

Esposito v Altria Group, Inc.

2008 NY Slip Op 31985(U)

July 14, 2008

Supreme Court, New York County

Docket Number: 0112510/2006

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 112510/2006

ESPOSITO, MICHELE

vs.

ALTRIA GROUP

SEQUENCE NUMBER : 001

DIMISS ACTION

INDEX NO. _____

MOTION DATE 4/8/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

JUL 16 2008

COUNTY CLERK'S OFFICE

NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's cross motion for summary judgment or partial summary judgment is denied; and it is further

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

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/14/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

MICHELE ESPOSITO,

Plaintiff,

-against-

ALTRIA GROUP, INC., and PHILIP MORRIS
CAPITAL CORPORATION,

Defendants.

EDMEAD, J.S.C.

Index No. 112510/06

DECISION/ORDER

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Defendants Altria Group, Inc. (Altria) and Philip Morris Capital Corporation (PMMC) move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Plaintiff Michele Esposito (plaintiff) cross-moves for summary judgment, or in the alternative, for partial summary judgment on her claim for a "Retention Incentive" bonus.

Commencing on or about February 3, 2003, plaintiff was employed as a billing clerk in the law department of PMMC in its offices in Stamford, Connecticut. PMMC is a wholly-owned subsidiary of Altria. The complaint alleges that defendants constructively discharged plaintiff, and that they discriminated against her because of a disability and retaliated against her for having complained of such discrimination, in violation of the Americans with Disabilities Act (ADA), 42 USC § 12101, et seq., the New York State Human Rights Law (NYSHRL), Executive Law § 92, et seq., and the New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York (Administrative Code) §§ 8-107 (1) (a) and (7).

The complaint also alleges violation of "the U.S Employment Opportunity Commission (EEOC)" and of the Rehabilitation Act. Assuming that the reference to the EEOC is a reference to Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq., plaintiff has not alleged any discrimination that is actionable under that statute. Title VII bars discrimination in employment against any individual "because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2 (a) (1). It does not bar discrimination on the basis of disability. See e.g. Quiroz v United States Postal Service, 2008 WL 373695, 2008 US Dist Lexis 11305 (SD NY 2008); Nicastro v Runyon, 60 F Supp 2d 181 (SD NY 1999). The Rehabilitation Act of 1973, 29 USC § 701, et seq. applies solely to "any program or activity receiving Federal financial assistance or ... any program or activity conducted by any Executive agency or by the United States Postal Service." 29 USC § 794 (a). Plaintiff has not alleged, much less shown, that either defendant has received federal financial assistance. Proof of such assistance is a necessary part of a prima facie case brought under the Rehabilitation Act. D'Amico v City of New York, 132 F3d 145 (2d Cir 1998).

Neither the NYSHRL, nor the NYCHRL, provides plaintiff with a viable cause of action. The NYSHRL is inapplicable to claims by New York residents that they have been discriminated against outside the state by a foreign corporation. Sorrentino v Citicorp, 302 AD2d 240 (1st Dept 2003). PMMC is a foreign corporation. The NYCHRL is inapplicable to acts, the impact of which occurs outside

the state. Shah v Wilco Sys., Inc., 27 AD3d 169 (1st Dept 2005). Plaintiff argues that, because Altria's human resources department controls labor relations at all of the Altria companies, Altria, which is a New York corporation, is a proper defendant here, and that, therefore, plaintiff has a claim under the NYSHRL. See generally Frank v U.S. West, Inc., 3 F3d 1357 (10th Cir 1993); Trevino v Celanese Corp., 701 F2 397 (5th Cir 1983). Here, however, unlike these cases, and others upon which plaintiff relies, plaintiff, with one exception, is not challenging any employment decision that, even arguably, was made by, or under the control of, the parent company. The exception is plaintiff's claim that she was denied a transfer that she had requested. However, plaintiff testified at her deposition that the position to which she wished to be transferred was held by an intern throughout the time of plaintiff's employment with PMMC.

The ADA, generally, bars discrimination in employment "against a qualified individual with a disability because of the disability of such individual." 42 USC § 12112 (a). Insofar as is relevant here, the ADA defines "disability, ... with respect to an individual" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC § 12102 (2) (A). The complaint alleges that plaintiff's impairment consisted of "mental anguish and panic attacks" and that this impairment limited her ability to perform the essential functions of her job.

Plaintiff's travails appear to have been precipitated by an

incident during the second week of April 2004, in which Joanna Pabst, an administrative assistant to Douglas B. Levine, PMMC's General Counsel, allegedly jabbed a finger in plaintiff's chest and cursed both plaintiff and her supervisor, Donna Lyde. Plaintiff testified at her deposition that, before this incident, Pabst had falsely accused her of leaving work early and had, on a number of occasions, surreptitiously added documents to those that plaintiff was responsible for filing so as to make it appear that plaintiff had not done her work. On this occasion, Pabst appears to have been infuriated that plaintiff and Lyde were questioning her denial that Levine had given plaintiff permission to retrieve files from his office whenever she needed. Lyde was allegedly unmoved by Pabst's outburst and unsympathetic to plaintiff's evident distress at it. Shortly after this incident, plaintiff developed panic attacks and requested a short-term disability leave. Plaintiff was granted such leave, which, with extensions, began on June 14 and ended on October 13, 2004.

Plaintiff alleges that when she returned to work, she was subjected to oppressive supervision by Lyde and ostracized by everyone else in the law department. In January 2005, plaintiff received an evaluation from Lyde that was one grade lower than that which she had received in 2004. Plaintiff, thereupon, wrote to Lyde, accusing her of having been "retaliatory and discriminatory." Ganz Affirm., Exh. 8, at 2. The letter does not identify what, if any, protected activity on plaintiff's part for which Lyde might have been retaliating. Shortly thereafter, plaintiff filed an

internal complaint with Altria's Compliance and Integrity Department. On April 29, 2005, plaintiff was informed that one of her complaints had not been substantiated, and that, while her complaints about Pabst were valid, Pabst would not be disciplined because she had been having "family problems." Plaintiff appears to argue that this response to her complaint constitutes retaliation for her having filed the complaint. It does not. Earlier in April, four checks that plaintiff was responsible for forwarding to attorneys for services rendered to PMMC appear to have been mislaid. Plaintiff was summoned to a meeting, at which she was accused of mishandling the checks and of deleting from a file server a cover letter that she had prepared to be sent with one of them. Plaintiff denied having any memory of the checks or of having deleted the letter. While plaintiff characterizes the investigation as retaliatory, she offers no factual support for that characterization. At that meeting, plaintiff was also accused of having tape recorded a conversation with the investigator of her complaint. Plaintiff denied having done so, but at her deposition she acknowledged that, in fact, she had recorded that conversation.

Plaintiff testified at her deposition that, at this meeting, she requested a transfer to the accounting department, which request was denied. Less than two months after this meeting, plaintiff requested a second short-term disability leave, which was granted, with extensions, from August 3, 2005 to February 3, 2006. Plaintiff, thereafter, requested long-term disability, which was denied by letter dated March 29, 2006, from the third-party

administrator of the Altria companies' long-term disability program (the Denial). That letter informed plaintiff that she had 180 days within which to appeal. By letter dated March 31, 2006, from the manager of Altria's department of health services, plaintiff was told that her options were to return to work, to resign, or to go on unpaid leave while appealing the Denial. She was also told that she needed to decide before April 7, 2006, the date on which her short-term disability benefits were due to end. By letter dated April 5, 2006, plaintiff's then-attorney notified PPMC that, prior to making any decision, plaintiff needed to consult with specialized counsel regarding an appeal of the Denial. On April 10, 2006, plaintiff was placed on unpaid leave. Plaintiff neither appealed the Denial, nor returned to work. By letter dated October 6, 2006, plaintiff was notified that she was deemed to have resigned as of October 1, 2006, upon the expiration of the 180-day period within which plaintiff could have appealed.

With the exception of the Denial, all of the acts that plaintiff characterizes as discriminatory based on her disability were performed prior to the time, or very shortly after she requested a transfer. Even now, she states that, while certain requirements of her position in the law department were "taking a mental toll," she believes that she could have performed the essential functions of the job in the accounting department. *Esposito Aff. in Opposition*, at 18. It is, therefore, inescapable that, while plaintiff may well be disabled at present, as her therapist affirms her to be, she was not disabled, within the

meaning of the ADA, at the times that she claims that she was being discriminated against. In order to be "substantially limited in the major life activity of work, 'one must be precluded from more than one type of job, a specialized job, or a particular job of choice.'" Sacay v Research Found. of City Univ. of N.Y., 193 F Supp 2d 611, 627 (ED NY 2002), quoting Sutton v United Air Lines, Inc., 527 US 471, 492 (1999); see also D'Angelo v Conagra Foods, 422 F3d 1220 (11th Cir 2005); Guzman-Rosario v United Postal Service, 397 F3d 6 (1st Cir 2005).

To the extent that plaintiff claims that she was subjected to a hostile work environment, none of plaintiff's difficulties with Pabst could have been triggered by impermissible discrimination, because plaintiff states that she became ill only after, and as a result of, those events. The allegedly oppressive supervision by Lyde did not rise to the level of a hostile environment. Plaintiff claims that Lyde criticized her and kept close watch on her, but she does not allege that Lyde belittled her, ridiculed her, or even referred to her illness or her disability leave. As for the investigation of plaintiff, plaintiff does not deny that four checks that she was responsible for sending were not received by their intended recipients, and she does not contend that any reference to her illness or her disability leave was made in the course of the investigation, or that the investigation was in any other way improperly conducted. In sum, plaintiff has alleged no facts sufficient to support her claim of a hostile work environment.

Plaintiff contends that she was constructively discharged, by virtue of having been placed on unpaid leave. That contention is meritless. At the time that plaintiff was placed on unpaid leave, she had exhausted her short-term disability benefits, and she had chosen not to return to work. She was placed on unpaid leave to preserve her ability to appeal the Denial and to avert a termination of her health and other benefits during the 180-day period within which she could appeal.

It is undisputed that in order to have received a retention incentive bonus, plaintiff would have had to have been on active employment status on the payout dates for such bonus, to wit, the end of May 2006, and the end of May 2008, or she would have needed to have been involuntarily terminated for other than certain specified causes. Plaintiff was not involuntarily terminated. She was invited to return to work after her second short-term disability period, and she could have returned at any time during the following 180-day period. When she did not return, she was deemed to have resigned. Plaintiff was not on active employment status at the end of May 2006, and she was not on any employment status with PPMC at the end of May 2008. Accordingly, plaintiff was not entitled to a bonus.

Accordingly, it is hereby

ORDERED that plaintiff's cross motion for summary judgment or partial summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements

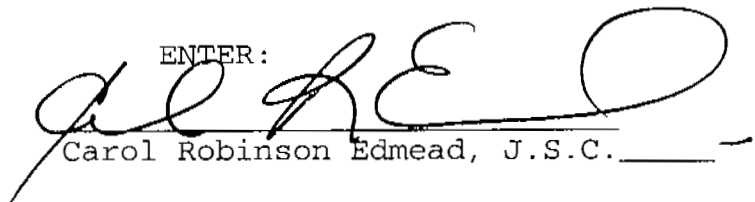
to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 14, 2008

ENTER:



Carol Robinson Edmead, J.S.C.

FILED
JUL 16 2008
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NEW YORK