

**Meier v Stony Brook Univ.**

2014 NY Slip Op 30777(U)

March 24, 2014

Supreme Court, Suffolk County

Docket Number: 11-8754

Judge: Jeffrey Arlen Spinner

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**COPY**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY**PRESENT:**Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme CourtMOTION DATE 8-7-13  
ADJ. DATE 10-2-13  
Mot. Seq. # 001 - MG; CASEDISP-----X  
SANDRA MEIER,

Plaintiff,

- against -

STONY BROOK UNIVERSITY, RICHARD  
GATTEAU (SUED IN HIS OFFICIAL AND  
INDIVIDUAL CAPACITY),Defendants.  
-----XSCOTT MICHAEL MISHKIN, P.C.  
Attorney for Plaintiff  
One Suffolk Square, Suite 240  
Islandia, New York 11749ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL  
By: Patricia M. Hingerton, Assistant  
Attorney General  
Attorney for Defendants  
300 Motor Parkway, Suite 205  
Hauppauge, New York 11788-5127

Upon the following papers numbered 1 to 107 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 53; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 56 - 100; Replying Affidavits and supporting papers 102 - 105; Other Memoranda of Law 54 - 55; 101; 106 - 107; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint is granted.

In 1995, plaintiff Sandra Meier was hired by defendant State University of New York at Stony Brook (hereinafter Stony Brook University) to the clerical position of Keyboard Specialist 1, a civil service title. She left her job with Stony Brook University the following year, but was reappointed to the same clerical position in January 1999. Thereafter, plaintiff was promoted on a probationary basis to the job of Secretary 1 and assigned to work in the university's Political Science Department. Fourth months later, the probation was terminated for poor performance, and plaintiff reverted back to the position of Keyboard Typist 1. Plaintiff then was assigned to Stony Brook University's Academic and Pre-Professional Advising Center (hereinafter the Advising Center), where she worked under the supervision of defendant Dr. Richard Gatteau. Plaintiff's duties at work included typing, photocopying and shredding documents, ordering office supplies, data entry, and running errands when needed.

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Dr. Gatteau, who currently serves as Assistant Provost of Stony Brook University, served as the director of the Advising Center during the period from June 2001 through September 2011. As Director of the Advising Center, Dr. Gatteau supervised a staff of 15 people, some of whom were student interns, and was responsible for conducting the annual evaluations of plaintiff's job performance. Plaintiff, the only civil service clerical worker in the Advising Center, met with Dr. Gatteau on various occasions to discuss, among other things, her alleged low productivity, personal use of the computer and telephone, unauthorized delegation of job responsibilities to student interns, and unscheduled absences from and late arrivals to work. Dr. Gatteau prepared written performance evaluations of plaintiff's work for the 2005-2006, 2007-2008, and 2008-2009 evaluation periods. The 2005-2006 performance evaluation, which rated plaintiff's performance "satisfactory," discussed plaintiff's use of sick leave and her practice of asking for time off without reasonable advance notice. Similarly, the 2007-2008 performance evaluation gave plaintiff a satisfactory rating and addressed plaintiff's use of sick and annual leave. However, it also discussed plaintiff's delegation of work responsibilities to others without prior approval, the amount of time spent on personal phone calls during business hours, and her failure to arrive on time on numerous work days. The 2008-2009 performance evaluation gave plaintiff a satisfactory ranking, but, like the 2007-2008 evaluation, stated that she had issues with tardiness, unscheduled absences, unauthorized delegation of job responsibilities, and personal phone calls at work. It is noted a different performance evaluation prepared by Dr. Gatteau for the 2008-2009 period that gave plaintiff an unsatisfactory rating later was rescinded, as it used incorrect dates and had insufficient supporting documentation. Plaintiff filed written comments in response to the 2005-2006, 2007-2008, and 2008-2009 performance evaluations.

Furthermore, during her assignment to the Advising Center, plaintiff was granted two requests for medical leave based on an alleged work-related injury to her hand, with one leave time running from April 2009 through June 2009, and the second, an extended leave, running from January 2010 until her retirement in October 2010. Meanwhile, in March 2009, plaintiff filed a request with the Stony Brook University's Disability Support Services (DSS) for a job accommodation. Upon submission of supporting documentation from a physician, plaintiff was granted her accommodation request for an ergonomic office chair. In July and August 2009, plaintiff filed employment discrimination charges against Stony Brook University with the United States Equal Employment Opportunity Commission (EEOC), claiming she was subjected to retaliatory conduct by Dr. Gatteau, and with the New York State Division of Human Rights (DHR), claiming she was subjected to disparate treatment by Dr. Gatteau because of her age and her nationality. Later, in December 2009, plaintiff advised a DSS counselor that she was having problems performing certain assignments at work, specifically the stuffing of envelopes and the removal of staples from large files. However, she did not submit any medical documentation substantiating her claim that she was unable to perform such tasks or file a request for a job accommodation.

Subsequently, in March 2011, plaintiff, who at that time was 67 years old, brought the instant action against Stony Brook University and Dr. Gatteau. The complaint alleges, in part, that Dr. Gatteau and Stony Brook University discriminated against plaintiff because of her age, and retaliated against her by fabricating allegations of poor work performance, low productivity, and problems with arriving on time and attendance for filing an age discrimination complaint with the EEOC in 2002. It alleges that Dr. Gatteau also retaliated against plaintiff after she filed a complaint against him with his supervisor for making a comment about her having a baby, by fabricating allegations about her performance at work, by closely monitoring her arrival time and activities at work, by assigning her the task of stuffing envelopes for upcoming graduations, and by changing her desk, disconnecting her telephone and moving her personal possessions while she was out

on medical leave. In addition, the complaint alleges Dr. Gatteau discriminated against plaintiff for suffering from a disability, namely carpal tunnel syndrome, by forcing her to perform the task of stuffing envelopes, even though student interns were available to perform such job, and then placing a written reprimand in her file regarding her work, even though the task was completed on time. It further alleges the assignment of the task of stuffing envelopes was a public display of Dr. Gatteau's animus towards plaintiff, making her feel humiliated and "extremely uncomfortable in the workplace," and constituted an averse employment action.

Stony Brook University and Dr. Gatteau now move for summary judgment dismissing the complaint, arguing that plaintiff is unable to make out a prima facie case of employment discrimination based on age or disability or of adverse employment actions in retaliation for her complaints to the EEOC, the Division of Human Rights, and the DSS. In opposition, plaintiff asserts that the instant action seeks damages for unlawful retaliatory employment conduct related to age and disability, and does not claim defendants are liable for age discrimination. Plaintiff argues the motion for summary judgment should be denied, as issues of fact exist as to whether Dr. Gatteau took adverse, retaliatory employment actions against her, and whether she was forced to endure a hostile work environment. Plaintiff alleges, among other things, that Dr. Gatteau discriminated against her and created a hostile work environment by making derogatory comments intended to humiliate and embarrass her, by "subjecting her to undue scrutiny and supervision," and by "knowingly assigning tasks that were injurious" to her carpal tunnel condition.

Article 15 of the Executive Law, known as the Human Rights Law, makes it an unlawful "for an employer . . . because of an individual's age, race, creed, color, national origin . . . disability . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (Executive Law § 296 [1][a]). The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330, 763 NYS2d 518 [2003]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]).

For purposes of the Human Rights Law, a hostile work environment exists "[w]hen 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" (*Harris v Forklift Sys.*, 510 US 17, 21, 114 S Ct 367 [1993] [citation omitted]; see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Matter of New State Div. of Human Rights v ABS Elecs., Inc.*, 102 AD3d 967, 958 NYS2d 502 [2d Dept 2013]; *Vitale v Rosina Food Prods.*, 283 AD2d 141, 727 NYS2d 215 [4th Dept 2001]). A determination as to whether a work place is hostile or abusive requires consideration of the surrounding circumstances, including the frequency of the alleged discriminatory conduct, the severity of such conduct, whether it is physically threatening or humiliating or merely offensive, whether it effected the employee's psychological well being, and whether it interferes with the employee's performance at work (*Harris v Forklift Sys.*, 510 US 17, 23, 114 S Ct 367; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310-311, 786 NYS2d 382). Significantly, the conduct at issue must have altered the conditions of the employee's employment by being subjectively perceived by the employee as abusive, and it must have created what a reasonable person would consider to be an "objectively hostile or abusive environment" (*Forrest v Jewish Guild or the Blind*, 3 NY3d 295, 311, 786 NYS2d 382; see *McRedmond v Sutton Place Rest. & Bar, Inc.*, 95 AD3d 671, 945 NYS2d 35 [1st Dept 2012]).

Further, to hold an employer liable for a hostile work place caused by an employee's discriminatory behavior, a plaintiff must establish that the employer became a party to such behavior by encouraging, condoning or approving it (*see Matter of Totem Taxi, Inc. v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 491 NYS2d 293 [1985]; *Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 496 NYS2d 411 [1985]; *Doe v State of New York*, 89 AD3d 787, 933 NYS2d 688 [2d Dept 2011]). Although calculated inaction to discriminatory conduct may indicate condonation, "only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake action which may be construed as condoning the improper conduct" (*Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 887-888, 913 NYS2d 296 [2d Dept 2010], *lv denied* 17 NY3d 716, 934 NYS2d 374 [2011]; *see Bianco v Flushing Hosp. Med. Ctr.*, 54 AD3d 304, 863 NYS2d 453 [2d Dept 2008]).

Here, defendants made a prima facie case that plaintiff was not harassed at work based on her age or alleged disability (*see Morse v Cowton & Tout, Inc.*, 41 AD3d 563, 838 NYS2d 162 [2d Dept 2007]), and that Dr. Gatteau's alleged offensive conduct did not alter the conditions of her work at the Advising Center or create an environment was objectively hostile or abusive (*see Novak v Royal Life Ins. Co. of N.Y.*, 284 AD2d 892, 726 NYS2d 784 [3d Dept 2001]; *see also Clauberg v State of New York*, 95 AD3d 1385, 943 NYS2d 653 [3d Dept 2012]; *cf. Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights*, 53 AD3d 823, 861 NYS2d 494 [3d Dept 2008]). The evidence presented in opposition to the motion demonstrates only intermittent conduct by Dr. Gatteau during the approximately five-year period she was assigned to the Advising Center that plaintiff perceived to be offensive and discriminatory, rather than severe or pervasive discriminatory conduct that created an actionable hostile work environment (*see Nettles v LSG Sky Chefs*, 94 AD3d 726, 941 NYS2d 643 [2d Dept 2012]; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003], *affd* 3 NY3d 295, 786 NYS2d 382 [2004]; *see also Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 815 NYS2d 159 [2d Dept 2006]; *cf. Kaptan v Danchig*, 19 AD3d 456, 796 NYS2d 706 [2d Dept 2005]).

As to plaintiff's claim for employment retaliation, Human Rights Law § 296 (7) provides "[i]t shall be an unlawful discriminatory practice for any person . . . to retaliate or discriminate against a person because he or she has opposed an practices forbidden under this article or because he or she filed a complaint . . . under this article." To make out a claim for unlawful retaliation, a plaintiff must show that (1) he or she was engaged in protected activity, (2) his or her employer was aware he or she participated in such activity, (3) he or she suffered an adverse employment action based on such activity, and (4) there is a causal connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313, 786 NYS2d 382 [2004]; *see Adeniran v State of New York*, 106 AD2d 844, 965 NYS2d 163 [2d Dept 2013]; *Delrio v City of New York*, 91 AD3d 900, 938 NYS2d 149 [2d Dept 2012]). An adverse employment action requires a materially adverse change in the terms and conditions of the plaintiff's employment, such as a termination of employment, a demotion, a material loss of benefits, or significantly decreased job responsibilities (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, 786 NYS2d 382; *see Furfero v St. John's Univ.*, 94 AD3d 695, 941 NYS2d 639 [2d Dept 2012]). To establish entitlement to summary judgment on an unlawful retaliation claim, a defendant must show that the plaintiff is unable to make out a prima facie case of retaliation or, "having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" (*Delrio v City of New York*, 91 AD3d 900, 901, 938 NYS2d 149).

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Defendants' submissions in support of the motion demonstrate that plaintiff, who voluntarily retired from her position following an extended medical leave, cannot establish that she suffered an adverse employment action related to her filing of complaints with the EECO, the DHR or Dr. Gateau's supervisor (see *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 909 NYS2d 439 [1st Dept 2010]; *Thompson v Lamprecht Transp.*, 39 AD3d 846, 834 NYS2d 312 [2d Dept 2007]). Defendants' evidence also shows that the criticisms of plaintiff's performance at work and of her use of sick and annual leave documented in the performance evaluations and statements included in her personnel file were based on legitimate grounds and were not retaliatory in nature (see *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 970 NYS2d 789 [2d Dept 2013]; *Michno v New York Hosp. Med. Ctr. of Queens*, 71 AD3d 746, 899 NYS2d 248 [2d Dept 2010]; *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 811 NYS2d 418 [2d Dept 2006]; *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 692 NYS2d 220 [3d Dept 1999]). In opposition, plaintiff failed to raise a triable issue as to whether she suffered materially adverse change in her job (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382). Contrary to the assertions by plaintiff's counsel, allegations that plaintiff only was permitted to attend the annual "Hoe-Down" lunch event during her lunch break and was not invited to a work retreat, that she was required to lift boxes and posters and to stuff envelopes when wearing a brace on her wrist, and that she was subjected to more intense supervision than the other employees and interns working in the Advising Center are in the nature of workplace grievances, and do not raise a triable question as to whether plaintiff suffered materially adverse changes in her employment situation (see *Gaffney v City of New York*, 101 AD3d 410, 955 NYS2d 318 [1st Dept 2012], *lv denied* 21 NY3d 858, 970 NYS2d 748 [2013]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: March 24, 2014

  
 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION