

Alfano v Starbucks Corp.
2012 NY Slip Op 31548(U)
May 30, 2012
Sup Ct, Nassau County
Docket Number: 8215/10
Judge: Thomas Feinman
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

SHERRY ALFANO,

Plaintiff,

- against -

STARBUCKS CORP., and ARISTOMENIS MENDRINOS,
individual, and IVY CUESTA, individual, and JENNA
SIMONETTI, individual, and SASKIA TATTEGRAIN,
individual, and MARISA TORRES, individual, and
KEVIN BREAKSTONE, individual,Defendants.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 8215/10

MOTION SUBMISSION
DATE: 4/6/12MOTION SEQUENCE
NO. 9

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Memorandum of Law in Support of Motion.....	<u>X</u>
Affirmation in Opposition.....	<u>X</u>
Reply Affirmation.....	<u>X</u>
Memorandum of Law in Support of Reply.....	<u>X</u>

RELIEF REQUESTED

The defendants, Starbucks Corp., (hereinafter referred to as "Starbucks"), Aristomenis Mendrinis, (hereinafter referred to as "Mendrinis" and "District Manager"), Ivy Cuesta, (hereinafter referred to as "Vásquez", [her married name was Cuesta], and "Store Manager"), Jenna Simonetti, (hereinafter referred to as "Simonetti" and "Supervisor"), Saskia Tattegrain, (hereinafter referred to as "Tattegrain" and "Supervisor"), and Marisa Torres, (hereinafter referred to as "Torres" and "Supervisor"), move, for an order pursuant to CPLR §3212 granting summary judgment to the aforementioned defendants, (also referred to collectively as the "Starbucks defendants"), on plaintiff's claims for retaliatory discharge and refusal to promote under New York State Human Rights Law, and common law intentional infliction of emotional distress. The defendants submit a Memorandum of Law in support of the motion. The plaintiff, Sherry Alfano, (hereinafter referred to as "Alfano"), submits opposition. The defendants submit a reply affirmation and a Memorandum of Law in support of the reply.

The plaintiff initiated this action seeking monetary damages based upon the defendants' alleged repeated and severe violations of the New York State Human Rights Law, Executive Law Section 290, *et seq.*, ("NYSHRL"), as well as common law torts of assault, battery and intentional infliction of emotional distress. The plaintiff alleges five causes of action: (1) sexual harassment under NYSHRL against the Starbucks defendants, (2) retaliation against the Starbucks defendants under NYSHRL for failure to promote and wrongful termination, (3) intentional infliction of emotional distress against all defendants, (4) battery against defendant, Kevin Breakstone, (hereinafter referred to as "Breakstone"), and (5) assault against Breakstone.

The defendants, by way of the instant motion, seek summary judgment dismissing only plaintiff's second cause of action for retaliation, and third cause of action for intentional infliction of emotional distress.

BACKGROUND

Plaintiff commenced employment with Starbucks as a barista in Merrick, New York, in April 2008. As a barista, plaintiff made drinks for customers, worked on the register, and stocked and cleaned various areas of the store. Plaintiff remained a barista throughout her employment with Starbucks which ended with her termination on December 11, 2009. Plaintiff worked at various locations for Starbucks from April 2008 to March 2009, including Merrick, Uniondale, Levittown, Roslyn, Massapequa, and Westbury. Plaintiff was transferred to the Starbucks store located at 55 Northern Boulevard, Great Neck, New York, (hereinafter referred to as the "Great Neck store"), in March, 2009, where she remained until her termination in December, 2009.

The defendants submit that on October 18, 2008, the plaintiff was issued her first written notice concerning her attendance issues on a Performance Review. Thereafter, plaintiff was issued a verbal warning concerning her attendance because plaintiff called in to advise that she would be late for her shift. A corrective action form followed providing that plaintiff's attendance violation was an ongoing problem. Defendants provide that on November 24, 2008, Alfano received a second written corrective action form for being late for two shifts, on December 1, 2008, and January 17, 2009, with warnings that future violations may result in future corrective action, including termination.

Thereafter, in March, 2009, plaintiff was transferred to the Great Neck store. Defendants submit that corrective action forms dated September 30, 2009, October 2, 2009, and December 7, 2009, reflect plaintiff's attendance issues, and the forms provided that further violations may result in further corrective action including separation. The defendant's Supervisor, Vasquez, decided to terminate plaintiff's employment on December 11, 2009 when "Alfano again arrived late to work". On December 14, 2009, Starbucks responded to plaintiff's call to Partner Resources contesting her separation and Starbucks advised plaintiff it would review the circumstances of plaintiff's situation. Carrie Glenn, Starbucks' Partner Resource Manager asked Mendrinos, its District Manager, to gather information that led to plaintiff's separation, whereby Mendrinos provided Carrie Glenn with a summary of the corrective actions, citing six occasions of tardiness at the Great Neck store. The defendants set forth that Vasquez's discharge decision was upheld by Starbucks' Regional Director within the New York Metro, Sean Zuckman, Mendrinos' direct supervisor.

The plaintiff began working at the Great Neck store in March, 2009, until her termination of December 22, 2009. Plaintiff provides that from March 2009 until September 2009, she had no written disciplinary write-ups from her supervisors, or any documented time and attendance issues in reporting to work, as confirmed by defendants in their moving papers. Plaintiff provides that prior to September, 2009, she received a customer service award. Mendrinos testified that he had told plaintiff that "her customer service skills were phenomenal and that she's in the top of customer service skills, absolutely". Mendrinos didn't remember if he told plaintiff this prior to November 12, 2009.

The plaintiff provides that a customer, defendant, Breakstone, and Torres, Supervisor at the Great Neck store, met each other through the Great Neck store while Breakstone was a customer there. Plaintiff refers to Breakstone's testimony which provides that Breakstone frequented the Great Neck store, on average, five-to-six hours over the course of two-to-three days the Great Neck store, including the time period from July, 2009 through December 11, 2009. Torres testified that at some point, Torres and Breakstone became involved sexually, hugged at the Great Neck store, and provided Breakstone access to the employee's back office, in violation of Starbucks' policy. Tattetrain, Supervisor, testified that she was friends with Breakstone, a "regular customer" who she ate out in town with, allowed him, on at least one occasion that she recalled, access to the back office while plaintiff was also present in the back office. Breakstone testified that he remembers being permitted access to the back office of the Great Neck store on two or three occasions, but could not remember which Starbucks' supervisor was on duty when he was permitted such access.

Plaintiff testified that in September, 2009, while plaintiff was sitting at a desk, on a break, in the back office of the Great Neck store, Tattetrain, Supervisor, and Breakstone, hugged each other and began a sexual encounter, whereby Breakstone unlawfully grabbed plaintiff's breast. Plaintiff testified she shouted Tattetrain's name, and Tattetrain responded "Sherry shut up" and continued the sexual encounter. Plaintiff provides that Tattetrain told her "that's just how Kevin is", and at a later time told plaintiff to "let [Breakstone] touch [her]" and give her a neck rub, and informed her that Breakstone wanted to take a picture of her.

Plaintiff testified that on a separate occasion in September, 2009 she was cleaning the condiment stand when Breakstone unlawfully came up behind her, pressing himself up against her, groped her breast with one hand, and attempted to reach her private area with his other hand. Plaintiff pushed Breakstone away, at which point Simonetti, Supervisor, said "hey, what are you doing over there with my husband. Husband, come over and talk to wifey". Plaintiff notified Mendrinos about this incident in October, 2009, who responded that plaintiff should tell Vasquez, Store Manager.

Plaintiff testified that in early October 2009, she was inside the ladies room at the Great Neck store, cleaning, when Breakstone began to repeatedly knock at the door. Plaintiff testified that she cracked the door open, whereby Breakstone pushed himself in, pinned her against the wall, and sexually assaulted her and told her that if she told anyone, he would find out where she lived, kill her and hurt her daughter. Breakstone left the restroom and plaintiff remained inside with the door locked. Torres, Supervisor, yelled out why it was taking plaintiff so long to clean the bathroom, and plaintiff, who came out of the bathroom, described to Torres the sexual assault that had taken place. Plaintiff avers that Torres then responded "that's how Kevin is. He's harmless" and advised plaintiff that she "can't complain about everything because they're going to think something is wrong with [plaintiff] because [plaintiff had] come from so many stores" ... and advised her "to let it roll off [her] back". Plaintiff described the incident to Vasquez, Supervisor, the next day, who responded by laughing and told the plaintiff "these people are crazy" and advised the plaintiff "to stay away from these people".

Thereafter, in early November, 2009, while plaintiff was behind the counter cleaning, plaintiff was being cursed at by Breakstone in the presence of Tattegrain, Supervisor, who, plaintiff provides, laughed and allowed the verbal barrage to continue.

On a separate occasion, on November 12, 2009, while plaintiff was working the drive-thru, Breakstone approached her with another verbal barrage, cursing her and threatened that he will kill her and hurt her daughter, and stating that he wants her to give him "good customer service". Simonetti, Supervisor, did not take any action to stop the barrage, but rather, supplied Breakstone with Mendrinos' number so that Breakstone could lodge a complaint against the plaintiff. Thereafter, plaintiff submits that she felt unsafe, retreated to the back office where she was unsure that Breakstone would come back there, called Vasquez and was unable to reach her. Plaintiff then called Mendrinos who told plaintiff to call Vasquez. As plaintiff couldn't reach Vasquez, she called 911. Plaintiff spoke to the police and asked them to remove Breakstone from the store, however, Simonetti, Supervisor, told the police that Breakstone did nothing wrong and that he was permitted to stay the store.

The plaintiff testified that on November 17, 2009, Mendrinos visited the Great Neck store and plaintiff informed Mendrinos that she felt unsafe because Breakstone was permitted to frequent the store, whereby, Mendrinos responded that she "can't blame the customer for what he did" because plaintiff was "too sexy". Breakstone testified that as a result of the November 12, 2009 incident, Mendrinos gave Breakstone a \$25.00 gift card, because he was "sorry [Breakstone] had to deal with this".

The plaintiff disputes the corrective action forms issued from September 30, 2009, and subsequent forms thereafter. Plaintiff submits she was marked late for days she was not scheduled to work, was not given an opportunity to review some of the forms and did not sign such forms, and notified her supervisor when she would be late and received approval. Plaintiff refers to various records demonstrating her punctuality. Plaintiff refers to records reflecting that Torres was late to work seven times from November 2009 through December 2011, and provides that Torres was not reprimanded for her lateness.

APPLICABLE LAW

In order to state a cause of action for retaliation under NYSHRL, the "plaintiff must 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).

Causal connection can be established by evidencing any of the following: (1) close temporal proximity between the protected activity and the adverse employment action; (2) evidence that other similarly-situated employees were treated differently than the plaintiff; or (3) with direct proof of retaliatory animus. (*Nativity St. Louis v. New York City Health & Hosp. Corp.*, 682 F. Supp.2d 216).

A time span of less than a month was "short enough to permit a jury to infer a causal connection". (*Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208). But "[w]here a claim of retaliation is based solely on timing" and the plaintiff suffered adverse job actions "well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." (*Nativita, supra*). "Where timing is the only basis for a claim of retaliation, and gradual adverse job

actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.” (*Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87).

After making out a *prima facie* case, a plaintiff may proceed on a “pretext analysis, in which case the burden shifts to the defendant to proffer a legitimate, non-retaliatory reason for the adverse actions taken against plaintiff. (*Ferrante v. American Lung Ass’n*, 90 NY2d 623). Once accomplished, a plaintiff then requires the burden of producing evidence creating a factual question that the defendant’s proffered legitimate reasons for taking the applicable adverse employment actions were merely a pretext for discrimination. (*Id.*) A plaintiff meets this burden by showing both that the defendant’s asserted legitimate reason was false and retaliation was the real reason for the complained about action. (*Id.*)

To prevail on a summary judgment motion in a claim brought under the NYSHRL that proceeds under a pretext analysis, the “defendants must demonstrate either plaintiff’s failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual.” (*Forrest, supra*).

The Court of Appeals has cautioned trial courts that their role in directing a motion for summary judgment under the NYSHRL on a pretext analysis is “issue-finding, rather than issue-determination”, and the courts should not “confuse[] plaintiff’s ultimate burden with the showing needed to withstand a summary judgment motion”. (*Ferrante, supra* (internal citations and quotations omitted). “Generally, a plaintiff is not required to *prove* his claim to defeat summary judgment to assess credibility”. (*Id.*) (emphasis added). Instead, if after having raised a material issue of fact on each required element of her claim, the defendant is able to articulate a non-discriminatory reason for the complained of action, to defeat the defendant’s summary judgment motion, the plaintiff “must show that there is a material issue of fact as to whether (1) the employer’s asserted reason for [the challenged action] is false or unworthy of belief *and* (2) more likely than not the employee’s [protected activity] was the real reason”. (*Id.*)

Alternatively, after making out a *prima facie* case of retaliation, rather than proceed under a pretext analysis, a plaintiff may proceed under a “mixed motive” theory. A mixed motive situation arises when an employer may have had both a “permissible and impermissible (or bad faith) discriminatory basis” for taking an adverse employment action - - such as termination - - against a plaintiff. (*Card v. Sielaff*, 154 Misc2d 239). Under this sort of analysis, “the question becomes which was the ‘real’ reason and how to uncover it. This is precisely the dilemma which mixed motives analysis was designed to address”. (*Id.*)

Under a mixed motive theory, once a plaintiff makes out a *prima facie* case, “the burden shifts to the employer to show that its employment decision would have been the same absent the unlawful motive”. (*Id.*) In order to prevail under this theory, a defendant “will have to prove, by a preponderance of the evidence, that it would have made the same [decision to terminate a plaintiff’s employment] even if it had not taken [the plaintiff’s protected activity] into account.” (*Id.*) To defeat a motion for summary judgment on such a theory, the court must find that there are disputed issues of material fact as to whether retaliation was one of the motivating reasons for the defendant’s conduct. (*Id.*, see also *Williams v. New York City Housing Authority*, 61 AD3d 62).

DISCUSSION

The defendants argue, essentially, that the plaintiff's termination was due to plaintiff's lateness in violation of Starbucks' policy. The defendants refer to Starbucks' company Partner Guide, citing pertinent parts that refer to attendance and punctuality, which require the plaintiff to be reliable in reporting to work on time and to notify the store manager, or assist the store manager if she could not report to work, or would be late. The defendants refer to the corrective action forms which reflect that plaintiff was marked late and submit that plaintiff's discharge was based on her reported tardiness.

The defendants set forth that plaintiff cannot establish a causal connection between her termination and her alleged complaints to Starbucks' Supervisors, Store Manager, and District Manager, that Breakstone allegedly harassed her. Likewise, the defendants set forth that plaintiff cannot establish a causal connection between Starbucks' failure to promote the plaintiff, and plaintiff's alleged complaints of sexual harassment.

However, several issues of fact exist concerning the causal connection between plaintiff's termination and her alleged complaints to Starbucks' Supervisors, Store Manager, and District Manager regarding Breakstone's alleged harassment. Such issues include, and are not limited to, the defendants' treatment of Torres, a similarly-situated employee held to identical time and attendance standard, but who never engaged in protected activity, who was late on more occasions than the plaintiff in a very short time span, and was treated entirely differently than the plaintiff. Additionally, issues exist concerning the temporal proximity to plaintiff's call to 911 concerning her complaints about Breakstone's alleged harassment. Issues of fact exist concerning the causal connection between plaintiff's complaints and produced emails of Starbucks' management indicating that plaintiff's situation was "getting out of hand" and an inquiry was made if there were "grounds to separate," immediately after plaintiff engaged in a protected activity, as well as the performance evaluation submitted by a Starbucks' Supervisor, shortly prior to plaintiff's termination, reflecting that plaintiff "meets expectations". Plaintiff was held to make a *prima facie* showing of retaliation by demonstrating that plaintiff was terminated from plaintiff's employment shortly after complaining about an incident in which all the female employees were forcibly weighed. (*McRedmond v. Sutton Place Restaurant and Bar*, - - - NYS2d - - -, 2012 WL 1836372). While defendants articulated a nondiscriminatory reason for termination, such as arriving late and being rude to customers, plaintiff raised issues of fact as to whether the articulated reasons were pretextual, and therefore plaintiff's retaliation claims proceeded. (*Id.*)

Here, under a retaliatory discharge theory, as well as a mixed motive analysis and a pretext analysis, issues of fact exist concerning the causal connection between plaintiff's complaints and termination, the disparate treatment afforded by the defendants to Torres, and the temporal proximity of the termination. Causation "can be established by showing that a retaliatory action was close in time to the protected activity, that other similarly situated employees were treated differently, or with direct proof of retaliatory animus". (*Nativita St. Louis v. New York City Health & Hospital Corp.*, 682 F.Supp. 2d 216). Plaintiff has raised issues concerning whether the defendants' proffered legitimate reasons for taking the applicable adverse employment actions were merely a pretext for discrimination. (*Ferrante v. American Lung Ass'n*, 90 NY2d 623). As already provided, "[T]he question becomes which was the 'real' reason and how to uncover it. This is precisely the dilemma which mixed motives analysis was designed to address." (*Card v. Sielaff*, 154 Misc2d 239).

Additionally, plaintiff has raised an issue of fact concerning the causal connection between defendants' failure to promote plaintiff and her alleged complaints of sexual harassment. Plaintiff claims that defendants' could not consider the plaintiff for a promotion as a result of plaintiff's alleged visible agitation and composure, in-part partially related to plaintiff's complaints about Breakstone. The classification of an employee as "nonpromotable" can be considered an adverse employment action to support a retaliatory failure to promote a claim under NYSHRL. (*Sogg v. American Airlines, Inc.*, 193 AD2d 153).

As to plaintiff's claim for intentional infliction of emotional distress, an issue of fact exists as to whether the conduct of the defendants is sufficient to rise to the level of extreme conduct. (*O'Reilly v. Executive of Albany, Inc.*, 121 AD2d 772). Plaintiff claims that she was continuously subjected to sexual attacks by Breakstone, a customer who allegedly was continuously permitted access to Starbucks' back office, in the presence of Starbucks' Supervisors, without corrective or remedial action. Plaintiff also claims that she suffered emotionally and mentally.

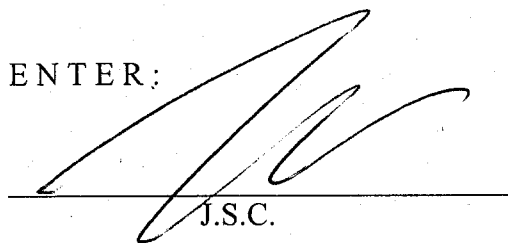
The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*).

Here, issues of fact exist which are arguable or debatable, warranting denial of this summary judgment motion.

CONCLUSION

The defendants' motion for an order, pursuant to CPLR §3212, seeking dismissal of plaintiff's second and third cause of action is denied.

ENTER:



J.S.C.

Dated: May 30, 2012

cc: Borrelli & Associates, P.L.L.C.
Gropper Law Group, PLLC
Epstein, Becker & Green, P.C.

ENTERED

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