2016 WL 165834 (N.Y.Sup.), 2016 N.Y. Slip Op. 30026(U) (Trial Order)
Supreme Court, New York.
IAS Part 14
Queens County

Digna LAGO, Plaintiff,
v.
WEN MANAGEMENT CORP., et. al., Defendants.

No. 705496/2013.
January 8, 2016.

Trial Order

Present: Honorable David Elliot, Justice.

***1** [This opinion is uncorrected and not selected for official publication.]

The following papers read on this motion by defendants for an order granting them summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF22-29
Answering Affidavits - Exhibits	EF31-40
Reply Affidavits	EF41

Upon the foregoing papers it is ordered that the motion is granted.

I. The Facts

Plaintiff commenced this action for age and gender discrimination on or about November 25, 2013.

Plaintiff began her joint employment with three related companies, defendant Wen Management Corp., defendant Ch-Wen Management, and defendant Benjamin Development Co., Inc. (collectively the Wen defendants or the company), in 1989, starting as a bookkeeper. Over the course of her employment – which lasted approximately twenty-four years – she received several promotions, including to site manager in or around 2003 and to office manager in or around May, 2007. At that time, she worked in a building located at 206-09 86th Road, Queens Village, New York (the Cunningham property), where she was supervised by defendant Jeff Wasserman (Wasserman) for approximately five and one-half years.

The Wen defendants develop real estate and manage twelve rental properties. The company handbook prohibits harassment and discrimination and advises employees to report incidents to management for investigation. Deborah Benjamin, the President of the company, and Denise Coyle (Coyle), the Chief Executive Officer, two females in their late fifties, serve as the two highest executive officers at the company.

In or around February, 2007, the Wen defendants transferred plaintiff to the Cunningham property to work in the rental office, where she was supervised by Wasserman, the property manager, and he, in turn, reported to Coyle. Wasserman also supervised two other female employees, Lourdes Diaz and Pamella Ramballi, who also worked in the rental office, and one male employee, John McKeegan, the Director of Maintenance. McKeegan supervised the maintenance employees, who were all male, and they worked in a building about two blocks from the rental office.

Plaintiff initially performed her job well at the Cunningham property, and Wasserman promoted her from an administrative assistant to an office manager in 2007. Her duties included the processing of paperwork from tenants, preparing paperwork needed by collection agencies for the payment of rents, and appearing as a witness for the company in court cases against tenants.

After Glendine Harper, one of the tenants at the Cunningham property, tried to kill another tenant with a machete, the company tried to evict her from her apartment. During court proceedings, the company's attorney asked plaintiff if she could identify the signature of a company official on the lease for the purpose of establishing ownership of the apartment. Plaintiff replied that she could not identify the signature since, according to her, the company had recently changed three owners and, as such, she honestly did not recognize the signature. According to defendants, the court dismissed the eviction proceeding against Harper, and the company also lost approximately $40,000 in back rent because of the manner in which plaintiff testified. Defendants claim that plaintiff was asked to prepare for court beforehand and that she had performed “this task” numerous times before in court. The company's attorneys informed Wasserman about plaintiff's conduct in what became known as the Machete Lady Incident. Plaintiff told Wasserman that the company's attorneys had lied to him. Joseph Lafferty (Lafferty), the company's general counsel, states that, as a result of the Machete Lady Incident, he and Coyle resolved to terminate plaintiff's employment. However, Wasserman got them to agree that plaintiff could keep her position, but would have the responsibilities for court work given to another employee. Despite Wasserman's advocacy on plaintiff's behalf, according to Coyle, he “kept me apprised of some serious performance issues that he had with [plaintiff] periodically and throughout her tenure at Cunningham.”

***2** In 2007, the company had given plaintiff a $10,000 bonus but, in subsequent years, she received much smaller bonses : 2008 – $0, 2009 – $750, 2010 – $874, 2011 – $873, 2012 – $1,747, 2013 – $0. According to Wasserman, “starting in or around 2008, Ms. Lago's performance began to decline and I started to observe a pattern of Ms. Lago being untruthful, blaming her mistakes on others, and trying to cover up her mistakes.” Wasserman testified at his deposition that plaintiff sometimes did not correctly process tenant applications and incorrectly wrote on the lease the date that the tenancy began. On August 12, 2013, plaintiff mistakenly accepted a rent check from a tenant, Dietrich Carr (Carr), who was “in legal,” a term the company used to refer to a tenant who owed back rent and whose check the company's computer noted should not be accepted by the rental office unless it was payment in full together with legal fees. Instead of informing Wasserman about her mistake, plaintiff on her own returned the check to Carr by sliding it under the door to his apartment. Although he had learned from other employees that plaintiff had left the office for the purpose of returning Carr's check, Wasserman asked her where she had been, but she gave evasive answers. Wasserman then told her that she should have returned Carr's check by certified mail to prevent him from alleging in court that the company had accepted it. Although Wasserman admits becoming upset at plaintiff and raising his voice, he did not mention her gender or age during their conversation.

Later that morning, Wassserman sent Lafferty an e-mail recommending the termination of plaintiff's employment. Wasserman stated: “[D]ue to increasing events like this and the display of an unrepentive, irrational & generally bad attitude, I regretfully feel it is time to seriously consider terminating her employment with the company.” On or about August 12, 2013, Coyle approved the termination of Lago's employment.

Plaintiff went on vacation the week after the Carr incident, and on or about August 20, 2013, she sent a letter to several members of the company's management, including Lafferty and Coyle, complaining about Wasserman. The letter stated in relevant part: “On Monday 8/12/13, I became the target of an aggressive and menacing outburst at the hands of Jeff Wasserman. For whatever reason or ill mood he was in that morning, he directed his anger and rage towards me. He pounded continuously on my desk in an aggressive, insulting and harassing manner, screaming at the top of his lungs.... Never has any man acted so hostile, demeaning, and threatening to me, and no one has the right to intimidate or abuse a woman in such a manner.”

Although the company had decided to end plaintiff's employment days before the receipt of the letter, management stopped the termination process while the company investigated plaintiff's complaint. After Lafferty talked to the two other women who worked in the rental office and who had witnessed the confrontation between Wasserman and plaintiff over the Carr incident, he decided that plaintiff's complaint was "baseless." The company decided to inform plaintiff about her termination after Labor Day, when she was scheduled to return from an extended vacation. On September 4, 2013, Lafferty informed plaintiff that her employment with the company was terminated, and he expressed dissatisfaction with the way she had returned the improperly accepted check from Carr and her evasiveness when questioned by Wasserman. She did not complain about any form of discrimination at the termination meeting.

About one week later, James Feretic (Feretic), an attorney representing plaintiff, called Lafferty in an attempt to obtain a severance package for his client. At about the same time, Feretic also called Coyle and, during the course of the conversation, he mentioned company e-mails discussing the termination of plaintiff's employment. Coyle and Lafferty believe that plaintiff took these e-mails before she went on vacation and before she wrote the complaint letter dated August 20, 2013.

II. Discussion

Plaintiff alleges that defendants violated the New York State Human Rights Law (Executive Law §§ 290 *et seq.*) and the New York City Human Rights Law (New York City Admin. Code §§ 8-101 *et seq.*) by discriminating against her on the basis of gender and age.

The courts generally analyze discrimination cases brought pursuant to NYSHRL and NYCHRL by following the shifting of burdens between the parties (*see e.g. Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623 [1997]).

***3** "On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination" (*Ferrante v American Lung Assn., supra* at 629). The criteria for establishing unlawful discrimination under section 296 of the state Human Rights Law are the same as those controlling Title VII cases under the Federal Civil Rights Act of 1964 (*see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326 [2003]; *Ferrante v American Lung Assn., supra*; *Nelson v HSBC Bank USA*, 41 AD3d 445 [2007]). Claims arising under the New York City Human Rights Law are generally controlled by the same federal standards (*see Landwehr v Grey Adv.*, 211 AD2d 583 [1995]; *Cruz v Coach Stores, Inc.*, 202 F 3d 560 [2d Cir 2000]). In order to prove a prima facie case of discrimination under the Human Rights Law in regard to her termination, plaintiff had to demonstrate: (1) that she belongs to a class protected by the statute; (2) that her employer actively or constructively discharged her or took other adverse action against her; (3) that she had the qualifications to hold the position from which she was terminated or from which she experienced adverse action; and (4) that her employer discharged her or took adverse action against her under circumstances giving rise to an inference of discrimination (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1973]; *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights, supra; Ferrante v American Lung Assn., supra*; *Kent v Papert Cos.*, 309 AD2d 234 [2003]; *Pramdip v Building Serv. 32B-J Health Fund*, 308 AD2d 523 [2003]). "Once a prima facie case is made, the burden of production shifts to the employer to rebut the presumption with evidence that the complainant was discharged for a legitimate, nondiscriminatory reason" (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights, supra* at 330; *Pramdip v Building Service 32B-J Health Fund, supra*).

"To establish its entitlement to summary judgment in a[ ] … discrimination case, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual" (*Hemingway v Pelham Country Club*, 14 AD3d 536 [2005]; *see Dzikowski v J.J. Burns & Co., LLC*, 98 AD3d 468 [2012]; *Nelson v HSBC Bank USA, supra*; *Cesar v Highland Care Ctr., Inc.*, 37 AD3d 393 [2007]).

In the case at bar, defendants demonstrated that plaintiff cannot prove a prima facie case of age discrimination. Although plaintiff may have been the oldest employee in the rental office and although she may have been replaced by a younger employee, these facts, without more, are not sufficient to support an age discrimination claim (*see* Woodman v WWOR-TV, Inc., 411 F3d 69 [2d Cir 2004]; *Charles v Highland Care Ctr., Inc.*, 5 Misc 3d 1017 [A] [Sup Ct, Queens County 2004]). Plaintiff came forward with no evidence that Wasserman had made remarks to her concerning her age (*compare* Rollins v Fencers Club, Inc., 128 AD3d 401 [2015]). Plaintiff also cannot prove a prima facie case of gender discrimination. "[A]lthough plaintiff, as a woman, is a member of a protected class, the evidence was insufficient to establish a prima facie case of sexual discrimination or harassment " (*Grovesteen v New York State Pub. Employees Fedn., AFL-CIO*, 83 AD3d 1332 [2011]). Plaintiff did not produce sufficient evidence to establish a link between Wasserman's alleged harsh treatment of her, such as speaking in a raised voice, and an alleged animus toward women. Plaintiff did not produce sufficient evidence showing that any different treatment or alleged harassment she experienced arose from gender or age or other protected classification (*see* Singh v State of N.Y. Off. of Real Prop. Servs., 40 AD3d 1354 [2007]), and "mere personality conflicts must not be mistaken for unlawful discrimination" (*Forrest v Jewish Guild for the Blind, supra* at 309; *see Singh v State of N.Y. Off. of Real Prop. Servs., supra*).

Even assuming that plaintiff made a prima facie case of discrimination, defendants came forward with evidence to show that they discharged her for legitimate, nondiscriminatory reasons (*see Rollins v Fencers Club, Inc., supra*; Miranda v Esa Hudson Val., Inc., 124 AD3d 1158 [2015]; *Pramdip v Building Serv. 32B-J Health Fund, supra*). Defendants produced evidence showing that plaintiff did not perform the work assigned to her in a competent manner, such as evidence relating to the Carr mistake. Defendants also produced evidence showing that: (1) no other employee had complained to management that Wasserman engaged in discriminatory conduct toward the aged or toward women; (2) prior to August 20, 2013, plaintiff had never complained to anyone that Wasserman had abused her during the five and one-half years that he had supervised her; (3) Wasserman saved plaintiff's job after the Machete Lady Incident despite recommendations that she be terminated; (4) Coyle, a woman, made the decision to terminate plaintiff's employment; and (5) Coyle made the decision to terminate plaintiff's employment before the receipt of the August 20, 2013 complaint letter, based on longstanding dissatisfaction with her job performance and her attitude.

***4** "The burden then shifted to the plaintiff to raise a question of fact with respect to whether the claimed reason for her termination was, in reality, merely a pretext for illegal discrimination" (*King v Brooklyn Sports Club*, 305 AD2d 465 [2003]; *Miranda v Esa Hudson Valley, Inc., supra*; *Rollins v Fencers Club, Inc., supra*; *Pramdip v Building Serv. 32B-J Health Fund, supra*). "[T]the plaintiff can avoid summary judgment by proving that the employer's stated reasons 'were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason' "(*Singh v State of N.Y. Off. of Real Prop. Servs., supra* at 1356, quoting *Forrest v Jewish Guild for the Blind, supra* at 305). Under all of the circumstances of this case, plaintiff failed to carry that burden (see, Scott v. *Citicorp Services, Inc., supra*; *Pramdip v Building Serv. 32B-J Health Fund, supra*; *King v Brooklyn Sports Club, supra*). Plaintiff did not raise a triable issue of fact concerning whether the reasons given by defendants for terminating her employment were merely pretextual (*see Cesar v Highland Care Ctr., Inc., supra*). Unsubstantiated allegations that Wasserman treated her differently from other employees because of her age and gender do not suffice (*see King v Brooklyn Sports Club, supra*).

Defendants also established their prima facie entitlement to judgment as a matter of law dismissing those causes of action which alleged unlawful retaliation in violation of Executive Law § 296 and Administrative Code of City of New York § 8-107 because of plaintiff's opposition to discrimination (*see Forrest v Jewish Guild for the Blind, supra*). Defendants made a prima facie showing that they did not unlawfully retaliate against plaintiff, who wrote the complaint letter dated August 20, 2013, through the submission of evidence that management had made the decision to terminate her employment before the receipt of the letter and that management had a legitimate, nondiscriminatory basis for its decision. In opposition, plaintiff failed to raise a triable issue of fact (*see* Mendelsohn v New York Racing Assn., Inc., -AD3d-, 2015 WL 8822357).

Because plaintiff did not raise a triable issue of fact concerning her causes of action for discrimination and retaliation, her claims that defendants aided and abetted each other in discriminatory and retaliatory conduct cannot survive this motion (*see Forrest v Jewish Guild for the Blind, supra*).

II. Conclusion

Accordingly, defendants' motion for an order granting them summary judgment dismissing the complaint is granted.

Dated: January 8, 2016

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J.S.C.