Chen v Jewish Bd. of Family & Children's Servs., Inc.
2022 NY Slip Op 31610(U)
May 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 525625/18
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10 day of May, 2022.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

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EKIA CHEN,

Plaintiff,

-against-

JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, INC. and AVROHOM ADLER,

Defendants.

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DECISION, ORDER, AND JUDGMENT

Index No. 525625/18

Mot. Seq. No. 2

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Supporting Affirmation (Affidavits), And Exhibits Annexed	23-70
Opposing Affidavits (Affirmations) and Exhibits Annexed	72-82
Reply Memorandum of Law and Exhibits Annexed	84-85

In this action to recover damages for discrimination based on gender, hostile work environment, and retaliation in violation of the New York City Human Rights Law (Administrative Code of the City of New York § 8-107 ("HRL"),[1] defendants Jewish Board of Family and Children's Services, Inc. ("JBF") and Avrohom Adler ("Adler" and, collectively with JBF, ("defendants") jointly move in Seq. No. 2 for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint of plaintiff Ekia Chen ("plaintiff").

[1] Additional claims of race- and religion-based discrimination have been withdrawn (*see* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated November 16, 2021, at 2, n 1 [(NYSCEF Doc No. 72]).

Relevant Background

JBF is a not-for-profit organization that operates adult-care residences for developmentally disabled adults. In January 2017, plaintiff was promoted by (and remained working for) JBF as a residence manager until her termination in July 2018. Plaintiff's employment was terminated approximately two months after she had lodged a formal complaint of discrimination against Adler who then held a position senior to plaintiff's but who was not her direct supervisor. Throughout her employment with JBF from August 2011 and until her performance evaluation on June 5, 2018, plaintiff had received satisfactory performance reviews in all categories.

The incident with an unruly male resident is a catalyst to start the discussion of defendants' alleged discrimination of plaintiff. On April 23, 2018, plaintiff sustained a bruise on her wrist when a physically imposing (6'4" tall, weighing 250 pounds), autistic, and often-restless male resident (the "unruly resident") grabbed her wrist, while she was trying to assist his direct-care professional – a medium-statured (5'4" tall) female, with controlling his movements. Plaintiff had previously assigned the direct-care professional to accompany the resident on trips inside the residence (the "incident"). Neither the direct-care professional, nor the unruly resident was injured in the incident.

Plaintiff alleges that Adler criticized her when informed of the incident, hypothesizing that she had been hurt by the unruly resident because, as a woman, she projected fear, whereas a man (had he been in her place) would not have been hurt by the unruly resident. In the same conversation, Adler allegedly told plaintiff that she had exercised poor judgment in assigning a female direct-care professional to supervise the unruly resident because of the latter's physique. Adler allegedly instructed plaintiff that she should only assign male direct-care

professionals to supervise the unruly resident in the future, even though the latter's behavioral plan, as developed for him by his interdisciplinary team, had failed to specify a male-only supervision.

When plaintiff complained to her immediate supervisor, non-party Israel Levy ("Levy"), that Adler's comments regarding her encounter with the unruly resident were sexist and gender-discriminatory, Levy sided with Adler, positing that some tasks could be performed by men only, rather than by men and women equally. Further, Levy allegedly warned plaintiff that if she persisted with her criticism of Adler, he (Levy) would have to report her to JBF's Human Resources Department ("HR") for calling Adler "sexist." Shortly thereafter, plaintiff submitted to HR a discrimination complaint against Adler.

At her ensuing annual performance evaluation conducted by Levy on June 15, 2018 (*i.e.*, less than two months after she lodged her discrimination complaint with the HR), plaintiff for the first time during her then approximately seven-year tenure at JBF, received a "Needs Improvement" rating in the "Relationships and Communication" category of her performance evaluation (the "June 15th evaluation"). Prior to the June 15th evaluation, plaintiff had received a rating of "Satisfactory" or better in each of the categories of her annual performance evaluation. At the June 15th evaluation, Levy explained that plaintiff was rated "Needs Improvement" in the "Relationships and Communication" category based on, among other things, a recent complaint from the father of a young resident (the "concerned father").

Prior to the June 15th evaluation, the concerned father had complained to JBF in March-April 2018 about his son's allegedly inadequate care. After those complaints had been brought to Levy's attention, he tasked plaintiff with addressing them and, to that end, telephoned the concerned father, with plaintiff listening in on Levy's speaker phone. In that telephone

conversation with Levy and plaintiff on the line, the concerned father asked for, among other things, a daycare placement for his son. The daycare placement of his son was challenging sue to the latter's profound disabilities; he was non-verbal, fed through a feeding tube, and required a wheelchair. Following the initial telephone meeting, plaintiff was calling the concerned father weekly to update him on his son's overall progress, and to inform him of what steps she was taking for his son's daycare placement.

According to plaintiff, some time after the aforementioned incident with the unruly resident, the concerned father made a telephone call to plaintiff's supervisor Levy allegedly complaining about the substandard care his son was receiving from JBF. Thereafter, plaintiff, in one of her weekly telephone conversations with the concerned father, asked him if there was anything that he wanted her to do for him because she understood that he had reached out to her supervisor with some dissatisfaction, and she wanted to be able to work on a plan to deal with it. Plaintiff stated that the concerned father denied having any dissatisfaction with her performance other than his previously expressed desire for his son's daycare placement. It is undisputed that plaintiff's inquiry into the concerned father's telephonic complaint to her supervisor – irrespective of the grounds or substance of that complaint – violated JBF's Code of Conduct. On July 3, 2018, JBF terminated plaintiff's employment "due to misconduct."

On December 20, 2018, plaintiff commenced the instant action. On February 13, 2019, defendants joined issue. On January 11, 2021, plaintiff filed a note of issue and certificate of readiness. On September 28, 2021, defendants timely served the instant motion in accordance with the parties' stipulated briefing schedule (NYSCEF Doc No. 22). On February 1, 2022, after oral argument, the instant motion was fully submitted, with the Court reserving decision.

Discussion

I. Gender Discrimination

"[A] defense motion for summary judgment under the . . . HRL must be analyzed under both the *McDonnell Douglas [Corp. v Green*, 411 US 792 (1973)] framework and the 'mixed motive' framework, which imposes a lesser burden on a plaintiff opposing such a motion" (*Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 668 [2d Dept 2019], *lv dismissed* 35 NY3d 997 [2020]). "A defendant must make a prima facie showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in their challenged actions" (*id.* [internal quotation marks omitted]). Where the defendant offers non-retaliatory reasons for the challenged action, the plaintiff must either raise an issue of fact as to pretext or as to whether, "regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive" (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 741 [2d Dept 2013]).

Here, defendants have made prima facie showing that plaintiff's gender-discrimination claim is devoid of merit. Specifically, defendants have demonstrated that plaintiff was not targeted because of her gender. Adler's *specific* questioning of plaintiff's judgment in assigning a medium-statured female to supervise a physically imposing male resident who, in plaintiff's own words, "did not know his own strength," was not indicative of gender-based discriminatory intent. Adler's *general* comments (as concurred to by Levy) that plaintiff, being a woman, inherently projected fear of others and that a man in her place would not have been hurt, did not (in and of themselves) give rise to an inference that plaintiff's gender played any role in her employment termination.

More fundamentally, defendants have demonstrated, without opposition from plaintiff, that she violated JBF's Code of Conduct by questioning the concerned father about his prior complaint to her supervisor about her. In her pretrial testimony, plaintiff admitted that she had informed the concerned father that she was aware of his complaint to her supervisor. The concerned father's intent underlying his complaint to plaintiff's supervisor – indirectly wanting to expedite his son's daycare placement – is irrelevant, inasmuch as plaintiff possessed neither a right nor a privilege under JBF's Code of Conduct to inquire about the complaint to the concerned father. Accordingly, JBF has offered a legitimate, non-discriminatory, gender-neutral reason for her employment termination. In opposition, plaintiff has failed to raise a triable issue of fact that the stated reason given by JBF for her employment termination – a violation of JBF's Code of Conduct – was motivated at least in part by an impermissible motive.

II. Hostile Work Environment

Under the HRL, "a court should award summary judgment dismissing a cause of action alleging a hostile work environment only if it can be said, as a matter of law, that the conduct complained of was 'truly insubstantial' and cannot be said to fall within the broad range of conduct . . . between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other" (*Golston-Green v City of New York*, 184 AD3d 24, 43 [2d Dept 2020] [internal quotation marks omitted]).

Defendants have demonstrated prima facie that plaintiff was not treated less well than other employees because of her gender or any other relevant characteristic. In the context of a broader discussion about how to care for the unruly resident, the record makes it clear that although the comments Adler and Levy made to plaintiff were insensitive, the "conduct

complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). In opposition, plaintiff has failed to raise a triable issue of fact.

III. Unlawful Retaliation

"[T]o establish its entitlement to summary judgment in a retaliation case [under the HRL], a defendant must demonstrate that the plaintiff cannot make out a prima facie claim 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 [2d Dept 2012]; *see also Brightman*, 108 AD3d at 740-741). For a plaintiff to state a claim for retaliation under the HRL, she must show, among other things, "a causal connection between the protected activity and the adverse action" (*Delrio*, 91 AD3d at 901).

Here, defendants have demonstrated prima facie that plaintiff is unable to satisfy the causal connection of her unlawful retaliation claim. As stated, plaintiff's employment was terminated for violation of the Code of Conduct. In opposition, plaintiff has failed to raise a triable issue of fact as to whether defendants' termination of her employment for misconduct was pretextual.

IV. Claims Against Adler

Under the HRL, Adler in his individual capacity may be held directly liable for discriminatory employment practices (*see* Administrative Code § 8-107 [1] [a]). Here, for the same reasons stated above with respect to JBF, defendants have demonstrated prima facie

entitlement to summary judgment as to Adler. In opposition, plaintiff has failed to raise a triable issue of fact.

The Court has considered the parties' remaining contentions and finds them to be without merit.

Conclusion

Accordingly, it is

ORDERED that defendants' motion in Seq. No. 2 is *granted*, and the complaint is dismissed in its entirety against both defendants without costs and disbursements; and it is further

ORDERED that defense counsel is directed to electronically serve a copy of this decision, order, and judgment with notice of entry and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision, order and judgment of the Court.

ENTER,

HON. CAROLYN E. WADE, J. S. C.

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