Okayama v Kintetsu World Express (U.S.A.) Inc.
2008 NY Slip Op 31691(U)
June 12, 2008
Supreme Court, New York County
Docket Number: 0111494/2005
Judge: Jane S. Solomon

SCANNED ON 6/13/2008

[* 1]

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

PRESENT: JANE S. SOLOMON

Justice

PART 55

Index Number : 111494/2005

OKATAMA, MIKO

vs.

KINTETSU WORLD EXPRESS (USA), INC.,

SEQUENCE NUMBER : $ 003

SUMMARY JUDGMENT

INDEX NO. 111494-05

MOTION DATE 3/10/08

MOTION SEQ. NO. #003

MOTION CAL. NO.

ead on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-9
Replying Affidavits	10

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. -- Pre-trial conference is scheduled for July 28, 2008 at 2 PM.

FILED

JUN 13 2008

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 6/12/08

JANE S. SOLOMON 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: IAS PART 55

MINAKO OKAYAMA,

Plaintiff,

-against-

KINTETSU WORLD EXPRESS (U.S.A.) INC. and DOE CORPORATIONS 1-5,

Defendants.

INDEX NO. 111494/2005

DECISION and ORDER

JANE S. SOLOMON, J.

Defendant Kintetsu World Express (U.S.A.) Inc. (Kintetsu) moves, pursuant to CPLR § 3212 (a), for summary judgment dismissing the complaint. The complaint alleges sexual harassment and retaliation, in violation of New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York (Administrative Code) §§ 8-107 (1) (a) and (7).

Background

The following is undisputed. Plaintiff commenced her employment with Kintetsu in March 2000, as a customer service agent for Kintetsu's JFK-Import Terminal. Until January 2003, when Kintetsu moved its operations to JFK Airport, plaintiff worked, and indeed, Kintetsu was located in, Inwood, New York, which is in Suffolk County. Plaintiff's job consisted of providing Kintetsu customers with information about such matters as cargo damage, insurance carrier claims, and the movement of cargo. At that time, one Sean Tanaka was the JFK-Import Terminal manager. In March 2002, plaintiff was promoted to the position of assistant sales manager for the JFK-Import Terminal. That job consisted of formulating and achieving sales objectives by developing and maintaining customers in assigned sales territories. Plaintiff's sales territory included Manhattan and Long Island, and she was also assigned a number of specific customers in New Jersey. In the spring of 2003, Brian Tanida replaced Tanaka as manager of JFK-Import Terminal. Plaintiff's direct supervisor at this time was Hidenori Moriwaki, the assistant terminal manager. Starting in May 2003, Moriwaki criticized plaintiff's job performance. Specifically, he complained that plaintiff was not timely submitting certain required paperwork, and that she was not spending sufficient time visiting target customers. After several such warnings, on April 19, 2004, Tanida issued plaintiff a formal written warning for failing timely to submit her sales reports. The following month, plaintiff received a below-average performance evaluation, and she was denied a raise. On June 30, 2004, Tanida issued plaintiff a second formal warning letter, stating that plaintiff had failed to submit her reports for the months of May and June 2004, and that should she continue to fail to submit timely reports she would be subject to further disciplinary action up to and including termination.

Approximately two weeks later, plaintiff contacted Kristy Stockwell-Grecki, who was, at that time, Kintetsu's assistant manager for human resources, and requested a meeting. When plaintiff and Grecki met, on July 22, 2004, plaintiff, whom Grecki described in a memorandum to file as visibly upset and

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shaken, told Grecki that, especially since her promotion in March 2002, she had been subjected to repeated sexual comments and assaults by Kintetsu employees. The employees whom plaintiff accused of having harassed her were Chin Soo Kim, Roger Uchino, Hide Yamamoto, Gregg Turano, and Bruce Hori.

Following this conversation, Grecki telephoned Kim and Uchino, but not Yamamoto, Turano, or Hori, and, without identifying plaintiff as the complainant, told them that an employee had complained about them. She then advised them about Kintetsu's policies regarding sexual harassment and retaliation. At her deposition, plaintiff acknowledged that, after Grecki's telephone calls to Kim and Uchino, about which Grecki had informed plaintiff, the harassment stopped.

