

Errico v Concepts in Time LLC
2013 NY Slip Op 30800(U)
April 18, 2013
Supreme Court, New York County
Docket Number: 116098/10
Judge: Cynthia S. Kern
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 116098/2010
ERRICO, JAMIE
vs.
CONCEPTS IN TIME
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

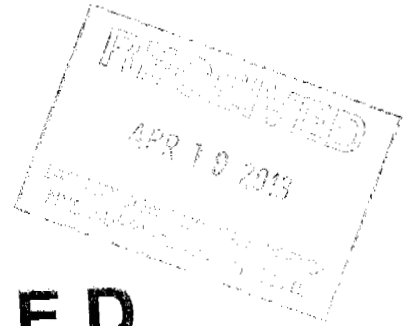
Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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



FILED

APR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/18/13

EOK, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X

JAMIE ERRICO,

Plaintiff,

Index No. 116098/10

-against-

DECISION/ORDER

CONCEPTS IN TIME LLC and SAUL JEMAL,
Individually,

FILED

Defendants.

APR 19 2013

-----X

HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2,3</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>4</u>
Replying Affidavits.....	<u>5,6</u>
Exhibits.....	<u>7</u>

Plaintiff commenced the instant action against defendants Concepts in Time LLC (“Concepts”) and Saul Jemal (“Mr. Jemal”) alleging, among other things, employment discrimination, hostile work environment, retaliation, breach of contract and unpaid wages. Defendants now move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. Plaintiff cross-moves for partial summary judgment on her sixth cause of action for unpaid wages. For the reasons set forth below, defendants’ motion is granted in part and denied in part and plaintiff’s cross-motion is denied.

The relevant facts are as follows. Concepts is a small, privately-owned company, engaged in the wholesale distribution of watches and home decor items. Plaintiff, a Catholic

woman, was hired by Concepts in 2002 as the Vice President of Sales pursuant to an employment agreement dated June 10, 2002. During her employment, plaintiff's job duties included, among other things, running Concepts' watch division, opening new accounts, generating sales and overseeing ordering and shipping. In or around 2005, Mr. Jemal had a falling out with his partner and thus, bought out the partner's interest in the company. Defendants allege that at that time, plaintiff's employment contract was renegotiated (the "2005 employment agreement"). The 2005 employment agreement provided that it could be terminated by either party for any reason with 90-days' notice and that if plaintiff resigned, she would be prohibited from selling watches for 90 days.

In or around 2005, Concepts' watch division had revenues representing approximately 40% of Concepts' business. By 2008, however, the watch business allegedly took a severe downturn and the sale of watches represented less than 15% of Concepts' business. Thus, in January 2009, Concepts sold the watch division to a company known as Concept Watch Company, LLC ("CWC"). CWC was owned and operated by Morris and Jack Beyda and Nathan Levy, who had been a sales representative at Concepts in the watch division. Pursuant to the agreement by which CWC acquired the watch division, CWC assumed certain of Concepts' contractual obligations, including plaintiff's 2005 employment agreement.

In September 2009, the Beydas were allegedly struggling and lacked the resources to continue with the watch business and pay their obligations to Concepts. The Beydas requested that Mr. Jemal acquire CWC's assets and while Mr. Jemal agreed, he did not assume all of CWC's debts or liabilities. In particular, defendants allege that Concepts did not assume plaintiff's existing 2005 employment agreement. Following conversations with plaintiff, the

Beydas agreed that CWC would be responsible for any salary owed to plaintiff. Plaintiff later filed suit against the Beydas and CWC for breach of the 2005 employment agreement but ultimately settled her claims.

On September 24, 2009, Mr. Jemal sent plaintiff a new job offer and engaged in discussions regarding the terms of a new contract (the "2009 employment agreement"). Defendants allege that the 2009 employment agreement was freely negotiated but plaintiff contends that she signed the agreement under duress and without consideration. However, it is undisputed that plaintiff signed the 2009 employment agreement with the help of an attorney on October 13, 2009. The 2009 employment agreement did not contain a 90-day notice before termination clause but it included a non-solicitation of business clause and the condition that plaintiff would not solicit any of Concepts' customers for a period of 180 days if she was fired or if she resigned. Additionally, the 2009 employment agreement stated "This agreement is the only employment agreement in effect between [Concepts] and [plaintiff]." Further, Paragraph 14 of the 2009 employment agreement expressly released Concepts from any and all claims that plaintiff may have had against it with a covenant not to sue for any such claim. Specifically, Paragraph 14 states

Except for the performance of the terms of this Agreement, Jamie Errico fully and unconditionally release and forever discharges Concepts In Time as well as past, present and future successors and assigns, directors, officers, employees...from and against any and all claims, contentions, debts, liabilities, demands, promises, agreements, costs, expenses (including but not limited to attorneys fees), damages, losses, suits, liens, actions or causes of action, of whatever kind or nature, whether in law or equity. Jamie Errico further covenants and agrees not to file or commence any lawsuit, administrative complaint, petition or assert any claim of any kind with any court, governmental or administrative agency or arbitrator against Concepts In Time,

successors or assigns, their parent or subsidiary corporations or their affiliates, officers, directors, owners, employees...relating to Jamie Errico's employment, this Agreement or Concepts In Time, generally. This release and covenant not to sue, does not and is not intended, to cover Concepts Watches LLC or its principals.

Plaintiff was terminated from Concepts on December 12, 2009 on the ground that she allegedly was a disloyal employee who violated her contractual and fiduciary duties to Concepts by informing co-employees and Concepts' customers that she was going to work for a competitor and downloading Concepts' proprietary pricing and customer information onto her personal laptop computer. In early 2010, plaintiff filed a claim with the Equal Employment Opportunity Commission ("EEOC") against Concepts alleging that she was the victim of religious or sexual discrimination. However, the EEOC dismissed plaintiff's claim finding no evidence to support a violation of the discrimination statutes. Thereafter, in or around December 2010, plaintiff brought the instant action against defendants alleging that she was terminated from her job at Concepts because she is a woman and not Jewish and that she is owed wages pursuant to the 2009 employment agreement.

The court first turns to defendants' motion for summary judgment dismissing the complaint. On a motion for summary judgment to dismiss a complaint alleging employment discrimination, the court is required to conduct a specific burden shifting analysis. This standard requires plaintiff to demonstrate (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action and (4) circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 (1973). If the plaintiff establishes her prima facie case using this analysis, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.*

at 802-04. Once the defendant satisfies its burden, it becomes the plaintiff's burden to show that defendant's stated reason was merely a pretext for discrimination. *See id.* Specifically,

[W]here a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence...or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination.

Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29, 35-36, 37 (1st Dept 2011).

In the instant action, defendants' motion for summary judgment dismissing the complaint's first, second and fifth causes of action alleging discrimination is granted. As an initial matter, plaintiff has met her initial burden of establishing a prima facie case of discrimination. She has demonstrated membership in a protected class, specifically that she is a woman and Catholic and she has demonstrated qualification for the employment as Vice President of Sales. Further, she has shown an adverse employment action taken against her in that she was terminated from Concepts in December 2009. Finally, she has alleged in her complaint that she was fired because she is a woman and because she is Catholic, as she alleges that those employees that were Jewish and male were treated more favorably than she was. Pursuant to the *McDonnell Douglas* analysis, the burden now shifts to defendants to articulate a legitimate, non-discriminatory reason for plaintiff's termination. In response, defendants have put forth evidence that plaintiff was fired for the nondiscriminatory reason that she was a disloyal employee. Specifically, defendants assert that plaintiff was fired because (a) she was caught downloading Concepts' information to her personal laptop computer and using her personal e-mail account for business; and (b) she was planning to leave Concepts to work for a competitor

to undercut Concepts' prices and ultimately put Concepts out of the watch-selling business. To support such nondiscriminatory reasons, defendants have provided an affidavit of David Odermatt, a security officer, who affirmed that he saw plaintiff downloading files onto her personal laptop computer and removing what appeared to be Concepts' pricing information from her office. Further, defendants have alleged that Nathan Levy, another Concepts employee, reported to Mr. Jemal that plaintiff had asked him whether he was interested in working for Concepts' competitor, Kimaya, Inc. ("Kimaya") and that he had overheard a conversation between plaintiff and a Concepts customer in which plaintiff informed the customer that she would be leaving Concepts and would be working for a factory that would be able to sell to the customer directly and at better prices.

As defendants have demonstrated nondiscriminatory reasons for terminating plaintiff, the burden shifts back to plaintiff to show that defendants' reasons are merely a pretext for discrimination or are false. In response, plaintiff has failed to meet her burden of establishing that the reasons provided by defendants' for plaintiff's termination are pretextual. Plaintiff attempts to demonstrate that she was actually terminated from Concepts because she is a woman and not Jewish. To support such a theory, plaintiff alleges the following: (1) that she was not allowed to wear a cross or other non-Jewish religious symbols at work; (2) that non-Jewish employees, like herself, were not allowed to hold prayer sessions at Concepts' offices; (3) that Mr. Jemal docked her pay because she did not work on Christmas Eve; (4) that Jewish employees were allowed to leave early the day before Jewish holidays; and (5) that she got less time off for holidays than Jewish employees did. However, such allegations are merely conclusory and plaintiff has not provided any evidence to support such contentions. Defendants have provided

affidavits of Renata Baluk, Kimberly Groves, Vladimir Litvin and Melissa Ann Rivera, employees of Concepts, who all affirm that they are not Jewish and were never prevented from openly wearing a religious symbol of their choice, including a cross, nor are they aware of any rule or policy imposed by defendants prohibiting them from doing so. Further, these employees affirm that they were permitted to leave early on non-Jewish holidays, including Christmas Eve, and that they also received Jewish holidays off as paid vacation days even though they are not Jewish.

Moreover, plaintiff has failed to meet her burden of establishing that the reasons provided by defendants' for plaintiff's termination are false. Defendants have provided a letter to plaintiff from Kimaya welcoming her to its employment, which is dated November 19, 2009. Defendants allege this letter was sent around the same time that plaintiff began e-mailing Concepts' information to her personal account. Plaintiff does not deny sending those e-mails nor does she deny downloading information onto her personal laptop computer on December 11, 2009, the day after her employment contract with Kimaya is dated. Further, although plaintiff asserts that her downloading of Concepts' information and her emailing of said information to her personal e-mail account was not prohibited by defendants, this allegation is insufficient to prove that the reasons for her termination were false or pretextual. The First Department has held that

In determining whether the reason for an adverse action was pretextual, 'it is not for the Court to decide whether the [] complaints...were truthful or fair, as long as they were made in good faith.' 'The mere fact that [plaintiff] may disagree with [the] employer's actions or think that [plaintiff's] behavior was justified does not raise an inference of pretext.'

Melman v. Montefiore Medical Center, 98 A.D.3d 107, 120-21 (1st Dept 2012). Thus,

defendants' motion for summary judgment dismissing the complaint's first, second and fifth causes of action for discrimination is granted.

Additionally, defendants' motion for summary judgment dismissing plaintiff's third and fourth causes of action alleging a hostile work environment is also granted. "A...hostile work environment exists 'when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 (2004) (citation omitted). Defendants have established their prima facie right to summary judgment as they have shown that the workplace was not permeated with such conduct. Defendants have provided affidavits from numerous female and male non-Jewish employees who affirm that defendants' workplace is not a discriminating or a hostile one. In response, plaintiff has failed to raise an issue of fact as to whether a hostile work environment exists as she has not provided evidence of intimidation or insult, such as derogatory comments based on her gender or religion. Moreover, to the extent that plaintiff alleges a hostile work environment claim based on defendants' conduct which occurred prior to October 7, 2009, such claim must be dismissed as plaintiff released Concepts from claims arising out of events that occurred prior to that date in the 2009 employment agreement. Thus, the third and fourth causes of action alleging a hostile work environment must be dismissed.

Defendants' motion for summary judgment dismissing plaintiff's seventh cause of action for breach of the 2005 employment agreement is also granted. Plaintiff alleges in her seventh cause of action that Concepts failed to give her the 90-day notice before firing her pursuant to the 2005 employment agreement. However, defendants are entitled to summary judgment

dismissing such claim because plaintiff waived such a claim when she signed the 2009 employment agreement. In Paragraph 12 of the 2009 employment agreement, plaintiff expressly agreed that it would be the only agreement in effect between the parties and the 2009 employment agreement did not include a 90-day notice provision. Therefore, plaintiff's seventh cause of action must be dismissed.

Defendants are also entitled to summary judgment dismissing the complaint's ninth cause of action for retaliation. To make out a prima facie case of retaliation under both the Executive Law and the Administrative Code, plaintiff must show that (1) she engaged in a "protected activity" known to defendant; (2) defendant took an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). If plaintiff makes out a prima facie case for retaliation, the burden then shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. *See Williams v. The City of New York*, 38 A.D.3d 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were pretextual. *See id.*

In the instant action, plaintiff fails to make out her prima facie case of retaliation as she has not established that she engaged in a "protected activity." Plaintiff alleges that she suffered adverse actions in retaliation after she allegedly complained to Mr. Jemal about the discrimination and after she filed her EEOC claim against Concepts. However, as an initial matter, plaintiff has not provided any evidence of any complaints made to Mr. Jemal and Mr. Jemal has denied ever receiving a complaint from plaintiff regarding discrimination. Furthermore, plaintiff filed her EEOC claim against Concepts in January 2010, which was more

than one month after she was fired. Therefore, any adverse employment action taken against plaintiff could not be based on such protected activity. Thus, as plaintiff has not established that she engaged in any protected activity, defendants' motion for summary judgment dismissing plaintiff's ninth cause of action for retaliation must be granted.

However, both defendants' motion for summary judgment dismissing plaintiff's sixth and eighth causes of action for unpaid wages and a breach of the 2009 employment agreement and plaintiff's cross-motion for partial summary judgment on her sixth cause of action are denied. Plaintiff alleges that she is owed \$12,527.86 in commissions pursuant to the 2009 employment agreement. Defendants contend that plaintiff is not entitled to such commissions because she was "disloyal and violated duties owed to the employer" and thus, breached the 2009 employment agreement. However, there exists an issue of fact as to whether plaintiff's conduct in using her personal e-mail account for business and allegedly soliciting business from Concepts' customers breached the 2009 employment agreement. Thus, defendants' motion for summary judgment dismissing the sixth and eighth causes of action is denied and plaintiff's cross-motion for partial summary judgment on her sixth cause of action is also denied.

Accordingly, defendants' motion for summary judgment is granted to the extent that the complaint's first, second, third, fourth, fifth, seventh and ninth causes of action are dismissed and plaintiff's cross-motion for partial summary judgment on her sixth cause of action is denied. This constitutes the decision and order of the court.

Dated: 4/18/13

FILED

Enter: _____

CR

J.S.C.

APR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE