SHORT FORM ORDER

INDEX No. 04-17712
CAL. No. 06-01602-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12/8/06
ADJ. DATE 2/9/07
Mot. Seq. # 003 - MD

MARYANN McCULLOH, Plaintiff, - against - NBTY, INC., VITAMIN WORLD, INC., JEFF SCHNEIDER and BILL DOHERTY, Defendants.	MICHAEL F. MONGELLI II, P.C. Attorney for Plaintiff 41-07 162nd Street Flushing, New York 11356 FARRELL FRITZ, P.C. Attorneys for Defendants 14th, West Tower Uniondale, New York 11556-1320

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 30; Replying Affidavits and supporting papers _____; Other 16; 31; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by the defendants for summary judgment dismissing the complaint, pursuant to CPLR 3212, is denied.

The supplemental summons and amended verified complaint in this action were filed on or about October 26, 2004, and issue was joined by the filing of defendant's answer on or about December 9, 2004. The second cause of action in the instant matter was withdrawn by stipulation of the parties on December 3, 2004. Discovery has been completed, and the note of issue was filed on or about July 10, 2006.

This is an action pursuant to New York State Executive Law § 296 (1) (a) for sex discrimination in employment. Plaintiff, Maryann McCulloh (McCulloh), alleges in the amended verified complaint that she was wrongfully terminated from her employment by the defendants, NBTY, Inc., Vitamin World, Inc., Jeff Schneider and Bill Doherty (collectively referred to hereafter as "NBTY") on October 21, 2003 solely on account of her gender. Plaintiff alleges that she began working for NBTY on or

about May 1997 and was continuously employed by the defendants through October 21, 2003. Plaintiff alleges that while she was pregnant with her son, issues arose concerning her ability to travel on company business. Plaintiff alleges that after her son was born, both prior to and after her return to her employment, Mr. Schneider on more than one occasion commented on her ability to handle her job and motherhood. Plaintiff alleges that after returning to work, limitations were placed on her position, and her inquiries concerning a new training position were dismissed with veiled reference to her responsibilities as a woman and as a mother. Plaintiff states that during the course of her employment, she received positive evaluations and, at the time of her discharge, she was one of the most senior regional managers. Plaintiff alleges that during the course of her employment she did not receive any disciplinary warnings or reprimands and she was never told that she did not perform her duties as expected. Plaintiff alleges that between October 2002 and February 2004, fifteen women in upper management, including plaintiff, were discharged from employment with the defendant companies and were replaced by men. Plaintiff alleges that the reason for her termination was pre-textual and that she was terminated in violation of New York Executive Law § 296 because of her gender.

Defendant NBTY now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that plaintiff waived any and all claims for discrimination when she executed an arbitration agreement pre-employment, that she failed to establish a prima facie case for sex discrimination, and based on defendants' legitimate non-discriminatory business reason for termination, there is no evidence of pretext. In support of its motion NBTY submits, *inter alia,* an affirmation of counsel, which is limited to reciting the exhibits attached[1], copies of the pleadings, excerpted copies of the examination before trial deposition transcripts of Maryann McCulloh, Jeff Schneider, Bill Doherty and Jeryl Griesing, a copy of the pre-employment arbitration agreement and copies of e-mail printouts between the defendants and employees dated between October 16, 2003 and October 19, 2003 relating to a loss prevention hot-line complaint referencing plaintiff.

Plaintiff opposes the motion on the grounds that defendants failed to plead the affirmative defense of arbitration in their answer and failed to raise this defense at any time prior to filing the within motion to the detriment and prejudice of the plaintiff, and that plaintiff has established a prima facie case of discrimination since plaintiff was qualified for the position and the circumstances surrounding her termination give rise to an inference of discrimination. Furthermore, plaintiff has adequately shown that the alleged reason for her termination was pre-textual since it is based solely on her alleged poor work performance on one day, October 7, 2003, despite a work history of six years without a grievance or complaint. Plaintiff submits in opposition, *inter alia*, an affirmation of counsel, copies of the deposition transcripts of Maryann McCulloh, Bill Doherty, Jeff Schneider, non-party witness Jeryl Griesing, non-party witness Patricia Ciccarone, and several copies of e-mails between the defendants and employees, dated between October 16, 2003 and October 28, 2003, specifically referencing the plaintiff.

---

[1] Pursuant to CPLR 3212 (b) an affidavit in support of a summary judgment motion shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit (CPLR 3212 [b]). Counsel's affirmation fails to meet these requirements.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial (*see,* ***Romano v St. Vincent's Medical Center,*** 178 AD2d 467, 577 NYS2d 311 [1991]). In addition, the party opposing summary judgment is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (***Nicklas v Tedlen Realty Corp.,*** 305 AD2d 385, 759 NYS2d 171 [2003]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (*see,* ***Schulz v Esposito,*** 210 AD2d 307, 619 N YS2d 774 [1994]), and since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact or where the material issue of fact is "arguable," summary judgment must be denied (*see,* ***Salino v IPT Trucking***, 203 AD2d 352, 610 NYS2d 77 [1994]).

A plaintiff in an employment discrimination case has the initial burden of showing, prima facie, (1) that the employee is a member of a protected class, (2) that she was discharged, (3) that she was qualified for the position, and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination (***McDonnell Douglas Corp. v Green,*** 411 US 792; ***Ferrante v American Lung Assn.,*** 90 NY2d 623). This burden, however, is "de minimus" (***LaFond v General Physics Servs. Corp.,*** 530 F3d 165, 173; ***Sogg v American Airlines,*** 193 AD2d 153, 162, *lv dismissed* 83 NY2d 846, *lv denied* 83 NY2d 754). In the instant matter, the first two prongs of the analysis are undisputed; defendant, however, claims that plaintiff was no longer "minimally" qualified for her position as regional manager due to her alleged disregard of her job responsibilities on October 7, 2003 and that plaintiff failed to demonstrate that her discharge occurred under circumstances giving rise to an inference of sex discrimination. This court disagrees.

First, defendants Jeff Schneider (Schneider) and Bill Doherty (Doherty) in their depositions admit that their duties and responsibilities within defendant NBTY and its subsidiary defendant Vitamin World overlap to such a degree that they are indistinguishable on a day-to-day basis. It is undisputed that Schneider is the president of Vitamin World and that Doherty is the senior vice president of Vitamin World. Both defendants Schneider and Doherty testified that they are ultimately responsible for personnel decisions such as hiring and firing of employees of Vitamin World and that they made the decision to discharge plaintiff. Defendants claim that the events on October 7, 2003 precipitated plaintiff's discharge and that they conducted an internal investigation of plaintiff based on a "hot-line complaint." However, the evidence presented by defendants in e-mails clearly shows that they were presented with contradictory evidence concerning the facts in the hot-line complaint and that they ignored the contradictions choosing instead to fire plaintiff.

The primary reason given for plaintiff's termination involves the fact that on October 7, 2003, it was claimed that plaintiff, who was a regional manager, spent the majority of the day in the back room of the Commack store instead of helping sales associates on the selling floor on a special sale day. However, it is undisputed that regional managers did not have their own offices and that their ability to communicate with the home office necessitates their hooking up their laptop computers in the back room of one of the stores. The testimony of both Schneider and Doherty stressed the necessity of the

regional manager's being on the selling floor and downplayed her necessity to communicate with the home office on the laptop. In contrast, Patricia Ciccarone, former senior vice president and senior operating officer of Vitamin World, testified that it would not ordinarily be necessary for regional managers to be on the selling floor, even on a special promotion day, but that they would ordinarily be in the back room running reports, responding to e-mails and would be in communication with the home office through their laptop. This contradiction, together with the fact that plaintiff was summarily discharged without being afforded the opportunity to address the complaint, begs the question of whether the reason for plaintiff's discharge, as opposed to a verbal or written reprimand, was pre-textual.

Furthermore, defendants state that plaintiff's claims concerning "a handful of stray remarks" concerning her job responsibilities and motherhood do not support an inference of discrimination. Defendants argue that stray remarks by non-decision makers, or statements by decision makers unrelated to the decisional process itself, will not raise an inference of discrimination (*citing* ***Price v Waterhouse v Hopkins,*** 490 US 228, 277 [1989]; ***Schreiber v Worldco, LLC,*** 324 F Supp2d 512, 518 [2004]). With regard to verbal comments the court considers (1) who made the remark and whether that person was a decision-maker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the decision-making process (***Schreiber v Worldco, LLC***, *supra).* Furthermore, a stray remark or, as in this case, several remarks may have a " 'more ominous significance' when considered within the totality of the evidence" (*id.; quoting* ***Danzer v Norden Systems, Inc.,*** 151 F3d 50, 56 [1998]). In the instant matter: all of the remarks were made by a decision-maker except for one; the remarks were made in the time period encompassing plaintiff's pregnancy, the birth of her child, her return to work and were within approximately a year of plaintiff's discharge; the contents of the remarks involved her ability to juggle her work responsibilities and motherhood including her ability to travel, which the defendant decision-makers saw as fundamental to her position as a regional manager. Thus, while defendants argue that the verbal comments were only "stray remarks" it should be for a jury to decide since the remarks were made by decision-makers and the remarks were made in relation to the decision-making process and involved her job responsibilities and her responsibilities as a woman and mother.

In conjunction with the above plaintiff also alleges that between October 2002 and February 2004 approximately fifteen women, in upper management positions, were terminated by the defendants and replaced with men. The testimony of defendants Schneider and Doherty as well as the testimony of plaintiff and non-party witnesses Jeryl Griesing and Patricia Ciccarone do not contradict this claim but instead confirm that during this period of time several female employees were discharged or left their employment with Vitamin World as opposed to male employees.

In general, "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means" (***Matter of New York City Bd. of Educ. v Batista,*** 54 NY2d 379, 383, 446 NYS2d 1, 2 [1981], *quoting* ***300 Gramatan Ave. Assoc. v State Div. of Human Rights***, 45 NY2d 176, 183; *see,* ***Matter of Holland v Edwards,*** 307 NY 38, 45, 1954 NY Lexis 1009 [1954]). Viewing the evidence presented herein as a whole and drawing all reasonable inferences in favor of the plaintiff (***Nicklas v Tedlen Realty Corp.,*** *supra*), a reasonable jury could find that plaintiff's gender was a factor in her dismissal or that an inference of discrimination

existed. Therefore, based on the totality of the circumstances (***Novak v Royal Life Ins. Co. of New York, Inc.***, *supra*), defendant failed to present prima facie proof to overcome plaintiff's claim of gender discrimination (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1985]).

Defendants also claim that plaintiff's complaint must be dismissed because plaintiff waived any and all claims for discrimination when she executed an arbitration agreement prior to her employment with Vitamin World. Plaintiff argues, however, that defendants failed to raise the arbitration agreement in their responsive pleading or subsequent motions to dismiss, and therefore, they have waived this defense, and this court agrees.

CPLR 3018 (b) states "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading . . ." (CPLR 3018 [b]). Thus, in general, an affirmative defense is deemed waived if not raised in the pleadings, and such a waiver can only be retracted by amendment of the answer. In addition, CPLR 3211 (e) states that "any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading." Defendants failed to plead the existence of an arbitration agreement in their answer and did not seek to amend their answer (***Surlak v Surlak,*** 95 AD2d 371, 383, 466 NYS2d 461, 470 [1983]); they also failed to raise the existence of the arbitration agreement in their prior motions to dismiss in accordance with CPLR 3211 (a) (1). Furthermore, at no time during the pendency of this action have defendants moved to stay the action and compel arbitration under CPLR 7503. Defendants have, however, utilized discovery procedures evincing acceptance of the judicial forum to address plaintiff's complaint. Where defendants' participation in a lawsuit manifests an affirmative acceptance of the judicial forum, such as contesting the merits of the action through the judicial process, the taking of depositions and the filing of a note of issue for trial, a later claim asserting arbitration is incongruous (***DeSapio v Kohlmayer,*** 35 NY2d 402, 405, 362 NYS2d 843, 846 [1974]), especially on the eve of trial, and constitutes a waiver.

Accordingly, the motion for summary judgment in favor of the defendants is denied.

Dated: JUL 16 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**