

Bendeck v NYU Hosps. Ctr.

2009 NY Slip Op 31441(U)

June 26, 2009

Supreme Court, New York County

Docket Number: 112884/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 112884/2007

BENDECK, PATRICIA

vs

NYU HOSPITALS CENTER

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____

motion to/for Summary judgment

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendants is denied in accordance with the attached memorandum decision.

FILED

JUL 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/26/09

[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 36

-----X
PATRICIA BENDECK,

Plaintiff,

-against-

Index No.: 112884/07

NYU HOSPITALS CENTER (also known as NYU
MEDICAL CENTER) and ANNETTE JOHNSON,

Motion Seq. No.: 002

Defendants.
-----X

LING-COHAN, J.:

In this action involving allegations of employment retaliation, defendants NYU Hospitals Center (NYU Hospitals) and Annette Johnson (Johnson), move, pursuant to CPLR 3212, for an order granting them summary judgment of dismissal of plaintiff Patricia Bendeck's claim for retaliatory discharge for allegedly voicing her objections to alleged sexual harassment by a co-worker. Defendants maintain that summary judgment should be granted because plaintiff cannot demonstrate a causal connection between any alleged protected activity and her termination at NYU Hospitals and because her termination in March of 2007 is too remote in time from Johnson's alleged conduct in December of 2006, to permit an inference of retaliation.

Plaintiff contends that defendants' motion for summary judgment must be denied because plaintiff sets forth all of the elements of a retaliation claim under New York City and New York State's Human Rights Laws and that defendants' reasons for her termination are contradicted by the record and are an indication of a retaliatory animus directed against plaintiff.

FACTUAL ALLEGATIONS

In September of 2006, plaintiff was hired to be the executive assistant to Johnson, Vice Dean and Senior Counsel for NYU's School of Medicine and Senior Vice President and General Counsel of NYU Hospitals. The position was subject to a six-month probationary period.

On March 26, 2007, plaintiff was terminated for misconduct and for failing to perform her duties in a satisfactory manner. Johnson maintains that she was dissatisfied with plaintiff's interpersonal style and communication skills with co-workers, her lack of initiative in creating an improved filing system and resolving invoices issues, her inattention to detail, her refusal to complete certain tasks, her unwillingness to close a closet door near her cubicle, her failure to prepare faculty summaries, and various incidents including not accepting a package sent to another co-worker at NYU Hospitals.

Plaintiff disputes Johnson's allegations of her poor performance and her conflicts with co-workers. On December 22, 2006, plaintiff contends that Johnson threatened to terminate her employment after the Human Resources Department had learned of an e-mail exchange between herself and Madeline Rios (Rios), an assistant that also worked for NYU Hospitals. In the e-mail, which was sent on December 1, 2006, plaintiff requested that Rios treat her in a more professional manner and accused Rios of grabbing plaintiff's wrist, grabbing her forearm on several occasions, and slapping her on the buttocks with mail. Rios replied to plaintiff's e-mail, apologizing for offending her, and stated that she would abstain from what she considered to be friendly actions. It is undisputed that, shortly after the e-mail exchange, Johnson met with Rios, a co-employee that she had known for 15 years, and that Rios denied touching the plaintiff. Plaintiff claims that, despite the seriousness of the issue, Johnson never made a written report,

and never requested or initiated a formal investigation of the incident because she doubted plaintiff's veracity and just instructed Rios to avoid physical contact with the plaintiff.

Johnson maintains that on December 8, 2006, she met with plaintiff to discuss the e-mail exchange. Johnson alleges that she asked plaintiff if she was making a sexual harassment claim against Rios and instructed plaintiff that if she wanted to make such a complaint, the incident had to be reported to the Human Resources Department. Johnson states that plaintiff responded that she was not making a sexual harassment complaint, that she did not want Johnson to get involved in the situation, and stated that the alleged touching had stopped.

Plaintiff contends that the meeting at which she spoke with Johnson about the Rios incident did not take place in early December, but on December 22, 2006, and that as soon as plaintiff walked into the meeting, Johnson stated that she wanted plaintiff to leave her position. Plaintiff alleges that Johnson explained that she received a call from the Human Resources Department that plaintiff was building a sexual harassment claim, that she was upset this information had reached that department, questioned why plaintiff put any of the allegations in writing and told plaintiff that she was going to give her time to find another job.

In February and March of 2007, Johnson and Reginald Odom (Odom), Vice President of the Employee and Labor Relations Department, discussed the end of plaintiff's probationary period. Odom recommended that, due to plaintiff's performance problems, Johnson discharge her employment. On March 23, 2007, Johnson decided to extend plaintiff's probationary period and sent plaintiff an e-mail stating that she was not satisfied with plaintiff's progress, that Johnson would provide her with a written evaluation on March 26, 2007, and that Johnson would like to set up a meeting that same day. Johnson forwarded this e-mail to Odom and attached an

evaluation which she planned to give to plaintiff. This evaluation was subsequently not provided to plaintiff.

Upon learning of the extension of her probationary period on March 26, 2007, plaintiff requested to meet with Odom or Nicole Delts (Delts), Manager of the Human Resources Department. Lakeesha Crawford (Crawford), an assistant, met with plaintiff because both Delts and Odom were out of the office. Crawford alleges that plaintiff yelled about the extension of the probationary period, criticized Crawford and Johnson and demanded to be transferred to a different department. Following this incident, Crawford alerted Delts and Odom about what occurred. Johnson contacted Odom who recounted plaintiff's behavior and recommended that due to this behavior as well as her performance and other conduct issues, plaintiff should be discharged.

