

Thompson v Lamprecht Transp.
2005 NY Slip Op 30512(U)
December 6, 2005
Supreme Court, Queens County
Docket Number: 15915
Judge: James P. Dollard
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13
Justice

	X		Index	
MARIE THOMPSON, et al.			Number	<u>15915</u>
2003				
			Motion	
			Date	<u>October 19,</u>
2005				
			Motion	
LAMPRECHT TRANSPORT, et al.			Cal. Number	<u>21</u>
	X			

The following papers numbered 1 to 13 were read on this motion by the defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint; and, cross motion by the plaintiff, pursuant to CPLR 2221 and 3212, for (a) leave to renew that branch of a prior motion of the defendant Lamprecht Transport, made pursuant to CPLR 3211, to dismiss the complaint interposed against it for lack of personal jurisdiction and, upon renewal, for an order denying that branch the motion, and (b) for partial summary judgment on the issue of the liability of all defendants on the complaint.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. Background and Relevant Facts

A. Background

The plaintiff Marie Thompson (Thompson) and her husband derivatively, commenced this action interposing eight causes of action seeking compensatory and punitive damages for, inter alia, alleged sex discrimination in violation of Executive Law § 296, including retaliation, creation of a hostile work environment and constructive discharge due to her opposition to the sex discrimination and complaints.

Thompson alleges that on July 3, 2000 she and a co-employee, the defendant Patrice Casimir (Casimir), argued, that Casimir intentionally punched her left breast during that argument, that Casimir made derogatory remarks to her that day and during the course of her employment. She also alleges that her employer, the defendant American Lamprecht Transport, Inc. (ALTI) and the individual defendants/managers or officers of ALTI, failed to act in response to her complaints, aided and abetted Casimir's conduct, and failed to promote her to managerial positions.

By prior order dated September 30, 2004 this court (Dollard, J.), inter alia: (1) granted that branch of a motion by the defendant Lamprecht Transport AG s/h/a Lamprecht Transport to dismiss the complaint interposed against it based upon lack of personal jurisdiction; (2) granted that branch of a motion by the remaining defendants seeking to dismiss the cause of action alleging intentional infliction of emotional distress and, otherwise, denied the defendants' motion to dismiss the complaint; and, (3) granted so much of a cross motion by Thompson as sought to dismiss affirmative defenses of improper service, collateral estoppel and res judicata.

In the motion and cross motion at issue, the remaining defendants seek summary judgment dismissing the complaint interposed against them; in turn, Thompson seeks, through a motion to renew, to reinstate the complaint against Lamprecht Transport and partial summary judgment on the issue of the liability of all defendants.

B. Examinations Before Trial (EBT)

During his EBT, the defendant Alan P. Tiercy (Tiercy) stated, inter alia, that he was first employed by ALTI in September 1977 as an operations clerk. From 1991 to 2003 he served as branch manager of the New York office running office operations and ensuring customer satisfaction. A total of six

employees, including himself, worked in the New York office.

Thompson became a part-time employee with ALTI in 1995 and, eventually, became a full-time employee. Thompson was the only licensed customs house broker for the office. Other than being late to work, Thompson's job performance was fair and she was never subject to any disciplinary action. Thompson worked at ALTI from mid-1995 to 2003.

ALTI did not conduct annual employee reviews or evaluations. If he saw a problem with an employee's performance, he discussed it with the employee to resolve it. Raises were determined through the defendant Hans-Peter Widmer (Widmer), the President of the ALTI, to whom all branch managers reported. Raises were given once a year in January and, generally, every employee received the same raise. Corporate policies were provided by Widmer, but Tiercy made decisions regarding hiring and firing of employees, sometimes in consultation with Widmer. To his knowledge, there was no employee handbook or written policy relating to sexual harassment prior to February 2003, and he was unaware of any employee being terminated or disciplined for sexual harassment.

Casimir was an operations clerk who, ultimately, became a branch manager of the Miami office. On July 6, 2000 he saw Thompson and Casimir yelling at and standing very close to one another in the office while other employees were in the area, and he immediately told them to come to his office. In his office they ultimately calmed down but, at that time, neither told him what the argument was about, and each returned to their desk. A reference regarding the incident was placed in each of their personnel folders. Thompson never asked him for help of any kind. Prior to the July 6, 2000 incident, Thompson never complained about the work environment.

On July 25, 2000, Widmer and the defendant Thomas Lamprecht (Lamprecht) came to the New York office to investigate the incident by conducting interviews with all employees present that day, including Casimir and Thompson. He never heard Casimir refer to female employees as "soup chickens" or "peasants," and never saw him engage in any physical or verbal outbursts.

During his EBT, Lamprecht stated that he met Thompson only two or three times when he visited the New York office. Presently, he was ALTI's Chairman of the Board, Widmer was President, Tiercy was Executive Vice President, Secretary and

Treasurer, and Ms. Martha Jeandea in South Carolina was another Executive Vice President. Generally, he coordinated functions between Switzerland and the United States.

He became aware of the Thompson/Casimir incident about a week after it occurred. Thompson complained that Casimir was shouting and yelling at her, and getting involved in business for which she felt responsible. Casimir stated they argued about how to fill out a document and, when Thompson started shouting at him, he shouted back. All office staff present at the time of the incident were questioned.

To his knowledge, Thompson never complained of sexual harassment or a hostile work environment during her employment with ALTI. Thompson did request that she be physically separated from Casimir in the New York office, and she received that accommodation to the extent possible. In any event, Casimir was transferred to Miami within a couple of months. He never heard Casimir refer to female employees as "soup chickens" or "peasants," and never observed him have physical or aggressive verbal outbursts. He had heard that Casimir argued with Thompson every now and then.

During his EBT, Widmer added, inter alia, that he never heard any sexual harassment complaints. ALTI did not publish announcements about upcoming positions or vacancies; instead, any such positions were discussed at the management meeting. He agreed that he, Tiercy and Lamprecht investigated the July 6, 2000 incident by asking other office staff what had occurred. Based upon the investigation, they determined that Casimir did not engage in inappropriate conduct.

On July 28, 2000 or in August, 2000, they promoted Casimir to branch manager of the Miami office, and he was transferred to the that office. Thompson never made any complaint between July 6, 2000 to the time she resigned in February, 2003.

During his EBT, Patrice Casimir stated, inter alia, that he commenced work with ALTI in October, 1988 as an import clerk, and left in March 2003 when the Miami branch closed. On July 6, 2000 he and Thompson argued about how to complete a custom's form and, when Thompson started yelling, he yelled back. He never touched Thompson during that argument and did not strike her breast. Prior to that incident, he did not have bad feelings or ill will toward Thompson.

He had used the term "soup chicken" in the office, which meant someone that was sexually unattractive. The term was used

by others in the office as well and it was intended as a joke; however, he could not name anyone else who used that term. He never used the word "peasant."

Documents in the record include, inter alia: (1) an internal memorandum by Tiercy dated July 25, 2000, which was placed in the personnel folders of Thompson and Casimir to document the July 6, 2000 incident, noting that Lamprecht and Widmer came to New York on the same date and investigated, and that a prior incident occurred in July, 1998 while he was on vacation; (2) a letter dated July 28, 2000, written by Thompson to Lamprecht about the July 6, 2000 incident, asserting that Casimir physically and sexually harassed and assaulted her, that the incident was witnessed by others, that Casimir punched her in the left breast and struck her in the nose with his nose, and demanding disciplinary action; and, (3) an internal memo by Tiercy dated February 24, 2003, documenting Thompson's resignation that morning by e-mail.

During her EBT Thompson stated, inter alia, that she was a high school graduate and took additional courses relating to the import-export industry. She was the licensed customhouse broker at ALTI, and oversaw the brokerage department and import division.

Beginning in 1995, there were constant derogatory remarks by Casimir toward female and other employees in the office, to the effect that the women in the office were "soup chickens" and "peasants," although the latter term was also used for males. Casimir made such statements 15 times a year and, when she complained to Tiercy about it, he smirked, laughed a little and stated that this was just the way Casimir was. Once or twice Tiercy did speak to Casimir about this conduct.

Prior to July, 1998, she and Casimir had two arguments about work when Casimir yelled and called her and others in the office "idiots." On both occasions Tiercy was on vacation but, when he returned, she requested that Tiercy instruct Casimir not to talk to her in an unprofessional manner.

