Wolfe-Santos v NYS Gaming Commn.
2018 NY Slip Op 32247(U)
September 12, 2018
Supreme Court, New York County
Docket Number: 160963/16
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

MARIVI WOLFE-SANTOS INDEX NO. 160963/16

MOT. DATE

- v -

NYS GAMING COMMISSION, et al. MOT. SEQ. NO. 002

The following papers were read on this motion to/for dismiss and x-mot to amend

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In this action, plaintiff, a former employee of the NYS Gaming Commission (the "Commission"), asserts claims against defendants for disability discrimination and retaliation for her opposition to said discrimination under the NYS and NYC Human Rights Laws (or "NYSHRL" and "NYCHRL" respectively). Defendants now move, pre-answer, to dismiss, in part, plaintiff's complaint for failure to state a cause of action (CPLR § 3211[a][7]). They argue that plaintiff fails to state a cause of action against defendant Lisa Lee, Inspector General of the Commission and against all defendants for hostile work environment under both the NYSHRL and NYCHRL.

Plaintiff opposes the motion and cross-moves to serve a second amended complaint (CPLR § 3025[b]). Plaintiff seeks to add M&A Gourmet Deli Grocery, Inc. d/b/a M&A Gourmet Deli ("M&A Deli"), and assert claims of negligence against it, and "to further correct alleged deficiencies in the 1st Amended Complaint as per the Commission defendants." Defendants oppose the cross-motion, arguing that plaintiff's allegations still fail to rise to the legal standard for a hostile work environment claim under the NYSHRL and NYCHRL.

At the outset, the court will consider the motion to dismiss in the context of plaintiff's second amended complaint, since leave to amend is freely given and there is no prejudice to the defendants as a result (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). Based on that complaint, plaintiff alleges the following. Plaintiff began working for the Commission as a probationary Lottery Marketing Representative ("LMR") on January 14, 2016 at the Commissions' Region One NYC. Plaintiff's job duties included: "being responsible for over 250 retail stores in New York City Area; evaluating new locations; managing retailers inventory; providing direction to retailer on merchandising and advertising to support overall sales of retailer; executing public relations, promotions, and local events coverage; and deliver speeches to local groups."

Between January 21, 2016 through January 29, 2016, plaintiff became sick and was absent from work for six workdays. Plaintiff alleges that during that time she was hospitalized and diagnosed with

Dated: 9/12/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

"chemical pneumonia, water in her heart, and collapsed lungs..." This illness will be herein referred to as plaintiff's "First Disability." Plaintiff returned to work on February 1, 2016. Plaintiff claims that after she returned to work, her supervisor, defendant Sara Ying, "became more aggressive, hostile, and increased mental and psychological abuse (sic)". Ying allegedly got into plaintiff's car and asked her to log into plaintiff's "attendance and time keeping application", took plaintiff's computer and changed plaintiff's time card without plaintiff's authorization and deducted 15 minutes for a day. Ying allegedly also told plaintiff "on almost a daily basis that she could be fired at any moment, and at Ying's will."

Plaintiff allegedly reported Ying's behavior to Fred Perrone, her union representative, Ron Antel, a Commission manager, and defendant Cindy Wong, the Commissions' Regional Manager. Wong and Peronne allegedly told plaintiff that Ying wanted to fire her while she was in the hospital. Perrone also told plaintiff that Ying's behavior "was nothing at the [Commission]" and that plaintiff could be fired at any moment. Perrone and Antel also allegedly told plaintiff that she had "no recourse [] available and they would not take any action against Ying." On February 9, 2016, Peronne and Antel transferred plaintiff to the Bronx, New York. This transfer "increased plaintiff's commute from ½ hour each way to 1.5 to 2 hours each way..."

On April 15, 2016, Plaintiff fell while at work in the field at M&A Deli. Plaintiff claims that she "fell on her left side and subsequently lost consciousness..." due to "a dangerous condition by maintaining a counter-type bar door which is lifted which latches close and a footstep as the entrance to the elevated floor level." Plaintiff suffered a concussion and "was having migraine headaches and problems concentrating." On April 18, 2016, plaintiff submitted to Francisco Collazo, plaintiff's new supervisor at the Commission, a note from her physician which indicated that plaintiff had suffered a concussion, and was experiencing symptoms of post-concussion syndrome as a result of the fall. On April 21, 2016, plaintiff's physician "would not clear [plaintiff] to return to work and wrote another physician's note stating that she could not return to work until after she had been seen by a neurologist.". Plaintiff alleges that had episodes of her being unable to find words, she could not recall how to get on a highway that she had previously travelled on a daily basis, she was repeating phrases, and her head was in severe pain." On April 28, 2016, plaintiff was diagnosed by a neurologist as having suffered "a severe concussion with loss of consciousness, post-concussion syndrome, and cervicalgia" as a result of the fall (the "Second Disability"). Ultimately, plaintiff was absent from work for thirty-four workdays (April 18, 2016 through June 3, 2016) and received workers' compensation benefits"

On May 9, 2016, plaintiff received an email from Wong who instructed plaintiff "to log into her work computer, update and download COLE systems, the agency's proprietary database, and insert one day of mileage and a gas receipt into the COLE system." Plaintiff believed this was not right to ask of her since she was not on payroll at the time and not cleared to work by her neurologist.

On May 22, 2016, plaintiff called Perrone and told him that "she was going to put in for a transfer" to the Commission's Long Island region after learning that there was a vacancy. Plaintiff submitted her transfer request and was told by Human Resources that there would be no issue with her transferring while out on workers' compensation. Plaintiff alleges the following:

> During plaintiff's telephone conversation with the LI regional assistant, the LI regional assistant replied, in sum and substance - "yes, you're fine, but you are out anyway, and not coming back", to which Ms. Wolfe answered - "yes I am coming back next week on the 6th of June". The LI regional assistant's response was of one of confusion and she said in sum and substance – "ohh, I guess, umm I don't know.

On June 2, 2016, the plaintiff's neurologist diagnosed her at 50% physical capability and gave her approval to return to work on June 6, 2016 on the condition that defendants provide plaintiff with reasonable accommodation for plaintiff's 2nd physical disability. Plaintiff requested that the number of site visits she had to do be reduced and sought five hours of standing and walking with rests as reasonable accommodation for the Second Disability. Plaintiff also submitted to a "NYS Business Services Center

("BSC") Form" to the BSC which notified defendants that "her neurologist expected that she would return on July 31, 2016 at 100 % physical capability."

When Plaintiff returned to work on June 6, 2016, she received a performance evaluation for an evaluation period ending on April 14, 2016. Plaintiff claims that the evaluation falsely accused plaintiff of poor work performance and incorrectly noted that plaintiff was absent 23 full work days as of April 29, 2016. Allegedly, it was also false that the evaluation indicated plaintiff made one vendor visit per day and otherwise "contained misleading information which was run by Wong and shown to plaintiff by Collazo at the same time she was shown the job performance evaluation." Plaintiff claims, rather, that she had an average of nine vendor visits per day.

Plaintiff allegedly went to see Perronne about the false evaluation, and he advised her that Michelle Castler, a Human Resources employee at the Commission, "gave the other defendants authorization to fire [plaintiff] while she was on workers' compensation leave."

Perrone also allegedly told [plaintiff] that he directed Collazo and Wong to "'hold off from creating anything else' to be used to justify terminating plaintiff's employment around the middle of May (when plaintiff put in her transfer request) to see if plaintiff would be transferred from the NYC region." On June 8, 2016, Collazo allegedly told plaintiff that "he had nothing to do with the performance evaluation he presented to her on June 6th, but that Wong, Castler and Ying had written the evaluation of Ms. Wolfe and presented it to Collazo to use against plaintiff."

On June 9, 2016, Collazo allegedly "directed plaintiff to write an email immediately to Castler, Wong, Perrone, and Antel saying that, as of the date of the email, she was "OK" in terms of working at 100% capacity." Plaintiff admits that she wrote the email but claims that she did so because "she was under extreme duress as she was experiencing a high amount of anxiety in Collazo's truck, and she knew that Mr. Collazo had previously had a physical altercation with another [Commission] employee."

On June 13, 2106, a temporary employee told her that "she had witnessed the individual defendants discussion how plaintiff 'was going to get fired.'" That same day, plaintiff received another performance evaluation, which was similar to the prior one, except that plaintiff's rating had been changed from "unsatisfactory" to "needs improvement". Plaintiff refused to sign the 2nd evaluation since defendants improperly included her workers compensation days off as "days absent",

After her return to work from workers' compensation on June 6, 2016, plaintiff maintains that the defendants did not provide her with the reasonable accommodations she requested. She claims that as a result she "was rendered incapable of doing any work". On July 25, 2016, plaintiff allegedly "became very ill at home and was unable to stand, and every time she stood, she would fall backwards, and she could not walk nor could she move." That same day, plaintiff "was admitted to a hospital emergency room for medical evaluation, all of which were known by defendants."