Later that day, Johnson met with plaintiff and explained that although she had planned to extend plaintiff's probationary period, due to plaintiff's behavior at the Human Resources office, the decision had been made to terminate her employment. Johnson informed Odom that plaintiff believed that she was eligible for a transfer of departments; however, Odom felt that it would not be prudent to attempt to place plaintiff in another position.

On September 24, 2007, plaintiff commenced this action. Defendants subsequently filed a motion to dismiss, pursuant to CPLR 3211 (a) (7). By decision dated July 11, 2008, this court denied the motion as to the claims of retaliation pertaining to the New York City and New York State Human Rights Law and granted defendants' motion to dismiss the causes of action for breach of contract, promissory estoppel, and tortious interference with contract.

DISCUSSION

The Court of Appeals has held that pursuant to the New York City and New York State's Human Rights Laws, "it is unlawful to retaliate against an employee for opposing discriminatory practices. In order to make out the claim, plaintiff has the initial burden to show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 (2004) (citations omitted).

Plaintiff maintains that pursuant to New York City and New York State's Human Rights Law, she has set forth the elements of a retaliation claim and that defendants' reasons for terminating plaintiff's employment after she took part in a protected activity, that is, objecting to Rios' sexual harassment, are pre-textual.

Defendants contend that summary judgment must be granted because plaintiff's termination was based upon her misconduct and poor work performance, that the sworn statements of plaintiff's co-workers confirm the problems she was having, and that Johnson did not know that the Human Resources Department was aware of the issue between plaintiff and Rios until February 2, 2007, well after she met with plaintiff in December of 2006. Defendants further contend that it was Odom, and not Johnson, who terminated plaintiff, and that the termination in March of 2007 was too remote in time from plaintiff's discussion with Johnson about Rios in December 2006.

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs.*,

Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Here, there is a dispute in the testimony concerning Johnson's meeting with plaintiff, the incident which frames plaintiff's allegations of retaliation. While Johnson alleges that at the December of 2006 meeting, she asked plaintiff if she was going to file a sexual harassment claim due to Rios' alleged conduct, plaintiff contends that Johnson stated at the outset of the meeting that she wanted plaintiff to find another job upon learning of the sexual harassment claim and that she was angry that plaintiff's complaint had reached the Human Resources Department.

There is also a dispute of fact concerning several of the statements of plaintiff's co-workers. For example, plaintiff maintains that Sandra Fiorelli (Fiorelli), an assistant to Kathleen Gallagher (Gallagher), the Vice Dean of Administration, was present when Rios made the physical contact with plaintiff. However, Fiorelli denies that she saw Rios engage in this behavior. Also, plaintiff maintains that she complained to Jacquelyn Sanders, an administrative assistant, about Rios's alleged touching five to ten times; however, Ms. Sanders states that plaintiff complained one time to her about Rios' behavior.

Defendants' allegations about plaintiff's job performance are also disputed. For example, while defendants contend that plaintiff would not accept a package for Gallagher from a delivery person, plaintiff states that she never refused to accept any packages for her co-workers. Plaintiff also maintains that she attempted to resolve the problems that she was experiencing with Fiorelli. She contends that, regardless of several allegations Fiorelli has made in her affidavit and to other

co-workers, plaintiff never attempted to strike Fiorelli or threw her hand up in her face, did not make negative comments about her weight and did not spray disinfectant to intentionally interfere with her breathing. Plaintiff also denies that she ever yelled at anyone in the Human Resources office in March of 2007, despite Crawford's allegations.

Moreover, plaintiff notes that Johnson acknowledged in her deposition that plaintiff was a hard worker, has high standards for performance in her professional life, performed excellently in re-establishing the invoice system in regard to law firms, was excellent in scheduling meetings, had her salary increased after working only one week despite no training, reported to work punctually, and stayed at work later than other co-workers. Plaintiff also contends that the only written evaluation was prepared by Johnson on March 23, 2007, after Johnson had threatened to terminate plaintiff's employment for building a sexual harassment claim. Odom maintains that the NYU School of Medicine does not require a supervisor to complete a performance evaluation during an employee's probationary period; thus, the testimony as to plaintiff's work performance is disputed.

Finally, defendants' allegations that Odom was the party responsible for the termination and that plaintiff's termination was too remote from the alleged protected activity is contradicted by plaintiff's deposition testimony which alleges that Johnson was the party who threatened her employment and that plaintiff was merely being given time to find another position.

In conclusion, there exists disputes as to the credibility of the testimony of plaintiff, the defendants, and plaintiff's co-workers. There are also various disputes of fact regarding plaintiff's work performance, whether Johnson made a statement threatening plaintiff's position in retaliation of a potential sexual harassment claim by plaintiff, and several incidents involving

plaintiff's interactions with co-workers. Therefore, defendants' motion for summary judgment is denied.

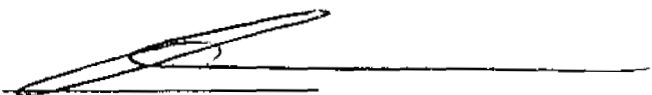
CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendants NYU Hospitals Center a/k/a NYU Medical Center and Annette Johnson's motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: June 26, 2009


Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\BendeckNYUSJ5

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