Gookool v Nature's Bounty
2015 NY Slip Op 31261(U)
July 10, 2015
Supreme Court, Suffolk County
Docket Number: 12-5878
Judge: Peter H. Mayer

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SHORT FORM ORDER

COPY

INDEX No. 12-5878
CAL No. 14-00632OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-18-14
ADJ. DATE
Mot. Seq. # 002 - MG; CASEDISP

STEPHEN GOOKOOL,

Plaintiff,

- against -

NATURE'S BOUNTY, ALAN TUCKERMAN, SUPERVISOR; THOMAS BONGIORNO, SUPERVISOR; BERNARD DOUGHTY, DEPARTMENT MANAGER,

Defendants.

ANDREW J. SCHATKIN, ESQ.
Attorney for Plaintiff
350 Jericho Turnpike
Jericho, New York 11753

LITTLER MENDELSON, P.C.
Attorney for Defendants
290 Broad hollow Road, Suite 305
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants dated 10/21/14, and supporting papers (including Memorandum of Law dated 8/8/14); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated 11/13/14, and supporting papers; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants to renew their summary judgment motion which was denied by this court's order dated October 1, 2014 is granted, and upon such renewal, judgment is granted in favor of the defendants dismissing the complaint.

Plaintiff commenced this action seeking damages for alleged violations of the New York State Human Rights Law ("NYSHRL") pursuant to Executive Law § 296(1)(a). Plaintiff, who was formerly employed by NBTY, Inc., i/s/h/a Nature's Bounty ("NBTY"), alleges that his termination was discriminatory

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and that he was subject to a hostile work environment based on his national origin (Trinidadian), sex and marital status.

In February 2009, plaintiff was hired by NBTY, a nutritional supplement manufacturer and distributor, to work in its warehouse in Ronkonkoma. At the start of his employment, plaintiff received a copy of the NBTY Associate Handbook (the "Handbook") which sets forth NBTY's attendance policy. NBTY uses an "occurrence based" policy to record attendance. Under this policy, employees are charged a half occurrence for arriving to work late or leaving early, i.e., within four hours of the start or end of a shift, and a full occurrence if absent an entire shift or two consecutive shifts, or report more than four hours late or leave with more than four hours left on a shift. If an employee accrues three occurrences in a rolling 12-month period, an employee will receive a written warning. A second written warning is given if an employee accrues four occurrences, and a final written warning is given for five accrued occurrences in the 12-month rolling period. An employee accruing six occurrences within the period is subject to termination. An absence or lateness due to jury duty, military duty, bereavement, FMLA leave or sick leave, pre-approved vacation, personal days and "other legally excluded reasons" do not count as occurrences.

Plaintiff initially worked as a machine operator on the second shift from 3 pm to 11 pm, and was supervised by defendant Alan Tochterman, i/s/h/a Alan Tuckerman ("Tochterman"). In August 2009, plaintiff was promoted to forklift operator on the first shift, 7 am to 3 pm, and was supervised by defendant Thomas Bongiorno ("Bongiorno") who selected plaintiff for the position based on the recommendation of Tochterman.

Plaintiff was late on January 19, 2010; worked a half day on March 1, March 25 and March 27, 2010 without any sick or personal time to cover the half days; and he did not report to work on March 17, 2010 again without any sick or personal time to cover the day. As plaintiff had accumulated three occurrences under the NBTY attendance policy he received his first written warning on May 28, 2010. The warning included the statement that "[a]dditional infractions will lead to further disciplinary action up to and including termination." The warning was signed by his supervisor, Bongiorno. Plaintiff also signed the warning, indicating that he agreed and accepted the facts and disciplinary action described therein.

Plaintiff was late for work on June 16, and absent on June 21 and 22, 2010 without any leave time to cover the absences, thereby accumulating an additional one and one-half occurrences bringing his total to four and one-half occurrences within a 12-month period. He was given a second written warning on June 28, 2010 which included a statement that he is one-half occurrence from a final warning and one and one-half occurrences from discharge. Plaintiff executed the discipline notice without objection.

Plaintiff was charged a full occurrence due to his absence from work on June 24 and June 25, 2010, earning a final written warning as a result of accumulating five and one-half occurrences. Thereafter, plaintiff requested a half day off on July 6, 2010 to attend a court appearance. As he had accrued a half-day of time off, the request was approved. However, he was advised by Bongiorno that if he reported to work after 11:00 am, he would be charged with a half occurrence, which would result in his termination. On July 6, 2010, plaintiff arrived to work at 11:45 am, thus accumulating six occurrences. On the same day, plaintiff was terminated in accordance with NBTY's attendance policy.

