

Berner v Gay Men's Health Crisis

2002 NY Slip Op 30073(U)

January 8, 2002

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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

PRESENT: _____
Justice

PART _____

PH *R*

INDEX NO. 106276-98

MOTION DATE 6/4/01

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

*Gay Men's Health
Crisis*

The following papers, numbered 1 to 7 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show _____	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6-7</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

SCANNED
JAN 23 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: 1-8-02

[Signature]

J.S.C.

Check one: FINAL DISPOSITION ~~N~~ FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

REINA BERNER,
Plaintiff,

INDEX NO. 106276/98

-against-

GAY MEN'S HEALTH CRISIS,
Defendant.

DECISION AND ORDER

-----X

JANE S. SOLOMON, J.

Defendant Gay Men's Health Crisis ("GMHC") is a not-for-profit organization that serves people with acquired immunodeficiency syndrome ("AIDS"). Plaintiff Reina Berner ("Berner") worked as the coordinator for group services at GMHC from February 10, 1995 until she was terminated on August 22, 1996. Berner is suing GMHC for discrimination on the basis of her sexual orientation in violation of Title 8 of the Administrative Code of the City of New York. GMHC moves for summary judgment dismissing the complaint, which is granted for the following reasons.

BACKGROUND :

Berner alleges as follows: As the coordinator of group services, she was responsible for recruiting volunteers with mental health experience to lead counseling groups for people with AIDS. From the start of her employment, she was mistreated by her supervisor, Alvaro Simmons ("Simmons"). Simmons is homosexual, and he is alleged to have discriminated against her on the basis of her sexual orientation, i.e., because she is

heterosexual. Simmons hired her because he was under pressure from his supervisor to hire heterosexual female employees. She was denied the use of a large cubicle with windows; she was assigned a broken computer that hindered her ability to carry out her assignments; she was denied clerical assistance; and Simmons challenged her commitment to her work on the ground that HIV was not part of her "community," implying that, as a non-homosexual she was not sufficiently sympathetic.

She testified at her deposition that Simmons was the only individual at GMHC who discriminated against her on the basis of her sexual orientation. On this motion, she argues (in apparent contradiction to the allegations in her complaint and at her deposition regarding the circumstances of her hiring) that Simmons became aware of her sexual orientation after she had been working successfully at GMHC, and only then gave the poor performance reviews.

Simmons denies knowing Berner's sexual orientation, but acknowledges knowing the orientation of many (but not all) other employees. He and GMHC counter that Berner performed poorly from the outset of her employment, and was fired as a result. Her work was rife with grammatical and spelling errors, and often was tardy and incomplete. In May 1995, Berner's performance evaluation was "competent." On her May 1996 evaluation, she was rated "needs improvement."

In the summer of 1996, GMHC retained a consultant named George Getzel, DSW ("Getzel"), who Simmons claims was asked to

assist Berner in improving her job performance. Getzel was a professor at Hunter College of the City University of New York, Department of Social Work. By a letter to Simmons dated August 21, 1996, Getzel criticized Berner's performance and her work product. He described his contacts with her as "amiable, but very frustrating" because of her performance issues. In March and September 1997, Getzel sent e-mails to Simmons suggesting that they had a social relationship, which Berner argues raises doubts as to Getzel's motivation in writing the letter that criticized her.

In opposition to this motion, Berner relies in part upon the opinion of an economist and statistician, Dr. Seymour Barcun. Dr. Barcun reviewed material presented to him by plaintiff's attorney, and applies a process he calls "Fisher's Exact Test", which leads him to opine that the probability that firing decisions made by GMHC, with respect to people identified as homosexual or heterosexual, would fall upon such individuals in a non-discriminatory manner is less than 5.16%. As a result, he opines that it is "inherently unlikely" that GMHC's firing decisions would occur absent sexual discrimination.

DISCUSSION:

Berner's complaint alleges unlawful discrimination on the basis of sexual orientation in violation of the New York City Human Rights Law. NYC Admin. Code § 8-107(1). In an action under city antidiscrimination laws, the court applies the same three-step burden shifting analysis of McDonnell Douglas Corp. v

Green, 411 U.S. 792 (1973) used in claims brought under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq. (2001). Norville v Staten Island University Hosp., 196 F.3d 89, 95 (2d Cir. 1999); and see, Landwehr v Grev Advertising, Inc., 211 A.D.2d 583 (1st Dept. 1995). The analysis is as follows:

First, the plaintiff must establish a prima facie case of discrimination by showing that 1) she is a member of a protected class; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) the action occurred under circumstances giving rise to an inference of discrimination. . . . Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. . . . If the employer meets its burden, the plaintiff then must prove that the articulated justification is in fact a pretext for discrimination. . . .

Norville, 196 F.3d at 95 (citations omitted).

To make out a prima facie case, Berner must show that GMHC knew her sexual orientation. Geraci v Moody-Tottrup, Int'l, Inc., 82 F.3d 578 (3d Cir. 1996). Although Berner testified at her deposition that she never disclosed her sexual orientation to her superior, she asserts that it was well known among her co-workers, so her supervisor must have known as well. This evidence is speculation and not sufficient to establish that Berner's supervisor was aware of her sexual orientation. "A plaintiff is not entitled to a trial based on pure speculation, no matter how earnestly held." Fitzgerald v Alleghany Corp., 904 F. Supp. 223 (S.D.N.Y.1995).

Berner does not present any evidence that the topic of

her sexual orientation was ever brought to the attention of her superiors. "When an employer files declarations that he did not know of an employee's membership in a protected class, the jury may not infer such knowledge from employee's having told other office workers." Geraci, 82 F.3d at 578. GMHC's knowledge of Berner's sexual orientation is a critical element of her prima facie case. GMHC cannot be liable for discriminating on the basis of a particular personal characteristic of which it was not even aware; and Berner's speculation as to Simmons' knowledge does not create a fact issue sufficient to defeat summary judgment. Hedbers v Indiana Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995).

Furthermore, Berner's claim of discrimination arising from her computer is not proved. Her own testimony indicates that she was not computer proficient when she accepted the job and, despite the computer's shortcomings, she was not prevented from completing her tasks. Although she testified that other employees were provided with working computers, she does not allege that working computers were withheld from other heterosexual employees, or present any evidence that her technical problem was related to her sexual orientation. The same is true of her claim that clerical help was withheld on the basis of her sexual orientation - her own testimony indicates that she shared volunteer clerical help on an equal basis with a homosexual coordinator. The help may have been less than Berner desired, but it is not a basis for her lawsuit.

Berner places a great deal of weight on a comment made by Simmons regarding her lack of passion for her job because AIDS was not her a part of her "community." This remark does not give rise to an inference of discrimination because there is no evidence to conclude that it reflected a discriminatory intent, as opposed to an effort to describe her perceived shortcoming on the job. Quadriwah Ali v. Mount Sinai Hospital, No.92 Civ, slip op. at 7 S.D.N.Y. June 12, 1996). Also, the comment is ambiguous and does not suggest that AIDS would be part of her community if she were homosexual. Furthermore, isolated remarks or occasional episodes of harassment are not enough to prove discrimination. Quinn v. Green Tree Credit Corporation, 159 F.3d 759 (2d Cir. 1998).

Berner has not succeeded in raising a triable issue of fact as to whether GMHC's decision to terminate her was motivated by discrimination on the basis of sexual orientation. Because Berner fails to meet her burden to produce evidence of a prima facie case, GMHC's motion must be granted.

Even if Berner had raised an issue of fact on her prima facie case, the motion should be granted because she did not succeed in showing that GMHC's reasons for firing her were pretextual. Berner disputes GMHC's criticism of her work performance by claiming that GMHC engaged in a campaign of negative written performance evaluations and memoranda. Nonetheless, Berner has not presented evidence to verify these claims. Her performance was negatively reviewed by her direct

supervisor. Although Berner disputes some of her negative reviews, mere disagreement with the assessment of her performance is inadequate proof of GMHC's discrimination. Ioele v. Alden Press Inc., 145 A.D.2d 29 (1st Dept. 1989).

With respect to Getzel's letter that was critical of Berner's performance, Berner incorrectly argues that it is inadmissible hearsay. The statement is admissible not for the truth of the matters asserted, i.e., that her performance was poor, but as notice to Simmons that Getzel reported that her performance was poor (Simmons testified that he had asked Getzel to report on Berner's progress). In that context, the letter is further proof of a nondiscriminatory basis for her termination.¹

Finally, with respect to the opinion of Berner's expert, Dr. Barcun, it is not GMHC's allegation that it terminated her as part of a program to randomly reduce force. GMHC alleges that she was terminated for a failure to perform that is specific to her case. Therefore, Dr. Barcun's opinion (based upon a process he does not explain) that a different pattern of terminations by GMHC would be expected under a certain statistical analysis is irrelevant, and is no help in establishing her prima facie claim of discrimination. See,

¹ Berner insinuates, based upon two 1997 e-mails from Getzel to Simmons that close with "Love, George," that Getzel and Simmons had an intimate relationship and therefore Getzel's letter is unreliable. Her insinuation is premised purely on speculation, is specifically denied by Simmons (who testified that Getzel was not homosexual), and in any event would go only to the weight afforded the letter and not to its admissibility.

Hudson v Int'l Business Machines Corp., 620 F.2d 351, 355 (2d Cir. 1980), cert. denied, 449 U.S. 1066 (1980). Moreover, the reliability of Dr. Barcun's data with respect to the sexual orientation of GMHC employees is not established such that his findings may defeat a motion for summary judgment. His identification of the sexual orientation of GMHC employees appears to be based upon the opinions expressed by Berner and Simmons at deposition, Berner's recollections expressed directly to Barcun, and other information provided by Berner's attorney that is not in evidence. **An** individual's sexual preference is a deeply personal matter, and none of the sources relied upon by Barcun are capable of ascertaining that information with respect to each of GMHC's employees.

Plaintiff's other arguments have been considered, and are not availing. Accordingly, it hereby is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and the Clerk is directed to enter judgment accordingly.

Dated: January 8, 2002



J.S.C.