

**Carter v Mone**

2014 NY Slip Op 31632(U)

June 19, 2014

Supreme Court, Suffolk County

Docket Number: 10-8196

Judge: Daniel Martin

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Plaintiff Tracy Carter commenced this action in accordance with Executive Law § 296, alleging that she suffered damages as a result of sex discrimination due to a hostile work environment and a retaliatory discharge in the course of her employment with defendants the New York State Office of Mental Health and the State of New York. On March 23, 2009, plaintiff underwent a physical examination that was required as part of her appointment as a food service worker at the Pilgrim Psychiatric Center (Pilgrim), which is operated by defendant the New York State Office of Mental Health and owned by defendant the State of New York. The complaint alleges that during the physical examination, defendant Dr. Vasudeo Mone intentionally contacted plaintiff's body in a harmful and offensive sexual manner.

Defendant Dr. Mone now moves for summary judgment dismissing the complaint against him on the ground that his conduct during the examination was proper. In support of his motion, Dr. Mone submits, among other things, a copy of the complaint, excerpts of transcripts of the parties' deposition testimony, and various documents relating to plaintiff's discrimination complaint.

Defendants the New York State Office of Mental Health and the State of New York (hereinafter the New York State defendants) move for summary judgment dismissing the complaint against them on the grounds that they had no notice of Dr. Mone's alleged inappropriate behavior, and that, upon learning of plaintiff's allegations, took immediate action. The New York State defendants also argue that there is no evidence of a hostile work environment or that they constructively discharged plaintiff in retaliation for filing a discrimination complaint. In support of their motion, the New York State defendants submit, among other things, copies of the pleadings, excerpts of the transcripts of the parties' deposition testimony, affidavits of Michael McCann and Michelle Bard, and various documents relating to plaintiff's discrimination complaint.

Plaintiff opposes the motion by Dr. Mone, arguing that his failure to submit copies of the pleadings requires that it be denied, and that triable issues of fact remain as to whether Dr. Mone's conduct created a hostile or abusive environment. Plaintiff also opposes the motion by the New York State defendants, arguing that triable issues of fact exist as to whether the New York State defendants had notice of Dr. Mone's alleged propensity to engage in discriminatory behavior, and whether the subject incident was sufficiently severe to create a hostile environment. Plaintiff further argues that a triable issue of fact exists as to whether plaintiff's working conditions were so intolerable that a reasonable person would be compelled to resign.

Michael McCann, who is employed at Pilgrim and has held various positions within the Office of Diversity Planning and Compliance, states in his affidavit that one of his duties includes investigating and resolving complaints of sexual harassment filed by employees. He states that plaintiff filed a discrimination complaint with the Office of Diversity Planning and Compliance on April 7, 2009, and that he investigated her claim. He states that he interviewed and obtained written statements from plaintiff, the nurse who was present during plaintiff's physical examination, the nurse who was working at the clinic on the day of the incident, and employees who had their employee physical examination conducted by Dr. Mone on the day of the incident. He also interviewed Dr. Alexander Edayadi, the Chief of Medicine at Pilgrim, and Dr. Martin Stecher, the former Chief of Medicine, regarding the

standard practice in conducting employee physical examinations. McCann states that Dr. Mone was scheduled to be “interrogated” on April 27, 2009, but a union representative was unavailable on that date, and that Dr. Mone retired on April 30, 2009. He states that a final investigative report was issued on May 8, 2009, which determined that “there was sufficient evidence to support a claim of hostile environment sexual harassment,” and recommendations were sent to various departments to increase awareness and review policies to improve in those areas. He states that Pilgrim had no prior complaints against Dr. Mone for conduct similar to the conduct alleged by plaintiff.

Michelle Bard, who is employed as Director of Facility Administrative Services at Pilgrim, states in an affidavit that plaintiff was appointed to a part-time position as a Food Service Worker 1 on March 26, 2009. She states that on May 31, 2009, plaintiff did not report to work, and later called to inform Pilgrim that she was found unconscious after excessive alcohol consumption, and brought to a hospital. She states that plaintiff stated that she would be entering a treatment program, and Pilgrim made efforts to contact plaintiff to obtain the required documentation to support her leave of absence. Bard states that letters were sent to plaintiff’s home, and later forwarded to Charles K. Post Addiction Treatment Center, when Pilgrim learned that plaintiff was an in-patient there. She states that the treatment center provided documentation regarding plaintiff’s treatment, and she was placed on sick leave without pay from July 3, 2009 until July 29, 2009. She states that plaintiff was informed that if she was unable to return to work after July 29, she would have to request an extension, but she failed to do so. She states that Pilgrim sent a letter to plaintiff on August 5, 2009, informing her that she was required to submit medical documentation by August 11, or she would be subject to administrative/disciplinary action. Bard further states that plaintiff failed to respond to the request, and a letter dated August 17, 2009, advised her of the process to resign from State service. She states that plaintiff never submitted the required medical documentation, and submitted her resignation letter on August 31, 2009.

At her examination before trial, plaintiff testified that she was hired to work at Pilgrim as a “Food Service 1 Worker,” and was informed that she was required to undergo a physical examination at the psychiatric center, which was scheduled for March 23, 2009. She testified that when she entered the examination room on March 23, she was told by a female nurse to take off her shirt and her boots, and to put on a gown. She states that Dr. Mone began the examination by rubbing her neck, which lasted for three to four minutes, and caused her gown to rip and fall down to her waist. She testified that Dr. Mone proceeded to use a stethoscope to check her heartbeat by putting it on her back and then on her chest. However, she testified that Dr. Mone then “peeled open [her] bra, looked at [her] nipple, placed a stethoscope on [her] left nipple, left it there for a couple of minutes.” Plaintiff testified that Dr. Mone did the same thing to her right nipple, and that he was looking at her breast during this procedure. She testified that at this time, the nurse was about 20 feet away, pacing around near the door, and looking down at the floor and up at the ceiling. She testified that Dr. Mone asked her to lay down and started to rub her abdomen, and that when she looked up at him, he pushed her face away and told her to relax, but never explained what he was doing. She testified that he “went lower with the rubbing,” and “pulled [her] pants down a little bit,” and told her to stand up so he could check for a hernia. She testified that after she stood up, Dr. Mone placed his hand on the left side of her groin and told her to cough. She further testified that as Dr. Mone placed his hand on her groin, his pinkie touched her vagina. She testified that after the examination was complete, she pulled up her underwear and pants, and dressed.

She testified that after she started work, she did not have any contact with Dr. Mone. She testified that when she informed her supervisors regarding the incident, they provided her with a form to file a complaint. Plaintiff testified that she stopped working at Pilgrim on May 31, 2009 as she had an alcohol relapse and was taken to an emergency room for treatment. She testified that she then went to an alcoholic rehabilitation center, that Pilgrim requested that she submit a doctor's note every month explaining her leave of absence, and that she failed to provide the note on time. She testified that Pilgrim requested that she submit a resignation letter and that she sent one in August 2013.

At his examination before trial, Dr. Mone, who was employed by Pilgrim at the time of the subject incident, testified that his duties included performing annual physicals on patients and employees, and that he does not recall performing a physical examination on plaintiff. He testified that when he does perform a physical examination, he generally starts by checking the patients eyes, ears, throat, and neck. He explained that he would apply pressure and palpate the neck, behind the ears, to check the lymph nodes. He testified that a female patient's bra is always on, and that he would use the stethoscope to touch the chest for the purpose of checking the respiratory system. He testified that as the lungs are extensive, he would listen to different parts of the patient's chest, and would slide the stethoscope under the patient's bra to do so. However, he testified that a female patient would never be asked to remove her bra, that he would not look under the bra, and that the stethoscope would generally not contact the patient's nipple. He testified that during the examination of the patient's abdomen, the upper and lower parts of the abdomen will be exposed, and that to check for a hernia, he would ask the patient to lower her pants. He explained that the patient would lower her pants to the inguinal areas, which is where the abdomen meets the thigh. He testified that when he is touching the patient's inguinal areas, it is far away from her vaginal area, and that he never looks at the patient's private parts.

At her examination before trial, Rachel Olmeda, who was employed by Pilgrim as a registered nurse, testified that she started working with Dr. Mone. Olmeda testified that if the patient being examined is female, she would stay in the room during the entirety of the examination. She testified that she does not recall the physical examination of plaintiff, but described Dr. Mone's physical examinations as very "thorough." She testified that she has never observed Dr. Mone place his stethoscope on a female patient's nipple or touch a female patient's private parts. She testified that she is always standing a few feet away from the patient, at the foot of the bed, during the examination.

The standards for recovery under § 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.) (*Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]). A claim of sexual harassment may proceed on the theory that the discriminatory conduct was so pervasive as to alter the conditions of the victim's employment, that is, a hostile work environment, or on the theory that unwelcome sexual advances or other sexual conduct was the quid pro quo for promotions and other employment conditions (see *Ortega v Bisogno & Meyerson*, 2 AD3d 607, 769 NYS2d 279 [2d Dept 2003]; *Fella v County of Rockland*, 297 AD2d 813, 747 NYS2d 588 [2d Dept 2002]).