On August 19, 2004, Tanida issued plaintiff a third warning, stating that she still was not submitting timely monthly reports and that she was failing to timely respond to customer requests for information. On January 25, 2005, Moriwaki issued plaintiff a written warning stating that her sales performance for the six months from July to December 2004 was deficient.

After receiving a number of additional criticisms of her work during the course of the following year, plaintiff resigned, by letter dated March 18, 2006.

In her deposition testimony, and in an affidavit that she has submitted in opposition to the instant motion, plaintiff states that, throughout the period from March 2002 to July 2004, Kim openly kept pornographic material at his desk, repeatedly and crudely solicited plaintiff, referred to her "great butt," said "fuck you, slut," when she told him to stop his harassing remarks, stated that she was having an affair with Tanaka, brushed against her and grabbed her by the waist, blocked her from moving forward so as to touch her arms, legs, or other body parts and, on one occasion, in the spring of 2004, assaulted her in the cafeteria, in front of a male employee, touching her entire body, including her breasts and buttocks. She states that it was that assault that drove her to seek the meeting with Grecki. Plaintiff also states that Uchino, who was Kim's supervisor, asked her whether she had a girl friend with whom she could set him up, whispered into her ear that he "want[ed] to fuck," and insisted on talking to her about his private life. She states that Hori commented on her looks and asked her how many boyfriends she had; that Yamamoto, like Kim, openly kept pornographic material at his desk and referred to plaintiff's "legs and butt"; that, during a staff luncheon, Turano suggested that she show her "pretty face" to a client because Turano was not getting business from him; and that Mike D'Esposito wrote out a "dating schedule" for her on a white board in the office. She also states that, just after she was promoted, she came to work and found Kim and Yamamoto at the front door. When Yamamoto congratulated her for having been promoted and she thanked him and said that she was a little nervous, Kim responded by saying "Don't worry. Just put on red lipstick and a mini skirt and you'll be fine," whereupon Kim and Yamamoto burst out laughing.

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In support of her retaliation claim, plaintiff states that, after she complained to Grecki, and after she made certain different complaints to Tanida, Tanida deprived her of some of her accounts, denied her certain commissions to which she was entitled, stopped giving her sales leads, and became harsher in his supervision of her.

Discussion

A. Hostile Environment

At the outset, an issue regarding the applicability of the NYCHRL to the matters alleged in the complaint must be discussed. The NYCHRL applies solely to acts occurring within the boundaries of New York City. Shah v Wilco Sys., Inc., 27 AD3d 169 (1st Dept 2005). Plaintiff argues, however, citing National R.R. Passenger Corp. v Morgan (536 US 101 [2002]), that because she has alleged an ongoing pattern of sexual harassment, the NYCHRL applies to the acts that occurred in Inwood, as well as to those that occurred later in the City. The issue in Morgan was whether acts outside of the limitations period may support a plaintiff's claim to having been sexually harassed. The Court held that, where the conduct complained of is of a continuous nature, such acts may be considered for the purpose of determining liability. The continuing violation analysis of Morgan, which is applicable to claims brought under the NYCHRL (Farrugia v North Shore Univ. Hosp., 13 Misc 3d 740 [Sup Ct, NY County 2006]), is irrelevant here. The acts alleged to have been performed in Inwood were not unlawful under the NYCHRL, because

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they were not performed in New York City. They cannot have become retroactively unlawful merely because other acts, unlawful under the NYCHRL, are alleged to have been performed subsequently in New York City. However, it is undisputed that much of the conduct of which plaintiff complains took place after Kintetsu moved to JFK airport, and that it is, therefore, actionable under the NYCHRL.

That conduct suffices to make out a claim of sexual harassment creating a hostile work environment. Under the New York State Human Rights Law (HRL), Executive Law § 290, et seq., as under Title VII of the Civil Rights Act of 1964 (Title VII), 42 USC § 2000-e, et seq., a "hostile work environment" is one in which "the workplace 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." Espaillat 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[k]e it more difficult to do the job.'" Harris v Forklift Sys. Inc., 510 US at 25 (Ginsburg, J. concurring), citing Davis v Monsanto Chemical Co., 858 F2d 345, 349 (6th Cir 1988). This court has no hesitation in concluding that a reasonable person in plaintiff's position would have found it more difficult to do the

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job as a result of the post-January 2003 harassment to which plaintiff testified. As for plaintiff's subjective experience, plaintiff states in her affidavit that "[e]very day that I reported to work I felt sick inside, but I feared for my job because I worked so hard to get where I was." Okayama Aff., at 12.

The Local Civil Rights Restoration Act of 2005, LL 85 of 2005 (LL 85), was enacted in order to:

> underscore that the provisions of [the NYCHRL] are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the [NYCHRL], viewing similarly worded provisions of federal and state civil right laws as a floor below which the [NYCHRL] cannot fall, rather than as a ceiling above which the local law cannot rise.

LL 85 § 1; see also Sorrenti v City of New York, 17 Misc 3d 1102(A), 2007 NY Slip Op 51796(U) (Sup Ct, NY County 2007) (NYCHRL, as amended, to be construed to accomplish broad and remedial purpose); Jordan v Bates Adv. Holdings, Inc., 11 Misc 3d 764 (Sup Ct, NY County 2006) (HRL and Title VII should serve as base for NYCHRL, not as ceiling). In accord with the remedial provisions of LL 85, one court has held that, under the NYCHRL, once a plaintiff has shown that he or she is a member of a protected group and that he or she was subjected to sexual harassment because of his or her membership in that group, liability should be determined by "the existence of unequal treatment, and questions of severity and frequency [should be] reserved for consideration of damages." Farrugia v North Shore Univ. Hosp., 13 Misc 3d at 748-49. While assuming that the standard set forth in Farrugia is the correct standard under the NYCHRL, this court need not decide the issue at this stage of the action, because plaintiff has met the more stringent standard of Title VII and the HRL.

That plaintiff was subjected to sexual harassment sufficient to have made her work environment hostile does not, of itself, make Kintetsu liable for that harassment. Under the NYCHRL, conduct creating a hostile environment is imputed to the employer where:

> (1) the [harassing] employee or agent exercised managerial or supervisory responsibility; or
> (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or superivsory [so in text] responsibility[.]

Administrative Code § 8-107 (13) (b).

Ms. Grecki states in her affidavit in support of Kintetsu's motion that, of the five men whom plaintiff names as her abusers, three, to wit, Uchino, Yamamoto, and Hori had authority to hire, fire, discipline, and set compensation for their subordinate employees, and Kintetsu implicitly acknowledges that, if the conduct of these three men created a hostile environment under the appropriate standard for deciding cases under the NYCHRL, then Kintetsu would be liable for that conduct.

The United States Supreme Court has recently observed, citing National R.R. Passenger Corp. v Morgan (536 US 101, supra), that "the actionable wrong [in a hostile environment case] is the environment, not the individual acts that, taken together, create the environment." Leadbetter v Goodyear Tire & Rubber Co., __ US __, 127 S Ct 2162, 2175 (2007). While the acts alleged against Uchino, Yamamoto, and Hori, had they all been performed by any one of them, would not have amounted to a hostile work environment under the standard of Title VII and the HRL, because they were neither severe nor pervasive, a reasonable jury could find that, if a plaintiff is repeatedly subjected to inappropriate sexual comments by three of her supervisors, that very multiplicity of harassers creates an oppressive environment that rises to the federal and the state standard. Accordingly, Kintetsu is not entitled to a judgment that, as a matter of law, it is not liable for the harassing conduct of Uchino, Yamamoto, and Hori.

Moreover, while Kintetsu contends that Kim was not at a sufficiently high managerial level for his conduct to be imputed to his employer, Grecki states in her affidavit that, at times relevant to this action, Kim was assistant terminal manager for the JFK-Export Terminal, a title equal in rank to that of Moriwaki, plaintiff's direct supervisor in the JFK-Import Terminal. An organizational chart proffered by Kintetsu shows Kim and one Larry T. Murphy directly below Uchino in the hierarchy of the Export Terminal. Kintetsu has not supplied enough evidence in admissible form about its overall organizational structure to allow this court to conclude, as a matter law, that Kintetsu may not be liable for Kim's conduct because he was not at a sufficiently high managerial level. Kintetsu also contends that Kim was only present at the JFK facility approximately once a month, but that contention is based upon no more than an unsworn statement by Kim, which, even had it been sworn to, would only have raised an issue of credibility to be resolved by the jury. Kintetsu also points out that the Import and Export Terminals were on different floors of the Kintetsu facility, thereby suggesting that Kim would have had little opportunity to harass plaintiff. The court notes, however, that the alleged harassers Uchino and Yamamoto were also located in the Export Department (see Grecki Aff., ¶ 12), and that plaintiff states in her affidavit that, as Import Department sales representative, she was required to interact with Kim. In sum, Kintetsu has failed to show that, as a matter of law, it may not be held liable for Kim's alleged harassment of plaintiff.

Finally, with regard to plaintiff's claim of hostile work environment, Kintetsu contends that it is entitled to the affirmative defense that the United States Supreme Court established for cases brought pursuant to Title VII. In Faragher v City of Boca Raton (524 US 775 [1998]) and Burlington Indus., Inc. v Ellerth (524 US 742 [1998]), the Court held that, in cases in which a hostile work environment had not resulted in a "tangible employment action," such as a demotion, a cut in pay, or a termination, a defendant could raise an affirmative defense "to liability or damages" by showing by a preponderance of the evidence "a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, at 745; Faragher, at 807. This defense is not available to Kintetsu because Kintetsu's liability, or lack thereof, is governed by Administrative Code § 8-107 (13) (b) (1), which governs an employer's liability for the unlawful discriminatory conduct of an employee where "the employee ... exercised managerial or supervisory responsibility." Administrative Code § 8-107 (13) (e) provides that, as to liability, certain factors similar to those that would constitute an affirmative defense under Ellerth and Faragher are to be considered "in determining an employer's liability under subparagraph three of paragraph b of this subdivision." Subparagraph three provides for employer liability where the employer "should have known of the employee's ... discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct." In accord with the maxim expressio unius est exclusio alterius (see Statutes § 240), neither Administrative Code § 8-107 (13 (e), nor the similar defense available pursuant to Ellerth and Faragher, is applicable to claims brought pursuant to Administrative Code §

8-107 (13) (b) (1).

Even were the Ellerth and Faragher defense available to Kintetsu, Kintetsu would not be entitled to summary judgment on that basis, because whether plaintiff acted unreasonably in not availing herself of the corrective opportunity provided by Kintetsu until her July 22, 2004 meeting with Grecki would be an issue for the jury.

B. Retaliation

A prima facie case of retaliation, under the NYCHRL, requires a showing that the plaintiff engaged in a protected activity known by the defendant, and that, because of that activity, the defendant took an employment action that disadvantaged the plaintiff. Farrugia v North Shore Univ Hosp., 13 Misc 3d 740, supra. While the HRL requires an employee who alleges retaliation to show that she has been subjected to a materially adverse employment action based upon her activity (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 313 [2004]), that is, an action affecting the "terms, privileges, duration, or conditions of the plaintiff's employment" id. at 327 [G.B. Smith, J., concurring] [internal quotation marks omitted]), the NYCHRL, as amended in 2005, expressly provides that such a plaintiff need not show "a materially adverse change in the terms and conditions of employment," but, instead must only show that "the retaliatory ... acts complained of must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7) (v); see also Farrugia, 13 Misc 3d at 752 (plaintiff alleging retaliation must show "employment action that disadvantaged the plaintiff"; Hernandez v Research Foundation of City University of N.Y., 19 Misc 3d 1110(A), 2007 Slip Op 52545(U) (under NYCHRL, "adverse employment action" need not be shown). The court notes that, in Burlington N. & Santa Fe Ry. Co. v White, 548 US 53, 68 (2006), the Court adopted a similar standard for cases brought pursuant to Title VII, to wit, that an employee alleging retaliation must show that "the challenged action might well have dissuaded a reasonable worker from making or supporting a charge of discrimination (internal quotation marks omitted)."

Plaintiff points out that Tanida sent her a warning letter concerning her work performance within a month of her complaint to Grecki. However, prior to her complaint, plaintiff had already received two formal warning letters from Tanida concerning the same work issues, and she had received a below-average evaluation and had been denied a raise in pay. Tanida's second warning letter had followed criticisms of her work that Moriwaki began to make more than a year before her complaint. Consequently, plaintiff cannot show that Tanida sent the third warning letter, and subsequent ones, because of plaintiff's complaint to Grecki, or because of her subsequent complaints to Tanida that, with regard to work requirements and the payment of commissions, he was discriminating against her because of her sex. See Slattery v Swiss Reinsurance America Corp., 248 F3d 87 (2d Cir 2001).

Plaintiff's contention that Tanida stopped sending her sales leads after he learned that she had retained counsel in February 2005 is refuted by an e-mail, dated March 21, 2005, in which he provides her with such a lead. See Grecki Aff., Exh. TT.

With regard to her claim that three significant accounts were taken from her within a month of her complaint to Grecki, to wit, Itochu, Tomen, and Kurrary, plaintiff testified at her deposition that, through July 2004, she was generating more than $10,000 of revenue per month, and that the reason that she generated less in August 2004 is that Tanida and Moriwaki transferred potential customers from her. Plaintiff's sole support for her contention that Tanida transferred accounts from her, in retaliation for her complaint to Grecki about his colleagues, is that these transfers occurred shortly after her complaint to Grecki. However, plaintiff testified that, in April 2004, well before she complained to Grecki, one of her customers, located in New Jersey, was transferred to Moriwaki because he had moved to New Jersey. With regard to Itochu, plaintiff testified that she had contacted that company in 2003, and that, in September 2004, Tanida instructed her not to contact that company again. She also testified, however, that, as of September 2004, she had not succeeded in getting any business from Itochu. Okayama Aff., Okayama EBT, 83. Moreover, she testified that, in her opinion, the reason why Tanida removed Itochu from the list of her potential customers is "they [Tanida and Moriwaki] don't

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like me. Brian Tanida doesn't like women." Richmond Affirm., Exh. A, at 288; see also id. at 385 ("[Tanida] just don't want to use me. He doesn't like wom[e]n." With regard to Tomen, and Kurrary, plaintiff offers no more than the summary statement that Tanida "stole" those accounts from her, because he wished to set her up to fail.

Finally, with regard to her claims that she was denied commissions and that she was required to do "crazy paperwork," the paperwork in question consisted of the timely filing of reports of sales activity, which Moriwaki had faulted her for failing to do as early as May 2003, more than a year before plaintiff met with Grecki, and the timely filing of forms that, apparently, were required to claim commissions. Plaintiff also contends that male sales representatives were not required to submit these forms, or to submit them in a timely manner. This contention would support a claim of disparate treatment, which claim is absent from her complaint, but does not support the retaliation claim because it predates her protected activity. Construing the evidence in the light most favorable to plaintiff (Kesselman v Lever House Rest., 29 AD3d 302 [1st Dept 2006]), plaintiff has failed to present evidence that Kintetsu retaliated against her for her complaint to Grecki, her complaint to Tanida that he was discriminating against her in the matter of pensions, or her retention of counsel.

Accordingly, it hereby is

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ORDERED that the motion for summary judgment is granted to the extent that the retaliation claim in the second cause of action is dismissed, and otherwise is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY on July 28, 2008 at 2 PM.

Dated: June 12, 2008

ENTER:

J.S.C.

JANE S. SOLOMON

FILED

JUN 13 2008

COUNTY CLERK'S OFFICE
NEW YORK