[*1] SCANNED ON 10/23/2009

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

PRESENT: Hon. Doris Ling-Cohan PART 26

Index Number : 109852/2007
KRIVONOS, IRINA
VS.
FOOT LOCKER
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this 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 defendant is denied in accordance with the attached decision/order.

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/19/09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 36

IRINA KRIVONOS,

Plaintiff,

-against-

FOOT LOCKER, INC.,

Defendant.

INDEX NO. 109852/07

MOTION SEQ. NO. 004

Ling-Cohan, J.:

In this action for employment discrimination and retaliation, defendant Foot Locker, Inc. (defendant) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of its former employee, plaintiff Irina Krivonos (plaintiff).

BACKGROUND

Defendant owns and operates athletic apparel retail stores under various trade names. Plaintiff commenced her employment with defendant in 1996 after graduating from college, where she majored in business management and finance. She is married and has a grown son. Until February 2006, plaintiff worked primarily at defendant's Foot Locker store in the Bensonhurst section of Brooklyn, where she became a manager and received numerous performance-based awards. For example, plaintiff received the "manager of the year" award three times and the "sales leadership award" four times. In 2005 alone, defendant awarded plaintiff

six different awards, including one for the highest percentage gain in sales volume, for which she was chosen out of approximately 300 managers in the northeast region.

Plaintiff aspired to a position of a district manager within the company. A district manager oversees all of defendant's stores within a particular district. In 2005, plaintiff was promoted to a position of manager-trainer, which is a step below a district-manager-in-training (DMIT) position. Holding the DMIT position is allegedly a prerequisite for the appointment to the district manager position.

At the time, Ruben Rosa (Rosa) was plaintiff's Brooklyn district manager and Darryl White (White) was defendant's northeast regional vice president. White wanted to promote plaintiff to the district manager position. He wanted her to manage a high-volume store first, so that she would be qualified to be a district manager (White Aff., ¶ 11). White found out that Kevin Sutton (Sutton), a general manager at the flagship Footaction store on 34th Street in Manhattan (the Footaction store), was likely to be promoted to a district manager's position within a year (*id.*, ¶ 12). White decided to offer plaintiff a co-manager position at the Footaction store, which had approximately $11 million in sales, so that when Sutton was promoted, plaintiff would take Sutton's position. This, White believed, would be the fastest track for plaintiff's promotion to a district manager position (*id.*, ¶¶ 10, 12, 13; Rosa Aff., ¶ 9).

The Footaction store has two co-manager positions, allegedly in order to train managers familiar with the store who can then become the store's general manager themselves, once this position becomes available (Coleman Aff., ¶ 5). Accordingly, in February 2006, White offered plaintiff a co-manager position at the Footaction store, which she accepted. Plaintiff was promised that she would get Sutton's position as general manager (Rosa Aff., ¶ 16). Eric Coleman (Coleman) was the district manager overseeing the Footaction store.

In July 2006, White left defendant's employ, and William Rousseau (Rousseau) took over his position. In November 2006, after Sutton was promoted to district manager, Rousseau informed plaintiff that she would not be promoted to general manager of the store, allegedly because she was a female with a family and a child. Instead, Sambu Baradji (Baradji), who was a general manager of a Harlem store, became the Footaction store's general manager.

At the time, Baradji allegedly was not a manager-trainer, a position which is a prerequisite to being a general manager of a large store such as the Footaction store (Krivonos Aff., ¶ 8; Rosa Aff., ¶ 14; Coleman Aff., ¶ 13), whereas plaintiff had been a manager-trainer for a year and a half (Krivonos Aff., ¶¶ 8, 54). Only subsequently did Baradji allegedly become a manager-trainer (*see* Coleman Aff., ¶ 13; Krivonos Aff., ¶ 54). Baradji allegedly did not have the same level of sales and managerial

skills that plaintiff had (Rosa Aff., ¶ 14; Coleman Aff., ¶ 13). Baradji's store had approximately $4.5 million in annual sales, whereas the Footaction store's sales volume was approximately $11 million (Coleman Aff., ¶ 13). By then, plaintiff had co-managed the Footaction store for 10 months (*id.*). Allegedly, Rousseau made a decision to pass over plaintiff and appoint Baradji without consulting with Coleman, which was allegedly a departure from the usual practice of consulting with a district manager when nominating a general manager of a store (*id.*, ¶ 12).

That same day, in November 2006, Rousseau informed plaintiff that she was being transferred to a Foot Locker store on 34th Street (the 34th Street Foot Locker store) as a co-manager.

Plaintiff complained of defendant's decision to transfer her at a meeting with the head of defendant's human resources department, Evelyn Ross (Ross) (Krivonos Aff., ¶ 10, 61). Believing that she was being discriminated against on the basis of her gender, plaintiff retained an attorney, who allegedly sent a letter to defendant's CEO.

In response, defendant allegedly attempted to retaliate against plaintiff. Rousseau contacted Rosa, plaintiff's former boss, and asked him to alter facts about plaintiff's employment history in order to create negative reports of her performance (Rosa Aff., ¶ 18).

In March 2007, the position of general manager at the 34th Street Foot Locker store became vacant. Plaintiff was not

appointed. Instead, Raoul Rosado (Rosado) from a different store was appointed.

Also at that time, plaintiff received an offer to become a general manager of defendant's store in SoHo. In April 2007, plaintiff received an offer to become a general manager at the Footaction store where plaintiff previously worked as a co-manager. Plaintiff claims that she did not believe that either offer was genuine, because: (1) she twice was denied a general manager position just several months prior; (2) both positions were not vacant and required that the general manager at that time would be either demoted or moved to a different location; (3) it appeared that both offers were made only as a result of plaintiff's complaint of discrimination; and (4) the SoHo store's sales volume was significantly lower than that of the Footaction store, and, as a result, her bonus would be smaller (Krivonos Aff., ¶¶ 80-86).

Rousseau testified that, at the time, there was no general manager position available at the Footaction store, which was taken by Baradji (Rousseau Dep. Tr., at 179-180). However, Rousseau thought that Baradji might take the general manager position in the SoHo store, which would then allow plaintiff to become the general manager at the Footaction store (*id.*).

Plaintiff declined both offers. Plaintiff alleges that she would not have had an opportunity to advance with defendant's company because of her gender. Therefore, she resigned in July

2007.

In her complaint (the Complaint), plaintiff alleges two causes of action: (1) defendant discriminated against her based on her gender, in violation of the New York City Human Rights Law (the Human Rights Law); and (2) defendant retaliated against plaintiff in violation of the Human Rights Law. Plaintiff seeks monetary damages, including punitive damages.

DISCUSSION

To obtain summary judgment, a movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

Defendant argues that its motion for summary judgment should be granted because plaintiff does not have a claim of gender discrimination against it under the Human Rights Law.

The Human Rights Law provides that:

> [i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived ... gender ... of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment

(Administrative Code of the City of NY § 8-107 [1] [a]).

The First Department has held that the Human Rights Law should be interpreted broadly and liberally (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66-67 [1st Dept 2009]). The Restoration Act, Local Law 85 for year 2005 (Local Law 85), amended the Human Rights Law, and provides that:

> [i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise

(Local Law 85/2005, § 1; *see also Williams*, 61 AD3d at 66-67).

"In any discrimination claim, the first thing the plaintiff must establish is that the plaintiff is a member of a group that the statute intends to protect" (*Hispanic AIDS Forum v Estate of Bruno*, 16 AD3d 294, 303 [1st Dept 2005]). The parties do not dispute that plaintiff, as a woman, belongs to a protected group. Therefore, the next issue is "whether the complained-of conduct may be found to constitute discrimination on that basis" (*id.* at 306). Discrimination may be proven by either direct or circumstantial evidence. The key question is whether an employer's conduct in question was predicated on an impermissible motive (*see Price Waterhouse v Hopkins*, 490 US 228, 250 [1989]).

Direct Evidence Analysis

A plaintiff can make out a prima facie case of

discrimination by showing direct evidence of the employer's impermissible motive, that is, that gender was a motivating factor for the employer's decision (*id.*). Liability depends on whether the protected trait actually motivated the employer's decision. The key determination is whether, at the time the decision was made, one of the employer's reasons for its decision was that the employee was a woman (*see id.*).

If plaintiff makes out a prima facie case of discrimination, then the employer must demonstrate , by a preponderance of the evidence, that it would have reached the same decision even if it had not allowed gender to play a role in its decision-making process (*see id.* at 244-245).

In this case, plaintiff alleges direct evidence of defendant's illegal motive, specifically, that Rousseau told her that she would not be appointed to the position of a general manager at the Footaction store because the position required long hours, and, considering that she was a female with a family, she would not be good enough for the job (Complaint, ¶ 28; Krivonos Dep. Tr., at 6-7, 265; Krivonos Aff., ¶¶ 4, 37). Instead, Baradji, a male general manager from the Harlem store was appointed. Additionally, plaintiff alleges that she was promised that she would become a general manager of the 34th Street Foot Locker store (Krivonos Dep., at 105-106). However, she was passed over again by defendant and Rosado, a male employee from a different store was chosen(Complaint, ¶ 44;

Krivonos Dep. Tr., at 104, 144). Accordingly, plaintiff has made a prima facie showing that would allow a jury to find that defendant relied on plaintiff's gender in making the decision not to promote her to the general manager position.

Defendant argues that, unlike plaintiff, Baradji had prior experience as a general manager, and had experience of managing managers and not only employees (Ross Dep. Tr., at 170). Baradji had a successful six-week sales trend just prior to the promotion. His store's annual sales increased significantly, and the upper management was impressed with him on one of their visits to his prior store (Rousseau Dep. Tr., at 84-85, 201).

Plaintiff contends, and offers in support, the affidavits of her former supervisors, that Baradji was less qualified for the position than she was. Specifically, plaintiff asserts that Baradji: (1) had less education and seniority than her, and his sales and managerial skills were inferior to plaintiff's (Krivonos Aff., ¶¶ 54-55; Rosa Aff., ¶ 14; Coleman Aff., ¶ 13); (2) managed a much smaller store in both the number of employees and the sales volume than plaintiff's store (Rousseau Dep. Tr., at 89-90; Coleman Aff., ¶ 13); (3) unlike plaintiff, was not a manager-trainer, a position that is allegedly a prerequisite to being a general manager of a flagship store (Rosa Aff., ¶ 14; Coleman Aff., ¶ 13); (4) unlike plaintiff, was not a co-manager at the Footaction store, which allegedly is typically a prerequisite to becoming the store's general manager (Krivonos

Aff., ¶ 51; Coleman Aff., ¶ 12); and (5) had fewer performance-based awards than plaintiff had (Krivonos Aff., ¶ 53). Additionally, Coleman believed that Rosado was less qualified than plaintiff to be the 34th Street Foot Locker store's general manager, because he was previously managing a much smaller store (Coleman Aff., ¶ 19).

Defendant's summary judgment motion must be denied, as there are issues of fact, as to whether defendant was motivated by plaintiff's protected trait or whether defendant would have made the same decision regardless of plaintiff's gender. Accordingly, under this analysis, summary judgment is not warranted.

Circumstantial Evidence Analysis

If plaintiff has circumstantial evidence of illegal motive, a three-step, burden-shifting analysis is used to make such determination, as articulated in *McDonnell Douglas Corp. v Green* (411 US 792, 802 [1973]).

> [F]irst, the plaintiff [must] establish a prima facie case of discrimination. If the plaintiff sustains this burden, the defendant must offer rebuttal evidence articulating a legitimate, independent, nondiscriminatory reason for its actions. Once defendant does so, in order to prevail plaintiff must prove, by a preponderance of the evidence, that the defendant's stated reasons are only a pretext for discrimination

(*Sogg v American Airlines*, 193 AD2d 153, 156 [1st Dept 1993]).

To make out a prima facie case, plaintiff must establish that she was (1) in a statutorily-protected group, (2) qualified

for the position in question, (3) denied the position, and that (4) denial occurred "'under circumstances which give rise to an inference of unlawful discrimination'" (*id.* at 156, quoting *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 [1981]). "That inference may be drawn from direct evidence, from statistical evidence, or merely from the fact that the position was filled or held open for a person not in the same protected class" (*id.* at 156).

Plaintiff alleges that she is a woman and that she was qualified for the position of the general manager at the Footaction store, which was denied to her in favor of Baradji. Defendant admits that plaintiff was considered, among other candidates, for this position (Rousseau Dep. Tr., at 83-84). Plaintiff alleges, and defendant concedes, that the position was filled by Baradji, who is not in the same protected class. Accordingly, plaintiff made out a prima facie case of discrimination.

As previously discussed, issues of fact exist as to whether defendant had a legitimate reason for appointing Baradji over plaintiff, and whether the stated reason was just a pretext, which defeats defendant's motion with respect to plaintiff's claim of gender discrimination under the Human Rights Law.

Plaintiff's Claim of Retaliation

Defendant argues that plaintiff's claim of retaliation fails as a matter of law.

The Human Rights Law provides that an employer may not

> retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter ...

(Administrative Code of the City of NY § 8-107 [7]).

> The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, ... or in a materially adverse change in the terms and conditions of employment ..., provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity

(*id.*; *see also Williams*, 61 AD3d at 71 ["no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was ... 'reasonably likely to deter a person from engaging in protected activity,'" quoting Administrative Code of the City of NY § 8-107 (7)]).

To establish retaliation under the Human Rights Law, a plaintiff must show that: (1) she engaged in a protected activity; (2) her employer was aware of that activity; (3) she suffered an employment action that would be reasonably likely to deter a person from engaging in such protected activity; and (4) a causal connection existed between the protected activity and

the adverse employment action (*see e.g. Raniola v Bratton*, 243 F3d 610, 624 [2d Cir 2001]).

The parties do not dispute that plaintiff engaged in a protected activity when (1) in November 2006, she complained to the head of defendant's human resources department about the fact that she was not appointed as the general manager of the Footaction store, and (2) retained an attorney, who allegedly contacted defendant.

The parties dispute, however, whether defendant took adverse employment action in response to plaintiff's engaging in a protected activity. Defendant argues that it did not demote or terminate plaintiff (*see e.g.* Ross Aff., ¶ 4). Rather, it offered her two promotions, including the position of a general manager at the Footaction store, both of which plaintiff rejected and, ultimately, voluntarily resigned. Plaintiff contends that, in response to her complaints, defendant (1) appointed a male employee, Rosado, for the position of the general manager of the 34th Street Footlocker store (Krivonos Aff., ¶¶ 75-76), (2) sought to alter her employment record in order to create negative reports of her performance (Rosa Aff., ¶ 18), (3) made disingenuous offers of positions that were filled by John Garcia at the SoHo store, and Baradji at the Footaction store, which required that the individuals in place would be either demoted or transferred to a different store (*see e.g.* Rousseau Dep. Tr., at 179-180; Krivonos Aff., ¶¶ 81, 83), and (4) offered her a general

manager position at a SoHo store that had allegedly less than one-third of the volume of sales of the Footaction store, which meant that plaintiff's bonus would be significantly diminished (Krivonos Aff., ¶ 84). A jury could reasonably conclude from this evidence that defendant's conduct was "reasonably likely to deter a person from engaging in protected activity" (Administrative Code of the City of NY § 8-107 [7]; *see also Williams,* 61 AD3d at 71), which defeats defendant's motion.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Foot Locker, Inc. for summary judgment is denied; and it is further

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

Dated: 10/19/09

J.S.C.

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