

**Quinteros v Adecco**

2008 NY Slip Op 30518(U)

February 11, 2008

Supreme Court, Suffolk County

Docket Number: 0004554/2004

Judge: Robert W. Doyle

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Plaintiff alleges she accepted the temporary work at Adecco because she was told by AOC that the assignment would last three months and then become a permanent position. Plaintiff asserts that as the three-month period to complete the Max phase-out project was continuously extended, several times during the course of her assignment she approached Christina Falcone ("Falcone"), Director of Financial Shared Services at Adecco, to inquire about obtaining a permanent position. Plaintiff asserts that on each occasion Falcone told her she would have to wait until the Max project was completed. However, plaintiff maintains, three other white, non-Hispanic temporary employees who were also working on the Max phase-out project were hired for the permanent positions she expressed an interest in obtaining. Plaintiff alleges that Falcone informed her that she was not qualified for the positions because she did not know the Oracle system.

In April 2002, plaintiff met with Lois Cooper ("Cooper"), Vice President of Employee Relations and Diversity at Adecco to complain about Falcone's decision to keep her as a temporary employee on the Max project rather than hire her for a permanent position. Plaintiff expressed to Cooper that she felt discriminated against because White temporary employees working on the Max project who were less qualified, were being hired for permanent positions. During this meeting, plaintiff also informed Cooper that she felt discriminated against because she was being mocked about her accent by Deborah Jordan ("Jordan"), a team leader on the Max project. Plaintiff complained that when she spoke in Spanish to co-workers, she was also told by Jordan to speak English. Additionally, plaintiff complained to Cooper about the instructions she received from her supervisor, Theresa Murphy ("Murphy"), to send an email upon here arrival to and departure from work, when she went to and returned from lunch, and prior to taking a 15-minute break. Plaintiff alleges, upon information and belief, she was the only individual required to send such emails.

In her affidavit, Cooper confirms that on April 15, 2002, plaintiff met with her and complained about not being offered permanent employment at Adecco, was upset that her supervisor, Murphy, required her to send an e-mail as set forth above, and was upset that she could not work overtime without prior supervisory approval. Cooper asserts that she investigated plaintiff's concerns by speaking with Falcone, Murphy and Ed DeGennaro, the Director of the Accounts Receivable Department and was satisfied that plaintiff was being treated fairly. Cooper also concluded that plaintiff's race had nothing to do with the fact that plaintiff was not offered a permanent position.

On April 18, 2002, plaintiff met with Falcone and Cooper. It was during this meeting, plaintiff contends, that she was first informed of certain job performance issues, including too many personal telephone calls, excessive socializing with co-workers, and falsifying her time cards, allegations which she denied. Based upon these accusations, plaintiff alleges she was informed by Falcone and Cooper that she was never going to be hired as a permanent employee to work on the Oracle project or in any other position at Adecco, but could continue to work in her temporary status until the Max project was completed.

Cooper asserts that during the April 18, 2002 meeting she explained to plaintiff that the purpose for the e-mails was to ensure time sheet accuracy since Murphy had observed discrepancies which plaintiff disputed. Also discussed were other job performance issues, namely, repeated counseling regarding plaintiff's excessive personal telephone calls and socializing and inappropriate use of the e-mail system. Cooper also advised plaintiff that Jordan would be counseled mocking her accent as

such behavior was unacceptable at Adecco. Cooper asserts, at the conclusion of the meeting it was agreed that plaintiff would remain in her assignment at Adecco as long as she met the performance expectations and until AOC found her another assignment. However, later in the day, Cooper asserts she received a telephone call from Falcone relaying that plaintiff insisted that her assignment end. Plaintiff had informed Falcone that she did not want to remain at Adecco as the time card discrepancy accusations were equivalent to calling her a liar and a thief. Plaintiff also stated that she had been lied to about the nature of her assignment, with Adecco, i.e., after three months she would be hired as a permanent employee.

It is undisputed that Adecco wanted plaintiff to stay as there was still work to do on the Max phase-out project. However, plaintiff was advised by Cooper that Adecco would agree to a “mutual separation” and not oppose plaintiff’s application for unemployment benefits. Plaintiff’s assignment ended on April 18, 2002.

Plaintiff maintains that in not hiring her as a permanent employee, Adecco discriminated against her on the basis of her race and national origin. Plaintiff also maintains that her purported job performance deficiencies were raised for the first time in retaliation of her lawful complaints about feeling discriminated against.

In support of its motion, Adecco argues that plaintiff has not come forward with any evidence to show that she was discriminated against based on either her race or origin, and thus, has failed to make out a prima facie case of discrimination. Moreover, Adecco argues, plaintiff cannot establish a prima facie case of employment discrimination as she cannot demonstrate she was qualified for the position or that she suffered an adverse employment action. Alternatively, Adecco argues that even if plaintiff could satisfy her initial burden, sufficient evidence has been presented to demonstrate legitimate, non-discriminatory reasons for its employment decisions, which have not been rebutted by plaintiff. Adecco maintains, in the absence of evidence that the reasons it articulated are pretext for race or national origin discrimination, summary judgment dismissing the complaint is warranted.

“The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards until Title VII of the Civil Rights Act of 1962 (42 USC § 2000e *et seq.*)” (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]). On a claim of discrimination, plaintiff has the initial burden of establishing a prima facie case of discrimination (*id.*). To state a prima facie case of employment discrimination based on race and national origin, plaintiff must demonstrate that she is a member of a protected class and qualified for the position, that she suffered an adverse employment action and that the action occurred under circumstances giving rise to an inference of discrimination (*see, McDonnell Douglas Corp. v Green*, 411 US 792, 93 Sct 1817 [1973]; *Ganthier v North Shore-Long Is. Jewish Health Sys., Inc.*, 345 F Supp 2d 271 [EDNY 2004]; *Ferrante v American Lung Assn.*, *supra*; *Landwehr v Grey Adver. Inc.*, 211 AD2d 583, 622 NYS2d 17 [1995]). While this burden is “de minimus” (*Sogg v American Airlines*, 193 AD2d 153, 162, 603 NYS2d 21, *lv dismissed* 83 NY2d 846, 612 NYS2d 106 [1994], *lv denied* 83 NY2d 754, 612 NYS2d 109 [1994]), plaintiff must present more than “conclusory allegations of discrimination” and provide “‘concrete particulars’ to substantiate the claim” (*Muszak v Sears, Roebuck & Co.*, 63 F Supp 2d 292, 296 [WDNY 1999], quoting *Meiri v Dacon*, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829, 106 Sct 91 [1985]). However, “a plaintiff who cannot demonstrate that she possessed the requisite qualifications

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for a position cannot charge that the position was awarded to someone else on a discriminatory basis” (*Muszak v Sears, Roebuck & Co.*, *supra* at 297).

Plaintiff has failed to make out the prima facie case for discrimination. Other than the uncontested fact that she is a member of a protected class, i.e., Hispanic, plaintiff has not established any of the other elements of discrimination.

Plaintiff testified, and it is not disputed that she sought three permanent positions at Adecco, namely, a position in the Credit and Collection Department which was filled by Stacey Jaeger (“Jaeger”), and two positions for an Oracle Remittance Processor which were filled by Pat Osborne (“Osborne”) and Frank Viegas (“Viegas”). Plaintiff has not provided any information regarding the nature of or the qualifications needed for the position in the Credit and Collection Department and testified that she never inquired of anyone at Adecco as to why she was not hired.

Similarly, plaintiff has not submitted any information regarding the duties and responsibilities for the position working on the Oracle system. During her EBT, plaintiff admitted that knowledge of the Oracle computer system was necessary and conceded that although she was attempting to learn the system on her own time, she was not very proficient. Plaintiff testified that she did not think Osborne or Viegas knew the Oracle system, but she also did not know whether either one of them had any other qualifications for the position. Plaintiff maintains, however, that Osborne and Viegas were hired as permanent employees with benefits, and given an opportunity to be trained on the job, while she was not afforded the same benefits and opportunity. Upon being asked whether there were any other reasons she thought it was discriminatory that she did not get the aforementioned permanent positions, plaintiff responded that the persons hired are “fluent” and they do not have “an accent”. Significantly, however, questioning also elicited testimony that Falcone advised plaintiff that she was the most experienced person on the Max phase-out and that Adecco needed her to stay on the project until its completion.

Plaintiff has failed to present any facts that would lead a reasonable trier of fact to conclude that the decision not to hire her for a permanent position was motivated by racial or national origin animus. Based on plaintiff’s own testimony, she cannot satisfy her initial burden that she qualified for the permanent positions or that she suffered an adverse employment action. Moreover, plaintiff testified and the record before the Court establishes that Adecco hired a racially diverse group of temporary employees into permanent positions, including an Hispanic male and female with whom plaintiff conversed in Spanish and had lunch with regularly. It has been noted that diversity in a defendant’s staff undercuts an inference of discriminatory intent (*see, Chambers v TRM Copy Ctrs. Corp.*, 43 F3d 29 [2d Cir 1994]). Further, the proof is clear that plaintiff asked for her temporary assignment to end, and that Adecco wanted her to remain until the Max project had been completed.

Q. Isn’t it true that Ms. Falcone said I’m not going to end your assignment? You still have a job here to complete the Max phase-out and I’m not going to end the assignment?

A. Yes. Yes.

Plaintiff also testified that Falcone “begged me to stay. She wanted me to stay.” Additionally, because the Max phase-out project was taking longer than anticipated, by letter dated October 4, 2001, Falcone

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on behalf of Adecco, informed plaintiff that she would receive a performance and completion bonus which she was paid the second week of January 2001. Thus, it is difficult to impute an invidious motivation to Falcone or Adecco (*see, Garcia v Henry St. Settlement*, 501 F Supp 2d 531 [SDNY 2007]; *Velasquez v Goldwater Mem. Hosp.*, 88 F Supp 2d 257 [SDNY 2000]).

As to the of discrimination based on national origin, plaintiff has not offered one scintilla of evidence that being Ecuadorian, played any role in Adecco's decision making. Classification on the basis of language does not by itself "identify members of a suspect class" and would support an inference of intentional national origin discrimination" (*Velasquez v Goldwater Mem. Hosp., supra* at 262). Plaintiff's allegation that Jordan mocked her accent and instructed her to speak English when conversing in Spanish, also is insufficient to infer a discriminatory animus on the part of Adecco (*see, Arugeta v North Shore Long Is. Jewish Health Sys., Inc.*, 2003 WL 22670915 [EDNY]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306, 786 NYS2d 382 [2004]).

Even if plaintiff could meet her initial burden, defendant has offered legitimate, non-discriminatory reasons for its hiring decisions. Defendant explains that the individuals selected for the permanent positions were selected on the basis of their demonstrated experience on the Oracle computer system. Evidence that the defendant filled the position with applicants who are more qualified than plaintiff rebuts any presumption of discrimination (*Holt v KMI-Continental, Inc.*, 95 F3d 123 [2d Cir 1996]). This non-discriminatory reason stands without any evidence of pretext (*see, Ganthier v North Shore-Long Is. Jewish Health Sys., Inc., supra; Forrest v Jewish Guild for the Blind, supra*).

Plaintiff also bears the initial burden of proving a prima facie case of retaliation, and must show that: (1) she was engaged in a protected activity; (2) that her employer was aware of her participation in such activity; (3) that she suffered an adverse employment action based upon the activity; and (4) there is a causal connection between the protected activity and the adverse action (*see, Forrest v Jewish Guild for the Blind, supra*). As plaintiff cannot establish that an adverse employment action was taken against her, the retaliation claims cannot be sustained.

In any event, plaintiff's predicate for her allegation of retaliation, is belied by the evidence. Plaintiff alleges that defendant raised the issue of her job performance and deficiencies for the first time in April 2002 after she made her discrimination complaints to Cooper. However, in the aforementioned letter dated October 4, 2001 wherein Adecco informed plaintiff that she was eligible to receive a performance and completion bonus, the bonus was conditional. The completion bonus for \$1,000.00 was contingent upon plaintiff working through AOC at Adecco through the end of December 2001. In addition to staying on at Adecco, plaintiff was eligible for a performance bonus of \$500.00 if she agreed to:

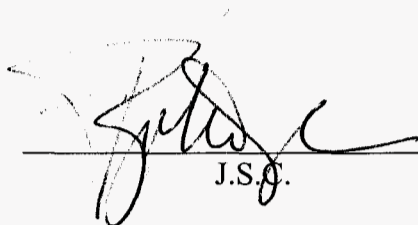
abide by Adecco's rules for employees including but not limited to controlling visitors at [her] desk, making or receiving no more than two personal calls/day, limiting the time on personal calls and being at [her] desk during working hours. In addition the performance bonus [was] contingent upon the following work responsibilities taken on and performed satisfactorily: 1) handling all research from field, 2) performing all journal entries and ensuring control total to justify with applicable, concise back-up included, 3) run reports on weekly and monthly basis and 4) learn Oracle system.

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Plaintiff accepted the terms by signing the letter. Additionally, Falcone also sets forth the specific dates and incidents on which plaintiff was counseled regarding her job deficiencies, including the excessive socializing, inappropriate use of the e-mail system at Adecco and the time sheet discrepancies. Falcone has also attached the e-mails created contemporaneously by Murphy regarding the discussions had with plaintiff which were sent to AOC with a "cc" to Falcone. Therefore, plaintiff's retaliation claim cannot be sustained.

Accordingly, defendant is entitled to summary judgment dismissing the complaint.

Dated: FEB 11 2008

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION