SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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CAROLYN GRAINGER,

Plaintiff,

- v -

THE CITY OF NEW YORK and LYNN DEMURIA

Defendants.

INDEX NO. 158264/2019

MOTION DATE 01/06/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for SUMMARY JUDGMENT.

HON. J. MACHELLE SWEETING, J.S.C.:

Defendants, The City of New York (the "City") and Lynn Demuria, move for summary judgement and an order dismissing the complaint, which alleges claims of employment discrimination. Oral argument on the motion was heard in court and on the record before the undersigned on February 16, 2023.

BACKGROUND

Plaintiff, Carolyn Grainger, commenced this action seeking to recover damages for employment discrimination based on sexual orientation in violation of the New York State Human Rights Law, N.Y. Executive Law §§ 296 *et seq*. ("NYSHRL") and the New York City Human Rights Law, N.Y. Administrative Code §§ 8-101 *et seq*. ("NYCHRL"). The facts, are as follows:

Plaintiff, a lesbian woman, was hired by the New York City Department of Correction ("DOC") as a correction officer on June 29, 2006, and assigned to work at Rikers Island Correctional Facility ("Rikers") (*see* Complaint, NYSCEF Doc. No. 2). Defendant Lynn Demuria, a heterosexual female and DOC captain at Rikers, began supervising plaintiff in 2016 or 2017 (*id.*).

Plaintiff alleges that she was subjected to repeated inappropriate and discriminatory comments about her sexual orientation by Lynn Demuria (*id.*). She also claims that her co-workers overheard one of Lynn Demuria's comments about her, which led to her sexual orientation becoming a topic of discussion, and her being subjected to further discrimination and harassment (*id.*).

In May 2018, plaintiff filed an internal complaint with the DOC's Office of Equal Employment Opportunity ("EEO"), naming Lynn Demuria and alleging "violations of the City and Department's EEO Policy based on color, race, and sexual orientation" (Final Determination, NYSCEF Doc. No. 37). On March 21, 2019, the EEO issued a final determination stating, in part, that "[a]n investigation into these allegations revealed sufficient evidence to support [the] allegations based on sexual orientation but insufficient evidence to support the allegations based on color and race. Accordingly, the allegations based on sexual orientation are substantiated and the allegations based on color and race are unsubstantiated" (*id.*). The final determination also states that "[a]ny and all remedial proceedings, as well as any claims raised which were not within the purview of the EEO, have been forwarded to the appropriate unit for review" (*id.*). Plaintiff, however, asserts that no remedial action was taken (*see* Complaint, *supra*).

Plaintiff commenced this action against defendants alleging discrimination and hostile work environment based on sexual orientation in violation of the NYSHRL (first cause of action) and the NYCHRL (second cause of action).

Defendants now seek summary judgment dismissing the complaint.

DISCUSSION

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 (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such *prima faci*e showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). Once such proof has been offered, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York, supra*, at 562). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*see Zuckerman v City of New York, supra*).

As stated, the complaint asserts claims of discrimination and a hostile work environment based on sexual orientation in violation of the NYSHRL and NYCHRL. The NYSHRL makes it "an unlawful discriminatory practice" for an employer to discriminate against an individual "in compensation or in terms, conditions or privileges of employment" because of "age, race, creed, color, national origin … sex …" (Executive Law § 296[1]; *see also Krause v Lancer & Loader*

Group, LLC, 40 Misc 3d 385, 391-392 [Sup Court, NY County 2013]). Similarly, the NYCHRL states that it shall be "an unlawful discriminatory practice" for an employer to discriminate against an individual "in compensation or in terms, conditions or privileges of employment" because of the "actual or perceived age, race, creed, color, national origin, gender …" of the individual (Administrative Code § 8-107[1][a]).

In cases alleging discrimination in employment under the NYSHRL, New York courts follow the same standard as that set by the federal courts (*see Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 25-26 [2002]). Although, the provisions of the NYCHRL mirror the provisions of the NYSHRL, the provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts (*see Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 [1st Dept 2016]).

A plaintiff alleging employment discrimination based on sexual orientation has the initial burden to establish a *prima facie* case of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). To meet this burden, the plaintiff must show: (1) that she is a member of a protected class; (2) that she was qualified for the position; (3) that she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*id.*). "The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision'" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997] [citations omitted]). If the employer meets this burden, then the plaintiff must prove that the legitimate reasons proffered by the defendant were merely pretext for the discrimination" (*see Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

In assessing a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have affirmed the applicability of the above burden-shifting analysis, as well as the mixed-motive analysis, under which, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by … discrimination" (*Melman v Montifiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012][internal quotation marks and citations omitted]).

