

Wang v New York State Dept. of Health

2013 NY Slip Op 34101(U)

October 30, 2013

Supreme Court, Albany County

Docket Number: 1901-11

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT

ORIGINAL

COUNTY OF ALBANY

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DONNA L. N. WANG,

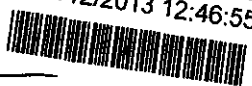
Plaintiff,

DECISION
AND
ORDER

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant.

Albany County Clerk
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Index No. 1901-11
(RJI No. 01-01-11-103840)

(Judge Richard M. Platkin, Presiding)

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Hon. Richard M. Platkin, A.J.S.C.

Discovery in this action is complete, a note of issue has been filed and the case is scheduled for a jury trial commencing on November 18, 2013. Plaintiff Donna L.N. Wang now moves pursuant to CPLR 3025 (b) for leave to amend her complaint against defendant New York State Department of Health (“DOH”) to add a new cause of action under New York State Executive Law § 296.

BACKGROUND

This action is brought pursuant to the Uniform Services Employment and Reemployment Rights Act (“USERRA”) (38 USC § 4301, *et seq.*) and New York State Military Law § 242 (“Section 242”). In a complaint dated March 10, 2011, plaintiff claims employment discrimination on account of her military service. The complaint alleges 15 causes of action and seeks the following relief: (a) compensatory damages, including lost wages, lost benefits, back pay, future pay and pension credits; (b) the costs of suit, including reasonable attorney’s fees, expert witness fees, costs and other litigation expenses; (c) liquidated damages; (d) punitive damages; and (e) an injunction restraining DOH from terminating plaintiff’s employment and directing the agency to comply with USERRA.

This action has been the subject of extensive motion practice. In a motion to dismiss the complaint pursuant to CPLR 3211 filed in June 2011, DOH argued, *inter alia*, that Supreme Court lacks subject matter jurisdiction to adjudicate plaintiff’s claims for compensatory damages under USERRA. In a Decision and Order dated September 6, 2011,¹ the Court determined that

¹ The prior motion practice will be discussed herein only to the extent relevant to disposition of the instant application.

plaintiff's demand for liquidated damages is within the exclusive jurisdiction of the Court of Claims because it is "a claim at law to recover money damages against the State that is not merely incidental to equitable relief". However, "plaintiff's demand for lost wages and benefits suffered by reason of DOH's alleged failure to comply with USERRA, as well as her demand for attorney's fees, expert witness fees and other litigation expenses", is within the jurisdiction of Supreme Court due to the equitable nature of the relief.

Following the conclusion of discovery, the parties cross-moved for summary judgment. By Decision and Order dated February 19, 2013, the Court determined that plaintiff's claim of a hostile work environment was actionable under both USERRA and Section 242, but certain other claims were subject to dismissal on various grounds. Following the motion to dismiss and cross-motions for summary judgment, plaintiff was left with claims under USERRA and Section 242 based upon the following acts of discrimination: (1) an alleged hostile work environment; (2) a challenge to plaintiff's removal from a certain on-call list; and (3) allegations that plaintiff was given shorter deadlines to complete her work than her colleagues.

In the meantime, plaintiff filed her Note of Issue on October 30, 2012, which certified that the case was ready for trial, neither physical examinations nor medical reports were required, and that all necessary discovery "now known to be necessary" had been completed. The trial in this matter originally was scheduled for April 15, 2013, but following several adjournments is set to begin on November 18, 2013. In a letter dated August 23, 2013 granting the most recent adjournment of the trial, the Court (McDonough, J.) stated that "[p]ursuant to the agreement of both parties, there will be no further adjournments absent extreme exigent circumstances."

Plaintiff now seeks to amend her complaint in order “to resolve an issue of damages that has been raised during these proceedings.” While conceding that USERRA does not provide for the recovery of her alleged “emotional damages”, plaintiff argues that Section 242 of the Military Law does so provide. DOH disagrees, arguing that USERRA and its state-law counterpart provide for the same measure of restitutionary damages. In a claimed effort to avoid “the need for a ruling on the availability of emotional damages under New York Military Law § 242”, plaintiff seeks to add a cause of action for a hostile work environment under Executive Law § 296, which is alleged to clearly authorize such damages. Defendant opposes the motion, principally on grounds of undue delay and unfair prejudice.

ANALYSIS

“While leave to amend a complaint . . . ordinarily should be freely granted, [l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion” (*Bailey v Village of Saranac Lake, Inc.*, 100 AD3d 1089, 1090 [3d Dept 2012] [internal citations omitted]). Further, “where a plaintiff files a note of issue certifying that the case is ready for trial and subsequently seeks to amend the complaint, a trial court’s discretion to amend should be exercised with caution” (*id.* [internal citations and quotations omitted]).

Applying this standard, the Court concludes that plaintiff’s belated motion to amend her complaint must be denied. This motion was submitted less than one month before trial, and it comes almost one year after the completion of all necessary discovery and the filing of a trial-term note of issue. Further, plaintiff offers no reasonable excuse or justification for the protracted delay in seeking to allege a claim under Executive Law § 296. While plaintiff’s

counsel claims the amendment is necessary due to a dispute between the parties as to the availability of “emotional damages” under Section 242, he acknowledges that this dispute has been ongoing throughout the litigation, which included two rounds of dispositive motion practice.

In addition to the lateness of plaintiff’s motion and the lack of any satisfactory excuse for the delay, the Court further finds that defendant would be prejudiced by the proposed amendment. As noted above, plaintiff’s complaint demands compensatory damages that are equitable in nature, such as lost wages, lost benefits, back pay, future pay and pension credits. Indeed, the issue of damages was a subject of the motion to dismiss, in which plaintiff’s demand for compensatory damages under USERRA were so limited. Given the nature of the relief requested in the complaint, the limited monetary damages available in this action under USERRA and the substantial similarity between USERRA and its state-law counterpart, it would be unfair to allow plaintiff to amend her complaint to allege a claim for “emotional damages” without removing the case from the trial calendar and according DOH the opportunity to: (a) obtain the records of plaintiff’s treating health-care providers; (b) re-depose plaintiff (and potentially other witnesses) concerning the demand for emotional damages; (c) obtain an independent medical and/or psychological examination of the plaintiff; (d) retain expert witnesses concerning plaintiff’s mental, physical and/or emotional state; and (e) exchange expert disclosure.

Given the lateness of plaintiff’s motion, the absence of a satisfactory excuse for the delay, the prejudice to defendant and the parties’ agreement in August 2013 that no further

adjournments of the trial would be granted "absent extreme exigent circumstances", the Court concludes that it would be an improvident exercise of discretion to grant the motion to amend.

Accordingly, it is

ORDERED that plaintiff's motion to amend the complaint is denied.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to counsel for defendant for filing and service. All other papers are being transmitted to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
October 30, 2013


RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

- Notice of Motion, dated October 16, 2013;
- Affidavit of Michael Macomber, Esq., sworn to October 16, 2013;
- Plaintiff's Memorandum of Law, undated;
- Affirmation of Cathy Y. Sheehan, Esq., dated October 23, 2013;
- Defendant's Memorandum of Law, dated October 23, 2013.

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