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

PRESENT: BARBARA R. KAPNICK PART 12

Justice

0115108/2001

AZZOPARDI, ANTHONY

vs

NEW WATER STREET CORP.

SEQ 4

STRIKE

Th

INDEX NO. 115108/01

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: X Yes ~~X~~ No and cross-motion

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision accompanying motion sequence number 003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/15/07

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: BARBARA R. KAPNICK PART 12

0115108/2001

AZZOPARDI, ANTHONY
VS
NEW WATER STREET CORP.

INDEX NO. 115108/01

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

SEQ 003

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 4/18/07

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

----------X

ANTHONY AZZOPARDI,

Plaintiff,

- against -

HARRY BRIDGWOOD,

Defendants.

----------X

DECISION/ORDER
Index No. 115108/01
Motions Seq. Nos.
003 and 004

BARBARA R. KAPNICK, J.:

Motions sequence numbers 003 and 004 are consolidated for disposition.

Defendant moves (under motion sequence number 003) for summary judgment dismissing plaintiff's complaint.

Defendant moves (under motion sequence number 004) to strike the affidavits of Timothy Dailey, Daniel Smith and Wilfredo Montalvo, which were submitted by plaintiff in opposition to defendant's motion for summary judgment, on the ground that they are based on unsubstantiated speculation and hearsay. Plaintiff cross-moves to motion sequence number 004 to admit nunc pro tunc the Designation and Report of Expert Witness, Dr. Peter Blanck, Ph.D., J.D., dated August 6, 2004 as part of plaintiff's opposition to defendant's motion for summary judgment.

Defendant's motion to strike the affidavits is granted to the extent that only those portions of the affidavits which contain

allegations based on the affiants' personal knowledge shall be considered in opposition to defendant's motion for summary judgment.

Plaintiff's cross-motion to admit the expert's report nunc pro tunc was granted on the record on March 23, 2005, and said report has been considered in reaching this decision.

Background

From 1993 through 1996, defendant Harry Bridgwood was a Detective with the New York City Police Department and was assigned by Manhattan District Attorney Robert Morgenthau to 55 Water Street where he worked undercover and held himself out as the building owner's representative.[1] Since 1996, Bridgwood has been the Executive Vice President of New Water Street Corporation, which owns and operates the commercial building located at 55 Water Street in Manhattan.[2]

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[1] According to Bridgwood, "[t]he goal of the investigation was to uncover corruption and organized crime in the carting industry and in other industries related to commercial real estate."

[2] Plaintiff's Complaint against New Water Street Corporation was dismissed by Decision/Order of this Court dated May 21, 2003 based on this Court's finding that plaintiff's claims against it were barred by the arbitration provision in his collective bargaining agreement.

Plaintiff Anthony Azzopardi, a mildly mentally retarded adult, was employed as a freight elevator operator and security guard at the building for 14 years, until he was discharged by New Water Street Corporation on December 28, 1999, after he allegedly sexually harassed several women within the freight elevator and the lobby.

Plaintiff claims that it was common knowledge in the building that he could not read or write. He denies that he engaged in any improper activity and claims that he was subject throughout his employment in the building to a hostile work environment, which included verbal and physical harassment by co-workers, supervisors, and vendors.

Plaintiff further claims that in late September 1999, Lou Gallo, a painter who was performing construction work at the building, poured scalding hot water from a large thermos over his head, resulting in severe burns to his face.[3] After receiving medical treatment at a hospital emergency room, plaintiff missed the next two and a half weeks of work while he recuperated.

Plaintiff alleges that when he returned to work, on or about October 15, 1999, defendant and non-party Ernesto Rivera, the operations manager and later Vice President of Operations at the building, met with him and his sister, asked whether he was planning to sue New Water, and told him that if he did, he would be fired.

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[3] Plaintiff admits that he squirted the worker with a water gun first, but claims that he did so in jest.

On December 22, 1999, after a hearing before the New York State Workers' Compensation Board, plaintiff was awarded disability benefits for the two and a half weeks of work that he had missed. On the following day, December 23, 1999, plaintiff was suspended, allegedly because a female messenger working for one of the tenants in the building accused him of having sexually harassed her. Plaintiff claims that he never sexually harassed any co-worker, tenant or vendor; rather, that he was discharged because of his disability in violation of the New York State Human Rights Law and the New York City Administrative Code.

Discussion

Defendant now moves for summary judgment dismissing plaintiff's Complaint on the grounds that: (i) no reasonable fact finder could conclude that plaintiff was subjected to actionable harassment; and (ii) defendant is not liable for the alleged conduct.

Defendant claims that neither he nor the other employees knew that plaintiff was disabled since he never informed anyone at New Water Street Corporation that he had a disability and never made any requests for accommodations of any kind.[4]

[4] In fact, defendant claims that even some of plaintiff's family members, who worked in or around 55 Water Street and were friendly with many of plaintiff's co-workers, did not know he was disabled until they met the lawyer handling this case for plaintiff. They further allege that the first time plaintiff ever claimed he suffered harassment was after he was terminated from his job and after he lost a union arbitration against his employer seeking reinstatement of his job.

Defendant further contends that plaintiff was a willing participant in (and initiator of some of) the horseplay and practical jokes that took place at the work site, which defendant describes as a typical 'blue-collar' work environment where joking around, name calling and male-on-male horseplay was ordinary.

In addition, defendant argues that there is no evidence that plaintiff informed his supervisors, his family or even his union about harassing behavior or even that he thought he was being harassed, and that there is no evidence that any of the alleged conduct, including name calling, graffiti and pranks, was motivated by plaintiff's disability.

Finally, defendant argues that there is no evidence that he approved, acquiesced in or condoned the alleged discriminatory conduct and claims that he terminated plaintiff for cause after he investigated several women's allegations of improper activity by plaintiff.

Plaintiff argues in opposition that there are issues of fact as to whether he was subjected to an unwelcome and hostile work environment. Plaintiff further claims that his sister, Agostina ("Wina") Iannotto, who worked for a tenant in the building, complained to his supervisor about the name calling and that both he and his sister complained about an incident in which his shoes were stolen and his locker defaced.

Plaintiff further contends that defendant Bridgwood failed to take any remedial action (other than directing Mr. Rivera to paint over graffiti relating to plaintiff) even though Bridgwood admitted during his deposition that he saw graffiti about plaintiff on multiple occasions. Defendant Bridgwood further admitted that he did not conduct an extensive investigation after learning of an incident in which contractors allegedly tied plaintiff up in duct tape, bound him to a chair and shoved the chair into the elevator car so that he landed in the freight lobby, unable to move.

Finally, plaintiff argues that Bridgwood contributed to and enabled the hostile environment to flourish by failing to put in place and to enforce an equal opportunity policy.

According to plaintiff's expert, Dr. Blanck, "[i]n the absence of effective EEO procedures, disability harassment, and anti-discrimination training, plaintiff [who cannot read or write and who has developmental disabilities] had no avenue to express his complaints regarding the discrimination and harassment he faced on the basis of his disability." In addition, Dr. Blanck states that:

> Mr. Bridgwood, as COO, presumably was responsible for compliance and company attitudes toward EEO compliance. In my view, I find no evidence that Mr. Bridgwood attempted to address the disability harassment plaintiff faced. For instance, although he learned of the incident in which plaintiff was tied with duct tape, Mr. Bridgwood did not conduct an EEO investigation of plaintiff's working conditions and the harassment he faced on the basis of his disability.

Defendant argues that the expert's report is based on Dr. Blanck's "subjective belief" and ignores, among other things, the existence of union grievance procedures to voice complaints about the workplace.

* * *

The United States Supreme Court has held that an employer is relieved of liability for a supervisor's creation of a hostile work environment if the employer can show that it exercised reasonable care to prevent and correct the harassment, and the employee (plaintiff) unreasonably failed to take advantage of the employer's preventive or corrective oppotunities. See, Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). (This rule shall be referred to herein as the "Farragher/Ellerth affirmative defense").

Defendant argues that there is no evidence that he condoned any of the alleged activities, and claims that plaintiff failed to take advantage of the procedures in place to protect New Water's employees, as provided in the employee manual and the collective bargaining agreement, or to take advantage of any informal procedures, including defendant's 'open door' policy, to complain about the alleged harassment.

Defendant further claims that if he knew who was marking the walls with graffiti, he would have instructed them to stop and would have taken other appropriate action. He also indicates that he did

not become aware of the duct tape incident until after the alleged event and does not know for sure what, if anything, took place.

In papers submitted after the initial oral argument, plaintiff sets forth an additional argument under the New York City Human Rights Law (Admin. Code § 8-101, *et seq.*), which was amended on October 3, 2005 by Local Law 85.

Section 1 of Local Law 85 provides as follows:

> The purpose of this local law, which shall be known as the "Local Civil Rights Law Restoration Act of 2005", is to clarify the scope of New York City's Human Rights Law. It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through the passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise (emphasis supplied).

Admin. Code § 8-107(13)(b) provides, in relevant part, as follows:

> An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:
>
> (1) the employee or agent exercised managerial or supervisory responsibility;...

Plaintiff contends that that the Farragher/Ellerth affirmative defense no longer has any applicability under the New York City Human Rights Law, as clarified by Local Law 85, because the New York City Human Rights Law now provides greater protection against discrimination than the federal law, and thus, defendant would be strictly liable under Admin. Code § 8-107(13)(b)(1) for the harassment of the plaintiff.

Specifically, plaintiff contends that Ernesto Rivera, an employee who exercised managerial or supervisory responsibility, harassed plaintiff, and that the defendant, another employee who exercised managerial or supervisory responsibility, failed to correct the harassment.

Defendant denies that Mr. Rivera exercised managerial or supervisory responsibility during the relevant period.

In addition, defendant argues that the amendment to the Administrative Code was not intended to radically change the discrimination statutes in New York City by removing all of the employer's affirmative defenses. Defendant further contends that the Act's failure to expressly limit employers' available affirmative defenses while expressly referring to areas of the law it seeks to clarify demonstrates that these defenses are still available.

Moreover, it is not clear that Admin. Code § 8107(13)(b) applies to the facts of this case, since said section imposes

liability upon the "employer" - i.e., New Water Street Corporation - who is no longer a defendant in this action.

Thus, this Court finds that defendant Bridgwood may assert the Farragher/Ellerth affirmative defense in this action.

Notwithstanding that determination, this Court finds that the conflicting testimony in the numerous affidavits and transcripts submitted herein raise issues of fact, inter alia, as to the extent of defendant's knowledge or awareness of the alleged harassment of plaintiff and as to whether defendant exercised reasonable care to prevent and correct that alleged harassment.

Accordingly, based on the papers submitted and the oral argument held on the record on March 23, 2005 and October 25, 2006, defendant's motion for summary judgment is denied.

A pre-trial conference to discuss settlement or a trial date shall be held in IA Part 12, 60 Centre Street, Room 341 on May 16, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 18, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK