

DARLA WILKINSON,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

NEW YORK CONTAINER TERMINAL, INC.,

Defendant

The following items were considered in the review of the following motion to renew and reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff, Darla Wilkinson, moves, pursuant to CPLR § 2221, for leave to reargue this court's decision and order dated September 2, 2009. That order granted New York Container Terminal, Inc.'s ("NYCT") motion for summary judgment and dismissed plaintiff's complaint in its entirety. After reconsideration, this court now: (1) grants plaintiff's motion to renew and reargue, (2) reverses its prior grant of defendant's summary judgment motion and (3) reinstates plaintiff's original complaint.

Procedural History

This court initially dismissed plaintiff's claim pertaining to gender and sex discrimination because, though plaintiff is a member of a protected class, by her own admission she was unable to perform her job as a result of her injuries. Therefore, NYCT's decision to not reinstate plaintiff was legitimate and non-discriminatory.

This court also dismissed plaintiff's retaliation claim when defendant's motion for summary judgment was granted. The claim was dismissed because plaintiff did not offer any evidence supporting her retaliation claim, nor did she report anything pursuant to NYCT's Anti-Harassment Policy. Moreover, this court noted a lack of evidence demonstrating the causal link showing that the alleged acts of harassment led to NYCT's subsequent decision not to reinstate her after the accident.

Lastly, this court had originally dismissed plaintiff's claim of sexual harassment because she had failed to offer any evidence or reports of acts that could constitute a hostile work environment. Consequently, this court granted defendant's motion for summary judgment and dismissed the complaint due to plaintiff's failure to meet her burden of establishing the elements of the claim.

Plaintiff now moves, pursuant to CPLR § 2221, to renew and reargue the original causes of action and to vacate this court's prior decision, which had granted defendant's summary judgment motion and dismissed plaintiff's complaint in its entirety.

Facts

The plaintiff's original complaint alleged eight causes of action for discrimination based on gender, sex, sexual harassment, and vicarious liability for workplace harassment under the New York State Human Rights Law and New York City Human Rights Law.

The Port Authority of New York and New Jersey ("PA") employed plaintiff as a longshoreman from August 2000 through February 2006. During that time, plaintiff was assigned to NYCT's marine cargo handling facility in Staten Island, New York. Plaintiff alleges that, throughout her employment with NYCT, she was subjected to sexual harassment in a hostile work environment and suffered discrimination based on her gender. The allegations of sexual harassment included instances of male co-workers making lewd and sexual comments to plaintiff as she attempted to do her job, being called derogatory names by her male co-workers, being threatened verbally, having the tires of her car slashed multiple times, having a male co-worker expose himself to plaintiff while at work, being stalked and being attacked by another NYCT employee.

Regarding the allegations of sex/gender discrimination, plaintiff contends that she was not afforded the same opportunities for training on different equipment that her male co-workers were given and that this training was withheld in an attempt to preclude her from applying for the better-paying and more prestigious positions at NYCT. Plaintiff also contends that she was paid significantly less than her male partner for doing the same job with the same level of seniority. She also alleges that she was routinely passed over for promotion and that those positions were ultimately filled by male NYCT employees with less seniority.

On February 7, 2006, the plaintiff sustained personal injuries while she was operating a top loader and, as a result, has not been employed by NYCT since on or about February 9, 2006.

Discussion

Plaintiff's Motion for Reargument

Motions to reargue are addressed to the sound discretion of the court, which decided the original motion, and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or mistakenly arrived at its earlier decision.¹ This court now finds its initial decision and order dated September 2, 2009 contained a misapprehension of relevant facts in this case. Accordingly, plaintiff's motion for reargument is granted.

Defendant's Motion for Summary Judgment

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."² Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. Moreover, "the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion."³ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁴

In sexual harassment cases, the general standards regarding the parties' respective burdens of proof on a motion for summary judgment are applicable.⁵ The party seeking summary

¹ *Marini v. Lombardo*, 17 AD3d 545, [2d Dept 2005].

² CPLR §3212(b)

³ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2nd Dept. 1990].

⁴ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁵ *Peskin v. New York City Transit Authority*, 757 N.Y.S.2d 594 [2d Dept. 2003].

judgment has the burden of demonstrating its entitlement thereto as a matter of law.⁶ Anything less requires the denial of its motion.⁷ As a general rule, “a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.”⁸ Once the proponent of a summary judgment motion is successful in a prima facie showing of entitlement to summary judgment, the burden then shifts to the opposing party to show that triable facts exist.⁹ The existence of these facts must also be proven through proffering admissible evidence or tendering an acceptable excuse for not doing so.¹⁰

When viewing the facts related to the sexual harassment claim in the light most favorable to the plaintiff, it is clear that a triable issue of fact does exist as to whether plaintiff was sexually harassed while she was employed at NYCT. Plaintiff alleges that male co-workers continuously made lewd sexual remarks to her while she worked, that she was screamed at and cursed at by male co-workers at various points in time and that one particular “Hatch Boss” exposed himself to plaintiff while other male employees watched on and laughed. Plaintiff also maintains that she reported these occurrences to various superiors at different times, but that no action was taken to rectify the situation.

In its motion for summary judgment on the sexual harassment claims, defendant contends that plaintiff did not report these incidents far enough up the chain of command to impute knowledge of the alleged hostile work environment to the defendant. Whether or not defendant had imputed knowledge of the situation, however, is a question of fact that cannot be summarily

⁶ *Smith v. AT & T Resource Mgt. Corp.*, 259 A.D.2d 480 [2d Dept. 1999].

⁷ *Gaetano Marzotto & Figli v. Filene's Basement*, 213 A.D.2d 591 [2d Dept. 1995].

⁸ *Pace v. International Bus. Mach. Corp.*, 248 A.D.2d 690 [2d Dept. 1998], quoting *Larkin Trucking Co. v. Lisbon Tire Mart*, 185 A.D.2d 614 [4th Dept. 1992].

⁹ *Vermette v. Kenworth Truck Company*, 68 N.Y.2d 714 [1986].

¹⁰ *Id.*

disposed of. Accordingly, summary judgment on this issue should not have been granted.

When there is no direct evidence of gender discrimination, claims of these violations are analyzed pursuant to the burden shifting framework outlined by the United States Supreme Court in the *McDonnell Douglas* case.¹¹ A party claiming gender discrimination must make out a prima facie case by demonstrating that she is a member of a protected class and that she was discharged or barred from a position for which she was qualified, or paid less in that position, and this occurred in a situation that gives rise to an inference of discrimination.¹² Only a *de minimus* showing is required to establish a prima facie case giving rise to an inference of discrimination.¹³ Once plaintiff has established a prima facie case of gender discrimination, a rebuttable presumption arises that the employer did discriminate against the plaintiff.¹⁴ The employer must then proffer sufficient evidence to show a legitimate, non-discriminatory reason for its actions towards the plaintiff.¹⁵ If the defendant offers evidence to rebut the presumption of discrimination, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that discrimination was the actual reason for the employer's actions and that the reasons offered by the defendant were false.¹⁶

Here, when viewing the facts in the light most favorable to the plaintiff,¹⁷ the plaintiff pleaded a cognizable claim of gender/sex discrimination. The plaintiff alleged that she was denied training on cranes and toploaders during her employment at NYCT between 2001 and

¹¹ *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 [1973].

¹² *Id* at 802.

¹³ *Howley v. Town of Stratford*, 217 F.3d 141, 150 [2nd Cir. 2000].

¹⁴ *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 254 [1981].

¹⁵ *Id*.

¹⁶ *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 630 [1997].

¹⁷ *Kesselman v. Lever House Restaurant*, 29 A.D.3d 302 [1st Dept. 2006]

2003 and, as a result, plaintiff was not eligible for the better-paying positions such as toploader and crane operator.¹⁸ Plaintiff further alleges that once finally trained to operate a crane in 2004, she was bypassed for promotion numerous times by men who had less seniority¹⁹ and that she was payed less than her male partner for performing the same tasks and with whom she shared the same level of seniority.²⁰ These allegations are sufficient to raise an inference that defendant's decisions to pay plaintiff less than her co-worker, deny her training and bypass her for promotion were discriminatory in nature.

In support of its motion for summary judgment dismissing the complaint, the defendant contended that plaintiff failed to establish an inference of discrimination under the New York State Human Rights Law or the New York City Human Rights Law. Defendant argues that plaintiff left her job as a result of her injury in February 2006 when she was no longer able to perform her job. This contention, however does not preclude a court's finding that there is a triable issue of fact as to whether plaintiff was discriminated against based on her gender when looking at the promotion decisions and training opportunities provided to her versus her male counterparts prior to 2006. Furthermore, the defendant failed to offer any evidence of non-discriminatory reasoning as to the alleged disparate treatment between the plaintiff and other male employees who allegedly received higher salaries than plaintiff for performing the same functions and the same level of seniority.

Conclusion

Since defendant failed to demonstrate its prima facie entitlement to summary judgment, a genuine issue of triable fact still remains and summary judgment should not have been granted.

Accordingly, it is hereby:

¹⁸ See Wilkinson Aff.at ¶ 8.

¹⁹ *Id.*at ¶ 10.

²⁰ *Id.*at ¶ 17.

ORDERED, that Darla Wilkinson's motion to reargue is granted, and it is further

ORDERED, that upon reconsideration the decision and order of this court granting summary judgment dismissing the complaint is vacated and the New York Container Terminal, Inc.'s motion for summary judgment is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3 on Monday, January 25, 2010 at 9:30 A.M. for a pre-trial conference.

ENTER,

DATED:

Joseph J. Maltese
Justice of the Supreme Court