

# New York Law Journal

ALM Properties, Inc.

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## Shamila Malik and Mubasher Alam, Plaintiff(s) v. American International Group, Inc., Law Offices of Bryan M. Rothenberg, Bryan M. Rothenberg, Anthony Nallan, and Haylee Grote, Defendant(s), 23055/10

Supreme Court, Queens County, IA Part 36

23055/10

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Cite as: Malik v. American International Group, 23055/10, NYLJ 1202598617070, at \*1 (Sup., QU, Decided April 19, 2013)

Justice Diccia T. Pineda-Kirwan

Decided: April 19, 2013

### ATTORNEYS

Attorneys For Plaintiff: David P. Mirabella, Esq., Mirabella & Quinn, LLC.

Attorneys For Defendants: Edward Cerasia II, Esq., Ogletree Deakins, Nash, Smoak & Stewart, P.C.

The following papers numbered 1 to 19 read on this motion by defendants American International Group (AIG): Law Office of Bryan M. Rothenberg (Rothenberg Law Office). Bryan M. Rothenberg. Anthony Nallan, and Haylee Grote, pursuant to CPLR 3212 for summary judgment dismissing the verified complaint.

### PAPERSNUMBERED

Notice of Motion-Affidavits-Exhibits 1-8

Answering Affidavits-Exhibits 9-15

Reply 16-19

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Upon the foregoing papers, it is ordered that the motion is determined as follows:

The plaintiff commenced this action on September 9, 2010. This is an action to recover damages for alleged discriminatory conduct by the defendants. In her complaint, the plaintiff alleges claims under the New York State Human Rights Law (NYSHRL) including race and disability discrimination, hostile work environment on the basis of her gender, disability and race, and quid pro quo sexual harassment. Additionally, Malik alleges tort causes of action for battery and intentional infliction of emotional distress and a cause of action for pain and suffering.

In December 2004, the plaintiff applied for a position at the Rothenberg Law Office which was one of the staff counsel offices of AIG. The plaintiff started to work at AIG and the Rothenberg Law Office in mid-January 2005. Malik reported to the defendant Rothenberg, who was the managing attorney of the Rothenberg Law Office. While working for AIG and the Rothenberg Law Office, Malik was in a motor vehicle accident and allegedly suffered back and

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neck injuries. The plaintiff also alleges that she suffered emotional distress damages as a result of the accident. The plaintiff took some short-term leaves of absence from work as a result of the accident. Additionally, the plaintiff alleges that, after the motor vehicle accident, her chiropractor placed limitations on her duties, including: (1) avoiding prolonged sitting or standing; (2) no lifting over 20 lbs; (3) frequent breaks while traveling/working; (4) limited travel of short distances (to Nassau and Queens Counties only); (5) no more than eight working hours a day.

In support of their motion, the defendants argue that Malik exhibited performance deficiencies early in her employment. The defendants argue that Malik was not meeting her objectives of closing case files or billing and did not know how to manage a caseload. Malik received an overall rating of 5 for the 2005 performance year. In May 2006, Rothenberg set aside four times each day to meet with Malik to discuss her cases. In February 2007, Malik was issued a verbal warning and a written warning was issued to her in May 2007. The defendants allege that Rothenberg wanted to terminate Malik due to her poor performance but AIG's human resource department encouraged him to give Malik another opportunity to improve her work. In August 2007, the defendant Nallan began to oversee the plaintiff's work. The defendants argue that Malik continued to exhibit the same performance deficiencies. Malik was issued another verbal warning in February 2008 and a written warning on April 2, 2008. Malik commenced a leave of absence on April 4, 2008 and never returned to work. Malik contends that any sub-par performance on her part was due to the fact that the defendants failed to adequately staff its office with proper support staff and that Malik, as well as other attorneys, were consistently behind in their work.

Malik alleges that during the calendar year of 2006 she called the AIG HR department, as she felt she was being retaliated against for going on disability pursuant to her medical conditions. During this conversation, Malik states that she reported both Rothenberg and Grote for harassing her concerning taking sick days. Malik alleges that when the AIG Human Resources representative got back to her, she used the same words and tone as Grote had used. Additionally, the plaintiff states that immediately after speaking with the representative, Grote confronted her and told her "don't you ever go over my head. If you have a problem, you talk to me. I know everyone in [AIG] HR. Things get back to me."

Malik further alleges that during her employment she was subjected to sexual harassment by Rothenberg, Nallan and other co-workers. In support of these allegations, Malik relies on her deposition testimony and her affidavit, as well as the affidavits of non-party witnesses who worked in the subject law office. Malik alleges, among other claims, that Rothenberg would refer to the size of his penis to her, made comments about a female employee's breasts, zipped and unzipped his pants when referring to his genitalia, leaned over seated female employees and smelled their hair, purposely dropped files in front of female employees and had the female employee pick up the file so he could check out her body, made sexual advances towards female employees and that he stated that he preferred hiring attractive women. Malik alleges that Nallan engaged in sexually harassing conduct, which included, among other actions, that he would display pornographic pictures in his office, would comment on pornographic magazines within the office, carried a cane in his office that he called the pimp stick and would state that "women ain't nothing but bitches and ho's [sic]," told Malik that he would beat her with his stick, and told Malik that she should have become a stripper rather than an attorney.

