

Vaca v Executive Club, LLC

2021 NY Slip Op 34167(U)

March 31, 2021

Supreme Court, Queens County

Docket Number: Index No. 703830/18

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

4/7/2021

12:26 PM

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

**COUNTY CLERK
QUEENS COUNTY**

-----x
JOSELYN VACA,

Index NO. 703830/18

Plaintiff,

Motion

Date: October 19, 2020

-against-

M# 2

THE EXECUTIVE CLUB, LLC, et al.,

Defendants.
-----x

The following papers numbered EF 22-41 read on this motion by the defendants for summary judgment.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 22-33
Affirmation in Opposition.....	EF 34-35
Replying Affirmation.....	EF 36-41

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment is decided as follows:

Plaintiff commenced this action asserting a violation of the New York City Human Rights Law alleging that she was terminated from her job because of her pregnancy. Plaintiff was employed as a receptionist for defendant The Executive Club ("Club") from 2008 until March 2017. The Club is a bar that also provides adult entertainment. Defendant Mark Yackow was the Chief Operating Officer of the Club. Plaintiff alleges that defendant Club hired someone to replace her while she was out on maternity leave even though she was able and willing to return to her job.

Plaintiff informed defendant Yackow in November 2016 that she was pregnant. Thereafter, in January 2017, Yackow told plaintiff that with a newborn, the job would not suit her anymore since she would be calling out sick at times. Plaintiff told Yackow, though, that this would not happen unless it was an emergency. Yackow suggested that plaintiff find a job closer to

her home, but he stated that he was giving this advice to her only as a friend. Further, he suggested that plaintiff not work until the end of her pregnancy since it would not be good for her health. In February 2017, plaintiff told Yackow that her doctor advised her that she can work until the end of the pregnancy, and she wanted to continue working. In addition, in March 2017, Yackow suggested that plaintiff work nights after she gave birth since mornings would not suit her with a newborn. Plaintiff, however, states that Yackow told her that she would no longer have her day job after her maternity leave and would have to work nights. Plaintiff explained that would not be possible with two other children at home.

On the advice of Yackow, plaintiff spoke to the Club's head of Human Resources, Karen Nethersole. Ms. Nethersole told plaintiff that she had 12 weeks of unpaid maternity leave and that she would have her job back or a comparable position when the maternity leave ended. Plaintiff went into labor on March 22, 2017. Thereafter, Carolina Chen, a payroll employee, notified Human Resources that the plaintiff was on maternity leave effective March 22, 2017. Human Resources was also advised that plaintiff "will not come back for the same position as per Mark."

At this point, the parties disagree on the facts. Plaintiff states that she contacted Yackow in May 2017 to advise him that she would be returning to work on June 1, 2017. However, Yackow told her that her job was no longer available and she should file for unemployment benefits. According to plaintiff, Ms. Nethersole's assistant, Jennifer Yuen, advised plaintiff to file for unemployment and say "lack of work" as the reason she was let go. Plaintiff also states that she left messages for Ms. Nethersole, but they were never returned.

According to defendants, plaintiff never sent in her maternity paperwork, but did send in disability forms on April 20, 2017. On May 26, 2017, plaintiff sent a text message to defendant Yackow telling him that she was ready to come back to work. Yackow told plaintiff that he would call her on Tuesday. In late May 2017, Yackow told Ms. Nethersole that plaintiff was returning to work and she needed to get transitioned over to the Imperial Club, which was the new name of the Club. On June 2, 2017, plaintiff and Yackow spoke, and he told her he had no issue with her returning to work. Later that day, plaintiff texted defendant Yackow that she decided to file for unemployment benefits. Yackow agreed and directed her to contact Human Resources.

Human Resources, however, sent plaintiff an updated employment packet from The Imperial Club since The Executive Club was now named The Imperial Club, LLC. All employees were required to complete the updated packet. Plaintiff agreed. Human Resources sent the application to plaintiff because they believed that she was remaining on the job.

In support of the motion, defendants assert that Yackow never told plaintiff that she could not have her job back after her maternity leave. Indeed, defendants maintain that an updated employment packet was sent to the plaintiff when the Club changed its name. Defendant also contend that it was plaintiff's idea to file for unemployment benefits and separate from employment with the defendants. Further, defendants argue that defendant Yackow cannot be held individually liable even if the Club discriminated against the plaintiff.

Plaintiff asserts in opposition that she suffered an adverse employment action giving rise to an inference of discrimination. She contends that she filed for unemployment benefits after she was told she had no job to return to. Further, plaintiff argues that the prior comments made by Yackow are evidence of discrimination.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

The New York City Human Rights Law, codified at § 8-107 of the Administrative Code of the City of New York, makes it unlawful for an employer or an employee, or an agent thereof, to discriminate against an individual in compensation or in terms, conditions or privileges of employment, or to discharge a person from employment, on the basis of the individual's race or gender. (Administrative Code § 8-107[1][a].) The statute also prohibits any person from aiding or abetting discrimination. (Administrative Code § 8-107[6].) Discrimination on the basis of pregnancy is a form of gender discrimination. (*Chauca v Abraham*,

30 NY3d 325, 330 [2017].) As part of the Local Civil Rights Restoration Act of 2005 of the City of New York, claims under the New York City Human Rights Law "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof..." The effect of this Restoration Act is that all provisions of the New York Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158, 1161 [2d Dept 2015].) Further, the New York City Human Rights Law was again amended in 2016 to add a provision directing that exceptions and exemptions "shall be construed narrowly in order to maximize deterrence of discriminatory conduct." (Administrative Code of the City of New York, § 8-130[b]; see *Golston-Green v City of New York*, 184 AD3d 24, 35 [2d Dept 2020].) Moreover, the City Human Rights Law requires that unlawful discrimination play no role in an employment decision.

In order to prove a violation of the New York City Human Right Law, New York courts have adopted the burden shifting analysis set forth in *McDonnell Douglas Corp. v Green* (411 US 792 [1973].) This analysis requires a plaintiff to prove that he/she was a member of a protected class, he/she was qualified for the position, he/she was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic and this change or treatment occurred under circumstances giving rise to an inference of discrimination. (*Golston-Green v City of New York*, 184 AD3d at 38.) Once this showing has been made, the burden shifts to the defendant to demonstrate non-discriminatory reasons for the action that was taken. (*McDonnell Douglas Corp. v Green*, 411 US at 802.) If that burden is satisfied, then the plaintiff must show that those reasons stated by the defendant are false or pretextual. (*McDonnell Douglas Corp. v Green*, 411 US at 802.)

Under the newer "mixed motive" standard to prove discrimination, after the first two prongs of *McDonnell Douglas* are met, it is sufficient if plaintiff shows that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor for the defendant's action. (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 [1st Dept 2017].)

The evidence submitted herein raises triable issues of fact as to whether plaintiff suffered an unfavorable change in employment. As noted above, plaintiff states that defendant Yackow told her that her position was no longer available

following her maternity leave. Defendants state, however, that plaintiff decided to file for unemployment benefits on her own. According to defendants, Human Resources advised plaintiff that she could return to her job after her maternity leave ended. Indeed, Human Resources emailed the plaintiff that they were sending her an updated employment packet since the Club was now owned and operated by the Imperial Club. Thus, the court cannot decide, as a matter of law, whether the plaintiff was subject to an unfavorable change in her employment.

Accordingly, this motion by the defendants for summary judgment is denied.

Date: March 31, 2021



CARMEN R. VELASQUEZ, J.S.C.

FILED

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QUEENS COUNTY**