

Wilson v Privett Special Risk Servs.

2007 NY Slip Op 30435(U)

March 15, 2007

Supreme Court, New York County

Docket Number: 0109966

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C. Justice

PART 1

Index Number : 109966/2006

WILSON, GALE

vs

PRIVETT SPECIAL RISK SERVICES

Sequence Number : 001

DISMISS ACTION

INDEX NO. 109966/096

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1


2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached decision and order,*

FILED
MAR 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 15, 2007



MARTIN SHULMAN 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: I.A.S. PART 1

-----X
GALE WILSON,

Plaintiff,

-against-

PRIVETT SPECIAL RISK SERVICES, LLC;
DONALD PRIVETT, PRESIDENT; and
WILLIAM LUI, SENIOR VICE PRESIDENT,

Defendants.

-----X

HON. MARTIN SHULMAN, J.S.C.:

Plaintiff Gale Wilson ("Wilson" or "Plaintiff") commenced this action against defendants Privett Special Risk Services, LLC ("Risk Services"), Risk Services' president, Donald Privett ("Privett"), and senior vice-president, William Lui ("Lui") (collectively the "Defendants"), asserting three causes of action against Defendants predicated upon New York State Executive Law § 296, *et. seq.* Wilson seeks damages arising out of alleged discriminatory acts against her based upon sex and national origin (the "Complaint"). Defendants move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the unverified Complaint on the grounds that the Complaint fails to state a cause of action and the documentary evidence establishes that Defendants had a legitimate business reason to terminate Plaintiff's at-will employment.

COMPLAINT

The Complaint sets forth the following factual averments which are assumed to be true for purposes of this motion. Risk Services is an insurance brokerage firm. Privett and Lui interviewed Plaintiff, a woman of Trinidadian national origin, and Risk

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DECISION/ORDER

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Services ultimately hired her in April 2005 as an assistant vice-president. At that time, Risk Services had sixteen (16) employees, Wilson being the only one of Trinidadian national origin.¹

The Complaint further alleges *inter alia* as follows:

Lui worked directly with Dorothy Hagenberg, Surma Jahan (“Jahan”), David Ashe (“Ashe”) and Plaintiff and, with the exception of Dorothy Hagenberg, Lui “harassed” each of them “on a continuous basis.” Plaintiff further alleges that she and Ashe were involuntarily terminated, while Jahan “left under compulsion” (Complaint at ¶7);

Lui was supposed to train Plaintiff but never did so. Instead, Dina Mountcastle (“Dina”) trained Plaintiff on “computer application”. Plaintiff alleges she “was assigned tasks she had not been trained for . . .” Plaintiff spoke to Dina about not being trained by Lui, resulting in discussions between Dina, Lui and Privett. Privett said he “would show her [Plaintiff] how to function effectively in the various tasks of the company [Risk Services]”. Although Plaintiff was supposed to work with Privett she was assigned to Lui. When Plaintiff spoke to Privett and requested to work with him, he responded that Wilson should get another job. (Complaint at ¶8);

Privett, who sat in front of Plaintiff, “continuously made remarks about women and that Ms. Wilson was a woman.” (Complaint at ¶9);

When Dina became pregnant Privett remarked to Wilson and others about Dina’s moods and the way she looked and walked (stating Dina “waddled like a duck”). Wilson also describes two (2) remarks Privett made, the first regarding a Trinidadian woman in his former office who could “drink the guys under the table and then went to the bathroom to throw up”, and the second involving a nanny he had with the surname Wilson and his statement that many with the surname Wilson were from Jamaica. In response to the second remark Plaintiff corrected Privett to the effect that she was not from Jamaica (Complaint at ¶10);

¹ The Complaint further states that as of April 1, 2005, Risk Services’ employees were all “Caucasian with the exception of William Lui who is Chinese; Surma Jahan who is from Bangladesh; Maribel Bustamente who is from Mexico; Jessica Hernandez who is of Puerto Rican national origin; David Ashe who was black” (Complaint at ¶12) and that during Plaintiff’s tenure at Risk Services all persons in authority at Risk Services were white males (Complaint at ¶9).

Privett frequently corrected Wilson's e-mails (Complaint at ¶10);

Beginning in June 2005 Lui demanded that Wilson meet with him every morning (Complaint at ¶10);

Lui and Privett consistently omitted Plaintiff from all meetings and conference calls (Complaint at ¶10);

Although Wilson was to travel twice to Chicago to meet with underwriters, Wilson only went once as the day before the second trip Privett "prevented it" (Complaint at ¶10);

Lui refused to speak directly with Wilson and only sent her e-mails. No other employee was treated this way (Complaint at ¶10);

Wilson was required to copy Lui and Privett on every e-mail she sent (Complaint at ¶10);

Wilson spent hours answering Lui's and Privett's e-mails (Complaint at ¶10); and

Wilson worked on the Benders Development Company account as Privett instructed. Privett and Lui "made the determination on property evaluations on this account" and Privett was responsible for marketing in that respect. Wilson made no error, but did as Privett instructed (Complaint at ¶11).

MOTION TO DISMISS A COMPLAINT

Executive Law § 296(1)(a) makes it an unlawful discriminatory practice for an employer to refuse to hire, to discharge, or to discriminate in compensation or in terms, conditions or privileges of employment because of, as relevant here, the national origin or sex of any individual. As stated in *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25 (1997): "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" (citing to 42 USC § 2000 *et seq.*). Because the statutory federal standards are

in conformity with the state statutory standards New York courts may rely upon title VII case law.

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211[a] [7]), a court must take all of the complaint's allegations as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998); *Marini v. D'Apolito*, 162 A.D.2d 391, 557 N.Y.S.2d 45 (1st Dept., 1990). Here, the scope of review is narrow and limited to determining whether the pleading states *any* cause of action, and not whether there is evidentiary support for the complaint. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977); *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314 (1976). The complaint must be liberally construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. *Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980).

The court must assume the complaint's allegations are true and must deem the complaint to allege whatever can be reasonably inferred therefrom, however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 A.D.2d 105, 489 N.Y.S.2d 182 (1st Dept., 1985); *see also, McGill v. Parker*, 179 A.D.2d 98, 582 N.Y.S.2d 91 (1st Dept., 1992); *Blitman Const. Corp. v. Kent Village Housing Co., Inc.*, 91 A.D.2d 173, 457 N.Y.S.2d 817 (1st Dept., 1983). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.*, 125 Misc.2d 530, 479 N.Y.S.2d 624 (Sup. Ct., Rich. Co., 1984).

As can be gleaned from the Complaint Plaintiff's claim for recovery is based upon "harassment"² with a proffered theory of discrimination based upon an alleged hostile work environment. In order for Wilson to state a claim for discrimination based upon a hostile work environment³ it is incumbent upon Plaintiff to allege that she: (1) is a member of a protected group; (2) was subjected to unwelcome sexual harassment; (3) the sexual harassment was based on her sex or national origin; (4) the sexual harassment affected a term, condition or privilege of employment; and (5) the defendant and/or defendants knew or should have known of the harassment and failed to take remedial action. See *Yukoweic v. Int'l Business Machines Inc.*, 228 A.D.2d 775, 643 N.Y.S.2d 747 (3rd Dept., 1996), *lv. to app. den.* 88 N.Y.2d 816, 651 N.Y.S.2d 17 (1996), citing *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F.Supp. 151 (S.D.N.Y., 1990).

It is clear that Plaintiff, a woman of Trinidadian national origin, has met the first requisite element, being a member of a protected group. Yet, having viewed the Complaint in the light most favorable to Plaintiff, the remaining elements of the claim are not sufficiently pleaded. To illustrate, Plaintiff summarily maintains that she is a victim of discrimination because she was "harassed on a continuous basis"; consistently subjected to a "pervasive hostile work environment by words and acts over time"; and

² The courts of this State recognize two varieties of unlawful harassment, one being quid pro quo claims (demand for sexual favors in exchange for employee benefits), which is not implicated here, and the other being "hostile work environment" claims.

³ In determining what constitutes "abusive work environment" harassment, the U.S. Supreme Court made it clear that a workplace must be free of discriminatory intimidation, ridicule and insult because such offensive conduct will inevitably alter the conditions of the worker victim's employment and create an abusive work environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

suffered *inter alia* severe emotional distress as a result thereof. To support the foregoing claims, the Complaint avers that: Wilson did not receive computer training from Lui; was not shown how to “function effectively in the various tasks of the Company [Risk Services]”; was assigned tasks she was not trained to perform, e.g., “underwriters”, “procedures for filing”, “how to set up files” and marketing”; Privett corrected Plaintiff’s e-mails; Lui demanded to meet with Plaintiff each morning; Privett and Lui, Plaintiff’s supervisors, omitted Plaintiff from meetings and conference calls; Privett prevented Plaintiff from attending a meeting with underwriters in Chicago; Lui refused to speak directly with Plaintiff and instructed Plaintiff to only communicate with him via e-mail (no other employee was treated this way); Privett “continuously made remarks about women and that Ms. Wilson was a woman” (Complaint at ¶19); Plaintiff was required to copy Lui and Privett with every e-mail she sent and Plaintiff spent hours responding to Privett’s and Lui’s e-mails; Plaintiff made no mistakes on the Bender’s Account; and Privett made a comment regarding the surname “Wilson”.

Evidently, for a relatively small company, Risk Services employed several employees of diverse national origins, as well as both genders. The fact that Wilson is a woman and Risk Services’ only employee of Trinidadian national origin, without more, renders Plaintiff’s claims deficient because, as to the remaining elements, the Complaint, without any salient factual recitation, merely states legal conclusions. Further, the Complaint’s factual allegations listed above are not “severe or pervasive enough to create an objectively hostile or abusive work environment . . . that a reasonable person would find hostile or abusive . . .” *Harris v. Forklift Systems, Inc.*, *supra*.

Inasmuch as the Complaint's factual recitations *inter alia* neither explicitly nor impliedly link the Plaintiff's gender or national origin to the perceived treatment Plaintiff claims to have been subjected to nor to Plaintiff's termination from Risk Services, the Complaint is deficient. Consequently, the Complaint fails to adequately state causes of action for discrimination based upon a hostile work environment.

As can be discerned from the Complaint, the factual allegations of "harassment" are inextricably tied to Plaintiff's contention that she suffered severe emotional distress, mental anguish, humiliation, depression, anxiety and loss of sleep (collectively referred to as "Distress Claims"). In order to state a claim for intentional infliction of emotional distress, Plaintiff must plead and prove four elements: 1) extreme and outrageous conduct; 2) the intentional or reckless nature of such conduct; 3) a causal relationship between the conduct and the resulting injury; and 4) severe emotional distress. See *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350 (1993). In evaluating such claims the courts of this State have adopted the rule articulated in §46, sub. (1) of the Restatement of Torts, which states as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress". See *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983)("Comment d to that section notes that: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").


With respect to Wilson's Distress Claims, having viewed the Complaint liberally and in light of the stated standard of review, this court finds that the factual allegations of the Complaint *inter alia* cannot be considered to be "outrageous in character", "so extreme in degree", or seen as "atrocious, and utterly intolerable in a civilized community". Therefore, Plaintiff's Distress Claims also fail to state a cause of action.

Accordingly, it is hereby

ORDERED that the Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court. A copy of this decision and order has been sent to counsel for plaintiff and defendants.

Dated: New York, New York
March 15, 2007



Hon. Martin Shulman, J.S.C.

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