SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HONORABLE KENNETH A. DAVIS
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

PETER VEKIARELLIS,

Plaintiff(s),

INDEX No. 14262/01

-against-

MOTION SUBMISSION
DATE: 12/21/01

THE PALL CORPORATION and PETER ARATO,

Defendant(s).

SEQ. #1

The following papers read on this motion:

Notice of Motion/ Order to Show Cause	X
Answering Affidavits	X
Replying Affidavits	
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	X

Upon the foregoing papers, defendants' motion to dismiss the complaint pursuant to CPLR 3211 is denied.

Plaintiff seeks damages as a result of sexual harassment which created a hostile and offensive work environment in violation of Executive Law §296 on the first cause of action and as result of intentional infliction of emotional distress on the second cause of action. The plaintiff was hired to work in the PC & Networking Group of the corporate defendant, The Pall Corporation (Pall), under the supervision of the individual defendant, Peter Arato (Arato).

The plaintiff claims that shortly thereafter Arato approached him and asked him to perform oral sex. In conjunction with that request Arato opened his zipper on his pants. Following that incident plaintiff was repeatedly subjected to sexual harassment, specifically verbal communications and physical contact, including the touching of his breasts and buttocks. According to the complaint, plaintiff reported the foregoing sexual harassment to other supervisors and the Human Resources Department of Pall whereupon he learned that other employees had also complained of similar experiences. The complaint further alleges that on May 9, 2001, the plaintiff was discharged from his employment as a result of his complaints of sexual harassment.

Defendants bring this motion to dismiss the complaint on the grounds that the plaintiff does not state a cause of action under New York Executive Law or for intentional infliction of emotion distress. "On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated." TKO Fleet Enterprises, Inc. v. Elite Limousine Plus, Inc., 286 A.D.2d 436, 436, 729 N.Y.S.2d 193, 194, (2d Dep't 2001). The court finds that the complaint on its face states the two causes of action. This is not a motion for summary judgment requiring disclosure of all the evidence on disputed issues. If there is a reasonable chance that plaintiff may ultimately prevail on the merits, disposition by summary dismissal pursuant to CPLR 3211(a)(7) is premature. *See,* Rovello v. Orofino Realty Co., Inc., 40 NY2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976).

Discriminatory termination is a violation of New York Execution Law §296. As defense counsel aptly points out, analysis of New York Executive Law claims is "often guided by the principles applied to Title VII claims." Defense counsel, therefore, cites to Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998 (1998).

A reading of Oncale reveals that the court held that "sex discrimination consisting of same sex sexual harassment is actionable." Id. at 82, 209. In Oncale Justice Scalia emphasized that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances.'" Id. at 81, 208 (citation omitted). He sets forth the example of a professional football coach smacking a player in the buttocks as he heads into the field. That working environment is not "severely or pervasively abusive," whereas the same behavior would be abusive if instead of the football player, it was the "coach's secretary (male or female) back at the office." Id. Clearly the behavior by the defendant in the instant action falls within these guidelines. The plaintiff isn't a football player but a male worker who has allegedly been repeatedly touched by his supervisor on his breasts and buttocks in the workplace. "Plaintiff has alleged sufficient facts that, if true, could render the defendants liable under a 'hostile work environment' theory." Espaillat v. Breli Originals, Inc., 227 A.D.2d 166, 167, 642 N.Y.S.2d 875, 876, 877 (1st Dep't 1996). As in Espaillat, plaintiff alleges that his supervisor, over a period of time, repeatedly made offensive sexual remarks to him and touched him without permission.

"In order to state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so as to be regarded as intolerable in a civilized society." Seal v. Marks, 232 A.D.2d 626, 627, 648 N.Y.S.2d 1019 (2d Dep't 1996). The court finds that the plaintiff's allegations rise to this level.

Defendants' reliance on Leibowitz v. Bank Leumi Trust Co. of New York, 152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dep't 1989) is misplaced. In Leibowitz the court held that mere insults consisting of religious and ethnic slurs did not rise to the level of extreme and outrageous. Here, however, it is not only the initial request for oral sex but continued sexual harassment including touching that rises to the level of extreme and outrageous behavior. Certainly such behavior in the workplace surpasses the limits of decency.

Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211 is denied.

This matter is scheduled for a preliminary conference in the courtroom of Justice Davis on March 26, 2002 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: FEB 8 2002

J.S.C.