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Malik also alleges that she was racially harassed by the defendant Nallan. This conduct included stating that all Muslims are terrorists; making anti-Islamic comments; telling Malik she could not wear an American flag pin; when Malik was carrying a bag, he would say to her, "see something, say something"; telling Malik that people in her family drive a taxi cab and own a 7-Eleven; stating that he hated Arabs; and stating that Malik's medical condition was caused by beatings from her husband because, "that is what men of your race/religion and culture do."

The defendants have moved for summary judgment dismissing the complaint in its entirety. A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The defendant first argues that all alleged discriminatory conduct that occurred prior to September 9, 2007 is outside the limitations period for NYSHRL violations, which is three years (CPLR 214). The plaintiff, however, argues that her claims are based on sufficiently similar conduct to warrant application of the Continuing Violation Doctrine. Under the Continuing Violation Doctrine, if the action is commenced within three years of the last discriminatory act, all prior misconduct, including acts outside of the limitations period, are subject to recovery; provided the discriminatory conduct that occurred within the limitations period was sufficiently similar to the alleged conduct outside the limitations period to justify the conclusion that the actions were part of a discriminatory practice (see *Walsh v. Covenant House*, 244 AD2d 214 [1st Dept 1997]). Here, there is an issue of fact as to whether the defendants' actions, with respect to all of Malik's harassment and discrimination claims, are sufficiently similar as to constitute one unlawful employment practice and thus be subject to the Continuing Violation Doctrine. Thus, summary judgment on the basis of the argument that the NYSHRL claims are time-barred, is not warranted.

The defendants next argue that the plaintiff cannot recover on her claims for hostile work environment. The defendants argue that AIG cannot be held responsible for the actions of Nallan prior to the time he began supervising Malik and was her peer. Under New York Law, an employer cannot be held liable for the discriminatory conduct of a non-management co-employee unless the employer became a party to the discriminatory conduct (see *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]). An employer, however, can become a party to the discriminatory conduct by (1) encouraging; (2) condoning; or (3) approving it (see *Id.*). Here, there is an issue of fact as to whether Rothenberg had knowledge of the discriminatory conduct and ignored such conduct, which would make AIG liable for the conduct of Malik's non-supervisor co-employees (see *Vitale v. Rosina Food Prods.*, 283 AD2d 141 [2001]). The evidence submitted by Malik is sufficient to raise an issue of fact to warrant denial of the summary judgment motion.

The defendant also argues that the hostile work environment claims must be dismissed because Malik did not properly avail herself of AIG's complaint procedures (see *Dunn v. Astoria Fed. Sav. & Loan Assn.*, 51 AD3d 474 [2008]). Malik, however, alleges that prior to taking a disability leave in April 2008, she properly complained to AIG Human Resources Department. She alleges that inasmuch as her initial complaint was rebuffed and ignored, she

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justifiably did not avail herself of AIG's complaint procedures. Malik alleges that she was told not to contact AIG HR again and that she suffered adverse employment action after her initial complaint. Malik has raised an issue of fact as to whether it was a reasonable belief that she feared that if she tried to complain in accordance with AIG's complaint procedures, she would be retaliated against.

The branch of the motion to dismiss the third cause of action, for quid pro quo sexual harassment, must be denied. To establish quid pro quo sexual harassment, a plaintiff must show that she was subjected to unwelcome sexual conduct, whether in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, which is used either explicitly or implicitly as a basis for employment decisions affecting compensation, terms, conditions or privileges of a complainant's employment (see *Matter of Fella v. County of Rockland*, 297 AD2d 813 [2002]). The allegations in Malik's complaint and affidavit in opposition to the summary judgment motion include allegations that, if proven, are sufficient to support a claim of quid pro quo sexual harassment, such as Nallan telling Malik, "she could make this all go away," that Nallan told Malik that if she was nicer he would not write her up or give her negative performance evaluations. Additionally, Malik stated that she refused Nallan's request to be nicer and make this all go away, and was subsequently issued written warnings, was given multiple cases in violation of her disability, was not given a raise and received poor treatment. Thus, there is an issue of fact as to whether any quid pro quo sexual harassment occurred against Malik.

The defendants next argue that the plaintiffs' cause of action based on the defendants' failure to accommodate must be dismissed as it properly accommodated the plaintiff. However, the evidence submitted by the parties was conflicting as to whether the restrictions due to the plaintiffs' disability were properly accommodated. The plaintiff testified that she was sent to courts covering the entire New York area, while the defendants testified that her duties were limited to appearances in Queens and Nassau counties. Additionally, the plaintiff submitted the affidavit of a non-party calendar clerk in the office, who stated that Malik was assigned cases throughout the New York City area. In light of this conflicting testimony, there is an issue of fact as to whether the defendants failed to accommodate Malik's medical disability. Therefore, the first cause of action cannot be dismissed on a summary judgment motion.

The defendants' argument that the plaintiff has not submitted any evidence of race or disability discrimination is without merit. To recover damages for disability discrimination, a plaintiff must show that she suffers from a disability and that the disability engendered the behavior for which he or she was discriminated against in the terms, conditions or privileges of his or her employment (see *Thide v. New York Dept. of Transp.*, 27 AD3d 452 [2006]). To succeed on a race discrimination claim, a plaintiff must show that she is a member of a protected class, that she was qualified to hold the position, that she was terminated from her employment or other adverse action occurred under the circumstances giving rise to inference of discrimination (*Forrest*, 3 NY3d at 324). Here, the evidence submitted by Malik includes adverse employment actions including: never receiving a pay increase;

sending Malik to various counties across the New York City area; appearing on multiple cases a day and having to simultaneously cover cases in Supreme and Civil Court, with depositions following in the afternoon; having to attend coaching sessions with her supervisor and being issued verbal and written warnings while

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other employees who were also deficient in the same areas did not have to attend these coaching sessions. These allegations along with the factual allegations concerning statements made to her are sufficient to raise a triable issue of fact on the plaintiff's racial and disability discrimination causes of action.

The branches of the defendants' motion for summary judgment dismissing the tort causes of action—the sixth cause of action is for battery and the seventh is for intentional infliction of emotional distress—are granted. These causes of action are governed by a one-year statute of limitations, and all allegations fall outside this limitations period (CPLR 215[3]). In light of the dismissal of the tort causes of action, the claims for punitive damages and attorney's fees must be dismissed.

The branch of the motion to dismiss the plaintiff's eighth cause of action for pain and suffering is granted without opposition, as there is no independent cause of action for pain and suffering in New York.

Additionally, the individual defendants seek summary judgment dismissing the portions of the complaint against them. First, the NYSHRI allows for individual liability against employees who have aided and abetted the unlawful discriminatory conduct of their employer (N.Y. Exec. Law §296[6]). In light of the finding that issues of fact exist as to the liability of AIG, dismissal is not warranted against the individual employees solely on the ground that there is no liability against AIG.

The defendant Grote has established her prima facie entitlement to summary judgment dismissing the entire complaint against her. The defendant Grote, as office manager, did not have the authority to give an accommodation to the plaintiff. Additionally, there is no evidence that Grote aided and abetted any disability, racial or sexual discrimination against the plaintiff. In opposition, the plaintiff failed to raise an issue of fact.

The defendant Rothenberg established his prima facie entitlement to summary judgment dismissing the cause of action for race discrimination. Here, there is no evidence that Rothenberg participated in any conduct giving rise to racial discrimination. In opposition, the plaintiff failed to raise any issue of fact. Rothenberg, however, failed to establish his prima facie entitlement to summary judgment dismissing the cause of action for disability discrimination. There is an issue of fact as to whether Rothenberg took adverse actions against the plaintiff due to her disability.

The defendant Nallan failed to establish his prima facie entitlement to summary judgment dismissing the disability discrimination. Here, there are issues of fact as to whether Nallan aided and abetted the discrimination by participating in conduct giving rise to the discrimination claim.

The defendants also seek to prevent Malik from recovering back and forward pay. This must be granted, as Malik does not have any allegations of constructive discharge as she was never terminated from her employment and continues to collect disability pay. Furthermore, inasmuch as the plaintiff left work to go out on disability and claims she can not presently work due to her disability, back pay and front pay are not appropriate remedies in this case.

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Finally, inasmuch as the plaintiff received Workers' Compensation Benefits for disability due to emotional distress stemming from the motor vehicle accident, she is not entitled to a recovery of emotional distress damages to the extent those damages were related to the accident. While the defendants seek to prevent the plaintiff from recovering any emotional distress damages, there is an issue of fact as to whether any portion of the damages were not caused by the accident, but rather were due to the conduct of the defendants. Thus, the plaintiff can only recover emotional distress damages for the portion of her emotional distress that can be proven to be caused by the conduct of the defendants rather than caused by the accident.

Accordingly, the branches of the summary judgment motion by the defendants AIG, Rothenberg Law Office and Nallan to dismiss the first, second, third, fourth and fifth causes of action are denied. The branches of the summary judgment motion by the defendants AIG, Rothenberg Law Office and Nallan to dismiss the sixth, seventh and eighth causes of action are granted and those causes of action are dismissed against those defendants.

The branches of the summary judgment motion by the defendant Rothenberg to dismiss the first, second and third causes of action are denied. The branches of the summary judgment motion by the defendant Rothenberg to dismiss the fourth, fifth, sixth, seventh

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and eighth causes of action are granted and those causes of action are dismissed against the defendant Rothenberg.

The summary judgment motion by the defendant Grote is granted and the complaint is dismissed against the defendant Grote.

Additionally, the plaintiff is not entitled to recovery of attorney fees or punitive damages or recovery of any front or back pay. Furthermore, any award of emotional distress damages is limited to damages that can be proven to be caused by the conduct of the defendants and not caused by the motor vehicle accident.

This constitutes the decision and order of the Court.

Dated: April 19, 2013