

Gargano v Combined Life Ins. of N. Y.

2008 NY Slip Op 30617(U)

February 20, 2008

Supreme Court, Queens County

Docket Number: 0018203/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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CATHY GARGANO,	No. 18203/06
Plaintiff,	Motion
-against-	Date October 23, 2007
COMBINED LIFE INSURANCE	Motion
OF NEW YORK,	Cal. No. 13
Defendant.	Motion
-----	Seq. No. 1

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Plaintiff commenced this action seeking to recover damages alleged to have been sustained due to the wrongful and discriminatory termination of plaintiff's employment in April, 2006 and other adverse acts of discrimination occurring prior thereto.

Plaintiff moves for an order pursuant to CPLR § 3124 compelling defendant to produce documents in response to plaintiff's first demand for the production of documents.

Plaintiff, a former sales agent for defendant, alleges that she was subjected to unlawful disparate treatment by two supervisors in her sales region, to wit, Stewart Zaid, her Regional Manager, and Robert Weiner, a District Manager. On December 20, 2004, plaintiff was demoted from sales manager back to her former position of sales representative. The reason given by defendant was plaintiff's alleged writing of business outside of her sales territory, that is, Queens County. Plaintiff claims that said reason was a

pretext as her actions were based upon leads given to her and it would mean she was being penalized for generating business.

Defendant asserts that Mr. Zaid's regional policy was that, if a sales employee generated a sales lead outside their contractual territory, permission from him, the Sub-Regional Manager or the District Manager of the other territory must be obtained to pursue that lead. Plaintiff disregarded said instruction on multiple occasions. Plaintiff was demoted by Mr. Zaid based, in part, upon her repeated failure to obtain such permission. When plaintiff continued to disregard the instructions, she was informed that she must either accept a transfer to a new district or resign. Upon her refusal to accept transfer, plaintiff's employment was terminated for failure to report to work.

By stipulation dated October 23, 2007, the parties agreed, *inter alia*, that the only issues to be determined by the court with respect to this motion relate solely to plaintiff's demands numbered 3, 6-8 and 9 as follows:

- "3. All documents covering the period 2001 to the present, constituting and/or relating to any complaints of any kind, formal or informal, including but not limited to internal investigations and disciplinary proceedings, lawsuits or petitions filed in court and complaints, whether individual suits or class actions, petitions or grievances filed with any administrative agency or with any labor organization relating to acts of discrimination, real or alleged, by Defendant against any employee based on gender or sexual harassment;
6. All documents relating to and/or constituting records of statistical or other data covering the period 2001 to the present concerning the number of female employees in Defendant's workforce;
7. All documents relating to and/or constituting records of statistical or other data covering the period 2001 to the present concerning the number of female employees in Defendant's workforce who were promoted;
8. All documents relating to and/or constituting

records of statistical or other data covering the period 2001 to the present concerning the number of female employees in Defendant's workforce who were demoted or discharged;

9. All documents relating to and/or constituting records of statistical or other data covering the period 2001 to the present concerning the amount of business written by sales representatives outside of their assigned sales district."

Contentions of the Parties

Plaintiff asserts that number 3 concerns other complaints of discrimination which are similar in nature and time to those described in the complaint. As to items numbered 6-9, plaintiff asserts that they are relevant to plaintiff's claim of discrimination as well as that for retaliation. The data on workforce composition is relevant in establishing whether plaintiff has a claim of disparate impact discrimination. Such information is routinely held subject to disclosure.

Defendant opposes the motion and asserts that, as to number 3, unrelated and un-adjudicated allegations by other employees are irrelevant because they do not make it any more probable that a plaintiff was subjected to discrimination in a particular case. This is a single plaintiff disparate treatment case. At all relevant times, plaintiff worked exclusively in the Queens area and claims that she was discriminated against by two particular supervisors within that region. Stewart Zaid made all of the decisions about which plaintiff complains. He and Robert Weiner did not supervise any employees outside of Mr. Zaid's region. There is no evidence or allegation of a systemic company-wide practice of discrimination or harassment in this case. Defendant has already offered to produce documents concerning any complaints of gender discrimination or sexual harassment made against the two individuals. As to items numbered 6-8, defendant does not routinely track such statistics and does not maintain statistical records of the type requested. Even if it did maintain such records, such are overly broad and irrelevant. It is undisputed that the promotion and discharge decisions in the region were made at the local level by Mr. Zaid. As to number 9, plaintiff does not maintain this type of statistical data. It would be unduly burdensome and

virtually impossible to construct the data because it would entail an extensive and meticulous review of thousands of paper files. None of the records requested by plaintiff would contain any indication of whether the out of territory sales were authorized or otherwise occurred under permissible circumstances.

In reply, plaintiff asserts, as to number 3, that defendant's only objection is that it does not wish to produce company-wide evidence of the same type of complaint or regarding any supervisors other than the two individuals specified. Defendant has not alleged that there would be any undue financial burden in producing company-wide materials. Defendant has been involved in numerous lawsuits involving allegations of nationwide sex discrimination and sexual harassment of its female workforce. The requested information can clearly be located and produced. Such information is necessary as it may lead to the discovery of witnesses, will demonstrate a pattern of discrimination and may establish active knowledge of discrimination on the part of defendant. It may permit plaintiff to undermine the credibility of defense witnesses who claim that they do not engage in discriminatory treatment. As to items 6-8, plaintiff states that she will accept statistical data regarding the treatment of defendant's female employees produced in prior litigation. As to number 9, plaintiff would be willing to narrow this request so as to include only the territory in which she worked, that is, Queens County.

Decision of the Court

The motion by plaintiff is granted to the extent that defendant is directed to provide plaintiff with further discovery as set forth below.

As noted by the court in Beckles v. Kingsbrook Jewish Medical Center, 36 AD3d 733: "CPLR 3101(a) provides for full disclosure of all evidence which is material and necessary in the prosecution or defense of an action (see Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430; Smith v. Moore, 31 AD3d 628, 818 NYS2d 603, Palermo Mason Constr. V. Aark Holding Corp., 300 AD2d 460, 751 NYS2d 599). However, 'unlimited disclosure is not required' (Smith v. Moore, supra; see Palermo Mason Constr.

V. Aark Holding Corp., supra), and '[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence' (Crazytown Furniture v. Brooklyn Union Gas Co., 150 AD2d 420, 421, 541 NYS2d 30; see Acosta v. Hadjigavriel, 6 AD3d 636, 775 NYS2d 179; Vyas v. Campbell, 4 AD3d 417, 771 NYS2d 375)."

This court notes that plaintiff's complaint mainly alleges misconduct by her supervisors so that limitation of the scope of discovery to the area of her sales territory is warranted as to numbers 3 and 9. Husiotis v. Xerox Corp., 191 AD2d 973. Given the defendant's assertion that it does not maintain certain statistical records, as requested in numbers 6 through 8, this court would not require the creation or construction of such statistical data absent a more compelling foundation laid by plaintiff. However, plaintiff has indicated that there is already in existence, statistical data used or produced in prior litigation relating to the treatment of defendant's female workforce. Therefore, as plaintiff is willing to accept copies of such data in response to numbers 6 through 8, disclosure thereof does not appear to be unduly burdensome to defendant.

In the event that defendant claims that any of the above directed disclosure cannot be located, an affidavit is to be provided by a representative of defendant setting forth the specific diligent efforts made with respect thereto.

Accordingly, within 45 days of the service of a copy of this order with notice of entry, defendant is directed to provide as to number 3, copies of such documents limited to the Queens County sales territory; as to numbers 6 through 8, defendant is directed to provide copies of any/all statistical data regarding the treatment of its female employees previously produced in prior sex discrimination litigation involving its nationwide sales force from 2004; as to number 9, defendant is directed to provide plaintiff with copies of such documents limited to the plaintiff's sales territory of Queens County.

Dated:February 20,2008

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HON. DAVID ELLIOT