

Hernandez v Research Found. of City Univ. of N.Y.

2007 NY Slip Op 34139(U)

December 13, 2007

Supreme Court, New York County

Docket Number: 0117013/2005

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN
Justice

PART 52

Index Number: 117013/2006

INDEX NO. 117013/05

HERNANDEZ, PAVEL

MOTION DATE 11/7/07

vs

RESEARCH FOUNDATION

MOTION SEQ. NO. 001

Sequence Number: 001

MOTION CAL. NO. 9

SUMMARY JUDGMENT

notion to/for SJ

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted for the reasons stated in the annexed decision & order of today's date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED

DEC 21 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/13/07

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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

PAVEL HERNANDEZ,
Plaintiff,

against

RESEARCH FOUNDATION OF THE CITY UNI-
VERSITY OF NEW YORK, CITY UNIVERSITY OF
NEW YORK and LINDA ROMA,
Defendants.

-----X

Index Number 117013/2005
Mot. Submit Date Nov. 7, 2007
Mot. Seq. No. 001
Cal. No. 9

DECISION AND ORDER

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Papers considered in review of this motion for summary judgment:

Papers

Notice of Motion, Affidavits, Exhibits, Memo of Law
Affirmation in Opposition, Exhibits
Reply Affirmation, Exhibits, Reply Memo of Law, Aff. of Service

Numbered

1, 2
4, 5,

FILED

DEC 21 2007

NEW YORK
COUNTY CLERKS OFFICE

PAUL G. FEINMAN, J.:

Defendants Research Foundation of the City University of New York (the Foundation) and Linda Roma move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Plaintiff has withdrawn all of his claims against defendant City University of New York. For the reason set forth below, the motion is granted.

Procedural and Factual Background

The complaint alleges five causes of action: (1) discrimination on the basis of gender, in violation of the New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York § 8-101, et seq.; (2) hostile work environment, also in violation of the NYCHRL; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) defamation.

In or about May 2002, the Foundation hired plaintiff as a Job Developer in the Center for Continuing Education and Workforce Development (the Center) at the Borough of Manhattan

Community College (BMCC). In addition to providing continuing education, the Center administers a number of locally-funded and state-funded programs that assist individuals to find jobs. Within several months, Roma, who was the Program Manager, that is, the highest level administrator, of the Center's Employment Services Department (ESP), Direct Care Counselor Program (DCC), and the STEP program, recruited plaintiff to work for her as a Placement Specialist in the ESP program. In that position plaintiff sought to place people in technology-related jobs. Several months thereafter, on Roma's recommendation, Roma's superior, Mary Kieran, promoted plaintiff to the position of Manager of the ESP, DCC and STEP programs. In those positions, plaintiff reported directly to Roma. Also at Roma's recommendations, plaintiff's salary was increased from \$34,000 per year, in 2002, to approximately \$48,000 in 2004.

In July 2004, at plaintiff's urging, Ms. Kieran hired non-party Julia Alvarez as a Placement Specialist in the ESP program. Ms. Alvarez reported to plaintiff. In Fall 2004, Roma confided to plaintiff that she was physically attracted to Ms. Alvarez. Plaintiff alleges that, throughout that fall and winter, Roma assigned Ms. Alvarez responsibilities outside her job title, in order to have her remain in the office more frequently. On December 8, 2004, Roma criticized some work that plaintiff had done. Plaintiff testified at his deposition that, at a meeting later that day, Roma told him that he was not good at management, that she was going to give his job to Ms. Alvarez, that he would be given a position as coordinator, and that she would try to get him a raise. Plaintiff responded that he did not want a raise, and that he was quitting. At that time, the Center was operating programs both at offices on 125th Street and at 45 John Street. Roma testified at her deposition that she and Ms. Kieran had discussed assigning some of plaintiff's administrative responsibilities to Ms. Alvarez so that plaintiff could spend more time with Roma at the 125th Street office to provide supervision and to focus on expanding the existing programs and developing new ones. Plaintiff and Roma agree that, after December 8, Roma called plaintiff at his home and urged him to return to work.

Discussion

To state a prima facie case of employment discrimination based on a disparate treatment theory, a plaintiff must show: (1) that he or she is a member of a statutorily protected class; (2) that he or she was qualified for the position held or applied for; and (3) that he or she suffered an adverse employment action, or was refused the job, in circumstances that give rise to an inference of discrimination based upon the plaintiff's membership in the protected class. Forrest v Jewish Guild for the Blind, 3 NY3d 295 (2004); Messinger v Girl Scouts of U.S.A., 16 AD3d 314 (1st Dept 2005). Other than in the context of a retaliation claim (see Administrative Code § 8-107 [7], and with regard to Title VII, Burlington Northern & Santa Fe R. Co. v White, ___ US ___, 126 S Ct 2405 [2006]), an adverse employment action "requires a materially adverse change in the terms and conditions of employment[, that is,] ... a change ... more disruptive than a mere inconvenience or an alteration of job responsibilities." Forrest v Jewish Guild for the Blind, 3 NY2d, at 306 (citation and internal quotation marks omitted).

Here, it is undisputed that plaintiff resigned, and that, prior to his resignation, he had not been demoted, his title had not been changed, and his compensation had not been reduced. Rather, he had been told that he would have new duties and that an attempt would be made to increase his salary. While plaintiff might have preferred not to have his duties change, he does not contend that the functions that he was to perform were merely "make-work," or in any other way less important and potentially satisfying than the work that he had been performing. Plaintiff testified at his deposition as follows:

Q: Before you quit, Ms. Roma just said I want to put you in a new position?

A: Yes. "You're going to a new position." It [was] not even a choice.

* * *

Q: Didn't she tell you that this new position would allow you to focus more on development than your administrative duties?

A: No, because there was no[t] much to discuss about that because I told her I wasn't interested in any other position.

Gegwich Affirm., Exh. H, at 211-212. A lateral transfer that effects no significant disadvantage

in the terms and conditions of a plaintiff's employment does not constitute an adverse employment action. Galabya v New York City Bd. of Educ., 202 F3d 636 (2d Cir 2000). Here plaintiff has not alleged that the work that he would have been performing had he accepted the transfer, with no change in his title and the prospect of higher pay, would have been "materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement" (id. at 641) than the work that he had been performing. Because plaintiff suffered no adverse employment action, he cannot make a prima facie case of unlawful discrimination.

Moreover, plaintiff has abandoned his claim of discrimination on the basis of sex. At his deposition, he testified that he believed that Roma wanted to give Ms. Alvarez his duties because of Roma's attraction to Ms. Alvarez. Asked about what adverse actions had taken against him, plaintiff testified that defendants "[c]hange[d] my position for somebody else based on Ms. Roma's liking this lady ..." Gegwich Affirm., Exh. H, at 263; see also id. at 225-6, 238. Employment actions taken on the basis of an isolated, non-work-related affectional preference for one employee, or an intimate relationship with that employee, might, in some circumstances constitute a hostile work environment for another employee (see Drinkwater v Union Carbide Corp., 904 F2d 853 [3d Cir 1990]; Nicolo v Citibank New York State, N.A., 147 Misc 2d 111 (Sup Ct, Monroe County 1990), but they do not constitute disparate treatment discrimination on the basis of sex. Matter of Fella v County of Rockland, 297 AD2d 813 (2d Dept 2002), citing Burgess v Gateway Communications, 26 F Supp 2d 888, 893 (SD WVA 1998) ("[P]referential treatment, favoritism, and cronyism ... do not constitute sexual discrimination"); Stallings v U.S. Electronics, 270 AD2d 188 (1st Dept 2000), Nicolo v Citibank New York State, N.A., 147 Misc 2d 111, supra; DeCintio v Westchester County Med. Ctr., 807 F2d 304 (2d Cir 1986), cert denied 484 US 825 (1987).

Finally in this regard, plaintiff's opposition to defendants' motion stresses that Roma discriminated against him and other employees, both male and female, who are heterosexual.

While the NYCHRL prohibits employers from discriminating on the basis of sexual orientation (see Administrative Code § 8-107 [1] [a]), a plaintiff may not raise a theory of liability that is not set forth in either the complaint or the bill of particulars in opposition to a motion for summary judgment. Abalola v Flower Hosp., 44 AD3d 522 (1st Dept 2007); Golubov v Wolfson, 22 AD3d 635 (2d Dept 2005).

A "hostile work environment" is one in which "the work place is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." Espaillet v Breli Originals, Inc., 227 AD2d 266, 267 (1st Dept 1996), citing Harris v Forklift Sys., Inc., 510 US 17 (1993). A work environment is "hostile," or "abusive," where the plaintiff found, and "a reasonable person subjected to the discriminatory conduct would find ... that the harassment so altered working conditions as to `ma[ke] it more difficult to do the job.'" Harris v Forklift Sys. Inc., *supra*, 510 US, at 25 (Ginsburg, J. concurring), citing Davis v Monsanto Chemical Co., 858 F2d 345, 349 (6th Cir 1988). The harassment of which a plaintiff complains must have been directed at him or her because of the plaintiff's membership in a protected class. Quinn v JPMorgan Chase & Co., 12 Misc 3d 1160(A) (Sup Ct, NY County 2006); Carrero v New York City Hous. Auth., 890 F2d 569 (2d Cir 1989). Here, plaintiff does not even attempt to show that he was the object of hostility or abuse that was directed at him because he is a man. Rather, he testified at his deposition that Roma denigrated employees, both male and female, whom he was supervising, that she engaged in "fierce conversations" in which she criticized plaintiff, as well as women and other men, and that she confided to plaintiff that she was sexually attracted to Ms. Alvarez. None of this constitutes a hostile work environment directed at plaintiff because of his sex, which is the claim asserted in the complaint.

Plaintiff has abandoned his claim of negligent infliction of emotional distress, and in any event, he did not allege any act of negligence in his complaint. With regard to his claim of intentional infliction of emotional distress, he appears to believe that because Roma knew that he

loved the work that he had been doing, Roma's attempt to give him a lateral transfer amounted to an intentional infliction of emotional pain. First, plaintiff does not allege that Roma intended to cause him pain. Secondly, under plaintiff's theory every employment decision that caused distress to an employee would be actionable as a tort. This is not and cannot be the law.

Plaintiff's defamation claim is predicated on several statements that plaintiff alleges Roma to have made after plaintiff resigned. Roma has submitted an affidavit in which she denies having made any of those statements. Janice W. Jones, who was employed at BMCC in a variety of administrative posts at the relevant time, and to whom Roma is alleged to have made a number of the defamatory statements, has submitted an affidavit in which she denies ever having heard Roma make those statements. Plaintiff, who has not submitted an affidavit of his own, has also not submitted affidavits from any of the other people to whom he alleges Roma made defamatory statements about him. His allegations as to those statements are no more than hearsay, which, absent other evidence, may not be used to defeat a motion for summary judgment. Briggs v 2244 Morris, L.P., 30 AD3d 216 (1st Dept 2006); Narvaez v NYRAC, 290 AD2d 400 (1st Dept 2002).

Conclusion

Accordingly, none of plaintiff's claims can succeed as a matter of law. It is therefore

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 13, 2007

RAJ

J.S.C.

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