Edun v Envirosell, Inc.
2019 NY Slip Op 31384(U)
May 17, 2019
Supreme Court, New York County
Docket Number: 155211/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
--X
LIINA EDUN,

Plaintiff,

-against-

ENVIROSELL, INC.,

Defendant.
--X

Index No. 155211/16
Motion Seq. No. 006

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In an action involving allegations of workplace discrimination, defendant Envirosell, Inc. (Envirosell, or Defendant) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Liina Edun's (Edun, or Plaintiff) complaint.

BACKGROUND

Envirosell is a New York based marketing company that conducts in-store behavioral research and advises clients how to design retail spaces to increase sales. Plaintiff is a Muslim woman and a Mauritius national. She was hired by Envirosell in March 2014, as a research assistant, and worked at the company until Envirosell terminated her employment on December 11, 2015. Edun started as a research assistant, but she was promoted to the position of project manager effective August 3, 2015. In her new position, Plaintiff supervised two research assistants. Initially, she reported to an employee who left the company in the fall of 2015; at that time Liam O'Connell (O'Connell) became her supervisor.

Prior to becoming her supervisor, Edun alleges that O'Connell, upon learning that she sent money home to her parents Mauritius, asked her if she was "sending money home so that they can keep coconuts on the table (Plaintiff tr at 213, NYSCEF doc No. 58). Moreover, Plaintiff alleges that she and Tom Moseman (Moseman), Envirosell's senior vice president, were

watching a television report at an airport about how the Islamic State of Iraq and Syria (ISIS) was recruiting women when he asked Plaintiff when she was going to join (*id.* at 105-106).

While O'Connell, at his deposition, denied making the coconut comment (NYSEF doc No. 38 at 20), Moseman has acknowledged that he made the ISIS comment:

Q: Do you remember seeing a TV report in the airport with her?

A: Yes.

Q: What was the TV report on?

A: It was explaining women who are going for weapons training.

Q: Do you recall what the weapons training was for?

A: Terrorist activities.

Q: Was it about a specific terrorist group?

A: I do not remember.

Q: Did you make a comment to plaintiff about the report?

A: I did.

Q: What did you say?

A: [Plaintiff] told me that she was going home to Mauritius. I made a very stupid joke saying, 'A-ha, you are really going for weapons training.'

Q: Did you ask her if she was going to join ISIS?

A: No.

Q: Did [Plaintiff] say anything in response?

A: Yes.

Q: What did she say?

A: She said something to the effect of, 'You said that because I'm Muslim.'

Q: And what was your response?

A: I was horrified. I immediately apologized to her and explained that I had no idea that she was Muslim.

(NYSCEF doc No. 64 at 19-21).

This roughly matches Plaintiff's recollection of the incident:

Q: ...Can you just explain where it happened, what was going on and ... what he said?

A: We were in the airport .... And there was a woman on the TV with, like, brownish/brown skin and black hair. And it was about ISIS. And it said that ISIS is now recruiting women. So he pointed at the woman. And then he looked at me and said, 'So when are you going to join them?'

Q: Did he say anything else?

A: Well, then I said, 'Are you asking that because I'm Muslim?' And then he saw my reaction and said, 'Oh, I – I'm sorry.'

(NYSCEF doc No. 58 at 105-106).

Plaintiff later reported the incident to Carolyn Hall (Hall), director of human resources at Envirosell. Hall discussed the incident with Moseman, who told Hall that he had made a "very stupid joke" and had apologized to Plaintiff both in person and via email (NYSCEF doc No. 22).

Plaintiff also alleges that another Envirosell employee, Jeff Wedwaldt (Wedwaldt), subjected her to discriminatory treatment. In April 2014, when she was still a research assistant, Plaintiff worked on a travel assignment to Utah. Wedwaldt, a supervisor and team, along with other more senior staff accompanied Plaintiff and her colleagues. Plaintiff testified that Wedwaldt took issue with Plaintiff's job performance while working in a store:

> "[Wedwaldt] told me that I was a rookie, and that he did not want to do a rookie job. And he did not want to do my job for me. And then he started listing all the employees that had been fired from Envirosell for being lazy or not doing their jobs ... I just thought it was really unprofessional"

(NYSCEF doc No. 93-94).

