

Digirolamo v Horn

2011 NY Slip Op 32270(U)

August 10, 2011

Supreme Court, New York County

Docket Number: 104145/2007

Judge: Geoffrey D. Wright

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

PRESENT: GEOFFREY D.S. WRIGHT
Justice

PART 62

Digirolamo, Francesca

INDEX NO. 104145/2007

Plaintiff/Petitioner(s)

MOTION DATE _____

- v -

Horn, Martin

MOTION SEQ. NO. 002

Defendant/Respondent(s)

The following papers, numbered 1 to 5 were read on this motion/petition for Summary Judgment.

	<u>Papers Numbered</u>
Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2,3,4
Replying Affidavits _____	5
Other (Cross-motion) & Exhibits Annexed _____	

Cross-Motion: Yes X No

This motion for summary judgment is granted as per the annexed decision

Dated: August 10, 2011

J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

FILED

Check if appropriate: DO NOT POST

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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 62

-----X

FRANCESCA DIGIROLAMO and MASHERE
PRIDE-RAWLS and MICHELLE BACON

Plaintiffs,

-against-

MARTIN HORN, individually and as Commissioner of the Department of Correction of the City of New York; the DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK; KATHLEEN COUGHLIN, individually and as Deputy Commissioner of the Department of Correction of the City of New York; LEASA MCLEISH, individually and as Assistant Commissioner of the Department of Correction of the City of New York; and ALAN VENGERSKY, INDIVIDUALLY AND AS Assistant Commissioner of the Department of Correction of the City of New York

Defendants.

-----X

Index # 104145/07
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Present:
Hon. Geoffrey Wright
Judge, Supreme Court

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NEW YORK
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgment

PAPERS	NUMBERED
Notice of Motion, Affidavit & Exhibits Annexed-----	1
Order to Show Cause, Affidavit & Exhibits-----	
Answering Affidavit & Exhibits Annexed-----	2,3,4
Replying Affidavits & Exhibits Annexed-----	5
Other (Cross-motion) & Exhibits Annexed-----	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiffs Francesca Digirolamo, Mashere Pride-Rawls, and Michelle Bacon were each demoted in 2005. Plaintiffs claim that these demotions amount to age, sex, and religious discrimination in violation of New York State Executive Law § 296(1) and New York City Human Rights Law § 8-107(1). Plaintiff Digirolamo also claims to have been retaliated against for opposing discrimination.

Plaintiffs claim that they were discriminated against because they are not Jewish. "A party alleging religious discrimination in employment under the New York State and New York City Human Rights Laws carries the initial burden of establishing a prima facie case. To meet this burden, an employee must show that he is a member of a protected class, was qualified to hold the position, was terminated from employment or suffered another adverse employment action, and the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" *Messinger v. Girl Scouts of U.S.A.*, 16 A.D.3d 314, 792 N.Y.S.2d 56, 2005 N.Y. Slip Op. 02406 citing *Forrest v. Jewish School for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382, 2004 N.Y. Slip Op. 07620. Claims of sex discrimination are held to the same standard. *Lyons v. New York State Div. of Human Rights*, 79 A.D.3d 1826, 913 N.Y.S.2d 586, 2010 N.Y. Slip Op. 09836.

Plaintiffs have established that they are members of a protected class. They claim to have suffered adverse employment actions because they are neither men nor Jewish. Religious and sex discrimination are prohibited by both New York State Executive Law and New York City Human Rights Law. Though plaintiffs do not identify their respective religious affiliations, they clearly state that they are not of the Jewish faith. In the context of a workplace that favors Jewish employees, workers that are not of the Jewish faith would qualify as a protected class.

There is no argument that the plaintiffs were not qualified for the positions they held. Digirolamo's Executive Administrator title was specifically created for her and tailored to her qualifications. Pride-Rawls and Bacon each held a number of supervisory positions before ascending to Executive Director and Assistant Commissioner.

It is also uncontested that each of the plaintiffs suffered an adverse employment action. Each plaintiff was reassigned and given a reduction in pay.

Plaintiffs fail to demonstrate that their demotions occurred under circumstances giving rise to an inference of sex discrimination. Plaintiffs claim that they were told that their salaries were cut because the Department of Corrections (DOC) needed to create room in the budget to hire Sara Gallagher. Plaintiffs assert that no male administrative managers had their titles or pay reduced to facilitate this new hire and that a number of employees, exclusively male, received raises. However, defendant was able to identify two men who suffered pay cuts and five women who received raises. Furthermore, the budget was being reorganized to facilitate the hiring of a woman, which indicates that DOC was not making employment decisions based on gender.

Plaintiffs make a prima facie showing that they suffered adverse employment actions under circumstances giving rise to religious discrimination. Four out of the five employees with identified religious affiliations that received raises are Jewish. The other employees that had their salaries adjusted were not identified as being Jewish or otherwise.

With the plaintiffs having made a prima facie showing for religious discrimination, the burden shifts to defendants to rebut a presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and nondiscriminatory reasons to support their decision to alter the conditions of plaintiffs' employment. *Bendeck v. NYU*

Hospitals Center, 77 A.D.3d 552, 909 N.Y.S.2d 439, 2010 N.Y. Slip Op. 07585 citing *Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 489 N.E.2d 745, 498 N.Y.S.2d 776, 53 Fair Empl.Prac.Cas. (BNA) 767. Defendants identify legitimate, nondiscriminatory business reasons for the demotions of each of the plaintiffs.

Defendants posit that Pride-Rawls was demoted because she was working with managerial titles and salary without managerial responsibilities. Pride-Rawls, herself, admits in deposition that after the 2004 reorganization of the Strategic Planning and Programs Division she no longer supervised anybody. The DOC was simply modifying Pride-Rawls' salary and title to better correspond with her responsibilities. Like Pride-Rawls, Digirolamo's was demoted because defendant deemed that her title and pay did not reflect her responsibilities. Bacon, on the other hand, was demoted because her work was considered to be unsatisfactory. Defendant provides deposition showing that there were numerous complaints against her and that Deputy Commissioner Coughlin was not satisfied with Bacon's performance and managerial style.

The burden now shifts back to the plaintiffs to demonstrate that these nondiscriminatory reasons are merely pretextual. *Bedny v. New York State Div. of Human Rights*, 84 A.D.3d 586, 923 N.Y.S.2d 88, 267 Ed. Law Rep. 311, 2011 N.Y. Slip Op. 04099. Plaintiffs must "prove by a preponderance of the evidence *both* that the reason [proffered by defendants] was false, *and* that discrimination was the real reason." *Taylor v. New York University Medical Center*, 21 Misc.3d 23, 871 N.Y.S.2d 568, 240 Ed. Law Rep. 868, 2008 N.Y. Slip Op. 28332 quoting *Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 14 A.D.3d 325, 787 N.Y.S.2d 289, 2005 N.Y. Slip Op. 00076 (internal citations omitted). Plaintiffs fail to meet these requirements. Neither Pride-Rawls nor Digirolamo provide any evidence indicating that their responsibilities warranted their previous title and salary. Bacon claims that she worked at a satisfactory level and provides an email showing that Commissioner Horn served as a personal reference when she applied to a position outside of DOC. This serves as evidence that her performance may not have been the reason for her demotion, but "it is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move." *Taylor v. New York University Medical Center* quoting *Iole v. Alden Press*, 145 A.D.2d 29, 536 N.Y.S.2d 1000, 53 Fair Empl.Prac.Cas. (BNA) 723. Bacon is not able to demonstrate that discrimination was the motivation driving the decision to demote her.

Plaintiffs also claim that defendants discriminated against them because of their respective ages. Claims of age discrimination are held to a different standard than claims of religious and gender discrimination. To establish a prima facie case for age discrimination, plaintiff must demonstrate that "(1) she was in a protected age group, (2) she was terminated, and (3) she was sufficiently qualified to hold her position. In addition, if she does not produce direct or statistical evidence that would logically support an inference of discrimination, she must show her position was subsequently filled by a younger person or held open for a younger person." *Bailey v. New York Westchester Square Medical Centre*, 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. Slip Op. 00099 citing *Iole v. Alden Press, Inc.*, 145 A.D.2d 29, 536 N.Y.S.2d 1000, 53 Fair Empl.Prac.Cas. (BNA) 723. Plaintiffs cannot make a prima facie showing for age discrimination because none of them were terminated.

Plaintiff Digirolamo asserts that after filing a complaint of discrimination, defendants retaliated against her. "In order to make out a claim of unlawful retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered adverse employment action based on her activity, and (4) there is a causal connection between the protected activity and the adverse action." *Bendeck v. NYU Hospitals Center*, *supra* citing *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382, 2004 N.Y. Slip Op. 07620.

It is clear that Digirolamo was engaged in an activity protected by Executive Law § 296 (7). She filed formal complaints to the Equal Employment Opportunity office in response to perceived discrimination and retaliation. It is also not contested that defendants were aware of the complaint and subsequent investigation. After the complaint, plaintiff claims to have suffered a number of adverse employment actions. These actions include the creation of a list of Tasks and Standards, the denial of a leave of absence, a memo regarding poor attendance, and a demotion. The creation of a list of Tasks and Standards and a memo do not negatively affect the terms of plaintiff's employment and do not constitute adverse employment actions. Denial of a leave of absence and a demotion can be adverse actions, but plaintiff fails to show a causal relationship between them and her protected activity. Though they occurred after the filing of a formal complaint, chronology does not imply causation. Furthermore, there is no evidence that the demotion and denial of leave of absence were not resulting from plaintiff's poor attendance and plaintiff having already used up her sick leave.

Defendants' motion for summary judgment is granted.

This constitutes the decision and order of the Court.


GEOFFREY D. WRIGHT
AJSC

August 10, 2011

FILED

AUG 22 2011

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