Here, plaintiff claims that Lynn Demuria's repeated, inappropriate and discriminatory comments about her sexual orientation, which was overheard by plaintiff's co-workers, led to her sexual orientation becoming a topic of discussion, subjected her to further discrimination and harassment, and created a hostile work environment. Plaintiff's evidentiary proof includes, *inter alia*, the transcript of her examination before trial ("EBT") held on May 24, 2021 (*see* Transcript, NYSCEF Doc. No. 38).

At her EBT, plaintiff testified that she had conversations with Lynn Demuria and four other people at the DOC about her sexual orientation, and that the four other people were of the same orientation as her (*id.* at 16). She also stated that on one occasion, she had a conversation with a lesbian co-worker about an upcoming lesbian party, and that after the co-worker left the area, Lynn Demuria asked plaintiff if she was gay, to which plaintiff responded "yes, I am" (*id*. at 17-18). Plaintiff further testified that one month later, Lynn Demuria asked her, "how do you know that you are gay, have you ever been with men," to which plaintiff responded, "I'm not interested in men that's how I know I'm gay" (*id*. at 20). In addition, plaintiff testified that on May 2, 2018, she told another correction officer that he looked nice in his Class A uniform, and that Lynn Demuria, who was standing nearby, stated "[i]t doesn't matter how he looks, you're not interested in him anyway" (*id*. at 25-26). Plaintiff testified that there were "numerous people" in the area

when Lynn Demuria made the comment (*id*. at 26). Plaintiff also stated that two of her co-workers took notice of the comment, and that one of them "looked like he was shocked or like in awe, surprised" with "his mouth opened, his eyes widened" (*id*. at 27). Plaintiff further stated that at the suggestion of another captain, she wrote a "synopsis of the incidents" and gave it to her union representative, who forwarded it to EEO (*id*. at 28-29). Plaintiff also testified that male co-workers asked her whether she finds other females attractive, and that the questions made her "uncomfortable" (*id.* at 33, 35). She further testified that female colleagues "continuously stared," made faces that made her feel uncomfortable, or left the locker room whenever she entered (*id*. at 35, 38). In addition, plaintiff testified about a July 18, 2019 altercation with a male colleague who, during mediation about the incident, reportedly told her that if she wanted to act like a man, he was going to treat her like a man (*id.* at 40-43). Lynn Demuria was promoted to tour commander in 2020, and they no longer work together (*id.* at 32).

Although, here, plaintiff does not allege that she suffered an adverse employment action, such as termination, demotion, decrease in salary, loss of title, material loss of benefits, or significantly diminished material responsibilities, such acts are but one of many factors considered by this court. Whether an environment would reasonably be perceived, and is perceived, as hostile or abusive can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct, its severity, and whether it unreasonably interfered with plaintiff's work performance (*see id.*). The NYCHRL standard is "whether defendants' conduct was more than 'petty slights and trivial inconveniences'" (*Sarr v Saks Fifth Ave. LLC*, 2016 WL 5142473, *3 [Sup Ct, NY County 2016]).

Here, plaintiff's claims are based on the totality of Lynn Demuria's actions, as described above, which include statements about plaintiff's sexual orientation, which were overheard by co-workers. As a result of this disclosure, plaintiff was subject to comments by male co-workers; uncomfortable stares by female co-workers in the locker room; and an altercation with a male co-worker. Importantly, this court cannot ignore the fact that based on these same allegations, the DOC's own EEOC office sustained plaintiff's claims of discrimination based on sexual orientation. While it was stated that the matter had been referred to the appropriate unit for review, as plaintiff correctly argues, there is no indication on this record that any remedial action had been taken but, instead, Lynn Demuria had been promoted. Viewed together, and contrary to defendants' contentions, this court finds that these were more than petty slights and trivial inconveniences. Thus, defendants' motion for summary judgment is denied. *Crookendale v New York City Health and Hosps. Corp.*, 175 AD3d 1132 (1st Dept 2019) (finding that a jury could reasonably find that conduct complained of by an employee was neither petty nor trivial).

Accordingly, it is hereby

ORDERED that the defendants' motion seeking summary judgment is **DENIED**.

2/27/2023
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	X **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**