Plaintiff also testified that in addition to calling her "rookie," Wedwaldt also called her "lady," and "followed me around the store and wouldn't leave me alone, all of which she found "inappropriate and unprofessional" (*id.* at 92, 95). Plaintiff subsequently complained to colleagues about Wedwaldt's conduct (*id.* at 95-96). Plaintiff, in her complaint and at her deposition, detailed another incident with Wedwaldt involving a rental car. While on a trip, Plaintiff wanted to borrow a rental car to take other colleagues to dinner: "And [Wedwaldt] did not want to let me have the car, so that I could drive our team members to get food. And then he insulted me and said, 'How old are you anyway? Are you even allowed to drive a car?" (*id.* at 147).

On October 13, 2015, Plaintiff met with Hall, the director of human resources, and Craig Childress, the chief operating officer, to discuss her various concerns about Wedwaldt's behavior.

In October 2015, Plaintiff also met with O'Connell to discuss her concerns about his behavior, which involved her perception that O'Connell condescended to her in front of other Envirosell employees, and that he generally acted in hostile manner toward her (NYSCEF doc No. 58 at 134). Plaintiff also told O'Connell that she had enjoyed working with him and she did not "know why our relationship had changed suddenly" around the time that O'Connell became her direct supervisor in Fall 2015 (*id.* at 135). When Plaintiff was finished raising her concerns, O'Connell "did not speak for a long time. And then when I was done talking, he said, 'I don't know why you're complaining … you have the least amount of projects [relative to other project managers]" (*id.* at 136).

On November 5, 2015, Childress wrote to Hall indicating that O'Connell wanted to fire Plaintiff:

> "Liam is now thinking about a termination for Liina instead of moving her back to RA. Could we talk about what we would have to do to make that happen? Also we can't decide if we should do this before she goes on vacation (Nov 27) or after she gets back (Dec 9). Liam says that by the time she gets back from her vacation she will have used up all of her comp, vacation, and sick days. If we terminate on December 9th what will be her severance pay"

(NYSCEF doc No. 71).

O'Connell testified that the basis for his recommendation for termination of Plaintiff's employment was that she "was turning in incomplete work often late, not taking responsibilities for her projects … basically she was doing substandard work (O'Connell tr, NYSCEF doc No. 63, at 43-44). Hall responded to Childress's email by stating that that there is no severance pay for a firing with cause (*id.*).

In the same month, Envirosell was negotiating with a prospective new client, Adorama, that O'Connell allegedly planned to assign to Plaintiff: "But because they were Hasidic Jews, I would not be able to interact with them or talk to them … even on the phone. But I would be doing the -- I would be officially the project manager doing all the back work" (NYSCEF doc No. 174). Plaintiff asked O'Connell why she would not be able to interact with the client, and she testified that he replied, "cultural differences" (*id.* at 174-175). However, after discussing the issue with other Envirosell employees, Plaintiff learned that Diana Dawson (Dawson) had met with, spoken to, and shook hands with representatives of Adorama (*id.* at 176).

Following Plaintiff's inquiries, an Envirosell employee, Plaintiff testified that Brett Barndt (Barndt), Envirosell's director of client services and business development, sent an email stating that Adorama "never specified working with only white males, because they do have women of different ethnicities working in their stores. So they … didn't have restrictions as far as he knew" (*id.* at 177-178). On November 20, 2015, Childress sent Hall an email discussing Adorama in relation to Plaintiff:

> "This Adorama project has ruffled some feathers. The Hasidic Jews who own and operate the store don't want a female lead and they are very uncomfortable with having female trackers watching them all day. They don't want to shake hands with our female employees (true to their religion) and they don't want to sit next to our female employees, and they don't want to be in a position where they may accidentally pump [sic.] against one of our female employees. When we didn't select Liina for the lead on this she got very upset. She said it was because she was a female and that she was Muslim"

(NYSCEF doc No. 72).

Plaintiff returned from her trip home to Mauritania on December 9, 2015. The following day, Plaintiff had a meeting with Childress, Hall, and O'Connell. Plaintiff testified that at the meeting Hall announced that she would act as a mediator, but Plaintiff felt that she was "really trying to scare me or something" (NYSCEF doc No. 58 at 189). At the meeting, Plaintiff's ongoing conflict with O'Connell was discussed, as well as Plaintiff's failure to appear for work on the day that she returned from vacation. Childress testified that plaintiff was "very defensive" (NYSCEF doc No. 62). The possibility of the termination of Plaintiff's employment was not discussed at the meeting (*id.* at 159).

Later that day, Plaintiff went to Childress's office to tell him she was thinking of quitting. Childress testified that he told her:

> "if she really doesn't like the job and the work skills of the job, then I think it would be fine to quit, but if she wants to quit because of all this extra stuff and the way that the company is behaving, any of that, do not quit, because we were improving on that and things were changing and certainly not to quit"

(*id.* at 160-161).

Childress discussed transferring Plaintiff to a different department or the company's London office (*id.* at 162). That evening, Plaintiff discussed the day's events with her subordinate, David Warner (Warner), via text message. In a lengthy thread, Plaintiff wrote, among other things, "Ugghh i wanted them to fire me so i can get unemployment benefits!"

(NYSCEF doc No. 37). After seeming to take Warner's counsel, Plaintiff says later in the thread: "Ok yeah then definitely better to quit than get fired. And to quit on good terms" (*id.*).

Childress testified that Warner forwarded the messages to Envirosell, and that O'Connell notified Childress of their existence. Childress reviewed the messages and he later testified that "[t]his was probably the most serious situation that I had ever been in in twenty-eight years" (NYSECF doc No. 62 at 183). Childress testified further that "I didn't know what she was going to do to get fired, and I was very concerned about the security of the company … I just had to terminate as fast as possible" (NYSCEF doc No. 184). Plaintiff's employment was terminated by letter dated December 11, 2015 and the reason stated for her termination was "poor performance" (NYSCEF doc No. 74).

Plaintiff filed her complaint on June 21, 2016 alleging eight causes of action. The first three causes of action allege violations of the New York City Human Rights Law (the City HRL) for hostile work environment based on gender, religion, and national origin. The fourth through the sixth causes of action allege violations of the City HRL for discrimination based on national origin, religion, and gender. The seventh cause of action alleges that Envirosell violated the City HRL by retaliating against Plaintiff. Finally, the eighth cause of action alleges that the Envirosell is liable under Labor Law, Article 6 §§ 190 et. seq. for violation of notice and wage statement requirements.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Notice and Wage Statement

Labor Law § 195, entitled "Notice and record-keeping requirements," requires that employers provide employees with a wage notice at the beginning of the employment relationship. The notice must contain, among other things, the rate of pay. Envirosell provides two conforming pay-rates notices, one dated March 31, 2014, when Plaintiff's employment with the company began, and one dated July 23, 2015, when she was given a promotion and her pay rate went up.

In opposition, Plaintiff abandons this cause of action by failing to address it (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Accordingly, the branch of Defendant's motion that seeks dismissal of eight cause of action for violation of Labor Law § 195 is granted.

II. The City HRL

A. Overview

The City Human Rights Law is codified in title 8 of the Administrative Code (*§ 8-101 et. seq.*). As is relevant here, Administrative Code § 8-107 (1) (a) (3) prohibits employers from discriminating on the basis of "creed," "national origin," and "gender" in "compensation or terms, conditions or privileges of employment."

Historically, the City's HRL was interpreted as coextensive with state and federal civil rights laws. However, in 2005, City Council passed the Local Civil Rights Restoration Act of 2005, which revised the City's HRL to ensure that it would "be construed liberally for the

accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York civil rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (Administrative Code § 8-130). In *Williams v New York City Housing Authority* 103 AD3d 106 [1st Dept 2009], the First Department summarized the import of these changes:

> "the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled"

Williams collapsed the analytical distinction between hostile work environment claims and other discrimination claims. The Court held that, under the City HRL, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has been treated less well than other employees because of her gender" (*id.* at 78). Courts have held that this differential-treatment standard applies to discrimination claims based on other characteristics protected by the City Human Rights Law, such as race, religion and national origin (*see e.g. Nelson v HSBC Bank USA*, 87 AD3d 995 [2d Dept 2011] [holding that the differential-treatment standard applies to claims of racial discrimination]).

Thus, under the formulation of the differential-treatment standard in *Williams*, summary judgment "should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred" (61 AD3d at 78). Moreover, "questions of severity and frequency," which go to liability in the analysis of discrimination claims under federal and state laws antidiscrimination laws, should typically "be reserved for consideration of damages" under the differential-treatment standard (*id.* [internal quotation marks and citation omitted]).

