Sarmiento v Ampex Casting Corp.
2019 NY Slip Op 30431(U)
February 21, 2019
Supreme Court, New York County
Docket Number: 150294/2011
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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ELSA SARMIENTO,

Plaintiff,

- v -

AMPEX CASTING CORPORATION and JOSEPH IPEK

Defendants.

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INDEX NO. 150294/2011

MOTION DATE

MOTION SEQ. NO. 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 150, 151, 152, 153, 155

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendants for summary judgment is denied.

Background

This gender discrimination action arises out of plaintiff's employment for defendants. Defendants operate a jewelry casting company and plaintiff worked as a wax injector. Plaintiff worked for defendants from 1991 until 2010. Defendants claim that they fired plaintiff because she was constantly late, and her work quality had steadily deteriorated. Plaintiff contends that she was fired because she resisted unwanted sexual advances by defendant Ipek (the company's president and plaintiff's supervisor).

Defendants move for summary judgment on various grounds, including their contention that plaintiff was fired for chronic tardiness and poor work performance. Defendants insist that plaintiff's allegations are implausible and highlight plaintiff's failure to marshal evidence in support of some of her claims. For instance, defendants point out that plaintiff's claim about

being intimidated by coworkers with knives is completely unsupported, plaintiff did not identify a single coworker responsible and plaintiff admitted at her deposition that she did not call police although the complaint states the police were called. Defendants also focus on plaintiff's alleged inconsistencies in her deposition testimony.

In opposition, plaintiff contends that any contradictory testimony from plaintiff or from defendants' witnesses must be decided by a fact-finder rather than through a motion for summary judgment. Plaintiff insists that her claims are timely and that her discrimination claims brought under the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") must stand.

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]).

"A plaintiff in an employment discrimination case has the initial burden of showing, prima facie, (1) that the employee is a member of a protected class, (2) that she was discharged, (3) that she was qualified for the position, and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination" (*Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 196, 671 NYS2d 759 [1st Dept 1998]). [1]

Claims under the NYSHRL and NYCHRL are treated differently. "[T]o establish a gender discrimination claim under the City Human Rights Law, a plaintiff need only demonstrate by a preponderance of the evidence that she has been treated less well than other employees because of her gender. We also found that the federal and state law, limiting actionable sexual harassment to "severe or pervasive" conduct, was not appropriate for the broader and more remedial City Human Rights Law" (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114, 83 NYS3d 9 [1st Dept 2018] [internal quotations and citations omitted]).

"The State HRL provides, in pertinent part, that it shall be unlawful to retaliate against any person because he or she has opposed any practice forbidden under this article. To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [plaintiff] engaged

[1] The Court recognizes that there is a difference under state law between sex discrimination based on harassment and sex discrimination based on non-harassment (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 79, 872 NYS2d 27 [1st Dept 2009]). But that distinction is not dispositive for this motion.

in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) [plaintiff] was subject to adverse action; and (4) there was a causal connection between the protected activity and the adverse action " (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51, 948 NYS2d 263 [1st Dept 2012] [internal quotations and citations omitted]).

"[T]o make out a retaliation claim under the City HRL, the complaint must allege that (1) [plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [plaintiff]; and (3) a causal connection exists between the protected activity and the adverse action" (*id.* at 51-52).

The central question on this motion is whether plaintiff has stated an issue of fact in her deposition testimony or whether the Court must disregard her entire testimony because it is not believable or consistent with the allegations in the complaint.

Defendants correctly point out numerous instances where plaintiff's deposition testimony is lacking (NYSCEF Doc. No. 132). This includes plaintiff's testimony that she did not remember reviewing the complaint, that the complaint was never translated into Spanish for her or that she did not remember calling the police on her coworkers despite that allegation's inclusion in the complaint (*id.*). Defendants also contend that plaintiff's description of bathroom incidents involving Ipek are not believable because plaintiff never testified that she actually saw Ipek in the women's bathroom. Defendants also stress that a groping incident should not be credited because plaintiff was "well-covered with high-cut clothes and her breasts were not exposed" (NYSCEF Doc. No. 155 at 6).

However, the fact is that defendants have merely stated reasons why a fact-finder should not believe plaintiff. Their arguments rely on the notion that plaintiff's conflicting testimony is so far-fetched that the Court should disregard plaintiff's entire testimony. This Court cannot do

that on these papers. On a motion for summary judgment, the Court may not weigh the credibility of witnesses. It does not matter that *some* of plaintiff's claims might seem unlikely.

From the deposition testimony, a fact-finder could conclude that plaintiff was repeatedly groped and subjected to unwanted sexual advances throughout her career because of her gender (*see* plaintiff's tr at 356 [Ipek allegedly kept asking plaintiff if she liked to drink wine and to dance with him]; 387-88 [allegation that Ipek pressed against plaintiff's chest]; 405 [Ipek purportedly touched plaintiff's chest]; 433-437 [Ipek allegedly touched plaintiff's chest again]). Plaintiff testified that the harassment started a few months after she started working for defendants and at one point, Ipek "was giving me looks and then after some time he started to touch me, but before that, he called me and ask me to go to a room" (*id.* at 355). Plaintiff also testified that the last "incident" occurred right before her termination (*id.* at 413-415). Plaintiff claims that she was going to punch out when Mr. Ipek groped her (*id.* at 414).

This testimony raises issues of fact for plaintiff's sexual discrimination claims brought under the NYCHRL and NYSHRL. Plaintiff claims she was subject to numerous sexual advances throughout her employment for defendants. Although defendants stress that this testimony conflicts with an affidavit from plaintiff, that is not a reason to grant defendants' motion. The fact that plaintiff's affidavit says that the harassment started immediately (as opposed to two or three months after she started working for defendants) or that during one incident Ipek was actually holding gold (thus, according to defendants, making it unlikely to have occurred) is not enough to grant summary judgment. These are credibility issues ripe for a fact-finder to consider when evaluating plaintiff's testimony. This Court cannot disregard plaintiff's claim that she was subjected to numerous advances because certain incidents seem questionable.

There are also issues of fact for plaintiff's retaliation claims. Plaintiff claims that the day after a groping incident, Ipek gave her an enormous order and directed her to finish it in an impossible time frame (plaintiff's tr at 101-105). Plaintiff insists that this large order was a pretext to fire plaintiff because Ipek knew she could never complete the work before the stated deadline (*id.*).[2]

Summary

"It is for the jury to make determinations as to the credibility of witnesses . . . A jury may believe or disbelieve the testimony of a witness, or believe portions of the testimony and disbelieve others. Indeed, the jury is free to accept or reject some or all of the parties' testimony and weigh any conflicting inferences" (*Scalogna v Osipov*, 117 AD3d 934, 935, 987 NYS2d 395 [2d Dept 2014]).

There is no doubt that plaintiff's deposition testimony was, at times, confusing and unclear. But the Court cannot ignore her entire testimony simply because her deposition testimony conflicts with certain allegations in her complaint or in an affidavit. Those are credibility issues that cannot serve as the basis for securing summary judgment as a matter of law. Despite the numerous issues with plaintiff's story identified by defendants, she consistently testified that Ipek groped her on numerous occasions, subjected her to unwanted sexual advances while she worked for defendants, and that she was fired after being groped. A fact-finder must decide whether to believe her account or defendants' story that plaintiff was fired because she was always late and delivered substandard work product.

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[2] To the extent that plaintiff has alleged a hostile work environment—the complaint only alleges sex discrimination and retaliation causes of action—there are issues of fact as well. If plaintiff's story is believed, then a fact-finder could conclude that defendants created an unbearable work environment where employees were routinely subjected to groping and sexual advances by the boss.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants is denied.

2.21.19
DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE