defendant; (2) the defendant took an employment action that disadvantaged plaintiff; and (3) a causal connection exists between the protected activity and the adverse employment action" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 140-41, 946 NYS2d 27 [1st Dept 2012]).

Defendants claim that plaintiff was not engaged in protected activity because her complaints, including the issues she raised at the September 6, 2013 meeting, did not address race. Defendants also claim that they did not know plaintiff was engaging in protected activity when she raised her complaints.

In opposition, plaintiff claims that defendants retaliated against her for complaining about being called girl by reducing her responsibilities and eventually firing her despite the fact that she had not received any negative feedback prior to her complaint. Plaintiff claims she was engaging in protected activity by complaining of Balidemic's comments to Tabershaw. Plaintiff urges the Court to consider that a doctor who worked on the site (Dr. Beverley) also thought that Balidemic's conduct to be discriminatory.

The Court finds that plaintiff was not engaged in protected activity when she complained about the comments. When asked why she found the term "girl" offensive, plaintiff testified that "It's a professional office. I never address Ms. Balidemic– I don't think I could dare say "Hi girl" to her or Ms. Tabershaw" (plaintiff tr at 315). Plaintiff also characterized the phrase as "offensive" (*id.* at 319). But there is no evidence that suggests that when plaintiff complained about being called "girl," her denouncement was based on race. Instead, the evidence suggests that plaintiff was upset over the immaturity and lack of respect derived from the term rather than a racial connotation. Making a complaint about disrespectful behavior is not a protected activity under the NYCHRL because plaintiff did not oppose or complain about discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312, 786 NYS2d 382 [2004]).

And, even if plaintiff was engaged in protected activity, there is no evidence that defendants knew about it. There is nothing in the record to suggest that she ever conveyed to

defendants at any time that she found the phrase "Hi girl" to be racially offensive. While a plaintiff need not always specifically complain to her employer that she was the victim of racial discrimination in order to sustain a retaliation claim, the fact is that there is no basis here to find that defendants were aware that plaintiff thought that Balidemic's comments were discriminatory. The evidence adduced suggests that plaintiff complained about a lack of respect from Balidemic and how she thought Balidemic was unprofessional. While plaintiff might have subjectively felt that the word "girl" derived from racial animus, that does not mean that defendants knew about it and took retaliatory action after plaintiff complained. Put another way, because the term "girl" is not inherently discriminatory, there was no way for defendants to engage in retaliatory conduct if they were not aware that plaintiff believed Balidemic's comments were rooted in racial animus.

To the extent that plaintiff claims that Dr. Beverley agreed with her, Dr. Beverley states that she left the practice in June 2013, long before the allegedly offensive comments were made (NYSCEF Doc. No. 29, ¶ 5).

Summary

Because the Court dismisses the first two causes of action, the third cause of action for aiding and abetting a discriminatory practice under the NYCHRL is also dismissed. Plaintiff voluntarily withdrew her only remaining cause of action brought pursuant to New York Labor Law § 741 (NYSCEF Doc. No. 19 at 36).

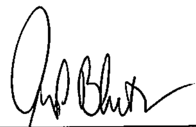
Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing plaintiff's

complaint is granted.

This is the Decision and Order of the Court.

Dated: ~~May~~ June 4, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH