

Bernhard v Google, Inc.

2023 NY Slip Op 31221(U)

April 14, 2023

Supreme Court, New York County

Docket Number: Index No. 155597/2020

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

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ERICA BERNHARD,

Plaintiff,

- v -

GOOGLE, INC., ADAM KATZ, JOHN DOES 1-10, XYZ
CORPS. 1-10

Defendant.

-----X

INDEX NO. 155597/2020

MOTION DATE 03/31/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 22, 23, 30, 31, 32

were read on this motion to/for DISMISS.

In this employment action for harassment and failure to hire, defendant, Google Inc. (Google), moves pursuant to CPLR 3211 (a) (1) and (a) (7) for an order dismissing the complaint as against it.

Plaintiff, Erica Bernhard, opposes.

By interim decision and order dated March 31, 2022, the branch of the motion seeking dismissal of the third cause of action for breach of implied covenant of good faith and fair dealing was granted.

For the reasons set forth more fully below, the remainder of the motion is denied.

Background

The Parties

Plaintiff, a 30-year-old, female, who resides in New York City, is an artist and business owner of Covalent Artists Inc., a company specializing in art installations and new media arts.

Google is an American multinational technology company specializing in Internet related services and products, with offices located at 111 8th Avenue, New York, New York 10011.

Defendant Adam Katz (Katz) was at all relevant times herein, employed by Google as the creative lead at “Google Creative Lab” (GCL), Google’s internal marketing agency. GCL is known for its collection of the brightest designers, writers, business leaders, filmmakers, animators, producers and creative technologists.

General Background

On or about January 14, 2019, plaintiff was introduced to Katz by plaintiff’s then-manager for the purpose of obtaining an interview with Katz for a position with GCL. According to plaintiff, one of her dreams was to join GCL as either an employee on their creative team or as an independent contractor working on large scale projects (complaint, ¶ 22).

After being introduced via email to Katz, who plaintiff believed was responsible for hiring and contracting with new talent for upcoming Google projects, she was worried about Katz’s lack of professionalism. Specifically, after the introduction through her then manager, Katz began to email plaintiff directly on a separate email chain (*id.*, ¶ 25).

On January 15, 2019, plaintiff met Katz at the Google office in New York City (*id.*, ¶ 26). During this interview, Defendant Katz explained to Plaintiff that he builds the team at GCL and “she could either be brought on as an employee of Google or as a contractor, where she would be placed on approximately eight to nine projects in the first month, and then would be brought in full-time to work on the three projects she had the best ideas for” (*id.*, ¶ 27). Plaintiff thought the interview went well. Katz told her that he looked forward to working with her on projects and that he would introduce her to the Google events team (*id.*, ¶ 28-29).

The next day, Katz emailed plaintiff about Google's sponsorship of the Tokyo Summer 2020 Olympics project. Plaintiff replied that same day stating that it would be a dream project.

On February 1, 2019, Katz emailed plaintiff requesting a second meeting and for her personal cell phone number (complaint, ¶ 33). The parties met a second time at Google on February 25, 2019, during which time Katz explained the scope of work on a Tokyo 2020 Summer Olympics project and an A.I. documentary, the estimated budget for contractors, what plaintiff's role would be and how the onboarding process works at Google (*id.*, ¶ 42). After the meeting, however, Katz apparently switched back to personal text exchanges with plaintiff.

According to plaintiff, Katz continued to pursue a personal relationship with plaintiff (*id.*, ¶ 49). She provides partial text messages that purportedly show Katz's inappropriate texting with plaintiff, with her attempts to keep it professional emphasizing her desire to work at and/or with Google (*id.*, ¶¶ 50-64, *see also* plaintiff exhibit A – T, NYSCEF Doc. No. 2). Plaintiff felt that despite Katz's alleged inappropriateness, once she was hired by Google, her work would stand out and she would not have to deal with Katz on a one-on-one basis (*id.*, ¶¶ 67-68).

On March 25, 2019, plaintiff sent a nondisclosure agreement (NDA) via email to Katz so that they could freely discuss potential project concepts based on the projects Katz was pitching to plaintiff. Katz signed the NDA on behalf of Google and emailed it back to plaintiff (plaintiff exhibit M, NYSCEF Doc. No. 2).

Two days later, on March 27, 2019, Katz stated to plaintiff that he blurred their relationship and suggested that they stick to being professional (complaint, ¶ 73; plaintiff exhibit N, NYSCEF Doc. No. 2). He then proceeded to use the same tactics by dangling additional projects such as a Coachella YouTube project and a Billie Eilish project but then saying he could not work with her because he was very attracted to her (complaint, ¶¶ 80-103).

Ultimately, plaintiff was not hired by Google and plaintiff sustained a loss in the value of the contracts that Katz was purportedly going to hire her for. She claims that Katz held his management position over plaintiff in exchange for sexual activity, which resulted in retribution against her for rejecting Katz's sexual advances.

Plaintiff asserts claims of discriminatory failure to hire and quid pro quo harassment under the New York City Human Rights Law (NYCHRL).

Discussion

Under CPLR 3211 (a) (1), “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . defense is grounded upon documentary evidence.” The court may grant dismissal when the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citation omitted]).

In considering a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), “we accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “factual allegations... that consist of bare legal conclusions...are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]). “The ultimate question is whether, accepting the allegations and affording these inferences, ‘plaintiff can succeed upon any reasonable view of the facts stated’” (*Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021] quoting *Aristy-Farar v State of New York*, 29 NY3d 501, 509 [2017] [internal quotation marks omitted]).

“[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund*,

L.P. v KeyBank N.A., 159 AD3d 618, 622 [1st Dept 2018], citing *Leon*, 84 NY2d at 88). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” and the court “determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], citing *Leon*, 84 NY2d at 87-88).

“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017][internal quotation marks and citation omitted]). “In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards [I]t has been held that a plaintiff alleging employment discrimination ‘need not plead [specific facts establishing] a prima facie case of discrimination’ but need only give ‘fair notice’ of the nature of the claim and its grounds” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] [internal citation omitted]).

Quid Pro Quo Harassment

“Quid pro quo sexual harassment occurs ‘when submission to or rejection of improper or unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual’” (*Bouveng v NYG Capital LLC*, 175 F Supp 3d 280, 311 [SD NY 2016] [citations omitted]). Claims under the NYCHRL must be given “an independent liberal construction” (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). Specifically, under the NYCHRL, “the primary issue for a trier of fact ... is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender” (*id.* at 78; *Garcia v New York City Health & Hosp. Corp.*,

2016 WL 4097850, * 7 [SD NY July 26, 2016, 15-CV-2119 [DAB]; *Friederick v Passfeed, Inc.* 2022 WL 992798, * 7 [SD NY Mar. 31, 2022, No. 21-CV-2066 (RA)] [“(a)llegations that a plaintiff was treated less well because of a discriminatory intent is sufficient to establish discrimination under the NYCHRL” [internal quotation marks and citation omitted]; *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 [1st Dept 2018] [internal citation omitted] [“in gender discrimination jurisprudence, such as ‘sexual harassment’ and ‘quid pro quo,’ [the court dispensed with this nomenclature] and instead focused on ‘the existence of differential treatment’ in connection with ‘unwanted gender-based conduct’”]. However, even under the NYCHRL’s liberal analysis, “the claim will not succeed if the offending actions are no more than petty slights or trivial inconveniences” (*Franco v Hyatt Corp.*, 189 AD3d 569, 570 [1st Dept 2020]; *Williams v New York City Hous. Auth.*, 61 AD3d at 80 [“petty, slight or trivial inconvenience(s)” are not actionable]).

By alleging that Katz told plaintiff that he denied her a position with Google because he was attracted to her, plaintiff pled sufficient allegations that plausibly support that she was treated less well because of her gender.

In addition, there is no question that defendant Google may be held vicariously liable for Katz’s alleged behavior (*see Garcia v New York City Health & Hosp. Corp.*, 2016 WL 4097850 at * 7 [“the rejection of a supervisor’s advances does constitute protected activity under the more liberal standards of the NYCHRL”], citing *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 115-116, n. 12 [2d Cir 2013]; *Reyes v Popular Bank*, 2021 WL 2719326, * 11 [Sup Ct, NY County June 30, 2021, No. 157397/2019, Hagler, J.] [“the City HRL imposes strict liability on employers for the acts of managers and supervisors, including where, as here, the offending employee exercised managerial or supervisory responsibility”] [citation omitted]).

“Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for quid pro quo harassment” (*Rashid v Beth Israel Med. Ctr.*, 1998 WL 689931, *3 [SD NY Oct. 2, 1998, No. 96 Civ. 1833 [AGS], quoting *Karibian v Columbia Univ.*, 14 F 3d 773, 777 [2d Cir 1993]).

“[T]he NYCHRL imposes liability on the employer in three instances: (1) where the offending employee exercised managerial or supervisory responsibility . . .; (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take immediate and appropriate corrective action; and (3) where the employer should have known of the offending employee's unlawful discriminatory conduct yet failed to exercise reasonable diligence to prevent [it]” (*Zakrzewska v New School*, 14 NY3d 469, 479 [2010] [internal quotation marks and citation omitted]; see also N.Y.C. Admin. Code § 8–107 [13] [b]). In other words, vicarious liability may be imposed on an employer “without regard to whether the employer or another of its managers or supervisors knew or should have known of the discriminatory acts” (*Chau v Donovan*, 357 F Supp 3d 276, 294 [SD NY 2019], citing *Zakrzewska v New School*, 598 F Supp 2d 426, 434 [SD NY 2009], *affd* 620 F 3d 168 [2d Cir 2010]). “An employer will not be held liable under the doctrine of respondeat superior for actions which were not taken in furtherance of the employer's interest and which were undertaken by the employee for wholly personal motives” (*Chau v Donovan*, 357 F Supp 3d at 290, quoting *Doe v Alsaud*, 12 F Supp 3d 674, 677 [SD NY 2014]).

The Court of Appeals has “made clear that the State HRL's minimum culpability standard was irrelevant to assessing whether an employer is liable under” the NYCHRL (*Doe v Bloomberg, L.P.*, 36 NY3d at 456). Under the NYCHRL, “unlike any provision in the State

HRL, is a vicarious liability provision which imposes strict liability on an employer—the employer need not have ‘participated’ in the offending conduct” (*Doe v Bloomberg, L.P.*, 36 NY3d at 456, citing *Zakrzewska v New School*, 14 NY3d at 480-481). However, the employee “must have acted ‘with or on behalf of the employer in hiring, firing, paying, or in administering the ‘terms, conditions or privileges of employment’ – in other words, in some agency or supervisory capacity”” (*Kwong v City of New York*, 204 AD3d 442, 446 [1st Dept 2022], quoting *Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003]).

Here, Katz represented that he had the authority to hire for Google. As creative lead, he oversaw and supervised projects. In addition, he signed a nondisclosure agreement on behalf of Google. Defendant argues that these allegations are conclusory and insufficient to withstand a motion to dismiss. The court disagrees. Taking the facts in the light most favorable to plaintiff, the court denies this branch of the motion.

Failure to Hire

The NYCHRL makes it unlawful for “an employer or an employee or agent thereof” to discriminate on the basis of gender (Administrative Code of City of N.Y. § 8–107 [1] [a]). The statute also prohibits “any person” from aiding and abetting discrimination (*id.* § 8–107 [6]) or from retaliating against another person for engaging in certain protected activities (*id.* § 8–107 [7]).

The NYCHRL makes it unlawful for an employer, to refuse to hire or to discriminate against an individual in compensation or in terms, conditions, or privileges of employment, because of that person’s sex/gender (*see* Administrative Code of City of N.Y. § 8–107 [1] [a] [2], [3]). “To state a claim for discrimination under the NYCHRL, a plaintiff must allege facts plausibly suggesting differential treatment of some degree based on a discriminatory motive; ‘the

NYCHRL does not require either materially adverse employment actions or severe and pervasive conduct” (*Tulino v City of New York*, 2016 WL 2967847, *4 [SD NY, May 19, 2016, 15-CV-7106 [JMF]). “Under the NYCHRL, the plaintiff must establish that she or he was subject to an unfavorable employment change or treated less well than other employees on the basis of a protected characteristic” (*Ayers v Bloomberg, L.P.*, 203 AD3d 872, 874 [2d Dept 2022], citing *Golston–Green v City of New York*, 184 AD3d 24, 38 [2d Dept 2020]; *Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1003 [2d Dept 2021]).

“Although ‘courts have yet to establish a test for analyzing failure to [hire] claims under the NYCHRL,’ judges look to the NYSHRL test as a guide ‘bearing in mind the more liberal standards of the NYCHRL’ (*Tulino v City of N.Y.*, 2016 WL 2967847, * 5 [SD NY May 19, 2016, 15-CV-7106 [JMF], quoting *Campbell v Celco Partnership*, 860 F Supp 2d 284, 297 [SD NY 2012]). In order to sustain a failure to hire claim on a motion to dismiss, a plaintiff must allege specific positions to which she applied and was rejected (*Brown v Coach Stores, Inc.*, 163 F3d 706, 710 [2d Cir 1998]). To qualify as an application, a “plaintiff need not show that he/she applied for a specific position” (*Tulino v City of N.Y.*, 2016 WL 2967847 at * 5), however, “a plaintiff’s actions must be more than a general request for employment” (*Wang v Phoenix Satellite Television US, Inc.*, 976 F Supp 2d 527, 537 [SD NY 2013]). However, a plaintiff may be excused from a specific application requirement, when he or she shows “ ‘that (1) the vacancy at issue was not posted, and (2) the employee either had (a) no knowledge of the vacancy before it was filled or (b) attempted to apply for it through informal procedures endorsed by the employer’” (*id.* at 537-538, quoting *Petrosino v Bell Atlantic*, 385 F3d 210, 227 [2d Cir 2004];¹

¹ Although this standard was set forth as applying to the NYS Human Rights Law (“NYSHRL”), the court in holding that the complaint was sufficient to sustain a claim under that law, found the complaint alleging the plaintiff attempted to apply for an unposted vacancy, was also sufficient to state a claim under the more liberal NYCHRL (*id.* at 539).

see also e.g., Pelepelin v City of New York, 189 AD3d 450, 452 [1st Dept 2020] [holding that it was not necessary to plead that the plaintiff applied for a specific position, since it was “alleged that promotions were typically made unannounced and unsolicited”]).

Here, taking the allegations as true and drawing all reasonable inferences in plaintiff’s favor, the complaint sets forth sufficient facts to show that plaintiff attempted to apply for a position with Google through informal procedures. She met with Katz with the intention of obtaining a job either as an independent contractor or as an employee. Katz continued the dialogue and suggested specific positions for which she may be hired, i.e., the Tokyo Olympics project, Coachella and potentially others (complaint, ¶¶ 31-32, 42-48, 80-82, 92-94). Plaintiff sent a nondisclosure agreement in attempts to secure the job (*id.*, ¶ 73) (*see Chau v Donovan*, 357 F Supp 3d at 293-294; *Wang v Phoenix Satellite Television US, Inc.*, 976 F Supp 2d at 537).


Defendant Google argues, however, that plaintiff fails to state a claim as against it because plaintiff does not allege that any of the purported positions she sought remained open and were filled with individuals outside her protected class. A NYCHRL failure to hire claim is not viable where the plaintiff fails to allege that the position was filled with someone outside her protected class or was ever created (*Okocha v City of New York*, 122 AD3d 550 [1st Dept 2014]; *Bernstein v The MONY Group, Inc.*, 228 F Supp 2d 415, 419 [SD NY 2002]). Plaintiff counters however, that she was not applying for a standard, open vacancy with a formal application process, but rather that the position was never formally posted. In *Wang v Phoenix Satellite Television US, Inc.* (976 F Supp 2d at 538), for example, a motion to dismiss was denied where although the plaintiff attempted to apply for an unposted position, plaintiff expressed her interest in a particular class of position, was led to believe she could obtain employment, was invited to discuss job opportunities and was not informed that there were no such opportunities available.

The facts presented here are more in line with *Wang*. The court, therefore, declines to grant this branch of the motion.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant Google LLC is denied.

4/14/2023		
DATE		SHLOMO S. HAGLER, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE