Girard v VNU Inc.
2006 NY Slip Op 30847(U)
June 1, 2006
Supreme Court, New York County
Docket Number: 109305/2004
Judge: Karen S. Smith

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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KEITH GIRARD and SAMANTHA CHANG,

Plaintiffs,

-against-

VNU INC., VNU BUSINESS MEDIA INC., JOHN J. KILCULLEN, and KEN SCHLAGER

Defendants.

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Index no.: 109305/2004
Motion seq.: 006
Motion date: May 10, 2006

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiffs' motion, pursuant to CPLR § 2221, is denied.

In this action, plaintiffs Keith Girard and Samantha Chang seek damages for harassing and discriminatory behavior arising from their employment with defendant VNU. On March 13, 2006, this court issued a decision and order on defendants' motion to dismiss the complaint in its entirety and on defendants' alternative motion to dismiss the complaint as against defendants John Kilcullen and Ken Schlager individually. In that decision, this court dismissed plaintiff Samantha Chang's cause of action under New York State Executive Law § 296 and New York City Administrative Code § 8-107 for hostile work environment, dismissed the complaint as against defendant Ken Schlager, and denied the remainder of defendants' motions. Plaintiff's now seek leave to reargue and renew their opposition to the portion of defendants' motion to dismiss plaintiff Chang's cause of action for hostile work environment. The relevant facts were discussed at length in the court's March 13 decision and will not be repeated here.

To the extent that it seeks leave to reargue its opposition to defendants' summary judgment motion, plaintiffs' motion is denied.

To the extent that it seeks leave to renew plaintiffs' opposition to defendants' summary judgment motion, plaintiffs' motion is likewise denied. In its previous decision, the court held that rumors of an affair between Chang and Girard could not support a claim for hostile work environment because there was no evidence that the rumors were targeted at Chang because of her sex. Plaintiffs now seek to submit additional deposition testimony from Carla Hay, a VNU

employee, which they contend supports their claim that the rumors concerning an affair between Chang and Girard constituted harassing behavior towards Chang based upon Chang's sex. Specifically, plaintiffs submit testimony from Hay in which she describes the rumors as consisting of allegations that, in hiring Chang, Girard had hired his girlfriend, and that some people ignored the fact that Chang was qualified for her job. Plaintiffs argue that this deposition testimony is evidence that the rumors included claims that Chang had been hired because of her affair, not because of her abilities and were thus targeted at Chang because of her sex. Plaintiffs also submit deposition testimony from Hay concerning a relationship between Tim White, Girard's predecessor as Billboard's Editor-In-Chief, and Brad Bramberger a white male who worked under White and held the same position as Chang. Hay testified that White and Bramberger were friends outside of the office, that Bramberger was one of White's favorite employees and that, although some people did remark about it, no one ever complained about the close relationship between Bramberger and White. Plaintiffs argue that, because Bramberger was not subject to rumors of an affair despite his close relationship with White, this evidence tends to establish that the individuals who spread rumors concerning Chang and Girard were motivated by Chang's sex. Plaintiffs contend that they did not present this evidence on the previous motion because they believed that they had previously submitted adequate evidence to support their claim.

CPLR § 2221 (e) provides that a motion to renew "(2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion." Generally, the purpose of the motion to renew is to bring to the court's attention facts which were unknown to the movant at the time of the original motion. (*Tishman Construction Corp. v. City of New York*, 280 AD2d 374, 376 [1st Dept 2001].) However, in the interests of justice, a court may grant renewal upon facts which were known to the movant at the time of the original motion, so as not to defeat substantial fairness. (Id. at 376-377.) "A hostile work environment exists when, as judged by a reasonable person, it is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the circumstances of plaintiff's employment." (*McIntyre v. Manhattan Ford, Lincoln-Mercury*, 175 Misc2d 795, 802 [Sup. Ct., N. Y. County, 1997][*citing*

Harris v. Forklift Sys. 510 US 17, 21 [1993]]). To establish a *prima facie* case for a hostile work environment, plaintiff must show that (1) she is a member of a protected class, (2) the conduct or words upon which her claim is predicated were unwelcome, (3) the conduct or words were prompted solely because of her protected status, (4) the conduct or words created a hostile work environment which affected a term or condition of her employment, and (5) that the defendant is liable for the conduct. (Id. *[citing Trotta v. Mobil Oil Corp*, 788 F Supp 2d 1336 [SDNY 1992] *and Danna v. New York Telephone Co.* 752 F Supp 2d 594 [SDNY 1990].)) The conduct complained of must be both objectively and subjectively offensive; that is, a reasonable person must find it offensive and the plaintiff perceive it as such. (*San Juan v. Leach*, 278 AD2d 299, 301 [2nd Dept 2000].)

Regardless of whether plaintiffs were justified in not raising these facts on the previous motion, the evidence plaintiffs submit is not sufficient to set aside the court's prior ruling. Hay's testimony that the rumors consisted of allegations that Girard had hired his girlfriend is consistent with the existence of rumors about an alleged affair, but does not tend to establish that the rumors were targeted at Chang because of her sex or any other protected characteristic. Moreover, while Hay's statement that certain people disregarded that Chang was qualified for her position may support plaintiffs' assertion that the rumors consisted of allegations that Chang was hired because of the affair, there is no evidence Chang was aware that the rumor about an affair consisted of such a claim while she was employed at VNU. Hence, Chang cannot now claim that such a rumor contributed to a hostile work environment.

The evidence concerning the relationship between White and Bramberger is similarly unavailing. Plaintiffs argue that the absence of rumors of a relationship between White and Bramberger demonstrates the disparate treatment of Chang and Bramberger. Plaintiffs argue that this constitutes evidence that the individuals who spread rumors about Chang were motivated to do so because of her sex. Evidence of disparate treatment of similarly situated employees normally arises as proof of discriminatory intent in a claim for damages arising from an adverse employment action. (*See, eg Cross v. New York City Transit Authority*, 417 F3d 241 [2nd Cir 2005]; *Shumway v. UPS, Inc.*, 118 F3d 60 [2nd Cir 1997]; *Chacko v. Dynair Services, Inc.*, 2001 US Dist LEXIS 24498 [EDNY 2001].) On a hostile work environment claim, the inquiry is focused not on the intent or motivation of the perpetrator but rather on the nature of the conduct itself. (*McIntyre*, 175 Misc2d

at 802 ["A hostile work environment exists when, as judged by a reasonable person, it is permeated by *discriminatory intimidation, ridicule, and insult* that is sufficiently severe or pervasive to alter the circumstances of plaintiff's employment."][emphasis added].) Hay's testimony concerning White and Bramberg could only possibly be probative on the question of the intent of the parties spreading rumors about Girard and Chang, certainly not on whether the rumors themselves were discriminatory in nature.

Plaintiff's remaining arguments are without merit. Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to reargue and renew their opposition to defendant's summary judgment motion is denied.

Dated: June 1, 2006
New York, New York

ENTER:

J.S.C.