Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE James J. Golia, JSC IA Part 33
Justice

x

ABDEL NOFAL,

Plaintiff(s),

-- against --

JUMEIRAH ESSEX HOUSE, CHRISTIAN GRADNITZER, AIDER AND ABETTOR; SARAH GALUCCI, AIDER AND ABETTOR; AND GEORGE DERTOUZOS, AIDER AND ABETTOR;

Defendant(s).

x

Index Number 5627/2011

Motion Date December 20, 2012

Motion Cal. No. 124

Motion Seq. No. 3

The following papers numbered 1 to 13 read on this motion by defendants Jumeirah Essex House (JEH) and George Dertouzos (Dertouzos) for summary judgment dismissing plaintiff's religious discrimination, retaliation, and hostile work environment causes of action remaining in the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-6
Answering Affidavits - Exhibits.....	7-9
Reply Affidavits.....	10-13

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Abdel Nofal, an Egyptian-American and practicing Muslim, commenced this action for employment discrimination based on his race, national origin and religion; hostile work environment; and retaliation under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

FACTS

In October 1998, Nofal was hired as a line cook by the Essex

House, a Westin luxury hotel located in New York, New York which was owned and managed by Starwood Hotels and Resorts Worldwide. In January 2006, Essex House was acquired by Jumeirah, a Dubai-based organization, and became known as JEH.[1] JEH subsequently hired new managers, the majority of whom were Christian by religion.

According to plaintiff, defendant Christian Grandnitzer (Grandnitzer), his supervisor and the executive chef for JEH, mockingly said to plaintiff on three or four occasions, "Salaam Aleikum," the traditional Arabic greeting spoken by Muslims, while touching his forehead and chewing on bacon, a meat prohibited for consumption in the Islamic religion. Plaintiff further alleges that Granditzer told plaintiff about his sexual relations with his Lebanese Arab wife and made comments such as "No Jihad" with reference to plaintiff's religion. Other comments included "Guys move faster, it's not a Mexican Taco Bell here."

Plaintiff also alleges that on October 6, 2006, he requested two days off (Sunday, October 22 and Monday, October 23) to celebrate the end of Ramadan, the holiest holiday for Muslims. Grandnitzer denied such request, stating that he "did not care about Ramadan. It's busy and I need you." Grandnitzer then proceeded to reprimand plaintiff and his work ethic.

On or about October 11, 2006, plaintiff complained to Human Resources (HR) that he was being discriminated against on the basis of his religion, as Christian co-workers would always receive days off for Christian holidays. However, HR told plaintiff that "business comes first" and ordered him back to work. Ultimately, plaintiff worked on Sunday, October 22, but was given the following day off. Plaintiff alleges that, after he made the complaint, Grandnitzer began harassing plaintiff on a daily basis for reporting him to HR by repeatedly making derogatory comments and criticizing his work.

On November 16, 2006, plaintiff's co-worker, Julius Jones (Jones), submitted a statement to HR that he had heard from employee Robert Felton (Felton) that plaintiff had offered "money to have sex with [Felton]" and made other inappropriate sexual comments. The following day, Felton filed a statement with HR that plaintiff had improperly exposed himself to Felton in the locker room and made other inappropriate sexual comments. Three days later, Grandnitzer informed plaintiff that he had been suspended

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[1] JEH has since been purchased by Strategic Hotels and Resorts as of September 2012, and is now managed by Marriott Hotels.

pending termination.

On December 5, 2006, plaintiff attended a meeting with a union representative; Dertouzos, the regional director of HR; other personnel from HR; and several co-workers. JEH terminated plaintiff at this meeting, where plaintiff claims he first learned of the sexual harassment allegations made against him by his co-workers. Jones, who was present at the meeting, stated that money had been offered to employees who were willing to speak out against plaintiff, in the event they could successfully have plaintiff terminated. During his deposition, Dertouzos claimed that the monetary incentive was part of a buy-out and was offered to several cooks, not including plaintiff.

Plaintiff and his union then filed a grievance regarding his termination, which resulted in a three-day arbitration hearing. Testimony at the hearing included statements by plaintiff's former co-worker, Andrelle Aubourg (Aubourg), that plaintiff began sexually harassing her in March 2006. Plaintiff denied the accusations by both Felton and Aubourg. In an award dated May 29, 2007, the arbitrator denied plaintiff's grievance, relying on the superior credibility of Felton's testimony, and acknowledging that Aubourg's accusations post-dated the employer's decision to terminate plaintiff.

Plaintiff claims he subsequently received a letter from Aubourg dated August 6, 2007, in which she recanted her statements at the hearing and explained that Grandnitzer had pressured her into fabricating her sexual harassment story for the hearing. She also stated that Felton had never complained about plaintiff's alleged inappropriate conduct until he was encouraged to do so by others. The union requested reconsideration of the award on plaintiff's behalf, but such application was denied, and plaintiff did not seek to vacate the award.

PROCEDURAL HISTORY

On October 5, 2007, plaintiff filed a complaint with the New York State Department of Human Rights (NYSDHR), charging defendants with discrimination and retaliation under the NYSHRL based on his race, national origin, and religion. The NYSDHR subsequently issued a finding of probable cause. On January 15, 2009, however, plaintiff requested an administrative dismissal from the NYSDHR in order to pursue an action in federal court.

Plaintiff then filed an employment discrimination and retaliation lawsuit in the Southern District of New York (the Federal Action). The Honorable Paul A. Crotty granted defendants

summary judgment dismissing the entire complaint, including plaintiff's race and national origin discrimination and retaliation claims under Section 1981 of the Civil Rights Act of 1964 (42 USC § 1981). However, the District Court declined to exercise pendent jurisdiction over the claims based on state and city law.

In the instant action, by decision and order dated December 14, 2011, this court dismissed defendants' race and national origin discrimination and retaliation claims on res judicata grounds based on the determination in the Federal Action. It further found that plaintiff had successfully stated a cause of action for religious discrimination as manifested in the harassment of plaintiff, the creation of a hostile work environment, and retaliation.

APPLICABLE LAW AND ANALYSIS

A. Religious Discrimination

Under the shifting burden analysis of *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), once a plaintiff establishes a prima facie case for discrimination, the defendant must come forth with evidence of a legitimate, non-discriminatory reason for its actions (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316-317 [2004]; *King v Brooklyn Sports Club*, 305 AD2d 465 [2003]). Once defendant meets this burden of production, plaintiff then has the burden of establishing by a preponderance of the evidence that the proffered reason is merely a pretext for discrimination (*see Forrest*, 3 NY3d at 316-317; *King*, 305 AD2d 465). Thus, in the context of a summary judgment motion, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual (*see Nelson v HSBC Bank USA*, 41 AD3d 445, 446 [2007]; *Cesar v Highland Care Ctr., Inc.*, 37 AD3d 393, 394 [2007]).

Defendants successfully sustain their burden on summary judgment by demonstrating that they had a facially valid, independent, and non-discriminatory reason for the termination of plaintiff's employment (*see Ferraro v Kellwood Co.*, 440 F3d 96, 99-100 [2d Cir 2006]; *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 453 [2006]). They submit evidence, including Dertouzos' deposition testimony and affidavit, that plaintiff was terminated as a result of his sexual harassment of Felton (*see e.g. Haviland v Yonkers Pub. Schools*, 21 AD3d 527, 528 [2005]; *Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271,

273 [2003]). Defendants also highlight the grievance arbitration award in their favor after an impartial hearing which upheld plaintiff's termination for impermissible sexual harassment (*see e.g. Norris v New York City Hous. Auth.*, 2004 WL 1087600, *13, 2004 US Dist LEXIS 8619, *50-51 [SDNY 2004]).

Additionally, defendants demonstrated prima facie that they did not discriminate against plaintiff by denying his request to use vacation days for Ramadan. A religious discrimination claim for failure to reasonably accommodate requires a prima facie showing that (1) plaintiff held a bona fide religious belief conflicting with an employment requirement; (2) he informed his employers of this belief; and (3) he was disciplined or suffered an adverse employment action for failure to comply with the employment requirement that conflicted with his belief (*see Hogan v Jet Blue Airways Corp.*, 17 Misc 3d 1137[A], 2007 NY Slip Op 52324[U], *4 [2007], citing *Baker v The Home Depot*, 445 F3d 541, 546 [2d Cir 2006]). Once a prima facie case is established by the employee, the employer must offer plaintiff a reasonable accommodation unless doing so would cause the employer to suffer an undue hardship (*id.*).

Here, defendants highlight the lack of any religious belief that conflicts with working during Ramadan; rather, it was plaintiff's own preference not to work on October 22nd (*see e.g. Betz v Memorial Sloan-Kettering Cancer Ctr.*, 1996 WL 422242, *9, 1996 US Dist LEXIS 10568, *25 [SDNY 1996]). Also, plaintiff never refused to work on that date, and in fact worked a double shift according to his time card. He was not disciplined or caused to suffer any adverse action as a result of such request (*see e.g. Siddiqi v New York City Health & Hosp. Corp.*, 572 F Supp 2d 353, 369-370 [SDNY 2008]; *Durant v Nynex*, 101 F Supp 2d 227, 233-234 [SDNY 2000]).

Even if plaintiff had set forth a prima facie case of religious discrimination on the basis of the denied vacation days, defendants nevertheless offered plaintiff a reasonable accommodation by allowing plaintiff to take October 23rd off, as well as several other days during Ramadan (*see id.*). Furthermore, plaintiff's employer stated it could not afford to have another worker off on that date because another Muslim employee who had made an earlier request had already been given October 22nd off, in addition to three other employees were on leave for various reasons.

In opposition, plaintiff did not raise any triable issues regarding a lack of reasonable accommodation for his religious practices (*see e.g. Khan v Bank of America, N.A.*, 572 F Supp 2d

278, 294 [NDNY 2008]). He also does not deny that other employees had already been given October 22nd off as a vacation or leave day.

Plaintiff further argues that triable issues of fact exist regarding whether the stated reason for his termination was a pretext, given that several employees have since declared that defendants fabricated the allegations against plaintiff regarding his termination and arbitration hearing. In order to meet the burden of showing that the employer's reason for firing him was pretextual, plaintiff must point to evidence that reasonably supports both a finding that the reason was false and that discrimination was the real reason (*see Westbrook v City Univ. of New York*, 591 F Supp 2d 207, 230 [EDNY 2008]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 [1997]).

As the Second Circuit has held, arbitration decisions have probative weight regarding the causal link between an employee's termination and an employer's motive (*see Collins v New York City Tr. Auth.*, 305 F3d 113, 115 [2d Cir 2002]; *see also Halstead v New York City Tr. Auth.*, 2003 WL 22426979, *2, 2003 US App LEXIS 21446, *3-5 [2d Cir 2003]). Courts have discretion as to how much weight an arbitral decision should be accorded (*see Collins*, 305 F3d at 119; *Wharton v Town of N. Hempstead*, 22 Misc 3d 83, 85 [2009]). As such evidence-based, independent, unbiased decisions may be "highly probative of the absence of discriminatory intent" (*Collins*, 305 F3d at 119), in order to defeat a summary judgment motion a plaintiff must offer "strong evidence that the decision was wrong as a matter of fact–e.g. new evidence not before the tribunal–or that the impartiality of the proceeding was somehow compromised" (*id.*).

Here, plaintiff does not challenge the arbitrator's partiality, but relies on evidence such as Aubourg's affidavit recanting her sexual harassment claims; Jones' statement that employees had been offered a bonus in exchange for helping have plaintiff terminated; Felton's statement to Aubourg that he did not know why management was encouraging him to make false statements; statements by other employees corroborating that management encouraged them to fabricate allegations against plaintiff; and a petition signed by JEH employees stating that Dertouzos fabricated testimonies and statements against employees.

First, the court observes that plaintiff may not collaterally attack the arbitration award; the proper procedure would have been to vacate the award (CPLR 7511; *see Rutter v Julien J. Studley, Inc.*, 244 AD2d 239, 239 [1997]; *Home Ins. Co. v Country-Wide Ins. Co.*, 134 AD2d 570, 571 [1987]). Nevertheless, Aubourg's recantation of her sexual harassment allegations has no impact

because the arbitrator did not regard such withdrawal as a proper basis for reconsidering the previously issued award. The court further notes that neither the unsworn statements of the other employees nor the group statement signed by JEH employees are in admissible form (*see Ulster County v CSI, Inc.*, 95 AD3d 1634, 1636 [2012]; *Holloman v City of New York*, 74 AD3d 750, 751 [2010]). The group statement also does not specify whether Dertouzos or defendants engaged in any unlawful discriminatory conduct that was religious in nature. Finally, contrary to plaintiff's contention, the NYSHRD finding of probable cause is insufficient to show that the prior arbitration award was wrong, as the probable cause finding was not based on a fully developed record (*see Kosakow v New Rochelle Radiology Assocs., P.C.*, 274 F3d 706, 733 [2d Cir 2001]). Thus, plaintiff's evidence is neither new nor sufficiently strong to overcome the probative weight of the arbitration award (*see Collins*, 305 F3d 113; *Halstead*, 2003 WL 22426979, 2003 US App LEXIS 21446).

Plaintiff therefore fails to demonstrate that triable issues of fact remain which preclude summary judgment with respect to the causes of action for religious discrimination.

B. Retaliation

Retaliation claims are also analyzed under the burden-shifting framework established in *McDonnell Douglas* (411 US 792 [1973]; *see also Jetter v Knothe Corp.*, 324 F3d 73, 75-76 [2003]). A prima facie claim for retaliation requires a showing that (1) plaintiff engaged in a protected activity; (2) defendants were aware of such activity; (3) plaintiff was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (*see Forrest*, 3 NY3d at 312–313; *Ruane-Wilkens v Board of Educ. of City of N.Y.*, 56 AD3d 648, 649 [2008]). Under the NYCHRL, however, the employee need not have "suffer[ed] a materially adverse action as a result of retaliation" (*Schanfield v Sojitz Corp. of Am.*, 663 F Supp 2d 305, 343 [2009]), and need only show that the employer took an action that disadvantaged him (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 140-141 [2012]) or that defendants retaliated "in any manner" (*Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 752 [2006]).

As Dertouzos testified, when plaintiff was asked whether he thought he had been discriminated against, plaintiff replied "No," and stated that Grandnitzer did not like him. Such testimony challenges whether defendants were aware that plaintiff was engaged in protected activity (*see Uddin v City of New York*, 427 F Supp 2d 414, 427-428 [2006]), to wit, voicing objection to unlawful discrimination. Moreover, as discussed above, defendants

sufficiently meet their burden of demonstrating that they had a facially valid, independent, and non-discriminatory reason for terminating plaintiff's employment, and plaintiff did not raise any triable issues of fact to refute that showing (*see Thide*, 27 AD3d at 454). Thus, summary judgment with respect to plaintiff's retaliation claim is warranted.

C. Hostile Work Environment

To establish a prima facie claim for hostile work environment, plaintiff must have demonstrated that "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" (*Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 673 [2006] [internal quotation marks and citation omitted]; *see also Forrest*, 3 NY3d at 310; Executive Law § 296[1][a]). Under the NYCHRL, which is analyzed under a more liberal standard (*see Albunio v City of New York*, 16 NY3d 472, 477 [2011]; *Nelson*, 87 AD3d at 999-1000), the court considers whether such comments amount to more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [2009]). Whether an environment is hostile or abusive can be determined by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance (*see Forrest*, 3 NY3d at 310-311 [internal quotation marks and citation omitted]). Such conduct must have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment — one that a reasonable person would find to be so (*Id.* at 311).

Here, defendants present plaintiff's deposition testimony as evidence that Grandnitzer used the mocking Arabic greeting while chewing bacon three to four times, made one comment about Ramadan while denying plaintiff's request for time off, and made at least one sexual comment about his Lebanese wife, which may not have been religious in nature. Plaintiff claims, in a conclusory manner, that the workplace is permeated with such discriminatory statements and harassment by Grandnitzer. However insensitive, these actions and comments were "nothing more than intermittent work-related conflict" (*Nettles v LSG Sky Chefs*, 94 AD3d 726, 730-731 [2012]) and are insufficient proof of the environment the NYSHRL was designed to protect against. In opposition, plaintiff did not raise any triable issues of fact that Grandnitzer's actions were objectively offensive and pervasive enough to have created a

hostile work environment (*see Id.* at 731).

Under the NYCHRL, however, Grandnitzer's actions and comments, even if considered isolated, clearly indicated that plaintiff's supervisor found it appropriate to foster a workplace that degraded employees' religious beliefs (*see Hernandez v Kaisman*, 103 AD3d 106, 115 [2012]; *see also Williams*, 61 AD3d 62). When viewing the evidence in the light most favorable to non-movant plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), the court concludes that the broad remedial purposes of the NYCHRL support survival of this hostile work environment claim to be addressed at trial.

Accordingly, defendants' motion for summary judgment is granted only to the extent that plaintiffs causes of action for religious discrimination and retaliation are dismissed and plaintiff's claim for hostile work environment under the New York State Human Rights Law is also dismissed. Plaintiff's claim for hostile work environment under the New York City Human Rights Law survives this motion and plaintiff may proceed on this cause of action.

This is the order of the Court.

Dated: May 14, 2013

James J. Golia, J.S.C.