SHORT FORM ORDER

INDEX No. 03-29405
CAL. No. 06-02260-OT

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 2/16/07
ADJ. DATE 3/30/07
Mot. Seq. # 001 - MD

YAVON SIMPSON, Plaintiff, - against - COMPUTER ASSOCIATES INTERNATIONAL, INC. d/b/a COMPUTER ASSOCIATES, Defendant.	LOUIS GINSBERG, P.C. Attorneys for Plaintiff 1613 Northern Boulevard Roslyn, New York 11576 FARRELL FRITZ, P.C. Attorneys for Defendant 1320 Reckson Plaza Uniondale, New York 11556

Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 34 - 42 ; Replying Affidavits and supporting papers 43 - 45 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint against it is denied.

Plaintiff commenced this action in accordance with Executive Law § 296, alleging that she has suffered damages as a result of sex discrimination due to a hostile work environment and a retaliatory discharge in the course of her employment with defendant. By her complaint plaintiff alleges that she was hired by defendant to work as a Call Center Representative in January 2000 and performed her job responsibilities in a competent manner. In August of that year, she discovered that she had been the subject of a series of e-mail messages shared by her immediate supervisor, Michael Lupia, and another co-worker, Bryan Spano. The undisputed content of these e-mails, dated February 9, 2000, is as follows:

Lupia: hey you see the size of Yavon's tits?
Spano: no man...I haven't paid close enough attention...are they supple?
Lupia: The type you put your face in the middle of
Spano: I just got a good glance...those things are so perfect...her nipples are probably the size of apples
Lupia: or mangos
Spano: like big, dark pearly mangos...yum

By her complaint plaintiff also alleges that she brought the e-mails to the attention of Mr. Lupia's supervisor, Kathy Migiliano, who said she would look into the matter. At her deposition plaintiff testified that she also complained that Mr. Lupia had sent an e-mail to all the members of their group stating that all the women should make their calls without their tops on and that Mr. Lupia told one of their co-workers, Chanel Maye, that he wanted to have sex with plaintiff. Plaintiff was then approached by Mr. Lupia, who told plaintiff that she had better not talk to Ms. Migliano about him again. Plaintiff further alleges that after she complained about Mr. Lupia's behavior, defendant's attitude towards her as an employee changed, and she was unfairly denied time off for medical care. Plaintiff asserted that she was given an unfavorable annual performance review, which was largely based upon comments from Mr. Lupia who, at that time, was no longer her supervisor. When she objected to the inclusion of Mr. Lupia's poor assessment of her work in her performance review, which she regarded as motivated by Mr. Lupia's anger at plaintiff's complaint about him, plaintiff's current supervisor, Donna Amendolia, told plaintiff that she better drop it because nothing more would be done about it. In March 2001 plaintiff requested a day's sick leave and was denied such even though she presented a doctor's note. On or about April 16, 2001, plaintiff wrote a letter to defendant's CEO regarding her claims of sexual harassment. The next day she received a memo from Adam Feirstein of defendant's Human Resources Department, advising plaintiff that he had completed his investigation and found no evidence of such conduct. Approximately one-half hour later she received a letter from Mr. Feirstein terminating her employment.

A hostile work environment exists when 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. Even a single incident of sexual harassment can create a hostile work environment if the alleged conduct is sufficiently severe. To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning or approving it (***Beharry v Guzman,*** 33 AD3d 742, 823 NYS2d 195 [2006]). To establish a claim for unlawful retaliation under Executive Law § 296 [7], a plaintiff must show that (1) she has engaged in a protected activity, (2) her employer was aware that she participated in that 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 (***id.***).

Defendant now moves for summary judgment dismissing the complaint on the basis that plaintiff cannot make a prima facie showing of sex discrimination, and based on defendant's legitimate non-discriminatory business reason for terminating her employment, there is no evidence of pretext. Defendant complains that plaintiff was fired for nondiscriminatory reasons related to her poor work performance. Among other problems, defendant claims that plaintiff was chronically late for work and was excessively absent from work. In support, defendant's submissions include the affirmation of its counsel, which is limited in its content to a recitation of the exhibits attached, a memorandum of law, copies of the pleadings, unauthenticated copies of documents purportedly from defendant's personnel files, and a copy of the transcript of the deposition testimony given by the plaintiff.

A three-part analysis applies to summary judgment motions where a plaintiff alleges employment discrimination (*see,* ***Singh v State,*** 40 AD3d 1354, 837 NYS2d 378 [2007]). A plaintiff asserting a claim of discrimination under Executive Law § 296 has the initial burden to establish prima facie 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 action occurred under circumstances that would give rise to an inference of discrimination (***Schwaller v Squire, Sanders & Dempsey,*** 249 AD2d 195, 671 NYS2d 759 [1998]). When that low threshold is met, the burden shifts to the employer to rebut the presumption of discrimination by setting forth admissible evidence of legitimate and nondiscriminatory reasons for the termination. To establish entitlement to summary judgment in a case alleging discrimination, defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether its explanations were pretextual (***Morse v Cowtan & Tout, Inc.,*** 41 AD3d 563, 838 NYS2d 162 [2007]). If the employer sufficiently proffers such reasons, the plaintiff can avoid summary judgment by proving that the employer's stated reasons were merely a pretext for discrimination, demonstrating that the stated reasons were false and that discrimination was the real reason (***Singh v State,*** *supra*). Generally, a plaintiff is not required to *prove* her claim to defeat summary judgment. To defeat a motion for summary judgment after the employer meets its burden, plaintiff must show that there is a material issue of fact as to whether the employer's asserted reasons are false or unworthy of belief and that it is more likely than not that discrimination was the real reason for the challenged action (***Ferrante v American Lung Assoc.,*** 90 NY2d 623, 665 NYS2d 25 [1997]). It is not the court's function on a motion for summary judgment to assess credibility. Moreover, in accordance with the oft-cite standards for summary judgment, it is the movant who has the burden to establish its entitlement to summary judgment as a matter of law. Thus, to prevail, in this case, defendants must demonstrate plaintiff's firing was based upon nondiscriminatory reasons (***id.***).

In the matter at hand, the allegations of her complaint and her deposition testimony are sufficient to satisfy plaintiff's minimal threshold burden of making a prima facie showing of discrimination; thus it became defendant's burden to establish by proof, in admissible form, that

plaintiff was not in fact subject to discrimination and that her employment was terminated for legitimate business reasons. This defendant has failed to do. The supporting affidavit of defendant's counsel is made without the affiant's having personal knowledge of the facts and is therefore without probative value. Similarly, the documents and memorandum attached to counsel's affidavit, the bulk of which apparently emanates from defendant's personnel records, are unauthenticated and thus, again, are without probative value. Notably absent from defendant's submissions is an affidavit or the deposition testimony from any representative of the defendant corporation who can attest to the accuracy of these records and who possesses personal knowledge of the reasons for plaintiff's termination. In the absence of such evidence the Court is constrained to deny defendant's request for summary judgment (*see,* ***Barnes-Pierce v McDermott,*** 198 AD2d 635, 603 NYS2d 921 [1993]).

Accordingly, defendant's motion is denied.

Dated: 10/16/07

Emily Pines
J.S.C.

____FINAL DISPOSITION _X_NON-FINAL DISPOSITION