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory

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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' " (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310, 786 NYS2d 382 [2004], quoting *Harris v Forklift Sys.*, 510 US 17, 21, 114 SCt 367, 126 LEd2d 295 [1993]; see *Beharry v Guzman*, 33 AD3d 742, 823 NYS2d 195 [2d Dept 2006]; *Vitale v Rosina Food Prods.*, 283 AD2d 141, 143, 727 NYS2d 215 [4th Dept 2001]). Even a single incident of sexual harassment can create a hostile work environment if the alleged conduct is sufficiently severe (see *San Juan v Leach*, 278 AD2d 299, 300, 717 NYS2d 334 [2d Dept 2000]). To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*Matter of State Div. of Human Rights [Greene] v St. Elizabeth's Hosp.*, 66 NY2d 684, 687, 496 NYS2d 411 [1985]; *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 305, 491 NYS2d 293 [1985]). To obtain summary judgment in its favor dismissing the complaint as against it, a defendant employer must demonstrate that it did not approve of, acquiesce in, or condone any alleged discriminatory conduct and that it did not retaliate against the plaintiff for reporting the incident (see *Ellis v Child Dev. Support Corp.*, 5 AD3d 430, 772 NYS2d 605 [2d Dept 2004]). If the complaint alleges that a plaintiff engaged in a protected activity by protesting harassment to her supervisors, that the employers knew that it was a protected activity, that the plaintiff suffered some adverse employment action, and that the adverse action was causally related to her earlier complaints a cause of action has been successfully stated based upon unlawful retaliation pursuant to Executive Law §296 (*Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 812 NYS2d 611 [2d Dept 2006]).

Here, the New York State defendants have established their entitlement to judgment as a matter of law with respect to the sexual harassment claims set forth by plaintiff (see *Ortega v Bisogno & Meyerson, supra*). Significantly, there is no evidence that Dr. Mone's alleged offensive conduct was so severe or pervasive as to permeate the workplace and alter the conditions of plaintiff's employment (see *Thompson v Lamprecht Transp.*, 39 AD3d 846, 834 NYS2d 312 [2d Dept 2007]; *Macksel v Riverhead Cent. Sch. Dist.*, 2 AD3d 731, 769 NYS2d 585 [2d Dept 2003]). The alleged offensive conduct involved a single incident where Dr. Mone allegedly touched plaintiff inappropriately during an employment physical examination, and plaintiff did not have any interactions with Dr. Mone after the examination. Furthermore, there is no evidence that the New York State defendants encouraged, condoned or approved of the alleged offensive conduct (see *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 878 NYS2d 454 [2d Dept 2009]). Plaintiff testified that when she informed her supervisors about the subject incident, they provided a form for her to file a complaint, and McCann conducted an investigation of the allegations. Moreover, the New York defendants demonstrated that they had neither actual nor constructive knowledge that Dr. Mone commit the alleged offensive conduct, as there have been no prior complaints of this nature against Dr. Mone (see *O'Neil v Roman Catholic Diocese of Brooklyn*, 98 AD3d 485, 949 NYS2d 447 [2d Dept 2012]). In opposition, plaintiff failed to raise a triable issue of fact (see *Johnson v NYU Hospitals Ctr.*, 39 AD3d 817, 835 NYS2d 340 [2d Dept 2007], *lv denied* 9 NY3d 805, 842 NYS2d 781 [2007]).

As to the cause of action for constructive discharge, to sustain such a claim, a person must prove that the employer intentionally created such an intolerable workplace environment where it would

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compel a reasonable person to involuntarily end his or her employment (*see Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 825 NYS2d 697 [2006]). Here, there is no evidence that the working conditions were so intolerable, difficult, or unpleasant that a reasonable person would have felt compelled to resign (*see Matter of Gold Coast Rest. Corp. v Gibson*, 67 AD3d 798, 888 NYS2d 186 [2d Dept 2009]). Moreover, the New York defendants have demonstrated prima facie that there was no causal connection between plaintiff's claim of sexual harassment and her termination (*see Beharry v Guzman*, 33 AD3d 742, 823 NYS2d 195 [2d Dept 2006]; *Matter of Ramos v Coombe*, 237 AD2d 713, 654 NYS2d 454 [2d Dept 1997], *lv denied* 89 NY2d 981, 656 NYS2d 739 [1997]). The affidavit of Bard states that plaintiff failed to respond to multiple requests for required medical documentation to support her leave of absence, and that plaintiff submitted a resignation letter in August 2009. In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's counsel contends that plaintiff acceded to Pilgrim's demand that she resign because of its insistence on receiving medical documentation and apprehensiveness in encountering Dr. Mone if she returned to work. While plaintiff testified at her deposition that she did not want to return to work for a number of reasons, including not wanting to run into Dr. Mone, she also testified that she was "embarrassed about waking up in the emergency room," and "failing to show up at work," and that it was not such a great job anyway. Thus, the New York State defendants' motion for summary judgment dismissing the complaint against them is granted.

With regard to Dr. Mone's motion for summary judgment, CPLR 3212 (b) requires that a motion for summary judgment be supported by copies of all of the pleadings (*see Ahern v Shepherd*, 89 AD3d 1046, 933 NYS2d 597 [2d Dept 2011]; *Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 84 AD3d 1153, 924 NYS2d 276 [2d Dept 2011]; *Sendor v Chervin*, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]). Here, Dr. Mone failed to include a complete copy of the complaint and a copy of the answer with his moving papers. He also failed to submit proper proof of service of the moving papers. Accordingly, the motion by Dr. Mone for summary judgment is denied, without prejudice to renewal.

Dated: June 19, 2014

  
A.J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION