

Elizarov v Martha Stewart Living Omnimedia, Inc.

2006 NY Slip Op 30481(U)

September 11, 2006

Supreme Court, New York County

Docket Number: 118284/03

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 118284/2008

ELIZAROV, AVNER S.

vs

MARTHA STEWART

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

_____ motion is decided in accordance

with accompanying memorandum decision

FILED

SEP 13 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 11 2006

hh
J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
AVNER S. ELIZAROV,

Plaintiff,

INDEX NO.
118284/03

- against -

MARTHA STEWART LIVING
OMNIMEDIA, INC.,

FILED

SEP 13 2006

Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
EDWARD H. LEHNER, J.;

Before the court is a motion by defendant Martha Stewart Living Omnimedia, Inc. (the "Company" or "Defendant") for summary judgment dismissing plaintiff's complaint. The complaint has two causes of action: i) violation of Executive Law §296; and ii) violation of New York City Administrative Code §8-502(a) for purportedly discriminating against him "because he is a religious Jew" (complaint ¶23).

Executive Law §296 (a) provides:

"1. It shall be an unlawful discriminatory practice:

(a) For an employer ... because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual ... to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * *

10. (a) It shall be an unlawful discriminatory practice for any employer ... to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business."

New York City Administrative Code §8-502(a) provides:

"(A)ny person claiming to be aggrieved by an unlawful discriminatory practice ... shall have a cause of action ... for damages."

Plaintiff contends: that he "was employed as a Quality Assurance Manager by (the Company) from June 24, 2002 until (his) termination on May 23, 2003" (Plaintiff affidavit ¶1); that his supervisor throughout his employment was Rafael Pisacane ("Pisacane"); that after his father died on October 11, 2002, plaintiff became more religiously observant, including wearing a yarmulka to work (Id ¶¶3, 4); that shortly thereafter Pisacane "began making a variety of anti-Semitic remarks to me ... (including) a comment about why everyone hated the Jewish people and the Jews practice of excluding everyone from their inner circle ... (and) Jews being lazy" (Id. ¶6); that during the spring of 2003 after reminding Pisacane he "would be on vacation

for the Passover holiday ... (Pisacane told him) ‘Go home, go to your vacation and never come back’ ... next time (he) would not approve (plaintiff’s) vacation requests” (Id. ¶¶9-11); that he identified seven comments made by Piscane as anti-Semitic (plaintiff’s EBT, pp. 359-364); that on May 16, 2003, plaintiff “received a sternly worded written reprimand ... (and) (o)n May 23, 2003 ... was told that (his) position was being eliminated and that (his) termination had nothing to do with (his) job performance” (plaintiff affidavit ¶¶12-14).

Defendant contends that: due to economic conditions in early 2002 “the IDC (Internet Direct Commerce) division was losing too much money and there was a need to drastically reduce costs ... including a reduction in force ... (beginning) in and around March 2002, at which time several dozen employees were laid off” (affidavit of Sheila Donahoe, ¶5); there was “intense pressure to cut costs and reduce size ... (and) in or about April 2003 (she) received a directive from senior management ... to further reduce the Internet Technology group’s budget ... (and) there was unfortunately no other available source of savings besides additional layoffs” (Id. ¶¶6, 7); that as Chief Information Officer after consulting with Pisacane, she “decided that we should eliminate the Q.A. Manager position ... (since) the Internet Technology group was no longer engaged in large-scale development projects such as launching of the website. Our directive was to maintain the site, rather than continuing to implement large new projects ... (and) we no longer needed a management-level

Quality Assurance position” (Id. ¶8); that her “overall impression of (plaintiff’s) performance was that he often failed to complete his work on schedule and did not live up to expectations” (Id. ¶4); that while plaintiff’s “substandard performance played some role in the decision to eliminate his position, the bottom line is that we eliminated that Quality Assurance Manager position because the business no longer needed, and could no longer afford, this type of managerial Quality Assurance position. This is evidenced by the fact that no one was ever rehired for the position” (Id. ¶9); that plaintiff was aware that the Company had rules and policies regarding discrimination; that these rules required a subject of discrimination to make a complaint to a supervisor or Human Resources and that plaintiff never made any complaint (plaintiff EBT, p. 237).

“The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.)” [Ferrante v. American Lung Association, 90 NY2d 623, 629 (1997)]. See also, McGrath v. Toys “R” Us, Inc., 3 NY3d 421, 429 (2004). Similarly “in determining employment discrimination claims under the New York City Human Rights Law, federal standards are applied” [Shah v. Wilco Systems, Inc., 27 AD3d 169, 177 (1st Dept. 2005)]. See also, Walsh v. Covenant House, 244 AD2d 214 (1st Dept. 1997).

In *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 (2004), the court summarized the rules in an employment discrimination action as follows (p. 305).

“A plaintiff alleging ... discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.

“To prevail on their summary judgment motion, defendants must demonstrate either plaintiff’s failure to establish every element of intentional discrimination, or have offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual” (internal citations omitted).

However, although the “presumption shifts the burden of *production* to the defendant, ‘(t)he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff’” [*St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)] (italics in original). “(P)laintiff is still entitled to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination ... (by showing) ‘*both* that the reason was false, *and* that discrimination was the real reason.’” (*Ferrante v. America*

[* 7]
Lung Association, 90 NY2d supra at pp. 629-630)(emphasis in original).

Plaintiff has asserted failure to accommodate religious observation, a hostile work environment and termination. Plaintiff has not presented a prima facie case of failure to accommodate his religious observation of Passover since his “vacation request was granted” (plaintiff affidavit ¶8).

Plaintiff also asserts that Pisacane’s derogatory remarks created a hostile work environment. A “hostile work environment exists ‘(w)hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’ Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances including ‘the frequency of the discriminatory conduct,’ its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance Moreover, the conduct must have both altered the conditions of the victim’s employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment – one that a reasonable person would find to be so” [Forrest v. Jewish Guild for the Blind, 3 NY3d supra at pp. 310-311, quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 23 (1993)]. “A hostile work environment requires ‘more than a few isolated incidents of racial enmity’ ... (n)or has plaintiff shown ... that the

egregious remarks interfered in any way with (his) job performance” [Id. at p. 311]. Plaintiff has identified seven statements, but has not shown severe, pervasive conduct that permeated his work environment.

Moreover, “a defending employer may raise an affirmative defense to liability ... (comprising) two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any (religious) harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense” [Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998)]. See also, Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Here, the Company had an anti-discrimination policy with a provision for reporting to the Senior Vice President, Human Resources (Exhibit V to affirmation of Katharine Rosenfeld). Plaintiff was

aware of this policy and never made any complaint against Pisacane's allegedly abusive conduct (plaintiff EBT, p. 237). In view of the foregoing, plaintiff's claim of a hostile work environment is dismissed.

"The downsizing of a company's employment rolls, due to business failings and economic setbacks, constitutes a sustainable rebuttal and explanation for the decision to terminate a particular employee (Put another way) (a) reduction in work force due to economic conditions has been recognized as a legitimate, independent and nondiscriminatory reason for an employment decision" [Matter of Laverack & Haines v. New York State Division of Human Rights, 88 NY2d 734, 738-739 (1996)]. See also, Sheikh v. Habib Bank Limited, 270 AD2d 107 (1st Dept. 2000); Green v. Citibank, N.A., 299 AD2d 182 (1st Dept. 2002). Defendant has presented adequate evidence of the need for layoffs to reduce costs and that as part of the review "the business no longer needed and could no longer afford (the position of Quality Assurance Manager held by plaintiff and) no one was ever rehired for the position" (affidavit of Sheila Donahoe, ¶9). This downsizing also led to Pisacane's termination (Laura Schmidt EBT, p. 21-23). Plaintiff has not controverted the Company's proof that economic conditions required cost cutting, resulting in significant job terminations, and has not presented evidence "that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the

real reason” [Forrest v. Jewish Guild for the Blind, 3 NY3d supra at p. 305]. See also, Mete v. New York State Office of Mental Retardation and Developmental Disabilities, 21 AD3d 288 (1st Dept. 2005).

In conclusion, Defendant’s motion for summary judgment to dismiss the complaint is granted, and the Clerk shall enter judgment accordingly.

Dated: September 11, 2006


J.S.C.

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