ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

....

TANYA SGROIA,

Plaintiff,

Index No. 601140/08
Sequence #001
Part 37

- against -

09/24/10

NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., FRANKLIN HOSPITAL MEDICAL CENTER and AKWASI ACHAMPONG,

Defendants,

....

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Upon the foregoing papers, defendants North Shore Long Island Jewish Health System, Inc. and Franklin Hospital Medical Center (collectively the Hospital's) motion for summary judgment pursuant to CPLR 3212 and dismissal of plaintiff's complaint against them only is granted.

This is an action for damages to redress alleged sexual harassment and assault against defendant Akwasi Achampong and the Hospital defendants for an incident that took place on July 5, 2007 at Franklin Hospital where plaintiff is employed as an ultrasound technician and defendant Achampong is a doctor.

The incident complained of occurred in plaintiff's office and lasted approximately two minutes. Essentially, it is alleged defendant Achampong, who is not a movant herein and who does not oppose the instant motion, intentionally sexually abused, assaulted and touched plaintiff without her consent in a harmful and offensive manner.

The causes of action applicable to the Hospital are the first (New York Executive Law Section 296 and the Article 15), third (negligence), fourth (respondent superior), fifth (Nassau County Unlawful Discriminatory Practice Law, Title C-2, Section 21-9.8) and eighth (intentional infliction of emotional distress).

Movants' application is made after their documentary disclosure has taken place but before the various witnesses have been deposed. However, since defendants' motion is based upon uncontradicted evidence that cannot be disputed through additional discovery and upon evidence within plaintiff's own knowledge, the Court determines first that the motion is not premature (see *Andre v. Pomeroy*, 35 NY2d 361). ✳

Chief among defendants' assertions is that prior to the subject incident in her 8 years of employment at the hospital plaintiff had never made any complaints of this nature involving defendant Achampong or any other individual. Moreover, there was no prior complaint from any other employee concerning improper conduct on Dr. Achampong's part (see affidavit, Stacie Caplan, former Franklin Human Resource Site Business Partner).

Further, defendants argue defendant Achampong is not an employee of the Hospital but is an independent physician who has hospital privileges. Nevertheless, even if he were an employee, the alleged sexual misconduct by Dr. Achampong was not within the scope of his employment and, in either case, the Hospital did not encourage, condone or acquiesce in the alleged assault as a matter of law.

First, the Hospital maintains that is cannot be held liable for sex discrimination because there had been no prior formal complaints against Dr. Achampong made to Human Resources (HR) until this incident. According to the Hospital's regulations regarding discrimination and harassment (defendants' Exhibit C), HR was the appropriate office to investigate such complaints. Plaintiff was made aware of that fact at her two orientations in 1999, anti-discrimination and sexual harassment training in 2000 and employee reviews in 2003 and 2006. In addition, plaintiff received an employee handbook (defendants' Exhibit D).

The Court of Appeals has determined that an employer cannot be held liable under New York Executive Law Section 296 for the discriminatory conduct of an employee or for sexual harassment unless the employer became a party to the harassment, which is defined as encouraging, condoning or accepting the inappropriate conduct complained of by the plaintiff (*State Division of Human Rights v. St. Elizabeth's Hospital,* 66 NY2d 684; *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 311). Without such proof, agency or respondent superior/ vicarious liability theories of liability cannot be sustained (*Vitale v. Rosina Food Products*, 283 AD2d 141).

✳ The Court cannot credit plaintiff's insistence that the Hospital must produce Dr. Achampong's file when counsel has been informed that since Dr. Achampong is not an employee there is no personnel file and plaintiff has not described the nature of the file that defendants allegedly have failed to produce. There is no reason for the Court to presume defendants have not acted in good faith in maintaining also that there have been no complaints against this defendant, consequently there would be no HR file other than the subject one.

In opposition plaintiff describes the incident, maintaining defendant Achampong entered her office and closed the door. After some brief conversation he proceeded to touch plaintiff in an inappropriate and unwanted manner, including fondling her breasts. Plaintiff screamed throughout the encounter.

