

Martin v McGraw Hill Cos., Inc.

2010 NY Slip Op 32867(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 112842/2009

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 112842/2009
MARTIN, DECEMBER
 vs.
MCGRAW-HILL COS., INC.
 SEQUENCE NUMBER : 002
 DISMISS

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

this motion to/for Dismiss

PAPERS NUMBERED
112
3
4

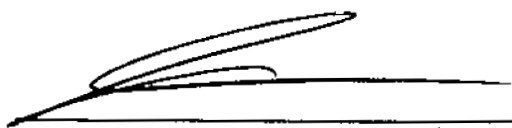
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits (none)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is denied
in accordance with the attached memorandum
decision.

FILED
 OCT 15 2010
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10-8-10


DORIS LING-COHAN J.S.C.
 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: IAS PART 36

-----X
DECEMBER MARTIN,

Plaintiff,

-against-

MCGRAW HILL COMPANIES, INC.,
PATRICK DYBERG, and DAVID MORALES,

Defendants.

-----X
LING-COHAN, J.:

Index No. 112842/2009

Motion Sequence No.: 002

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COUNTY CLERK'S OFFICE
NEW YORK

In this employment discrimination, wrongful termination, retaliation, sexual harassment, gender and disability discrimination action, defendant David Morales (Morales) moves, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint on the ground that the pleading fails to state a cause of action.

The following allegations are taken from the amended complaint. Plaintiff was hired by The McGraw-Hill Companies, Inc. (McGraw) on March 14, 2007 and began working on March 26, 2007 as an Executive Coordinator at an annual salary of \$57,500. At the time of her hire, defendant Patrick Dyberg (Dyberg) was plaintiff's manager and Morales was a manager in the Financial Reporting Department. On February 7, 2008, plaintiff informed Dyberg and Thuy Nguyen of the Human Resources Department of her pregnancy and that her anticipated delivery date was September 17, 2008. Due to complications surrounding her pregnancy in February 2008, plaintiff was placed on complete bed rest at the direction of her physician and she subsequently was absent from work for several weeks. Plaintiff alleges that after Dyberg learned of her pregnancy, he began harassing and intimidating her by making it difficult for her to take days off for doctor's appointments. As a result, plaintiff was forced to use personal days on occasions when she worked from home or left early for visits with her physician. In June of 2008, plaintiff approached Andy Baker, a Human Resources Manager, and reported that Dyberg

had become confrontational and overly critical of plaintiff after she announced her pregnancy. The stress from the situation caused nausea and illness, adversely affecting her pregnancy.

Plaintiff also took her complaints to William Harper, Vice President of Human Resources, and reported that she was feeling threatened by Dyberg following a series of intimidating stares by Dyberg. Despite Harper's efforts to address the situation, plaintiff alleges that Dyberg's hostility continued, and he issued plaintiff an unfavorable evaluation.

Plaintiff alleges further that, in April of 2009, she was subjected to sexual harassment at McGraw. Specifically, she was approached by Morales, who made inappropriate remarks and inquiries into her sex life. Plaintiff reported Morales' conduct to Dean Kelly, her new supervisor, and several other managers in the Human Resources Department. On June 5, 2009, management advised plaintiff that it could not substantiate her allegations. During that meeting, plaintiff alleged that Morales subjected two other employees, Lashonda Sasser and Sharon Rambarran, to sexual harassment and that despite its knowledge of said events, McGraw failed to take any action.

In June of 2009, plaintiff was suspended and her suspension was effective through October of that year. When she returned to work, McGraw advised plaintiff that they had concluded the investigation into the complaints regarding Dyberg and found that he had not engaged in any wrongdoing. McGraw did not advise plaintiff of any determination regarding plaintiff's complaint against Morales. Thereafter, McGraw accused plaintiff of breaching a confidentiality agreement and she was fired approximately two days later. Plaintiff avers that, at all times, she acted reasonably and properly, and with the full knowledge of her supervisors and the Human Resource Department.

Plaintiff commenced this action asserting claims for: (1) wrongful termination; (2) sexual harassment; (3) aiding and abetting employment discrimination; (4) negligent and intentional infliction of emotional distress; (5) disability and gender discrimination based on employment; and (6) retaliation. Plaintiff seeks lost wages and benefits, compensatory damages for mental,

emotional, and physical injury, as well as damage to her reputation, punitive damages, attorney's fees, costs and disbursements incurred in this action.

Morales argues that he is entitled to dismissal because: (1) the complaint fails to state a cause of action for sexual harassment under the Administrative Code of the City of New York § 8-107 (1) (a); (2) the complaint fails to state a cause of action for retaliation against defendant Morales; (3) plaintiff failed to plead sufficient facts to establish that Morales was an aider and abettor of employment discrimination under Administrative Code § 8-107 (6); (4) plaintiff failed to support a claim of disability discrimination under NYC Administrative Code § 8-107 (19) or show that she sought a reasonable accommodation for her disability from Morales; (5) the complaint fails to state a cause of action against Morales for gender and disability discrimination under Administrative Code § 8-107 (13) because the provision centers on employer liability, and plaintiff failed to plead facts that Morales was an employer under the law; (6) the complaint fails to state a cause of action for intentional or negligent infliction of emotional distress; (7) the complaint fails to state a cause of action for constructive discharge; (8) the complaint fails to state a cause of action and pursuant to New York State Executive Law § 296, because plaintiff failed to establish that Morales had any ownership interest or any power to influence personnel decisions made by others at McGraw that would impact plaintiff's employment; and (9) the complaint fails to state a cause of action as to the Family Medical Leave Act.

On a motion pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994); *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275(1997); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 (1st Dept 2002). Applying such principles herein, defendant Morales' motion is granted in part and denied in part, as detailed below.

In her amended complaint, plaintiff has stated a valid cause of action for sexual harassment under Administrative Code § 8-107 (1).

“Despite the popular notion that ‘sex discrimination’ and ‘sexual harassment’ are two distinct things, it is, of course, the case that the latter is one species of sex or gender-based discrimination” There is no ‘sexual harassment provision’ of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender.”

(*Williams v New York City Hous. Auth.*, 61 AD3d 62, 75 [1st Dept], *lv denied* 13 NY3d 702 [2009]; New York City Administrative Code § 8-107 [1] [a]). As such, in *Williams*, the First Department held that, as applied in the context of sexual harassment, the relevant query in such an action is whether the facts of the case state circumstances which constitute inferior terms and conditions based on gender (*Williams v New York City Hous. Auth.*, 61 AD3d at 78). Here, the complaint asserts that, on more than one occasion, Morales made several unsolicited comments regarding plaintiff’s sex life and practices. Plaintiff also alleges that two other female employees contacted the Human Resources Department to lodge a complaint against Morales after he groped and kissed one employee and made sexually suggestive gestures to the other. It should be noted that courts recognize that the complaints of women who have been sexually harassed are routinely dismissed because courts often apply the “federal standard that they have not been harassed enough” (*id.* at 78). However, the City Human Rights Law affords more latitude than its federal and state counterparts and thus allows such claims as these to survive dismissal (*id.* at 79-80). Generally, it is for the trier of fact in harassment cases to determine whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender (*id.* at 78).

Plaintiff has asserted a valid cause of action against Morales for aiding and abetting sexual harassment under Administrative Code § 8-107 (6). Individual liability as an aider and abettor of sexual harassment can be imposed upon a defendant who actively participates in the conduct giving rise to a discrimination claim. (*See Almonord v. Kingsbrook Jewish Med. Ctr.*,

2007 WL 2324961, *12 [EDNY 2007][noting that the NYCHRL § 8-107(6) is subject to the same analysis as the NYSHRL § 296(6) because it “uses virtually identical language,” thus finding individual liability under both statutes]; *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 329 [2004][“The person alleged to have engaged in the discrimination does not have to have power to hire and fire, just ‘direct participation’ in the discrimination”]). Here, the discriminatory acts listed in the complaint provide the foundation for possible liability against Morales under Administrative Code § 8-107 (6).

Contrary to Morales’ contention, plaintiff has stated a valid cause of action for interference with protected rights under Administrative Code § 8-107 (19). In the complaint, plaintiff alleges that defendants deprived her of a work environment free of sexual harassment. The complaint further alleges that, after she lodged a complaint with Human Resources following Morales’ lewd conduct, she encountered hostility, punishment, and a degree of indifference from defendants upon seeking a reasonable accommodation. As such, plaintiff has sufficiently pled her fourth cause of action.

As for the remaining causes of action, plaintiff consents to the dismissal of her second, fifth, sixth, seventh, and eighth causes of action against Morales.

Finally, Morales has not demonstrated his entitlement to costs in light of the fact that plaintiff’s first, third, and fourth causes of action have survived dismissal.

Accordingly, it is

ORDERED that defendant David Morales motion to dismiss the amended complaint is granted in part and the second, fifth, sixth, seventh, and eighth causes of action of the complaint are dismissed as against defendant Morales; and it is further

ORDERED that defendant David Morales is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that defendant’s motion for costs is denied; and it is further

ORDERED that the parties shall complete discovery expeditiously; 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.

The Court notes that the discovery process is being supervised by Special Referee Beverly Cohen, in accordance with this court's order dated May 25, 2010.

Dated: 10-8-10



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

J:\Dismiss\Martin v McGraw II.carpenter.wpd

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OCT 15 2010
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