

Davin v JMAM, LLC

2005 NY Slip Op 30003(U)

October 20, 2005

Supreme Court, New York County

Docket Number: 0113895/2003

Judge: Sherry Klein Heitler

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

PRESENT. *Sherry Klein-Heitler*
Index Number : 113895/2003

PART 30

DAVIN, DONNA

vs
JMAM, LLC

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 113895/03

MOTION DATE _____

MOTION SEQ. NO. (003)

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated Oct 20, 2005.

FILED

OCT 28 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: Oct 20, 2005

[Signature]
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

-----X
DONNA DAVIN,

Plaintiff,

-against-

JMAM, LLC,

Defendant.
-----X

SHERRY KLEIN HEITLER, J.:

Index No. 113895/03

DECISION & ORDER

FILED
OCT 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 002 and 003 are consolidated for disposition herein.

This is an action alleging employment discrimination on the basis of pregnancy. In motion sequence 002, defendant JMAM, LLC d/b/a Joan Rivers Worldwide Enterprises ("JMAM"), seeks disqualification of plaintiff's counsel, the law firm of Storch Amini & Munves ("Storch"), pursuant to Disciplinary Rule 5-102, the advocate-witness disqualification rule. Plaintiff Donna Davin ("Davin") opposes the motion and cross-moves to compel the release of plaintiff's employment records pursuant to C.P.L.R. § 3101. Plaintiff also cross-moves for sanctions under 22 N.Y.C.R.R. § 130-1.1.

In motion sequence 003, JMAM moves, pursuant to C.P.L.R. § 3212, for summary judgment and dismissal of the complaint. As this motion is potentially dispositive of JMAM's motion to disqualify plaintiff's counsel, the court will address this motion first.

Motion for Summary Judgment

Davin commenced this action against her former employer, JMAM, in July 2003, alleging that JMAM unlawfully discriminated against her on the basis of her pregnancy. Davin contends that she was fired during her maternity leave because of her pregnancy. Davin alleges that JMAM's

* 3]
behavior has violated New York State Human Rights Law, N.Y.2D. Exec. L. § 296(1)(a), and New York City Human Rights Law, N.Y. City. Admin. Code § 8-107(1)(a). Because these laws are in accord with the federal standards promulgated under Title VII of the Civil Rights Act of 1964, plaintiff's claims must be analyzed in accordance with the three-step framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973):

First, the appellant/employee must make a *prima facie* showing of [gender] discrimination. Second, once the appellant has satisfied her burden, defendant must articulate a clear non-discriminatory reason for the termination or other action. Third, appellant must show that the proffered reasons are pretextual.

Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 317 (2004). Defendant contends that plaintiff cannot establish a *prima facie* case of gender discrimination and that, even if she can, defendant has proffered a legitimate, nondiscriminatory reason for her termination – namely, plaintiff's poor job performance – sufficient to rebut any inference of gender discrimination.

On a motion for summary judgment, however, the court is bound to consider the facts in the light most favorable to plaintiff. Id. at 315. Here, presuming plaintiff's evidence to be true for the sake of this motion, the court finds that plaintiff has established a *prima facie* case of gender discrimination, in that she has sufficiently established that: “(1) she is a member of a protected class; (2) she satisfactorily performed the duties required by the position; (3) she was discharged; and (4) her position remained open and was ultimately filled by a non-pregnant employee.” Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2nd Cir. 1995).

Plainly, as a pregnant woman, Davin was a member of a protected class. Id. at 63-64. Indisputably, Davin was discharged from her employment with JMAM. JMAM, however,

disputes that Davin “satisfactorily performed” her duties. Nevertheless, “[a] plaintiff’s burden to establish a prima facie case of discrimination is not onerous.” *Id.* at 64 (internal citations omitted).

For example, defendant acknowledges having given Davin a pay raise and a bonus in 2001 on the basis of her “satisfactory” performance, and a lesser pay raise and bonus in December 2002, after learning that Davin was pregnant. *See* Memorandum in Support of Motion for Summary Judgment at p. 6. Although defendant asserts that the lesser remuneration in 2002 was “[c]onsistent with the unsatisfactory nature of [Davin’s] performance review,” *id.* at p. 8, “when confronted with facts from which several differing conclusions may be drawn, the inferences drawn from such underlying facts are viewed in the light most favorable to the non-movant.” *Quarantino, supra*, 71 F.3d at 64.

Here, the inference may be drawn that Davin’s lesser bonus and pay raise in 2002 was tied to her status as a pregnant woman, and not to any decrease in the quality of her performance. In this regard, plaintiff claims that, just prior to taking her maternity leave, her supervisor, David Dangle, told her that she was “one of his top five people” and indicated that he was “disappointed” that she would be taking twelve weeks’ maternity leave. *Aff. of Sangita A. Shah in Opposition to Defendant’s Motion for Summary Judgment, Exh. A (Davin Dep.)* at pp. 166-67. While the sufficiency of plaintiff’s performance raises a factual issue for trial, it does not warrant dismissal of plaintiff’s complaint.

JMAM also contends that Davin has failed to establish that her position was “filled by a non-pregnant employee.” *Quarantino supra*, 71 F.3d at 64. Davin, however, asserts that her duties were spread out amongst three non-pregnant employees, and JMAM’s Response to Interrogatory

No. 18 (Aff. of Sangita A. Shah in Opposition to Defendant's Motion for Summary Judgment, Exh. G) indicates that "plaintiff's former responsibilities are being handled by Susan Gibson, Kristen Monteleone and Sara Bilk." The court finds that this Interrogatory Response raises a factual issue for trial as to this prong of plaintiff's *prima facie* case:

Employers have the right to restructure jobs and job responsibilities, but they cannot use that process to implement discriminatory objectives. An employee may always show that her employer's decisions on restructuring -- as applied to her -- were made to displace her for impermissible reasons such as taking maternity leave. Whether the former position remained open or had been eliminated presented a question of fact that should [be] determined by a jury, not by the trial court judge. The [trial] court's function is to decide whether any factual issues exist that would warrant a trial, not to resolve them in favor of either party.

Quarantino, supra, 71 F.3d at 65. Thus, "[s]ince plaintiff's burden of proof in a pregnancy discrimination action is de minimis at the prima facie stage, and because we must view all of these mostly disputed facts most favorably to the plaintiff, [Davin's] evidence was sufficient to support a prima facie case showing that either her position remained open and was filled by a non-pregnant female or that she was terminated under circumstances giving rise to an inference of unlawful pregnancy discrimination." Id.

Having determined that there is sufficient evidence to support a *prima facie* case of gender discrimination, the court finds, as well, that defendant has met its burden to put forth a legitimate, nondiscriminatory reason for plaintiff's termination, namely, Davin's allegedly poor job performance as testified to by her supervisors at JMAM, and as reflected in certain commentary in her December 2002 performance evaluation. Thus, the burden shifts back to plaintiff to proffer sufficient evidence that this reason for plaintiff's termination was merely a pretext for gender discrimination. Forrest, supra, 3 N.Y.3d at 317.

“[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id.* at 308 (quoting Reeves v Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 147 L. Ed. 2d 105, 120 S. Ct. 2097 [2000]). Here, Davin relies upon both direct and circumstantial evidence to rebut JMAM’s assertion of a legitimate, nondiscriminatory reason for firing her. While the court will not compile an exhaustive list of Davin’s evidence, it is the court’s position that the following proffered evidence sufficiently meets Davin’s burden of proof and warrants that this case proceed to trial:

(1) Davin was terminated while on maternity leave;

(2) Davin’s lowered salary raise and bonus between 2001 and 2002 followed closely on the heels of her announcement that she was pregnant;

(3) the alleged comments by David Dangle, Davin’s supervisor, indicating that Davin was one of his top employees and he was dissatisfied with the length of her maternity leave;

(4) the alleged comments by Susan Gibson, the Vice President of Marketing, to the effect that, following the announcement of her pregnancy, Davin was no longer “focused” or “committed” and might be making mistakes because she was “nauseous”.

Davin’s termination while on maternity leave is circumstantial evidence supporting her assertion that she was discriminated against due to her pregnancy, *see Quaratino, supra*, 71 F.3d at 65-66. Moreover, the alleged comments by Davin’s supervisors pertaining to her pregnancy permit an inference that the reason for her termination was her pregnancy, not her job performance, *see id.*; *see also Pace College v. Commission on Human Rights*, 38 N.Y.2d 28, 40-41 (1975). Additionally, Davin contends that another employee, Ann Marie Byrnes, was

similarly discriminated against on the basis of her status as a pregnant woman. While Byrnes denied that this was the case, it must be noted that, at one point in her deposition testimony, she did indicate that, after returning to work following her maternity leave, Susan Gibson commented to Byrnes that she (Gibson) hadn't told Byrnes to get pregnant. See Motion to Disqualify Plaintiff's Counsel, Exh. G (Byrnes Dep.) at pp. 41-42.

Although courts have noted that it is not often that an employer will make explicitly discriminatory statements against an employee, where, as here, evidence is proffered of a combination of discriminatory "slips of the tongue, jests with a serious half-hidden barb, inconsistent handling, and then a smoke screen, perhaps, of obscuring lawful motivations and reasons for" termination, there is sufficient evidence of impermissible discrimination to submit to the fact finder. Pace, supra, 38 N.Y.2d at 40-41.

Similarly, the parties' papers demonstrate that there are issues of fact regarding the measure of Davin's damages. The parties disagree – each offering evidence to rebut the other's contentions – as to whether Davin mitigated her damages, and whether Davin's alleged misconduct as an employee was sufficiently egregious as to vitiate her right to damages. Like the issue of gender discrimination, the appropriate measure of Davin's damages should be determined by the fact finder. See Sweet v. Blue Cross and Blue Shield of Utica-Watertown, Inc., 1998 U.S. Dist. LEXIS 15566, *1, *19 (N.D.N.Y. 1998).

Motion to Disqualify Plaintiff's Counsel

As mentioned above, Davin asserts that JMAM has previously discriminated against another employee, non-party witness Ann Marie Byrnes ("Byrnes"), on the basis of her pregnancy. Byrnes was deposed on January 13, 2005. Byrnes testified that, after returning from

maternity leave, her supervisors at JMAM determined that half of her duties – those pertaining to business in the United Kingdom – would be eliminated. See Motion to Disqualify Plaintiff’s Counsel, Exh. G (Byrnes Dep.) at pp. 41-42. Thus, Byrnes understood that her “job was either terminated or was drastically going to change.” Id. at p. 50. Byrnes, however, stated that she “absolutely” did not believe that she was discriminated against on the basis of her pregnancy. Id. at p. 53. Rather, she left her position voluntarily, because of the changes in her position and because she was finding the commute to work too stressful as a new mother. See id. at p. 42.

In a letter dated January 18, 2005, plaintiff’s counsel wrote to the court, asserting that Byrnes had committed perjury when she testified, during her deposition, that she had voluntarily resigned from JMAM. Counsel indicated that this testimony contradicted Byrnes’s previous statement to counsel, “that she believed she was discriminated against on the basis of pregnancy and that she was forced to resign from her position.” Additionally, counsel noted that Byrnes’s deposition testimony was at odds with her statement to the Unemployment Board, which indicated that her position had been terminated. For the foregoing reasons, plaintiff’s counsel renewed its request “to compel production of both Ms. Burns[sic] severance agreement, her performance reviews, e-mails concerning her performance, and any documents related to her application for and receipt of unemployment benefits.” Counsel asserted that “[t]his information is directly relevant as it goes to the credibility of both the witness and the Defendant (who lawfully should have opposed the unemployment benefits if Ms. Burns indeed had voluntarily resigned) and because it also demonstrates Defendant’s pretextual motive.”

In a response on the same date, defendant’s counsel contended that plaintiff’s counsel “has injected herself and her firm into this case and made them witnesses.” Additionally,

defendant's counsel noted that the Note of Issue was filed on September 20, 2004 and that the discovery period had closed without plaintiff requesting the documents pertaining to Byrnes's unemployment compensation. In conclusion, defendant indicated its desire to file this motion to disqualify the Storch firm as counsel for plaintiff.

DR 5-102(a) states: "A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client ...". This Disciplinary rule, commonly referred to as the advocate-witness disqualification rule, "provide[s] guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation" S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp., 69 N.Y.2d 437, 440 (1987). Also relevant to this determination is whether the motion to disqualify, if granted, will operate to "stall and derail the proceedings, redounding to the strategic advantage of one party over another." Id. at 443 (internal citation omitted). See also Nomura Securities Int'l v. Hu, 240 A.D.2d 249, 251 (1st Dept. 1997).

To succeed on its disqualification motion, defendant must establish that plaintiff's counsel's testimony will be "necessary" to the case. Eisenstadt v. Eisenstadt, 282 A.D.2d 570, 570 (2nd Dept. 2001). To determine whether the proposed testimony at issue is necessary, the court must consider the "significance of the matters, weight of the testimony, and availability of other evidence." Id. at 570-71 (quoting S & S Hotel Ventures, supra, 69 N.Y.2d at 446).

Here, defendant has not established that the testimony of plaintiff's counsel will be necessary. At this juncture, it appears that there are alternate routes available to both parties to explore the question of whether JMAM discriminated against Byrnes on the basis of her pregnancy. Where, as here, other witnesses are available to testify regarding the same matters as the attorney, the attorney's proposed testimony is merely cumulative and unnecessary. See O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp., 198 A.D.2d 154, 155 (1st Dept. 1993). Thus, at this stage of the proceedings, the possibility that plaintiff's counsel will testify is, at best speculative. See Subin Associates, P. C. v. Two Ninety One Broadway Realty Associates, 126 A.D.2d 443, 444 (1st Dept. 1987). Additionally, the court notes that, even if it came to pass that plaintiff's counsel sought to testify with regard to conversations with Byrnes, it would not necessarily follow that disqualification of the entire Storch law firm, rather than one or two of its members, would be required. See, e.g., Talvy v. American Red Cross, 205 A.D.2d 143, 152 (1st Dept. 1994), aff'd, 87 N.Y.2d 826 (1995).

Cross-Motion to Compel Release of Records

C.P.L.R. § 3101(a) provides that “[t]here shall be full disclosure of all matter **material and necessary** in the prosecution or defense of an action, regardless of the burden of proof, by: . . .(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.” (Emphasis supplied). As noted above, plaintiff seeks to compel JMAM and Byrnes to produce any documents concerning Byrnes's application for unemployment benefits, or, in the alternative, to compel them to authorize the New York State Department of Labor to release Byrnes's unemployment records. Additionally, plaintiff seeks to compel JMAM and Byrnes to produce a copy of Byrnes's separation agreement with JMAM. Plaintiff contends that

these documents are “material and necessary” to plaintiff’s claim of gender-based pregnancy discrimination, insofar as these records may establish that JMAM systematically discriminated against pregnant employees by pressuring them to “voluntarily” terminate their employment in exchange for JMAM’s foregoing any objection to the employees’ receipt of unemployment benefits.

JMAM counters by asserting that any documents concerning Byrnes’s unemployment benefits application are in the possession of the New York State Department of Labor and are, therefore, immune from disclosure. See N.Y. Labor Law § 537(1).¹ Additionally, JMAM argues that both Byrnes’s unemployment records and the separation agreement between Byrnes and JMAM are not “material and necessary” to plaintiff’s claim of gender-based pregnancy discrimination.

Plainly, Byrnes’s and JMAM’s communications with the New York State Department of Labor are privileged and are not discoverable under N.Y. Labor Law § 537(1):

The statute (Labor Law, § 537) promotes the concept that where “disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure”. (Cirale v 80 Pine St. Corp., 35 NY2d 113, 118.) Here, the legislative intent, arising from the need to encourage employers and employees to make honest reports, indicates that the requested disclosure would be harmful to the public interest.

Clegg v. Bon Temps, Ltd., 114 Misc.2d 805, 808 (S.Ct. N.Y. Cty. 1982). Notably, in Clegg, the court declined to order the disclosure of such documents where the plaintiff alleged that the

¹ N.Y. Labor Law § 537(1) provides: “Information acquired from employers of employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding, notwithstanding any other provisions of law.”

employer's statements to the Unemployment Compensation Board would support plaintiff's libel claim against the employer.

Here, the connection between these documents and plaintiff's case are even more tenuous, in that plaintiff is seeking documents related not to herself, but to another employee (Byrnes) who is a non-party witness in this case. Moreover, defendant correctly notes that, even assuming JMAM did not dispute Byrnes's purported request for unemployment compensation, no presumption would be raised that JMAM, in fact, terminated Byrnes, as Byrnes was arguably entitled to unemployment benefits, even if she voluntarily terminated her employment due to the length of her commute to her position. See N.Y. Labor Law § 593(1)(a).² While Byrnes's alleged submission of a form to the New York State Department of Labor, indicating that she was terminated by JMAM, may be relevant to plaintiff's claim of a pattern of discrimination on JMAM's part, such a link is of insufficient relevance to this case to justify this court overriding the privilege found in N.Y. Labor Law § 537 (1). See Clegg, supra, 114 Misc.2d at 808; see also Viruet v. Citizen Advice Bureau, 2002 U.S. Dist. LEXIS 15045, *1, *90-91 (S.D.N.Y. 2002).

The same, however, may not be said of Byrnes's "severance agreement, her performance reviews, [and] e-mails concerning her performance," discovery of which has been requested by plaintiff. First, it must be noted that, as Byrnes has testified that she has already faxed the

² N.Y. Labor Law § 593(1)(a) provides: "[V]oluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section or if the claimant . . .". N.Y. Labor Law § 593(2)(c), in turn, provides that employment may be rejected for good cause where "the employment is at an unreasonable distance from his residence, or travel to and from the place of employment involves expense substantially greater than that required in his former employment unless the expense be provided for."

severance agreement between herself and JMAM to plaintiff's counsel³, see Motion to Disqualify Plaintiff's Counsel, Exh. G (Byrnes Dep.) at pp. 26-27, she has waived any purported privilege as to that document. The court, therefore, directs Byrnes to provide the severance agreement to plaintiff's counsel forthwith or, if such cannot be found in Byrnes's possession, then the court directs JMAM to provide this document to plaintiff's counsel.

Additionally, the court directs JMAM to provide all of Byrnes's performance reviews while employed at JMAM, as well as any e-mails concerning Byrnes's performance while employed at JMAM, to plaintiff's counsel forthwith. In so doing, the court is mindful of the sensitive nature of such information, as well as plaintiff's assertion that these items are "material and necessary," see C.P.L.R. § 3101(a), to establish an alleged pattern of gender discrimination at JMAM. Where, as here, these documents may bring to light "facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 406 (1968), the court elects to exercise its broad discretion to support "the strong policy supporting open disclosure." Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 747 (2000). In so ordering, the court is mindful of the fact that these issues arose following Byrnes's deposition testimony and were not, therefore, addressed in plaintiff's earlier discovery requests.

Accordingly, it is hereby

ORDERED that defendant's motion to disqualify counsel (motion sequence 002) is denied; and it is further

ORDERED that plaintiff's motion for sanctions (motion sequence 002) is denied; and it

³ The record is unclear as to whether plaintiff's counsel ever received this fax.

is further

ORDERED that plaintiff's cross-motion to compel discovery (motion sequence 002) is granted to the extent indicated above; and it is further


ORDERED that disclosure of such discovery (motion sequence 002) as is indicated above shall take place on or before November 7, 2005; and it is further

ORDERED that defendant's motion for summary judgment (motion sequence 003) is denied; and it is further

ORDERED that counsel for the parties shall appear for a conference at 9:30 a.m. on November 14, 2005, at Room 438, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of the court.

DATED: October 20, 2005



SHERRY KLEIN HEITLER
J.S.C.

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