Thereafter, plaintiff applied and, despite NBTY's opposition, received unemployment benefits. The instant action for alleged violations of the New York State Human Rights Law ("NYSHRL") pursuant to Executive Law § 296(1)(a) ensued.

"The standards for recovery under section 296 of the Executive Law are in accord with Federal Standards until Title VII of the Civil Rights Act of 1962 (42 USC § 2000e *et seq.*)" (***Ferrante v American Lung Assn.***, 90 NY2d 623, 629, 665 NYS2d 25 [1997]). In a discrimination case, a plaintiff has the initial burden of establishing a prima facie case which gives rise to a presumption of discrimination (***Ferrante v American Lung Assn.***, *supra*). If the plaintiff makes out a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason" for the adverse action (***McDonnell Douglas Corp. v Green***, 411 US 792, 803, 93 S Ct 1817 [1973]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 311, 786 NYS2d 382 [2004]; ***Ferrante v American Lung Assn.***, *supra*). If the defendants provide such a reason, the burden shifts back to the plaintiff to offer admissible evidence that the legitimate reason proffered by the defendants was merely a pretext for discrimination by demonstrating both that the stated reason was false and that discrimination was the real reason (*see* ***McDonnell Douglas Corp. v Green***, *supra*; ***Forrest v Jewish Guild for the Blind***, *supra*; ***Ferrante v American Lung Assn.***, *supra*).

To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual (***Forrest v Jewish Guild for the Blind***, *supra*). Defendants have satisfied their burden of establishing their prima facie entitlement to summary judgment dismissing plaintiff's discrimination claims.

In opposition, plaintiff has failed to make out a prima facie case establishing that there were any circumstances giving rise to an inference of discrimination. While termination is indisputably an adverse action (*see* ***Forrest v Jewish Guild for the Blind***, *supra*), plaintiff's conclusory claims that his termination was motivated by a gender-related bias, his national origin or his marital status are insufficient to establish discrimination. Plaintiff has failed to present any facts that would lead a reasonable trier of fact to conclude that the decision to fire him was motivated by discriminatory animus.

During his deposition plaintiff testified that he believed he was treated differently because of his marital status, criminal offenses and Family Court proceedings. Other than the allegations that he was the only person working in NBTY's warehouse from Trinidad, and that he is a male who was experiencing marital problems, not one scintilla of evidence has been proffered to give rise to the presumption that any of these factors played a role in the decision to terminate him (*see* ***Muszak v Sears, Roebuck & Co.***, 63 F Supp 2d 292, 296 [WDNY 1999], quoting ***Meiri v Dacon***, 759 F2d 989 [2d Cir 1985], *cert. denied* 474 US 829, 106 SCt 91 [1985] [plaintiff must present more than "conclusory allegations of discrimination" and provide "concrete particulars" to substantiate the discrimination claims]). In fact, upon further questioning as to what knowledge, information or evidence he had to substantiate his beliefs that he was treated different from other employees, plaintiff conceded that he did not have any.

Moreover, "it is difficult to impute ... an invidious motivation," to Biorgonio as he was the person who made the decision to promote and terminate plaintiff (*see* ***Carlton v Mystic Transp.***, 202 F3d 129, 137 [2d Cir], *cert denied* 530 US 1261, 120 S Ct 2718 [2000]; ***Grady v Affiliated Cent., Inc.***, 130 F3d 553 [2d

Cir 1997], *cert denied* 525 US 936, 119 S Ct 349 [1998]). Where the termination occurs within a relatively short time after the hiring (here 11 months) there is a strong inference that discrimination was not a motivating factor in the employment decision (***Carlton v Mystic Transp.***, *supra*; ***Grady v Affiliated Cent., Inc.***, *supra*).

Furthermore, individuals may be liable under the NYSHRL only if they have an "ownership interst or any power to do more than carry out personnel decisions made by others"(***Patrosky v Chemical Bank***, 63 NY2d 541, 542 [1984]). No evidence has been presented to establish that the individually named defendants herein, Bongiorno, Tochterman and Bernard Doughty, have an ownership interest in NBTY. Therefore, these defendants cannot be held individually liable for any claims of discrimination.

Even if plaintiff could meet his initial burden, defendants have articulated a legitimate, non-discriminatory reason for the adverse employment decision. Considering the facts in the light most favorable to plaintiff, and giving him the benefit of every inference that might be drawn in his favor, there is ample evidence to demonstrate that plaintiff was discharged because of his violations of NBTY's attendance policy, and not because of any unlawful discrimination (*see* ***Jordan v American Intl. Group***, 283 AD2d 611, 725 NYS2d 232 [2d Dept 2011; ***Mitchell v Boys Harbor, Inc.*** 259 AD2d 529, 686 NYS2d 474 [2d Dept 1999]). It is noted that plaintiff does not attempt to show that the defendants' proffered reason for his termination was pretextual. Instead, plaintiff argues that NBTY's attendance policy should be interpreted to exclude the days he was late or absent under the "other legally excluded" category in the Handbook as he was either required to appear in court on the domestic violence case or was incarcerated for violating the order of protection issued in the case. This argument is unavailing, as even if such an interpretation was plausible, it would not show a discriminatory motive. Thus, plaintiff has failed to establish the existence of any material issue of fact.

Defendants also have established their entitlement to judgment as a matter of law dismissing the plaintiff's claim of a hostile work environment by proffering sufficient evidence that the allegedly offensive conduct was not sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an objectively hostile or abusive work environment (***Forrest v Jewish Guild for the Blind***, *supra*; ***Sayegh v Fiore***, 88 AD3d 981, 931 NYS2d 884 [2d Dept 2011]; *see* ***Morse v Cowtan & Tout, Inc.***, 41 AD3d 563, 838 NYS2d 162 [2d Dept 2007]). At his deposition, plaintiff testified that he complained to Bongiorno about having an issue with a co-worker, Mike Kotak ("Kotak"). When queried about what the plaintiff told Bongiorno about Kotak, he responded, Kotak "is mad at me. He keeps telling me I took his position." Plaintiff further testified that Kotak "had hostility" towards him because he did not get the forklift operator job. Plaintiff never made a written complaint or reported to NBTY's human resources department any offensive or pejorative comments made by Kotak. Borgionio denies that plaintiff complained to him about being called derogatory and racist names by Kotak, but asserts he was aware that they had personality conflicts.

"A hostile work environment exists where 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" (***Chiara v Town of New Castle***, 126 AD3d 111, 125, 2 NYS3d 132 [2d Dept 2015]; ***Nettles v LSG Sky Chefs***, 94 AD3d 726, 730, 941 NYS2d 643 [2d Dept 2012]. "Various factors, such as frequency and severity of the discrimination, whether the allegedly

discriminatory actions were threatening or humiliating or a 'mere offensive utterance,' and whether the alleged actions 'unreasonably interfere[ ] with an employee's work' are to be considered in determining whether a hostile work environment exists" (***Chiara v Town of New Castle***, *supra* at 125 quoting ***Forrest v Jewish Guild for the Blind***, *supra* at 310). "The allegedly abusive conduct must not only have altered the conditions of employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an objectively hostile or abusive environment—one that a reasonable person would find to be so" (*id.*; ***Nettles v LSG Sky Chefs***, *supra* at 730). "[M]ere personality conflicts must not be mistaken for unlawful discrimination" (***Forrest v Jewish Guild for the Blind***, *supra* at 309; ***Chiara v Town of New Castle***, *supra* at 125).

Additionally, "to hold a defendant liable under New York law for alleged pervasive harassment, a plaintiff must prove that the employer had knowledge of and acquiesced in the discriminatory conduct of its employee" (***Vitale v Rosina Food Prods. Inc.***, 283 AD2d 141, 143, 727 NYS2d 215 [4th Dept 2001]). "Where the complainant is harassed by a low-level supervisor or a coemployee, the complainant is required to establish only that upper-level supervisors had knowledge of the conduct and ignored it; if so, the harassment will be imputed to the corporate employer and will result in imposition of direct liability" (*id.*).

Assuming the truth of plaintiff's assertion that Kotak made disparaging and racist comments towards him, there is no evidence to show that this behavior was reported to NBTY or that NTBY was otherwise aware of the alleged harassment. Moreover, plaintiff does not assert that the offensive comments permeated the workplace, were threatening or humiliating or interfered with his work. Plaintiff simply testified that he complained to Bongiorno more than twice, and that Kotak was mad and hostile towards him. However, plaintiff also testified that he would eat lunch and laugh with a group of co-workers, including Kotak. Further, in his affidavit, plaintiff only states that the remarks by Kotak caused him great emotional suffering. Thus, as neither plaintiff's assertions nor the bare allegations in the complaint, are sufficient to make out a hostile work environment cause of action, summary dismissal is warranted (*see* ***Chiara v Town of New Castle***, *supra*; *see also* ***Torres v Louzoun Enterprises, Inc.***, 105 AD3d 945, 963 NYS2d 682 [2d Dept 2013]; ***Kamen v Berkeley Coop. Towers Section II Corp.***, 98 AD3d 1086, 952 NYS2d 48 [2d Dept 2012]).

Accordingly, the motion is granted.

Dated: July 10, 2015

PETER H. MAYER, J.S.C.