

McCormick v International Ctr. for the Disabled

2013 NY Slip Op 31063(U)

May 10, 2013

Supreme Court, New York County

Docket Number: 114541/2011

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

5/14/13

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 114541/2011
MCCORMICK, DEIRDRE
vs.
INTERNATIONAL CENTER
SEQUENCE NUMBER : 001
DISMISS

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

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

decided per the memorandum decision dated May 10, 2013
which disposes of motion sequence(s) no. 001 and 002.

FILED
MAY 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/13

Saliann Scarpulla, J.S.C.
HON. SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

----- X
DEIDRE MCCORMICK,

Plaintiff,

- against-

Index No.:114541/2011
Submission Date: 2/5/2013

INTERNATIONAL CENTER FOR THE
DISABLED, MARVIN DELUTY, and
CATHERINE MINDOLOVICH,

DECISION AND ORDER

Defendants.

----- X

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Papers considered in review of this motion to dismiss (motion seq. 001):

- Notice of Motion 1
- Aff in Support 2
- Mem of Law in Support 3
- Aff in Opp 4
- Mem of Law in Opp 5
- Reply Mem of Law. 6

FILED
MAY 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to dismiss (motion seq. 002):

- Notice of Motion 1
- Mem of Law in Support 2
- Aff in Opp 3
- Mem of Law in Opp 4
- Reply Mem of Law. 5

HON. SALIANN SCARPULLA, J.:

In this action alleging age discrimination, defendants International Center for the Disabled (“ICD”) and Marvin Deluty (“Deluty”) (collectively the “ICD defendants”) move pursuant to CPLR 3211(a)(7) to dismiss plaintiff Deidre McCormick’s (“McCormick”) complaint for failure to state a cause of action (motion seq. 001). Separately, defendant Catherine Mindolovich (“Mindolovich”) also moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action (motion sequence 002). Motions sequence numbers 001 and 002 are hereby consolidated for disposition.

As alleged in the complaint, McCormick is a 61 year old student, studying for her Ph.D. in clinical psychology at Walden University, a “distance-learning institution headquartered in Minnesota.” Her degree requirements included completion of a 750 hour externship and a 2000 hour internship. After completing her externship, McCormick commenced an internship in September 2010 at ICD.¹ The internship was to last “for at least one year of full-time work.”

McCormick was assigned to work in the behavioral medicine department, which treated patients with brain injuries. McCormick alleges she expressed an interested in psychological assessment testing, but her duties consisted mainly of patient intakes, therapy sessions and record-keeping.

¹ In paragraph 12 of the complaint McCormick states that internship was to begin in September 2011, yet in paragraph 14 she states that the internship began on September 9, 2010. The remainder of the allegations in the complaint suggest that the internship began in 2010, so that is that date which will be used for purposes of this motion.

Deluty was McCormick's therapy supervisor, and Mindolovich her overall supervisor. McCormick alleges in the complaint that from the start of her internship, Deluty and Mindolovich were clearly biased against her "and did not want to help her succeed in her internship."

McCormick alleges that Mindolovich's bias against McCormick's age was apparent by a few comments she made, including asking if McCormick "wouldn't rather be spending time with her granddaughter" instead of working at ICD, and suggesting that McCormick work part time instead of full time. McCormick also alleges that after remarking to Mindolovich that "it was so different being a student in a new field," Mindolovich responded "that is why most of the therapists do not want to work with older students."

As alleged in the complaint, McCormick began having problems with her supervisors when she began seeing patients in the second week of her internship. McCormick alleges that Mindolovich instructed her how to write progress reports. When McCormick brought the completed progress reports to Deluty, he said they were wrong and had to be done again. Mindolovich then advised McCormick not bring the reports to Deluty.

McCormick alleges that her supervisors were supposed to mentor her and improve her therapy with clients. But, she maintains, their time supervising her was instead spent telling her to "correct trivial writing mistakes in her reports." McCormick claims that she did not receive educational value from these exercises. McCormick also recites instances

in which her supervisors “yelled at her” for errors, including misreading a date in a report, and playing checkers with a brain injured patient.

In November, McCormick received a required evaluation from Mindolovich, which was “overall satisfactory,” but which noted that McCormick was overly defensive. McCormick alleges in the complaint that she was merely responding naturally to unfair criticisms.

McCormick claims that in November and December, her supervisors “unfairly blamed” McCormick for failing to submit her intakes and progress reports on time. McCormick maintains that the reports were late “due to the constant corrections they forced her to make, and to problems with the computers at ICD” McCormick further alleges that once the reports were submitted, her supervisors often ignored them for weeks or months.

In addition, McCormick alleges that in December and January, Mindolovich complained that McCormick was not seeing enough patients. McCormick maintains she was seeing fifteen (15) patients, but that she wanted to focus on assessments not therapy. McCormick also notes that had she seen additional patients, she would have fallen even further behind on her reports and record keeping.

In mid-January 2011, the ICD supervisors contacted Walden University’s field training director to complain about problems with McCormick’s work. McCormick alleges that when the training director inquired what McCormick could do to improve, the supervisors replied “nothing.”

McCormick alleges that on February 1, 2011 she completed all of her accumulated paperwork. On February 3, security guards confronted her at her desk, told her that she was dismissed and asked her to remove her belongings from the office. At her exit interview with Mindolovich and another ICD staff member, McCormick was told she was being dismissed from the internship because she was not a good fit with ICD, and was promised that was all that would be said in future evaluations and recommendation letters.

McCormick received the February evaluation from Mindolovich several weeks later. McCormick claims that, instead of stating that McCormick was not a good fit, the evaluation was “extremely negative and filled with falsehoods about her work,” including that McCormick had neglected to use a computer to grade her psychological tests as required.² The evaluation also stated that McCormick failed to read the assigned textbooks and articles, which McCormick claims is false. McCormick’s dismissal and poor evaluation resulted in McCormick failing the internship course at Walden University, and receiving no credit for the hours she spent at ICD.

In her complaint McCormick alleges one cause of action for unlawful discrimination by defendants based on her age in violation of New York State Executive Law §§ 296(1)(a); 296(1-a)©; 296(3-a)(a); 296(4); 296(6) and Title 8 of the New York City Administrative Code. McCormick seeks recovery for all “compensatory, emotional,

² McCormick claims that she was “able to grade [her psychological tests] by hand without error.”

physical and punitive damages (where applicable), [and] injunctive relief” The nature of the injunctive relief is not specified.

On this motion the ICD defendants and Mindolovich separately move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7). The ICD defendants argue that McCormick cannot establish a cause of action for age discrimination under either the New York State Human Rights Law (“NYSHRL”) or the New York City Human Rights Law (“NYCHRL”) because McCormick concedes she was an unpaid intern, and therefore not a paid employee and without standing under the NYSHRL or the NYCHRL to assert these claims.

In addition, the ICD defendants argue that McCormick’s factual allegations are insufficient to establish a claim of age discrimination. The ICD defendants note that in the entire complaint, McCormick alleges only three comments made by Mindolovich as evidence of bias due to McCormick’s age, and the complaint lacks any allegations that Deluty or any other ICD employee made reference to McCormick’s age. Further, the ICD defendants note that the complaint contains many instances of McCormick being counseled for performance deficiencies and unfavorable evaluations of her work.

In support of her motion, Mindolovich puts forth similar arguments: that the complaint fails to state a cause of action because McCormick was an unpaid intern, and not an employee under the NYSHRL and NYCHRL, and because it fails to allege facts from which an inference of discrimination may be drawn. Mindolovich argues that three

remarks attributed to her, even if said, are innocuous, stray remarks which are not sufficient to establish discriminatory animus.

In opposition, McCormick argues that the complaint alleges facts demonstrating that an employer/employee relationship existed between McCormick and ICD, and that the complaint states a viable claim of age discrimination under NYSHRL and NYCHRL.

Discussion

CPLR 3211 (a) states that: “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . (7) the pleading fails to state a cause of action” On such a motion, the test is not whether the opposing party “has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep’t 1998).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true all allegations in the pleading, “accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001). “In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards.” *Vig v. The New York Hairspray Co., L.P.*, 67 A.D.3d 140, 145 (1st Dep’t 2009).

As a threshold matter, to state a cause of action for age discrimination under either the NYSHRL³ or the NYCHRL,⁴ a plaintiff must plead (1) that he or she is a member of the class protected by the statute; (2) was actively or constructively discharged; (3) was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination.”

Terranova v. Liberty Lines Transit, Inc., 292 A.D.2d 441, 442 (2d Dep’t 2002) (citing *Ferrante v. American Lung Ass’n*, 90 N.Y.2d 623, 629 (1997)).

For her complaint to withstand a motion to dismiss, McCormick must allege facts to show that she is a member of the class protected by the NYSHRL and/or the NYCHRL. While her age is not in dispute, all defendants challenge her standing on the

³ The NYSHRL, Executive Law §296(1)(a), provides

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of an individual or to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

⁴ The NYCHRL, Administrative Code §8-107 provides:

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status 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.

basis of whether, as an unpaid intern, she was an ICD employee for purposes of the statutes.

The NYSHRL governs discrimination only “in the traditional employer-employee relationship.” See *Murphy v. ERA United Realty*, 251 A.D.2d 469, 470 (2d Dep’t 1998) (“It has been established that Executive Law § 296 (1) (a) only governs discrimination in the traditional employer-employee relationship and not in the employment of independent contractors. As a general rule, the determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results.”) ((internal citations omitted). Additionally, the Second Department has held, on review of an order of the New York State Division of Human Rights, that “[t]he protection of Executive Law §296 does not extend to petitioner’s unpaid, voluntary relationship with respondent’s school which lacked ‘the mutually beneficial economic substance which is the touchstone of an employer/employee relationship.’” *In re Sweeney*, 112 A.D.2d 240, 241 (2d Dep’t 1985) (quoting *State Div. Of Human Rights v. Board of Coop. Educ. Servs.*, 98 A.D.2d 958 (4th Dep’t 1983)).

Here, there is no dispute that McCormick was an unpaid intern at ICD. As such, McCormick can not establish that she is a covered employee under the NYSHRL.⁵

⁵ In addition to the cases cited in her papers, at oral argument McCormick cited to three additional cases which she claims support the position that she is covered under both the NYSHRL and NYCHRL. I find that none of these cases assist McCormick in asserting her claim under the NYSHRL. First, McCormick cites *Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep’t 1979). *Alper* was an Article 78 proceeding and, as the ICD defendants point out, the Second Department in *Alper* reviewed provisions of the Civil

In light of the 2005 Local Civil Rights Restoration Act, the NYCHRL affords a more liberal construction on the issue of whom is covered than the NYSHRL. “Under the 2005 Local Civil Rights Restoration Act, ‘it is beyond dispute that the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL’s uniquely broad and remedial purposes, which go beyond

Service Law. Any reference in *Alper* to the NYSHRL was made to the version of the NYSHRL in effect in 1979. At that time, the NYSHRL did not include the current provision which states specifically that volunteer firefighters are afforded NYSHRL protection, and is therefore not instructive in this instance. See Executive Law § 296(9). The court acknowledged as much in *Sweeny v. Board of Education*, 112 A.D.2d 240, 241 (2d Dep’t 1985) (“While Executive Law § 296 (9) does expressly cover volunteer firemen, the Legislature’s failure to include other voluntary, unpaid positions evidences its intent not to extend the protection of the statute to all voluntary positions (*cf. Matter of Alper v. Gaffney*, 73 A.D.2d 644; McKinney’s Uncons Laws of NY § 9122 [4] [b] [New York State Defense Emergency Act § 22; L 1951, ch 784, § 22 as amended])).

McCormick next cites *New York State Office of Mental Health v. New York State Division of Human Rights*, 75 A.D.3d 1023 (3d Dep’t 2010). There is no discussion in *New York State Office of Mental Health* about whether an unpaid intern is an employee for purposes of the NYSHRL, thus the case is not instructive. Finally, McCormick cites *Lynch v. Town of Southampton*, 2008 U.S. App. LEXIS 24426 (2d Cir. N.Y. Dec. 2, 2008). This decision by the U.S. Court of Appeals for the Second Circuit addresses a post-judgment motion, after a trial over plaintiff’s claim that her volunteer position was terminated in retaliation for statements she made regarding the animal shelter where she volunteered in violation of her First Amendment rights. There is no discussion of any claims under either the NYSHRL or the NYCHRL. Moreover, the decision notes that at trial, the Town initially argued that Lynch’s loss of an uncompensated volunteer position could not give rise to a First Amendment claim, but later abandoned that position, and argued on appeal “that whether or not the action taken against Lynch triggers First Amendment scrutiny is a question of fact that should have been submitted to the jury.” Acknowledging that the issue of whether a termination from a volunteer position is equal to termination from a paid position has not been addressed by the Second Circuit, the Court chose not to exercise its discretion to find an error in the District Court’s failure to instruct the jury on this. *Lynch*, 2008 U.S. App. LEXIS 24426 .

those of counterpart state or federal civil rights issues.” *Dominguez v. Department of Educ. of the City of N.Y.*, 37 Misc. 3d 1205(A) (N.Y. Misc. 2012) (quoting *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d29, 34 (1st Dep’t 2011) (internal quotations omitted). I found no binding precedent as to whether, under the more liberal analysis under the NYCHRL, an unpaid intern may bring a cause of action for age discrimination. However, I need not address this novel issue, because I find that the allegations in the complaint fail to allege facts to show that the discharge occurred under circumstances giving rise to an inference of age discrimination under either the NYSHRL or the NYCHRL.

In the context of reviewing a discrimination claim, “[t]he complaint must be sustained as stating a cause of action unless the conduct complained of consisted of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences.” *Lamper v. Pryor Cashman*, 242 N.Y.L.J. 83 (Sup. Ct. Kings Co. 2009); *see also Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dept. 2009)

Here, McCormick alleges that due to her age, she was treated unfairly in her internship. However, the only allegations regarding age based discriminatory motive in the complaint consist of three (3) random comments attributed to Mindolovich. McCormick alleges that Mindolovich, her supervisor, stated that the therapists at ICD preferred not to work with older students, and suggested that she might rather spend time

with her grandchildren or work part time. McCormick argues that these three stray remarks should give rise to an inference of age discrimination in her eventual discharge.

These three remarks, without more, are insufficient to give rise to such an inference. Only one of the alleged remarks actually mentions age, and none can be considered anything more than petty and trivial references. Moreover, “[s]tray remarks such as these, even if made by a decision maker, do not, without more, constitute evidence of discrimination.” *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 125 (1st Dep’t 2012) (citations omitted). I note that the complaint is devoid of any statements or references to age made by Deluty, or any other ICD employees.

McCormick states in her complaint that the friction between herself and her supervisors began her second week of the internship, and continued until her dismissal. She complains of her treatment by Deluty and Mindolovich, but she makes no allegations connecting the stray remarks about her age to any of the work place actions taken against her. Moreover, the complaint is replete with allegations that McCormick was chastised for errors directly related to the quality of her work. She alleges she was not treated well, including being yelled at for making mistakes. McCormick may have been unhappy with her ICD supervisors’ management style, but the complaint fails to connect this to her age. And despite the broader application of the NYCHRL, it is well recognized that the law does not “operate as a general civility code.” *Williams*, 61 A.D.3d at 79.

McCormick also acknowledges, while putting forth self-serving excuses, that she was late in preparing her written reports, that she failed to use a computer to grade

assessment tests, and that she made other mistakes in her written work, which while she categorized as “trivial,” her supervisors were required to spend time correcting.

McCormick details an unpleasant working experience, where certain personality conflicts between herself and her supervisors were present from the start. “[M]ere personality conflicts must not be mistaken for unlawful discrimination, lest the anti[-]discrimination laws become a general civility code.” *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 126 (1st Dep’t 2012) (internal quotation omitted).

As I find that McCormick’s allegations fail to give rise to an inference of age discrimination under either the NYSHRL and NYCHRL, the complaint must be dismissed against all defendants.

In accordance with the foregoing, it is

ORDERED that the motion by defendants International Center for the Disabled and Marvin Deluty pursuant to CPLR 3211(a)(7) to dismiss plaintiff Deidre McCormick’s complaint for failure to state a cause of action (motion seq. 001) is granted; and it is further

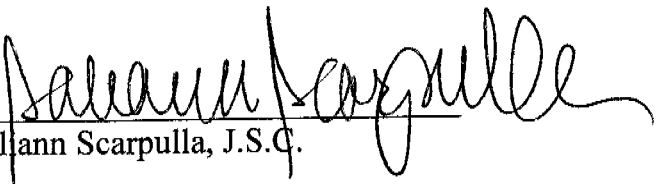
ORDERED that the motion by defendant Catherine Mindolovich to dismiss plaintiff Deidre McCormick's complaint for failure to state a cause of action (motion seq. 001) is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 10, 2013

ENTER:


Saljann Scarpulla, J.S.C.

FILED
MAY 15 2013
NEW YORK
COUNTY CLERK'S OFFICE