Dole v Prime Care Physicians, P.C.
2007 NY Slip Op 30932(U)
April 25, 2007
Supreme Court, Albany County
Docket Number: 0008592/0031
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
LINDA DOLE,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 859-03
RJI NO. 01-06-086454

PRIME CARE PHYSICIANS, P.C.,

Defendant.

Supreme Court Albany County All Purpose Term, April 6, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

The DeLorenzo Law Firm, LLP
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Schenectady, NY 12307

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George F. Carpinello, Esq.
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TERESI, J.:

Defendant by notice of motion seeks an order pursuant to CPLR § 3212 dismissing the Plaintiff's complaint. Plaintiff opposes the motion.

Plaintiff commenced this action to recover damages she claims to have suffered as a result of alleged sexual harassment by her supervisor, Marjorie Foote ("Foote"), and retaliation by Defendant, which was her employer, Prime Care Physicians.

Plaintiff claims that she had been employed by Defendant as an office manager for approximately one month before Foote, a long-standing employee who was married with four children, kissed Plaintiff on her cheek and asked where she had been for the last seventeen years. Plaintiff claims that a couple weeks later, Foote tried to hug and kiss Plaintiff and that Plaintiff pushed Foote away and told her to stop. Plaintiff claims that Foote repeatedly asked Plaintiff to go to lunch and dinner and to have drinks with her and that Plaintiff refused. Plaintiff also claims that on one occasion, Foote spoke to Plaintiff about the status of Foote's sexual relationship with her husband. Plaintiff claims that she never saw Foote act this way toward any males in the office.

Plaintiff claims that when she attempted to report Foote's conduct to Dr. Drislane, one of the physicians in her office and a shareholder of Defendant, Dr. Drislane told Plaintiff that she did not want to hear any complaints about Foote. Plaintiff claims that on the next day, Foote confronted Plaintiff about Plaintiff's complaint to Dr. Drislane and stated that she had a great deal of power in the office and was willing to use it.

Following this encounter, Plaintiff reported these incidents, with the exception of her conversation with Dr. Drislane and her following conversation with Foote, to John Lutz ("Lutz"), the CEO of Prime Care Physicians.

Plaintiff contends that she suffered retaliation because of her complaints, consisting of the following: the doctors generally stopped talking to her; Foote spent too much time in Plaintiff's office, which made Plaintiff uncomfortable; Lutz asked Plaintiff to bring a list of problems that the office was experiencing and what she had done and could do to resolve the problems to an office meeting, which she had never been asked to do before; and Plaintiff was not put in charge

of the agenda for that meeting. Plaintiff also accuses Foote of stealing a small amount of money from Plaintiff's payment drawer while Plaintiff was met with Dr. Drislane and Lutz.

Following the meeting to discuss problems in the office, Plaintiff left the office, went to her doctor's office, and did not return to work. Subsequently, Defendant received a note from the nurse practitioner who worked at her doctor's office, indicating that Plaintiff should stay out of work until cleared by a cardiologist. Defendant received another note from Plaintiff's cardiologist stating that Plaintiff was under his care for hypertension and would remain out of work. Plaintiff never returned to work. Plaintiff claims to have been "constructively discharged."

Contrary to Plaintiff's claims, the male CEO of Defendant and two female physicians, claim that Foote hugged them and other employees, and sometimes gave other doctors or employees a kiss on the cheek as an expression of friendship and support.

Defendant also claims that after Plaintiff complained to Lutz, Lutz, Dr. Drislane and Dr. Rappazzo interviewed Foote to investigate the allegations. Defendant claims Foote stated that she had hugged Plaintiff and kissed her on the cheek to console Plaintiff when she was crying. Defendants claims that Foote said she had never asked Plaintiff to lunch individually. Foote was told that touching, hugging, kissing or having other physical conduct with co-workers was against Defendant's policy and that unwelcome contact would lead to termination.

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue.'" Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether summary judgment is warranted, the court's primary function is issue identification, not issue

determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

The plaintiff must demonstrate the following elements to establish a prima facie case of sexual harassment resulting in a hostile work environment:

> (1) [the plaintiff] belongs to a protected group, (2) [the plaintiff] was the subject of unwelcome sexual harassment, (3) the harassment was based on [the plaintiff's] sex, (4) the sexual harassment affected a term, condition or privilege of employment, and (5) the employer knew or should have known of the harassment and failed to take remedial action.

Yukoweic v. Int'l Bus. Machines, Inc., 228 A.D.2d 775, 776 (3d Dept. 1996) (quoting Fair v. Guiding Eyes for the Blind, Inc., 742 F. Supp. 151, 155 (S.D.N.Y. 1990)). The standard for proving hostile work environment is the same in both New York and federal law. Yukoweic, 228 A.D.2d at 776.

The plaintiff may establish the first and second elements of such a sexual harassment claim by stipulating that the plaintiff is a woman (or a man) and that the plaintiff "regarded the conduct [at issue] as undesirable or offensive." Trotta v. Mobile

682 F.2d 897, 903 (11th Cir. 1982)).

To establish the third element, the plaintiff must show that the conduct at issue was "prompted simply because of the [plaintiff's] gender . . . ." Trotta, 788 F. Supp. at 1348 (quoting Carrero v. New York Housing Authority, 890 F.2d 569, 578 (1989)).

To establish the fourth element, "the conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Trotta, 788 F. Supp. at 1349 (citing Meritor Sav. Bank, FDB v. Vinson, 477 U.S. 57, 67 (1986); Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991)).

To establish the final element, the work environment must be considered objectively hostile or abusive based on the totality 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." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). In order for the work environment to be found hostile or abusive, "the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998).

The Third Department has found that where an employer takes "immediate and adequate measures to ensure that the alleged offensive behavior would cease," the employer has not created a hostile or abusive work environment. Pace v. Ogden Services Corp., 257 A.D.2d 101, 103-04 (3d Dept. 1999) (affirming a decision granting summary judgment in a sexual harassment case).

Plaintiff has failed to demonstrate that the conduct at issue was based on her sex

or gender. Further, the offensive behavior, which consisted of hugging, a kiss on the cheek and certain comments about Foote's sex life, did not continue after Lutz spoke to Foote within a day of Plaintiff's complaint to him about Foote's conduct. Hence, Plaintiff has not established a prima facie case of sexual harassment resulting in a hostile and abusive work environment.

To establish a prima facie case for retaliation, "the plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 310 (2004); see also Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998).

To satisfy this standard, the plaintiff must show that the claimed retaliation resulted in a "'materially adverse change' in the terms and conditions of employment." Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000)). A materially adverse change may consist of termination, demotion, "a material loss of benefits, [or] significantly diminished material responsibilities. . . ," but cannot consist simply of "a mere inconvenience or an alteration of job responsibilities." Id., 202 F.3d at 640 (quoting Crady v. Liberty Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)).

Further, the plaintiff cannot "avoid summary judgment 'by merely pointing to the inference of causality resulting from the sequence in time of the events.'" Forrest, 3 N.Y.3d at 313 (2004) (quoting Chojar v. Levitt, 773 F. Supp. 645. 655 (S.D.N.Y. 1991)).

Here, Plaintiff claims that the changes in her working condition consisted of

doctors not talking to her as they had previously; Foote spent too much time in Plaintiff's office; Lutz asking her to bring to an office meeting a list of problems that the office was experiencing, what she had done to resolve the problems and possible future solutions; her not being put in charge of the agenda for that meeting; and Foote taking money from her drawer. These claims do not suffice to show that Plaintiff suffered a materially adverse action such as a demotion or material loss of benefits. Plaintiff also failed to establish causality, since the only connection Plaintiff draws between her complaint to management and these events is that they occurred soon after she made her complaint.

Therefore, after a full review of the record, the court grants Defendant's motion for summary judgment.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: April 25 2006
Albany, NY

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment dated February 27, 2007.
2. Affirmation in Support of Motion for Summary Judgment of Carla Hogan, Esq. dated February 27, 2007 with Attached Exhibits A - E.
3. Affidavit in Support of Motion for Summary Judgment of Mary Ellen Drislane, M.D. dated February 26, 2007 with Attached Exhibits A - B.
4. Affidavit in Support of Motion for Summary Judgment of John A. Lutz dated February 14, 2007 with Attached Exhibits A - D.
5. Affidavit in Support of Motion for Summary Judgment of Mary E. Rappazzo, M.D. with Attached Exhibits A - E.
6. Affirmation in Opposition to Motion for Summary Judgment of Thomas E. DeLorenzo, Esq., undated.
7. Affidavit in Opposition to Motion for Summary Judgment of Linda Dole dated March 29, 2007 with Attached Transcript of Examination Before Trial of Linda Dole and Exhibits
   1 - 3.
8. Reply Affidavit in Support of Motion for Summary Judgment of John A. Lutz dated April 4, 2007.