Plaintiff went to work on July 27, 2016, "but felt very ill and had to return home, where she felt dizziness and weakness and proceeded to fall down." Plaintiff left work on July 29, 2016, again receiving workers' compensation benefits during her absence. Plaintiff never returned to work and was terminated on August 10, 2017, pursuant to New York Civil Service Law ("Civil (" Service Law") § 71, because she had exhausted a year of disability-related leave from work on workers compensation benefits, resulting from her workplace injury.

Plaintiff claims that she was terminated because of her "disabilities, her opposing defendants' unlawful disability discrimination, plaintiff's requests for reasonable accommodations for her disabilities, plaintiff's complaints of being subjected to unlawful disability discrimination, and for filing this lawsuit."

Parties' arguments

Defendants argue that plaintiff's claims against Lee fail because she has not alleged specific facts showing that Lee directed or participated in discriminatory conduct against plaintiff. As for the hostile work environment claims, defendants contend that they fail under the NYSHRL because the allegedly hostile comments and conduct were neither severe, pervasive or continuous, nor resulted in a material adverse change in the terms and conditions of plaintiff's employment. With respect to the NYCHRL, defendants maintain that plaintiff has not alleged that she was treated "less well" than any other similarly situated probationary employee.

Meanwhile, plaintiff contends that she has alleged sufficient facts against Lee because Lee "had full knowledge that the other Individual Defendants intended to terminate Ms. Wolfe upon her return from her leave of absence based on Ms. Wolfe's disability." Plaintiff otherwise maintains that Lee "[was] tasked with investigating allegations of corruption, fraud, criminal activity, and conflicts of interests or abuse in the [NYSGC] [and] . . [sic] [r]eceive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in the [NYSGC]". Plaintiff claims that Lee's failure to investigate and/or otherwise address the underlying discrimination is grounds for a cause of action against her.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

A hostile work environment under the NYSHRL (Executive Law § 296) exists where the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]). To state a hostile work environment claim under the NYCHRL, however, plaintiff must demonstrate that she has been treated less well than other employees because of her disability (*Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009]).

In determining whether a plaintiff was subject to a hostile work environment under the NYSHRL, the court must look at the totality of the circumstances and may consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (*Forrest*, *supra* at 326).

The court finds that defendant's motion must be granted in its entirety. Plaintiff's only specific allegation in the Complaint relating to Lee is a hearsay allegation that an unnamed temporary employee at the Commission told her that the individual defendants discussed that Plaintiff was going to be fired. This allegation, standing alone, is insufficient to establish that Lee participated in discriminatory conduct against the plaintiff. The court further rejects plaintiff's reliance on the Commission's website description of Lee's duties as providing a basis for individual liability against Lee, as well as her statutory arguments. Accordingly, plaintiff's claims against Lee are severed and dismissed.

Furthermore, plaintiff has failed to state a claim for hostile work environment against any of the defendants. Her claims about the individual defendants' conduct amount to nothing more than "petty slights and trivial inconveniences." Further, plaintiff has failed to allege any facts which would demonstrate that the defendant's conduct was motivated by discriminatory animus based on plaintiff's disabilities. Plaintiff's hostile work environment claims under the NYCHRL also fail because she has not alleged how she was treated differently from other similarly situated employees. Accordingly, plaintiff's hostile work environment claims are also severed and dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted in its entirety; and it is further

ORDERED that plaintiff's claims against defendant Lisa Lee, Esq., in her corporate capacity as Gaming Inspector General and in her individual capacity, are severed and dismissed; and it is further

ORDERED that plaintiff's hostile work environment claims under the NYSHRL and NYCHRL are severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that plaintiff is granted leave to file and serve the second amended complaint in the form annexed to the motion papers as Exhibit 1 on the new party, M&A Gourmet Deli Grocery, Inc. d/b/a M&A Gourmet Deli, within 20 days from the date of entry of this decision/order; and it is further

ORDERED that the second amended complaint is deemed served and filed on the remaining appearing defendants; and it is further

ORDERED that the remaining appearing defendants are directed to serve and file their answer within 20 days from the date of service of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on October 16, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 9/12/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.