

Fernandez v POP Displays

2017 NY Slip Op 30012(U)

January 3, 2017

Supreme Court, New York County

Docket Number: 154516/2016

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Magdalena Fernandez,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 154516/2016
Motion Seq. No.: 001

POP Displays and Active Staffing,

Defendants/Respondents.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1-9
Opposition Affirmation, and Exhibits	10-12
Reply Affirmation	13

In this motion to dismiss, defendant POP Displays moves, pursuant to CPLR 3211(a) to dismiss the portions of plaintiff's first, second, and third causes of action under the New York City Human Rights Law because the Court lacks subject matter jurisdiction over these claims, and pursuant to CPLR 3211(a)(7) to dismiss plaintiff's second cause of action in its entirety for failure to state a claim.

Factual Background

In this action, plaintiff seeks damages for alleged sexual harassment, disparate treatment, and retaliation in violation of the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL).

According to the complaint, plaintiff Magdalena Fernandez (Fernandez) began working with defendant Active Staffing, a recruitment and employment agency, in or about 2010 to procure employment. Through Active Staffing, plaintiff secured a position with defendant POP

Displays and commenced working for POP Displays on or about March 31, 2015, as a machine operator.

Fernandez is a female resident who resides in Bronx, New York. POP Displays has been an entity duly organized and existing under the laws of the State of Delaware, with its principal place of business located at 555 Tuckahoe Road, Yonkers, New York 10710. Active Staffing is an industrial recruitment and employment agency with its principal place of business located at 41 West 33rd Street, New York, New York 10001.

Arguments

Defendant POP Display moves to dismiss the first, second, and third causes of action under NYCHRL as against it on the grounds that the Court lacks subject matter jurisdiction because the alleged discriminatory conduct engaged in by POP Displays did not occur within New York City. POP Displays also moves to dismiss the second cause of action for disparate treatment in its entirety because it fails to state a cause of action and is duplicative of the first cause of action alleging sexual harassment.

Plaintiff contends that NYCHRL applies to because she is a resident of New York City and the alleged acts of discrimination had an impact in New York City.

Discussion

Pursuant to CPLR 3211(a)(2) a party may move for judgment dismissing one or more causes of action asserted against it on the ground that the court lacks jurisdiction of the subject matter of the cause of action.

Title 8 of the New York City Administrative Code makes it unlawful for an employer to discharge from employment, or to discriminate against in compensation or in the terms, conditions or privileges of employment, any person based on their "actual or perceived age, race,

color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status.” NYC Admin. Code §8-107(1)(a). To state a claim under the NYCHRL, plaintiff must allege that the defendant discriminated against her “within the boundaries of New York City.” *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 175, 806 NYS2d 553, 558 (1st Dept 2005). In analyzing where the discrimination occurred “the courts look to the location of the impact of the offensive conduct.” *Robles v Cox & Co, Inc.*, 841 FSupp2d 615, 623 [EDNY 2012]. “Where the alleged discriminatory act takes place outside of New York City, the relevant location of the injury for purposes of the impact analysis is not the Plaintiff’s residence, but the Plaintiff’s place of employment.” *Id* at 625; *see also Ortiz v Haier America Trading, LLC*, 2011 NY Slip Op. 31414U, 2011 WL 2283771, 2011 NY Misc LEXIS 2577 (NYSupCt May 24, 2011).

In the instant action, plaintiff argues that because she resides in New York City, plaintiff’s termination of employment affected her in New York City, and thus had an impact in New York City. Plaintiff does not assert that she ever worked in New York City. To the contrary, plaintiff was employed by and worked at defendant POP Display’s company, which is located in Yonkers, outside of New York City. Plaintiff’s contention, thus, is insufficient to apply the NYCHRL to a defendant who does not maintain offices in New York City and where the alleged discrimination giving rise to the claims occurred well outside the boundaries of New York City. Accordingly, NYCHRL does not apply to the plaintiff’s first, second and third causes of action as against defendant POP Displays.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at

law a motion for dismissal will fail.” *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Plaintiff’s first cause of action alleges hostile work environment. To establish a claim for a hostile work environment, plaintiff must establish that she (1) is a member of a protected class; (2) suffered unwelcome harassment such that the workplace was permeated with discriminatory intimidation, ridicule, and insult; (3) was harassed because of her membership in a protected class; (4) the harassment was sufficiently severe or pervasive to alter conditions of her employment and create an abusive work environment; and (5) there is a specific basis of imputing harassment to the employer. *Williams v NY City Hous. Auth.*, 61 AD3d 62, 872 NYS2d 27 (2009). Under this cause of action, plaintiff alleges that she was subject to repeated, severe, pervasive, and unwelcome sexual harassment by defendant based on her gender, and that defendants’ senior employees and human resources personnel were aware of the discrimination.

Plaintiff’s second cause of action alleges disparate treatment based on her gender. New York courts agree that “it is well settled that in determining employment discrimination claims under the New York City Human Rights Law, federal standards are applied.” *Shah v Wilcom Sys., Inc.*, 27 Ad3d 169, 806 NYS2d 553, 559 (1st Dept 2005). “Gender discrimination claims brought pursuant to the NYSHRL and the NYCHRL are analyzed under the Title VII framework.” *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 498 n. 1 [2d Cir.2009], *superseded on other grounds, as recognized in Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 108–109 [2d Cir.2013]). To establish a claim for disparate treatment, plaintiff must establish 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 the circumstances giving rise to an inference of discrimination. *Collins v New York City Transit Auth.*, 305 F3d 113, 118 (2d Cir.2002). Plaintiff’s disparate treatment claim arises from the

allegation that defendant POP Displays purposefully hired women, instead of men, so that they could be sexually harassed. Under this cause of action, plaintiff alleges she suffered disparate treatment based on her gender because defendant only hired females so that they could be sexually harassed. This claim is based on allegations that constitute a hostile work environment. A "hostile work environment cannot alone be considered an adverse employment action lest every...harassment claim would give rise to a disparate treatment claim and vice versa." *Huaman v Am Airlines, Inc.*, 2005 WL 2413189 (EDNY Sept. 29, 2005) (citing *Sexton v Runyon*, 1997 WL 704910, *4 [ND Ill Nov. 10, 1997]). Thus, the claims under the guise of disparate treatment are identical and duplicative of the first cause of action. Accordingly, it is

ORDERED that the first and third causes of action alleging violations under the New York City Human Rights Law *only*, are dismissed as against defendant POP Displays only; and it is further

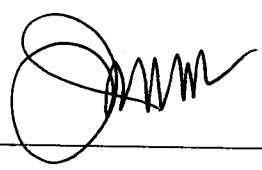
ORDERED that the second cause of action alleging violations under both New York City Human Rights Law and New York State Human Rights Law is dismissed in its entirety as against defendant POP Displays only; and it is further

ORDERED that the parties appear for a preliminary conference on February 23, 2017 at 9:30 am at 71 Thomas Street, NYC 10013.

January 3, 2017

Dated: December, 2016

ENTER:



Joan M. Kenney, J.S.C.