On June 30, 2000 she and Casimir disagreed about how to complete a form. Casimir began berating everyone and calling them "idiots" and, when she got involved, he pointed his finger in her face and began "nose-butting" and spitting on her. When Tiercy and Widmer came out of their offices Casimir told her to "shut her mouth or else." When she asked Tiercy to stop Casimir

from threatening her, Casimir intentionally punched her in her left breast with his right fist. At that point, Tiercy called them into his office to calm them down.

Later, she asked Tiercy to document the incident and reprimand Casimir for his behavior. During the July 25th meeting with Widmer and Lamprecht, she told Tiercy that she would like to apply for any promotional opportunities but, at that time, the opening at the Miami office was not mentioned. Following the July 25th meeting, she never heard another thing about the incident. Casimir never touched her after the July 6, 2000 incident.

Casimir was promoted to branch manager of the Miami office in August, 2000 and he left to work in the Miami office in December, 2000. When Casimir moved to Miami, she insisted that if he called the New York office he should call Tiercy directly so she would not have to deal with him, but she received no response to her request. Everyone picked up the phones in the office. If Casimir called and she answered, she always transferred the call.

Although ALTI had one female manager in South Carolina, that person had owned a company acquired by ALTI and she felt that, otherwise, ALTI did not promote women to management positions. To her knowledge, the only management position in each branch office was that of branch manager.

II. Motion and Cross Motion

ALTI and the remaining defendants move for summary judgment dismissing the complaint asserting, inter alia, that: (1) the sexual harassment and hostile work environment claims rest on two incidents that occurred in January, 1995 and June, 2000, and on allegations of being called a "soup chicken," "peasant" and idiot;" (2) all defense witnesses stated that they never witnessed any sexual harassment or derogatory conduct, and never saw Casimir strike Thompson in the left breast; (3) Thompson continued working for another three years without complaint before voluntarily resigning; (4) Thompson was not qualified for any position other than that which she held; and, (5) there is no evidence of retaliation.

Thompson cross-moves for leave to renew that branch of the defendants' prior motion seeking to dismiss the complaint interposed against Lamprecht Transport for lack of personal

jurisdiction and, upon renewal, for the denial of that branch of the motion and for summary judgment on the issue of the liability of all defendants. In support, she contends, inter alia, that: (1) there are issues of fact relating to the defendants' credibility; (2) she repeatedly complained about Casimir's conduct and no meaningful investigation ever occurred; (3) she was subjected to a hostile work environment based upon her gender, and was negatively treated after making complaints; (4) she was qualified for other positions, but the defendants failed to post any of the branch manager positions filled by men; (5) the individual defendants are vicariously liable for the conduct of Casimir, and she was constructively discharged; and, (6) the EBTs demonstrate that Lamprecht Transport, a Swiss corporation, is subject to the jurisdiction of this court as it is the parent corporation of ALTI, it dominates ALTI business and operations, and it shares officers with.....1

III. Decision

To establish a prima facie case of discrimination, a plaintiff must first show by a preponderance of the evidence that: (1) he or she is a member of a protected class; (2) discharged from a position for which he or she was qualified; and, (3) that the discharge occurred under circumstances giving rise to an inference of discrimination (see Mittl v New York State Div. of Human Rights, 100 NY2d 326, 330 [2003]). Once a prima facie case is made, the burden of production shifts to the employer to rebut the presumption with evidence that the plaintiff was discharged for a legitimate, nondiscriminatory reason (see id.; see also Pramdip v Building Serv. 32B-J Health Fund, 308 AD2d 523 [2003]). If such evidence is produced, the presumption is rebutted and the fact finder must determine whether the proffered reasons are merely a pretext for discrimination (see Mittl, 100 NY2d at 330). A fact finder who concludes that the proffered reasons are pretextual is permitted to infer the ultimate fact of discrimination but is not required to do so (see id.).

Hostile work environment sexual harassment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is so sufficiently severe or pervasive that it alters the terms or conditions of employment (see Macksel v Riverhead Cent. Sch. Dist., 2 AD3d 731, 732 [2003]). Whether a New York workplace may be viewed as hostile or abusive can be determined only by considering the totality of the circumstances (see id.). Isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment in New York (see Macksel, 2 AD3d at 732).

In order to hold a defendant liable under New York law for alleged pervasive harassment, a plaintiff must prove that the employer had knowledge of and acquiesced in the discriminatory conduct of its employee (see Vitale v Rosina Food Prods. Inc., 283 AD2d 141, 142 [2001]). Where the plaintiff is harassed by a low-level supervisor or co-employee, the plaintiff is required to establish only that upper-level supervisors had knowledge of the conduct and ignored it; if so, the harassment will be imputed to the corporate employer and will result in imposition of direct liability (see id.; see also Father Belle Community Ctr. v New York State Div. of Human Rights, 221 AD2d 44 [1996], lv denied 89 NY2d 809 [1997]; see also Murphy v ERA United Realty, 251 AD2d 469 [1998]). A defendant may disprove condonation by a showing that it reasonably investigated complaints of discriminatory conduct and took corrective action (see Vitale, 283 AD2d at 142).

As to claims brought under Executive Law § 296, in the absence of compelling circumstances, individual instances of a failure to promote do not constitute a continuing violation (see Nielsen v United Parcel Serv., Inc., 210 AD2d 641 [1994]). To establish a prima facie case of retaliation in the context of employment discrimination, a plaintiff must show that: (1) she has engaged in a protected activity; (2) her employer was aware of such participation; (3) she suffered from an adverse employment action based upon her activity; and, (4) there is a causal connection between the protected activity and the adverse action taken by her employer (see Forrest v Jewish Guild for the Blind, 309 AD2d 546 [2003], aff'd 3 NY3d 295 [2004]).

Here, the defendants demonstrated the absence of a prima facie case of discrimination under Executive Law § 296 as they never discharged Thompson who, instead, voluntarily resigned almost three years after the incident and after Casimir was transferred to Miami (see Pramdip, 308 AD2d at 524; Ioele v Alden Press, Inc., 145 AD2d 29 [1989]). In addition, the defendants demonstrated the absence of a prima facie case of hostile work environment by showing that any alleged harassment by Casimir through name-calling or arguments with Thompson were isolated, occasional episodes (see Macksel, 2 AD3d at 732).

In response, Thompson failed to raise any issue of fact as to whether she was terminated, whether her termination was a pretext for illegal discrimination or whether her termination was retaliatory for her complaints (see id.). Moreover, in view of the investigation conducted by the defendants following the July 3, 2000 incident, and the almost three year hiatus between the time of the incident and Casimir's move to Miami and Thompson's resignation in February, 2003, Thompson failed to raise a triable

issue of fact as to whether there was a causal connection between a protected activity and any adverse employment action, or of deliberate acts on the part of ALTI to make her working conditions so intolerable that a reasonable person in her position would feel compelled to resign (see Kaptan v Danchig, 19 AD3d 456 [2005]; see also Graham v New York City Transit Auth., 242 AD2d 722 [1977], lv denied 94 NY2d 759 [2000]; Mountleigh v City of N.Y., 191 AD2d 291 [1993]).

Finally, Thompson failed to raise any triable issue of fact as to her claims of alleged failure to promote or retaliatory discharge (see e.g. Graham, 242 AD2d at 722; Mountleigh, 191 AD2d at 291). As Thompson failed to demonstrate a *prima facie* case of discrimination, her claims of aiding and abetting by the individual defendants need not be addressed (see Forrest, 309 AD2d at 560).

Conclusion

Based upon the papers presented to the court and the determinations set forth above, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted, and the complaint interposed against the defendants is dismissed; and it is further

ORDERED that the branch of the cross motion by the plaintiffs for leave to renew that branch of a prior motion of the defendant Lamprecht Transport to dismiss the complaint interposed against it for lack of personal jurisdiction and, upon renewal, for an order denying that branch the motion is denied as academic; and it is further

ORDERED that the branch of the cross motion by the plaintiffs for partial summary judgment on the issue of the liability of all defendants on the complaint is denied.

Dated: December 6, 2005

..... efendants and Thompson also submit affidavits in support of the motion and cross motion.