At some point Linda Newman the Nurse Manager knocked on her door, which was opened by the defendant. Plaintiff asserts that she was visibly upset, yet Ms. Neuman left without assisting her.

Afterwards, plaintiff immediately reported the incident to Drs. Del Priore and Denier, who advised her to report it to HR. As it turns out, HR was closed that day due to the extended July 4th holiday and the hospital was on "ghost" staffing. Plaintiff reported to HR on July 6th, one day after the incident.

Plaintiff takes issue with the fact that Drs. Del Priore and Denier were not interviewed by HR.

As far as either the Nurse Newman encounter or HR's failure to interview the doctors, the Court determines that neither are admissible as evidence against the Hospital to demonstrate its acceptance of the inappropriate conduct.

In the first situation, plaintiff may not testify as to what Ms. Neuman saw, plaintiff's upset state, or heard, plaintiff's screams. Therefore, there is no evidence that the nurse deliberately left without assisting plaintiff. In addition, there is no claim that plaintiff asked Nurse Newman for help.

In the case of interviewing the doctors, no one contests that plaintiff sought advice after defendant Achampong left her office. They were not eye-witnesses, however, nor did the doctors have relevant facts to contribute to the investigation.

In any event, there is no question that HR took immediate action as soon as plaintiff filed her complaint (see *Sutherland v. Roman Catholic Diocese of Rochester*, 39 AD3d).

Plaintiff continues by asserting that the 6 months it took the Hospital to complete the investigation was unreasonable, referring to a letter from HR dated January 2, 2008 stating "appropriate action" was taken against Dr. Achampong. It appears that plaintiff was not informed until afterward what that action was.

Yet plaintiff does not dispute that she was told by Stacey Kaplan from HR that Dr. Achampong was out of town on sabatical and HR would get back to plaintiff on his return. Moreover, during those 6 months several individuals were interviewed, including the defendant and plaintiff. Also, as plaintiff learned later, during that period defendant Achampong completed a 7-hour sensitivity course plus a reiteration of the Hospital's strict policy against harassment, discrimination or retaliation. Movants submit a letter acknowledged by the defendant concerning the charges, HR's investigation and the Hospital's policies. Also included is a Continuing Medical Education (CME) certificate that Dr. Achampong completed the "Professional Sexual Misconduct" Course.

While generally the question of whether the period an employer takes to conclude an investigation on charges of this nature is a reasonable one is best determined by a jury, under the totality of the circumstances of this case, the undersigned determines as a matter of law 6 months was not an unreasonably long period of time. Anything less and plaintiff might argue that the period was too short, therefore indicative of a cursory investigation.

The Court must also point out that, according to plaintiff's own evidence, the handwritten notes and final report of Stacie Kaplan (see paragraph 17, Affirmation in Opposition), plaintiff does not dispute that she did not relay to HR that the defendant groped her breasts but described instead defendant "rubbing the sides of her" and hugging her.

Although the Hospital did not inform plaintiff of the nature of defendant's punishment in the January 2nd letter, that fact is irrelevant to the issue of whether the Hospital otherwise condoned or accepted the defendant's behavior.

Nor does the fact that the defendant continues to walk past her offices reflect on the Hospital's attitude. Plaintiff does not refute the HR report stating that the Hospital offered to move her office but she turned it down. That the defendant on one occasion entered her office with another physician, evidently to consult with her regarding a patient, is not evidence of the Hospital continuing acceptance of inappropriate conduct.

Nowhere has plaintiff demonstrated that Dr. Achampong had any untoward motive in walking past her office while on rounds or that she brought these specific occasions to HR's attention aside from generally telling Ms. Kaplan that she was upset defendant was still in the building.

In any event, after the singular act of July 5th, the behavior related above is not actionable as evidence of a hostile working environment or under the doctrine of a continuing violation. Rather plaintiff's assertion pertains to the continuing effects of the earlier unlawful conduct (*Selkirk v. State of New York*, 230 AD2d 818).

The Court does not credit counsel's hyperbole that the doctor continues to "stalk" plaintiff. It fails to raise a genuine issue of fact.

The undersigned also rejects counsels' interpretation that the defendant admitted to HR he had no business being *near* plaintiff's office at any time. It is clear withing the context of the interview and as the notes indicate, Dr. Achampong had no official medical business for being *in* plaintiff's office on July 5th. ✳

Finally, plaintiff does not dispute the Hospital's rendition described above of how she was trained as an employee regarding the policy against discrimination and harassment and that she signed an acknowledgment she received a handbook.

✳ The Court also finds counsel's supposition that Nurse Newman's account to HR that Dr. Achampong appeared "bothered" referred to his being sexually aroused, rather than annoyed, to be speculative.

There is no question that an incident of sexual harassment occurred on July 5, 2007. Dr. Achampong admitted hugging plaintiff and, with the exception of graping her breasts and plaintiff screaming or otherwise protesting his words or actions, the defendant's version of what occurred is not totally unlike plaintiff's recitation.

The genuine material issues of fact in this action are between plaintiff and defendant Achampong, not the Hospital. Thus, even in viewing the evidence most favorable to plaintiff, the first cause of action against the Hospital under Executive Law Section 296 is dismissed (see *Forrest v. Jewish Guild For the Blind*, 3 NY3d 295; *Schenkman v. New York College of Health Professionals,* 29 AD3d 671; *O'Dell v. Trans World Entertainment*, 153 F. Supp. 2d 378, *aff'd* 2002 WC 1560266; *Sullivan v. Newburgh Enlarged SD*, 281 F. Supp 2d 689; *Clauberg v. State*, 19 Misc. 3d 942, *citing National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115).

The fifth cause of action against the Hospital under the Nassau County Discrematory Practice Law is likewise dismissed. This statute does not authorize a private right of action (see *e.g.*, *Carrier v. Salvation Army*, 88 NY2d 298, 302). Rather, the County Attorney is authorized to take legal action under this title.

Any action against the Hospital under the theory of respondent superior requires first that defendant Achampong be an employee. However, even assuming arguendo that he is an employee of the hospital, a fact denied by defendants, the acts upon which this lawsuit is based cannot be considered in furtherance of the Hospital's business and within the scope of Dr. Achampong's duties as a matter of law (*N.X. v. Cabrini Medical Center*, 97 NY2d 247; see PJI 2:235).

Accordingly, the fourth cause of action against the Hospital is dismissed.

The third cause of action sounding in negligence is dismissed outright. It may not be maintained against the Hospital by plaintiff, its employee, since the Workers' Compensation Law Section 29 (6) provides that statute as the exclusive remedy, even within the context of a discrimination or harassment complaint (see *Conde v. Yeshiva University*, 16 AD3d 185, 187; *Sormani v. Orange County Community College*, 240 AD2d 724).

However, the Court does not credit defendants' argument that plaintiff's remaining viable claims are barred due to her failure to file a grievance or proceed to arbitration under the applicable collective bargaining agreement (see *Conde v. Yeshiva, supra*).

The final claim under the eight cause of action is for intentional infliction of emotional distress. This claim is permissible since plaintiff may seek punitive damages against the Hospital, which are not allowed under Executive Law Section 296, the first cause of action (*Id.*).

Nevertheless, plaintiff has not raised any genuine material issues of fact that the Hospital should be held vicariously liable (*N.X. v. Cabrini Medical Center*, 97 NY2d 247; *Godineaux v. LaGuardia Airport Marriot Hotel*, 460 F. Supp 2d 413 PJI 2:235, 2:236, 2:237), or that the Hospital itself intentionally inflicted emotional distress on its own employee (see PJI 3:6).

Accordingly, defendants' motion is granted in its entirety and the complaint and all cross-claims against the Hospital defendants North Shore Long Island Jewish Health System, Inc. and Franklin Hospital Medical Center are dismissed.

The action continues solely against defendant Akwasi Achampong.

October 29, 2010

Hon. John M. Galasso, J.S.C.

ENTERED

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