

**Herrington v Metro-North Commuter R.R. Co.**

2013 NY Slip Op 31472(U)

July 5, 2013

Sup Ct, NY County

Docket Number: 159328/2012

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 159328/2012  
HERRINGTON, SHERRY  
vs  
METROPOLITAN TRANSPORTATION  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. 159328/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3

Replying Affidavits \_\_\_\_\_ | No(s). 4

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

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

Dated: 7/5/13

  
\_\_\_\_\_, J.S.C.  
**HON. EILEEN A. RAKOWER**

- 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 15

-----X

SHERRY HERRINGTON,

Plaintiff,

Index No.  
159328/2012

- against -

DECISION

Mot. Seq. 01

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiff Sherry Herrington (“Plaintiff”) brings this action against defendant Metro-North Commuter Railroad Company (“Defendant”), her current employer, alleging claims under the Administrative Code of the City of New York 8-107 for discrimination based on sexual orientation (first cause of action), retaliation (second cause of action), and discrimination based on gender (third cause of action).

Herrington, according to the complaint, was hired by Plaintiff’s predecessor, Conrail, in 1978. Employed by the railroad for over 35 years, she claims to have been one of the first female railroad engineers in the region. Her performance was and continues to be outstanding. She was promoted to Assistant Vice President - Operational Services. Indeed, as of the date of the complaint, she continues in Plaintiff’s employ in that position.

Herrington reports that in 2008, she noted a shift in the way that she was regarded. George Walker, Defendant’s Senior Vice President of Operations, announced his retirement. He had previously promised Plaintiff that he would recommend that she replace him. However, “in late 2008, Plaintiff made a formal internal complaint against high-level Metro North

employees, John Kroll and Kyle McCarthy, after they made inappropriate and offensive comments about her sexual orientation.” Also, in late 2008, George “gave his support to similarly situated male Metro-North employee Robert Lieblong.”

Ultimately, Lieblong was appointed to the position of Senior Vice President of Operations. Plaintiff claims “Lieblong avoided interaction with her and spoke with her staff ‘behind her back,’ which was both undermining and marginalizing.”

On May 18, 2010, Lieblong spoke with Plaintiff, and said that “Metro-North President, Howard Permut, wanted to move Deputy Chief Sue Doering into Plaintiff’s position to ‘test’ her abilities. Lieblong asked Plaintiff if there was another position she would be interested in because he wanted to put Doering into her position.” Plaintiff expressed her desire to stay in her position “until advancement opportunities existed for her.” “On May 27, 2010, Lieblong said that Plaintiff would remain in her position, although it was not his desire.”

Plaintiff alleges that on “November 15, 2010, Lieblong chastised Plaintiff in front of her peers and subordinates because he purportedly disagreed with a disciplinary decision she made. This was uncharacteristic, and was embarrassing and demeaning to Plaintiff.”

Plaintiff also alleges that on “April 20, 2011, Plaintiff requested a review and increase of her salary. The request was denied.” Plaintiff claims that she was no longer asked to cover the duties of the Senior Vice President position when Lieblong was away, “as she had been before. Instead, male employee Robert Walker was asked to assume those duties.”

Finally, Plaintiff alleges that in or about “late 2008 and early 2009, [she] was reprimanded by Defendant and, now - four years later - continues to be under investigation for illegitimate and discriminatory reasons.” Here, Plaintiff is referring to a time in or about late 2008 and early 2009 when she was asked about the qualifications of a job applicant, the applicant being her domestic partner. Plaintiff claims Defendant was aware of the personal relationship between she and the applicant when Defendant solicited her opinion of the applicant’s qualification, and she “provided objective opinions

about [the applicant's] qualifications for the position sought." Defendant and the MTA alleged Plaintiff acted improperly. "With respect to the Moore [applicant] investigation, the State Controller's Office and State Inspector General's Office only acted and act based on information provided by Defendant regarding Plaintiff."

Plaintiff claims she was reprimanded for failing to disclose her relationship with the applicant, and her "integrity, honesty, and judgment were put in question." Plaintiff claims that as a result "of this verbal reprimand (as well as Walker's retaliatory removal of his support of her candidacy), Plaintiff was compelled not to formally apply for Walker's position [when he retired in late 2008, early 2009]." Ultimately, in May of 2012, there was a redistribution of services and Plaintiff's domestic partner was removed from her Unit.

Plaintiff alleges that a media article reported that "Sherry Herrington, the \$170,000 operations chief at Metro-North Railroad praised her partner's qualifications in an email to the human resources department without revealing their relationship, according to the report by state Controller Thomas DiNapoli's office." Plaintiff states "Defendant was aware of this article and took no steps to rebut or rectify the article." She concludes that the "actions by Defendant were retaliatory and based upon sexual orientation bias and nothing more."

The Complaint further alleges that Plaintiff has been paid less than male employees in similarly situated positions including Robert Lieblong and William Duke, that she held greater responsibility than them, and that she had complained about the differences, and has not received an increase in pay.

Defendant now moves to dismiss pursuant to CPLR §§3211 stating that documentary evidence flatly contradicts the allegations, and that the causes of action are time barred. Plaintiff opposes; however, Plaintiff concedes that punitive damages, which are sought in the Complaint, are not available against Defendant, a public benefit corporation.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action;

On a motion to dismiss under CPLR §3211(a)(1) and (7), "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 A.D.2d 243 [1st Dept. 2000]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Plaintiff's claims are based on the New York City Administrative Code. As amended by the Local Civil Rights Restoration Act of 2005, all provisions of the New York City Administrative Code "now explicitly require[] an independent liberal construction analysis in all circumstances,

even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws.'" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [2009], *lv denied* 13 NY3d 702 [2009]).

Discrimination and retaliation claims under the New York City Administrative Code are subject to a three-year statute of limitations. (*Williams*, 61 AD3d at 72). Under the "continuing violation doctrine," where applicable, a plaintiff may recover for discriminatory conduct that occurred outside the limitations claims. (*Id.*). However, the "continuing violation doctrine" may be applied only if the misconduct occurring outside the limitations period was joined with actionable conduct within that period. (*Id.*). Thus, in *Williams*, where an inappropriate comment was made to an employee some 19 months before the start of the limitations period, subsequent conduct within that period that amounted to nothing more than "petty slights or trivial inconveniences" did not save Plaintiffs' harassment claim from being time-barred. (*Id.*).

New York City Administrative Code, §8-107(1)(a), provides, in relevant part:

It shall be an unlawful discriminatory practice for an employer... because of...gender, ... , sexual orientation...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.

A plaintiff who alleges sexual orientation or gender discrimination in employment has the initial burden to establish a prima facie case of discrimination by showing that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she...suffered [an] adverse employment action; and (4) the...adverse action occurred under circumstances giving rise to an inference of discrimination." (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295 [2004]) (citations omitted).

Once the plaintiff establishes a prima facie case, “the burden then shifts to the employer ‘to rebut the presumption of discrimination’” by articulating “legitimate, independent, and nondiscriminatory reasons” for its adverse action. (*Id.*). (citations omitted).

“In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.” (*Id.*).

“An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be ‘more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.’” (*Id.*). (citations omitted).

#### 1. Sexual Orientation Discrimination (First Cause of Action)

Plaintiff fails to state a cause of action for sexual orientation discrimination because she fails to allege any facts to support a claim that she was discriminated against or suffered any adverse employment action on the basis of her sexual orientation within the three year period preceding Plaintiff’s commencement of this litigation on December 29, 2012.

Plaintiff’s allegations concerning the 2008 comments made by high-level Metro North employees, John Kroll and Kyle McCarthy, are barred by the three year statute of limitations. Plaintiff’s allegations arising in late 2008 and early 2009, including that Plaintiff was not recommended to a position that she admits she did not apply for and that she received a verbal reprimand, are also time-barred. Even if these actions were not time-barred, these allegations do not constitute adverse employment actions sufficient to state a discrimination claim.

Those allegations that fall within the three year statute of limitations, such as the ongoing investigation into the hiring of her partner and the

newspaper article regarding the same, also do not constitute adverse employment actions. No other allegations, even if true, constitute adverse actions, including alleged changes to a unit that reports to Plaintiff, the transfer of some employees to another unit, and the transfer of Ms. Moore. There are no facts alleged that suggest that these changes were based on Plaintiff's sexual orientation.

## 2. Retaliation (Second Cause of Action)

Plaintiff's second cause of action alleges retaliation. New York City Administrative Code, 8-107(7), provides, in relevant part:

Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter . . .

To make out a retaliation claim under the New York City Administrative Code, 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 N.Y. 3d 295, 819 N.E.2d 1998, 786 N.Y.S.2d 382 [2004]).

"In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of [the] realities [of the circumstances surrounding the plaintiff], of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities." (*Williams*, 61 AD3d at 71).

Plaintiff's second cause of action fails to state a retaliation claim because it does not allege any facts to support that she suffered an adverse

employment action based on her protected activity in 2008 in filing a formal internal complaint against high-level Metro North employees, John Kroll and Kyle McCarthy, after they allegedly made inappropriate and offensive comments about her sexual orientation within the three years preceding her commencement of this litigation. Furthermore, even if the allegations were to constitute adverse actions under *Williams*, the facts do not support any causal connection between the alleged protected activity (the 2008 Complaint) and the alleged adverse actions.

### 3. Gender Discrimination (Third Cause of Action)

“Where the claim is based on disparate pay, a plaintiff must first set forth a prima facie case of discrimination, i.e., that he is a member of a protected class and that he was paid less than similarly situated nonmembers of the class.” *Shah v. Wilco Sys., Inc.*, 27 A.D. 3d 169, 176 [1<sup>st</sup> Dept 2005].

Plaintiff claims gender-based “pay disparity” based on the “the difference in her salary as compared to her peers and similarly situated managers: Robert Lieblong and William Duke” whom she alleges “held the same level titles” as Plaintiff from 2003 to 2009. Such allegations, pre-dating December 31, 2009, are time-barred. Furthermore, the Complaint alleges that Mr. Lieblong was promoted in mid-2009 and therefore was not similarly situated to her in any respect during the three years before she filed this action.

Plaintiff also alleges that Robert Puciloski, who held a different position than Plaintiff, received \$5,000 more than she received. While Plaintiff alleges that she “is more senior in her position with Defendant and has more experience in Defendant’s operation than Puciloski,” she also acknowledges that Puciloski held a more senior position than her. Mr. Puciloski is therefore not alleged to be similarly situated to support Plaintiff’s claim for gender discrimination. Plaintiff alleges no other facts that support a claim for gender discrimination.

Wherefore it is hereby,

ORDERED that Defendant’s motion to dismiss is granted and Plaintiff’s Complaint is dismissed in its entirety as against defendant Metro-

North Commuter Railroad Company, and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 5, 2013



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EILEEN A. RAKOWER, J.S.C.

**HON. EILEEN A. RAKOWER**