However, the First Department has observed that the City HRL is not a civility code and that summary judgment is appropriate under the differential-treatment standard where the alleged discriminatory conduct "could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences (*id.* at 80). Moreover, the First Department has also held that "stray remarks" that are marginally-related to a protected category are not actionable under the City HRL (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012] [affirming the trial court's grant of summary judgment dismissing the plaintiff's age discrimination claims]).

The Second Circuit Court of Appeals, surveying New York caselaw evaluating workplace discrimination claims under the City's HRL after the Restoration Act, sketched the broad guidelines to be considered when applying the differential-treatment test:

> "(1) NYCHRL claims must be analyzed separately and independently from federal and state discrimination claims; (2) the totality of the circumstances must be considered because the overall context in which [the challenged conduct occurs] cannot be ignored"; (3) the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages; (4) the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives, or if the defendant proves the conduct was nothing more than petty slights or trivial inconveniences; (5) while courts may still dismiss truly insubstantial cases, even a single comment may be actionable in the proper context,
> (6) summary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory"

(*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 [2d Cir 2013]).

The First Department recently stated that it found *Mihalik's* approach "persuasive" and noted that that the Second Circuit recognized that City HRL permits plaintiffs to recover for differential treatment even "where the treatment does not result in an employee's discharge" (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 [1st Dept 2018]).

Suri used *Mihalik* as an example in a discussion of the interaction between the differential-treatment test and the federal burden-shifting test. The federal burden-shifting test was articulated by the Supreme Court in *McDonnell Douglas v Green* (411 US 792 [1973]), and the Appellate Division has affirmed that it plays a role in the analysis of City HRL claims following the Restoration Act and *Williams* (*Bennett v Health Mgt. Sys.*, 92 AD3d 29 [1st Dept 2011]). In *Bennett*, the First Department sketched out the operation of the burden-shifting test:

> "[the] burden-shifting approach initially requires only that the plaintiff make a prima facie showing of membership in a protected class and that an adverse employment action had been taken against him. The adverse action must have occurred under circumstances giving rise to an inference of discrimination. Once that minimal showing is made, the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of its action. If that burden is successfully shouldered then plaintiff must show those reasons to be false or pretextual"

(*id.* at 35-36).

The Court in *Suri* notes that while the Second Circuit in *Mihalik* applied the burden-shifting test "to the part of the claim alleging wrongful termination," it declined to apply that framework hostile work environment claim, which, like the facts in *Suri*, involved allegations of a rejected sexual advance followed by demeaning conduct by the jilted superior to the plaintiff (164 AD3d at 121). The First Department explicitly adopted this approach, holding that the burden-shifting test applied to the "the wrongful termination and failure to promote aspects" of the plaintiff's complaint, but not to the plaintiff's hostile work environment claims (*id.* at 117-118). The First Department noted that this dichotomy, which is explicitly stated for the first time in *Suri*, is consistent with how it has handled discrimination claims under the City HRL since the Restoration Act and *Williams* (*id.*, citing *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18 [1st Dept 2014] [applying the differential-treatment standard to the plaintiff's hostile work environment claim, while applying the burden-shifting standard to the

plaintiff's retaliatory firing claim]; *Hernandez v Kaisman*, 103 AD3d 106 [1st Dept 2012] [applying the differential standard to the plaintiff's hostile work environment claims]).

Thus, following *Suri's* directives, Plaintiff's hostile work environment and differential-treatment claims must be analyzed separately from her claims that she was terminated for discriminatory and retaliatory reasons.

B. Allegations of Differential Treatment

Wedwaldt

None of Plaintiff's allegations against Wedwaldt raise an issue of fact as to whether her treated her unequally due to her gender, religion, or national origin. Referring to Plaintiff as a "rookie" and "lady," criticizing her job performance, and listing other employees who were fired for a lack of professionalism or failing to carry out their duties are, at best, petty slights. His refusal to lend a rental car was a trivial inconvenience.

Moseman

Moseman's question about whether Plaintiff was going to a join a terrorist organization may have been in bad taste, and it certainly failed spectacularly as a joke. But, at least in isolation, it does not rise above the kind of stray remark, which, under *Melman*, cannot serve as a basis to infer discriminatory intent.

Moseman testified that he was humiliated when he learned that Plaintiff was Muslim and that she was offended by his joke. He apologized to her both immediately, and via email after Plaintiff registered a complaint about his comment. Moreover, Moseman did not supervisor Plaintiff's and was not involved in any decision making over her career path. Thus, both in isolation and when viewed through the full context of Plaintiff's allegations, Moseman's remark only registers as an unactionable petty slight and stray remark.

O'Connell

While O'Connell denied making the "coconuts on the table" comment, the court must assume, for the purposes of this motion, that he made it. Once again, this comment is a petty slight rather than one from which a reasonable jury could infer discriminatory intent.

Here, this is the only instance in the record that possibly suggests that Plaintiff faced any discrimination at the workplace based on her origins in Mauritius. *Kim*, a First Department case referred to above, provides some guidance here as to where the dividing line between petty slights and trivial inconveniences" and actionable conduct is. In *Kim*, the plaintiff alleged that she was treated differently after becoming pregnant, and alleged conduct by her colleagues that included screaming at her for reading a book at work when male colleagues were not reprimanded for doing the same, receiving an inappropriate comments about breast feeding, and being told by superiors not to complain about those comments. The First Department found that these allegations amounted to "petty slights and trivial inconveniences" (120 AD3d at 26). In this context, O'Connell's coconut comment must also be considered a petty slight and a trivial inconvenience.

As to O'Connell's treatment of Plaintiff once he became her direct supervisor in Fall 2015, the record shows that Plaintiff and O'Connell's relationship soured. However, unlike *Suri*, there is no evidence here that the relationship soured for a discriminatory reason. In the absence of a showing of differential treatment on the basis of a protected characteristic, the City HRL does not protect workers against difficult and demanding bosses.

Finally, with respect O'Connell's involvement in staffing Adoroma, Plaintiff fails to make a showing that she was subject to differential treatment with respect to the staffing of this project. To the extent that Defendant responded to a client request as to gender for staffing, the

record reflects that Envirosell, in this case and generally, took such requests into account, along with staffing resources and other factors. For example, the record reflects that Envirosell staffed Victoria's Secret stores with only women employees in the past, per client request. Accordingly, Plaintiff fails to raise an issue of fact as to whether the staffing of the Adorama project amounted to differential treatment.

C. Plaintiff's Retaliatory Termination Claim

Plaintiff alleges that the reason for her termination was the complaints she lodged regarding the allegedly discriminatory conduct of Wedwaldt, Moseman, and O'Connell. Under the *Bennett* burden-shifting analysis, this is enough to shift the burden to Defendant. Envirosell then provided a non-discriminatory reason for her firing: the desire to be fired that plaintiff expressed via text message to her colleague. According to Childress, who made the decision to terminate Plaintiff's employment, he was concerned that Plaintiff would sabotage client relationships to achieve this purpose, thus doing damage to Envirosell and its employees.

Plaintiff, in response, fails to raise an issue of fact as to whether the nondiscriminatory purpose proferred by Defendant was pretextual. Plaintiff argues that the stated reason in her termination letter was "poor performance," rather than any specific reference to the text messages. Moreover, Plaintiff argues that Envirosell was considering the termination of Plaintiff's employment weeks before she sent the subject text messages, citing the email Childress sent to Hall on the subject on November 5, 2015.

The record reflects that Envirosell had legitimate concerns about job performance. While Envirosell did not follow its own policy of giving underperforming employees notice and time to improve their performance, Childress's concerns about Plaintiff's future performance justified immediate termination. Moreover, Plaintiff's termination letter is not evidence of pretextuality,

as the broad category of "poor performance" can refer both to past performance, as well as well-grounded concerns about future poor performance. Defendant was not required to elaborate further.

CONCLUSION

Accordingly, it is

ORDERED that Defendant's motion for summary judgment seeking dismissal of Plaintiff's complaint is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendant shall serve a copy of this decision, along with notice of entry, on Plaintiff within 10 days of entry.

Dated: May 17, 2019

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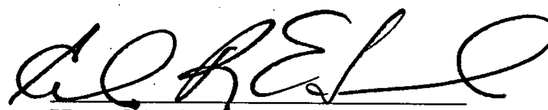

Hon. CAROL R. EDMEAD, JSC

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J.S.C.