SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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CYNTHIA SANABRIA

Plaintiff,

-against-

M. FABRIKANT & SONS, Inc., and
DAVID BROWN

Defendants.

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Index No.113378/2002
Mtn Seq. 006

WALTER B. TOLUB, J.:

This is a motion to dismiss the complaint against Defendant David Brown. Plaintiff cross-moves for a judgment of attorneys' fees incurred in opposing this motion to dismiss.

Facts

As stated in this court's prior decision dated August 2, 2006, Plaintiff is a former employee of the defendant M. Fabrikant & Sons, Inc. (Fabrikant). Plaintiff brought the underlying action to recover damages for sexual harassment by her supervisor David Brown[1].

Fabrikant is a diamond and jewelry manufacturer and distributor. Plaintiff began working for Fabrikant in February 1999. She was hired as a data entry clerk. Mr. Brown was initially hired to work in Fabrikant's Finance Department, but when Jill Fink left for maternity leave, Mr. Brown was

[1]Mr. Brown was assigned to take the place of Plaintiff's original supervisor, Jill Fink, who left on maternity leave.

transferred to work in the Solitaire Department and take on Ms. Fink's supervisory role.

Plaintiff claims that Mr. Brown began to harass her almost immediately after he replaced Ms. Fink. Plaintiff claims that within two weeks of his move to Ms. Fink's station, Mr. Brown began to make sexually provocative comments on a regular basis. She claims that beginning in January 2002 she began to complain to management about Mr. Brown's conduct. A few months later Plaintiff was transferred to the management information systems (MIS) department. Plaintiff had no experience in the MIS field. Seven months after Plaintiff was moved to the MIS department, she was terminated.

Plaintiff brought the underlying action claiming that she was sexually harassed and retaliated against in violation of the New York State Human Rights Law, Executive Law §290 et seq (State Human Rights Law), and the New York City Human Rights Law, Administrative code §8-101 et seq (City human Rights Law).

Defendants moved for summary judgment to dismiss the complaint. That motion was denied by decision dated August 2, 2006.

Defendant Brown now brings this motion to dismiss claiming that Fabrikant commenced a Chapter 11 reorganization case on November 17, 2006. Pursuant to §362 of the Bankruptcy Code, the instant action was stayed. Defendant Brown claims that on or

about July 18, 2007, Plaintiff entered into a settlement agreement with Defendant Fabrikant in which Fabrikant agreed to a general unsecured non-priority claim in the bankruptcy estate. By settlement agreement between the Plaintiff and Fabrikant, Plaintiff released Fabrikant from any further claims against it.

Mr. Brown now seeks to dismiss the complaint against him because, he argues: (1) the mere title of supervisor does not make him liable under either the State or City Human Rights Law; (2) since Plaintiff cannot establish employer liability due to the settlement, that Mr. Brown cannot be liable for "aiding and abetting;" and (3) that Defendant Brown should be granted leave to amend the complaint to add a set off defense in the event the motion to dismiss is not granted.

Discussion

Individual Liability Under New York State Human Rights Law

As previously found by this court, and as the deposition testimony establishes, during the relevant period, Defendant Brown was Plaintiff's direct "supervisor." However, there is nothing indicating that Mr. Brown had any ownership interest or any power to do more than carry out personnel decisions made by others.

A corporate employee who has a title as an officer, manger or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on sex under

New York State Human Rights Law (Executive Law Art 15). (Patrowich v. Chemical Bank, 63 NY2d 541 [1984]). However, even though Defendant Brown may not be held liable under New York State Law, he can be held individually liable under the New York City Human Rights Law.

Individual Liability Under the New York City Human Rights Law

The Local Civil Rights Restoration Act (LCRRA) of 2005 was enacted on October 3, 2005 and states that the purpose of the Act is to clarify the scope of the City's Human Rights Law. The Act states that the Human Right's Law has been construed too narrowly. Through this local law the Council sought to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provision of the New York State or Federal statutes. (Section 1 of the Local Civil Rights Restoration Act of 2005; Sorrento v. City of New York, 17 misc.3d 1102(A) [Sup Ct. NY County 2007]; Farrugia v. North Shore university Hospital, 13 Misc.3d 740 [Sup Ct. NY Court 2006]). Federal and State Civil Rights Law are a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise. (Section 1 of the Local Civil Rights Restoration Act of 2005; Sorrento v. City of New York, 17 misc.3d 1102(A) [Sup Ct. NY County 2007]; Farrugia v. North Shore university Hospital, 13 Misc.3d 740 [Sup Ct. NY Court 2006]).

Through the expansive language of the City Human Rights law, it becomes clear the aider and abettor provisions contained therein may support a finding of individual liability regardless of the individual's role as an owner or supervisor. Unlike its Federal and State counterparts, the New York City Human Rights Law specifically defines employee as someone who can be found liable. Section 8-107 of the New York City Administrative Code states that it shall be an unlawful discriminatory practice for an "employer or agent thereof" to discriminate based on sex. Therefore, the New York City Human Rights Law contains an statutory basis for individual employee liability and Defendant Brown may be held individually liable for his conduct.

Furthermore, it appears that the New York City Human Rights Law provides for an individual to be held liable if he attempts to aid or abet illegal discriminatory conduct. (Section 8-107.6 NYC Human Rights Law). An attempt by its definition is an act which has not been successful. Therefore, under the attempt provision, an individual may be held liable, even in the absence of an employer's liability.

Set Off

Defendant Brown also seeks a common law set off and equitable relief arguing that Plaintiff should not be entitled to a double recovery from Fabrikant in the settlement and from Brown at trial. Defendant's motion to Amend is denied as it was made

on the eve of trial and unaccompanied by a proposed pleading. Furthermore, unlike General Obligations Law §15-108 and CPLR 1601, New York City Human Rights Law deals with matters of public policy in which the prevention and eradication of discrimination is the central goal. (Executive Law 290(3)). It follows that the equitable grounds for sett-offs and reductions do not apply to discrimination actions.

Accordingly it is

ORDERED that Defendant Brown's motion to dismiss the Complaint is denied; and it is further

ORDERED that Defendant Brown's motion to amend the pleadings to include a Set-off is denied; and it is further

ORDERED that Plaintiff's cross-motion is denied.

Counsel are to appear for trial as scheduled on March 24, 2008 at 9:30 a.m. in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/21/08

HON. WALTER B. TOLUB, J.S.C.