

Hernandez v Kaisman
2008 NY Slip Op 30329(U)
February 1, 2008
Supreme Court, New York County
Docket Number: 0104989/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SOLOMON

PART 55

Index Number : 104989/2007

HERNANDEZ, YAHAIRA

vs

KAISMAN, DR.ARDEN

Sequence Number : 001

DISMISS ACTION

INDEX NO. 104989/2007

MOTION DATE 9 - 17 - 2007

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for dismiss

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1 - 4

5 - 6

7 - 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. Preliminary conference scheduled for February 25, 2008 at 12 Noon in Part 55, Room 432, 60 Centre Street.

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

FILED
FEB 05 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/1/08

HON. JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

YAHAIRA HERNANDEZ, ESTHER HERARTE
and JENNIFER V. STERN,

INDEX NO. 104989/2007

Plaintiffs,

-against-

DR. ARDEN KAISMAN

DECISION and ORDER

Defendant.

-----X

DR. ARDEN KAISMAN,

Defendant/Third-Party Plaintiff,

-against-

DR. PAUL BRISSON,

Third-Party Defendant.

FILED
FEB 05 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X

JANE S. SOLOMON, J.

In this action for sex discrimination, assault, battery and intentional infliction of emotional distress, defendant Dr. Arden Kaisman ("Kaisman") moves under CPLR § 3211(a)(7) to dismiss the Complaint for failure to state a claim. The motion is decided as follows.

Plaintiffs Yahaira Hernandez ("Hernandez"), Esther Herarte ("Herarte") and Jennifer V. Stern ("Stern") claim to be

former employees of Kaisman, a medical doctor, whose office employs approximately fourteen people. Kaisman previously had a joint medical practice with third-party defendant Dr. Paul Brisson ("Brisson"). The three plaintiffs all allege that during the course of their employment, Kaisman created an atmosphere "permeated with sexual tension due solely to his continuous, inappropriate behavior," and that when Brisson separated his practice from Kaisman in December 2006, they left with him "due solely to the nature of the work environment Kaisman had created." Plaintiffs' Affirmation, Memorandum and Annexed Exhibits in Opposition ¶ 26.

Plaintiffs' specific allegations include that Kaisman sent sexually suggestive images, video and sounds files as email attachments. Some of these attachments were: a video from an R-rated movie where a woman is caught masturbating by her family and friends on her birthday; a picture of a naked woman without a head entitled "The Perfect Woman;" a video that displays a man's exposed naked buttocks; a video of a phallic snow sculpture with obscene commentary; and an audio lecture about the many uses of the four letter word for fornication. Plaintiffs also allege that Kaisman showed them a model of a person with a phallic object being inserted into his rectum, and commented that he showed the object to everyone and that it was funny.

[*4]

In addition to exposing them to sexually graphic content, plaintiffs also allege that the Kaisman frequently made comments about their physical appearance, telling Hernandez that she should get breast implants and telling Heararte that she had to lose weight. Hernandez describes an incident where Kaisman leaned over her chair to stare down her pants, which were slightly pulled away from her body, and Herarte alleges that Kaisman once touched her derriere. They further claim that Kaisman frequently screamed obscenities and threats at employees in the office, and that during one such prolonged incident on October 17, 2006, Kaisman physically grabbed Stern's arm in anger. Finally, they claim Kaisman often walked around the office in his long johns, and that he took females into a room to be alone with them for extended periods of time.

For the most part, Kaisman admits that he engaged in offensive behavior, but argues that it did not rise to actionable conduct. With respect to the emails, he states that they were all descriptively labeled, he advised plaintiffs that the attachments were potentially offensive, and that plaintiffs, all adults, voluntarily chose to open them. He further contends that plaintiffs' other allegations may describe actions that are "mean, nasty, uncalled for, unprofessional and outright stupid, but they are devoid of sexual content" (Defendant's Memorandum of

[* 5]
Law at 24). In addition, he argues the alleged acts were infrequent, or the kind of inconsequential conduct that happens in every office.

Hostile Work Environment

Plaintiffs alleging sex discrimination can invoke either a "quid pro quo" or a "hostile work environment" theory. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). Here, plaintiffs' claims are premised solely on a hostile work environment; under such a theory, the harassment at issue must be "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Id. at 67. Federal law, and specifically Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et. seq.), defines what acts and omissions constitute sexual discrimination for the purposes of New York State Executive Law § 296, et. seq. and the Administrative code of the City of New York §§ 8-107. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295 (2004).

Kaisman argues that plaintiffs have failed to allege conduct that constitutes unwelcome sexual harassment. In addition, he argues the alleged acts were not "pervasive" or "continuous," but rather "rare" and "infrequent," and isolated vulgar acts generally do not rise to the level of pervasiveness

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required for a hostile work environment. See Lucas v. South Nassau Communities Hosp., 54 F.Supp.2d 141 (E.D.N.Y. 1998).

However, federal courts have held that "a single act can meet the threshold [of creating a hostile work environment] if, by itself, it can and does work a transformation of the plaintiff's workplace." Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002). Moreover, courts are to "examine the case-specific circumstances in the totality and evaluate the severity, frequency, and degree of the abuse." Id. at 394. Given the lack of discovery at this time and the blatant nature of Kaisman's alleged actions, it is premature to decide as a matter of law whether they meet the threshold of showing discrimination arising from a hostile work environment.

Kaisman also argues that even if his conduct was "horrifically offensive," plaintiffs fail to allege that they were treated any differently than Kaisman's male employees, and without a showing of sexually disparate treatment, plaintiffs cannot pursue their claim for sexual discrimination. See Forrest, 3 N.Y.3d 295. Kaisman's argument is unpersuasive because although some of the alleged actions (such as the email attachments) could be equally offensive to men and women, other allegations (such as his suggestions to Hernandez that she get breast implants and offering to pay for them) are clearly

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targeted against them as women. Accordingly, the motion to dismiss the first cause of action must be denied.

Battery as to Stern

Kaisman argues that there has been no showing that his grabbing of Stern's arm was anything more than the heat of the moment, inconsequential, harmless contact "every employee must accept [i.e., consensual] as the occasional touching or contact that arises in the normal workday environment." Lucas, 54 F.Supp.2d at 151. However, the Complaint alleges that Kaisman physically grabbed Stern's arm in anger after he argued with another individual. "A valid claim for battery exists where a person intentionally touches another without that person's consent." Wende C. v. United Methodist, 4 N.Y.3d 293, 298 (2005). Accordingly, Stern has stated a *prima facie* case for battery under New York law, and the motion is denied as to it.

Assault

With regard to Stern, she alleges that during the October 17, 2006 incident where Kaisman grabbed her arm, he also "screamed obscenities and threats" at her for several hours and knocked over a chair when he grabbed her. Thus, Stern has sufficiently stated a claim for assault.

With regard to the other plaintiffs, however, Kaisman correctly argues that they have failed to allege that he

intentionally placed them in "apprehension of imminent harmful or offensive contact."¹ The allegations generally deal with what he said, either orally or by email, and "threatening words without some action are not enough to constitute an assault." PJI 3:2. Thus, Hernandez and Herarte's assault claims must be dismissed.

Intentional Infliction of Emotional Distress

Kaisman argues that although the Complaint alleges isolated incidents of inappropriate behavior, the alleged facts are not "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." Murphy v. American Home Products Co., 58 N.Y.2d 293, 303 (1983). Moreover, he argues that plaintiffs' allegations do not, as a matter of law, rise to the level of the requisite "severe emotional distress" - distress of "such intensity and duration that no reasonable person should be expected to endure it" (PJI 3:6), as plaintiffs "fail to allege any medical treatment whatsoever or any loss of time from work or other incapacity whatsoever" (Defendant's Memorandum of Law at 24). Plaintiffs' opposition papers do not specifically address their claim for intentional infliction of emotional distress, and Kaisman's

¹Herarte does not bring a battery claim in connection with the alleged touching of her derriere, and the Complaint fails to allege anything other than that Kaisman touched her.

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argument is persuasive, so the fourth cause of action is dismissed.

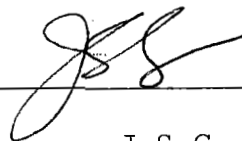
Accordingly, it hereby is

ORDERED that Kaisman's motion is granted to the extent of dismissing the third cause of action (assault) with respect to Herarte and Hernandez, and dismissing the fourth cause of action (intentional infliction of emotional distress) with respect to all plaintiffs, and is otherwise denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, on February 25, 2008 at 12:00 noon.

Dated: February / , 2008

ENTER:



J.S.C.

HON. JANE S. SOLOMON

FILED

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