

19 A.D.3d 456, *; 796 N.Y.S.2d 706, **;
2005 N.Y. App. Div. LEXIS 6684, ***

Umit Kaptan, et al., Appellants, v Ilene Danchig, Respondent. (Index No. 3284/02)

2004-05459

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

19 A.D.3d 456; 796 N.Y.S.2d 706; 2005 N.Y. App. Div. LEXIS 6684

May 3, 2005, Submitted

June 13, 2005, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a Turkish woman and her husband, appealed an order from the Supreme Court in Kings County (New York), which granted defendant former employer summary judgment dismissal of the woman's claims for damages for employment discrimination under *N.Y. Exec. Law § 296* and New York City, N.Y., *Admin. Code § 8-107* that were based on hostile work environment (HWE), constructive discharge, and unlawful retaliation.

OVERVIEW: The woman and her husband were practicing Muslims. The woman claimed that the employer created a HWE by repeated comments about her race, national origin, and sex. She also claimed, among other things, constructive discharge due to the HWE and retaliation. The employer's motion for summary judgment dismissal of those claims was granted and the woman appealed. The court found that summary judgment dismissal of the retaliation claims was proper since the woman failed to raise a triable issue of fact on whether a causal connection existed between a protected activity and any alleged adverse employment action. Also, the HWE based on sex claim was properly dismissed since only one isolated comment was presented, which was insufficient to sustain the claim. However the HWE and constructive discharge based on religion and national origin claims were erroneously dismissed. The employer's alleged repeated comments about the Muslim religion were more than insulting and insensitive, and they occurred more than a few isolated times. Also, the woman raised a triable issue of fact on whether her resignation was prompted by the intolerable work environment.

OUTCOME: The court modified the order by reinstating the claims of a HWE based on religion and national origin and the claims of a constructive discharge. The court affirmed summary judgment dismissal of the retaliation claims and the HWE claims that were based on sex.

HEADNOTES

[***1] Civil Rights--Discrimination in Employment--Religion--National Origin--Hostile Work Environment.--In employment discrimination action in which it was alleged that defendant subjected plaintiff to constant and repeated disparaging comments related to her sex, religion, and national origin, which significantly increased after September 11, 2001 terrorist attacks, causes of action alleging that defendant was liable for unlawful retaliation were dismissed in absence of triable issue of fact as to whether there was causal connection between protected activity and any alleged adverse employment action--it was error to dismiss causes of action alleging hostile work environment and constructive discharge based on religion and national origin; comments about plaintiff's religion were more than insulting and insensitive, and alleged comments about Muslims, which escalated after September 11, 2001, occurred more than few isolated times--defendant was entitled to dismissal of causes of action alleging hostile work environment based on sex, as isolated "prostitute" comment was insufficient to sustain such claim.

COUNSEL: Akin & Smith, LLC, New York, N.Y. (Zafer A. Akin and Derek T. Smith of counsel), for appellants.

McDermott Will & Emery, LLP, New York, N.Y. (Joel E. Cohen and Brett Schneider of counsel), for respondent.

JUDGES: BARRY A. COZIER, J.P., DAVID S. RITTER, FRED T. SANTUCCI, DANIEL F. LUCIANO, JJ. COZIER, J.P., RITTER, SANTUCCI and LUCIANO, JJ., concur.

OPINION

[*456] [**706] In an action, inter alia, to recover damages for employment discrimination pursuant to *Executive Law § 296* and the *Administrative Code of the*

19 A.D.3d 456, *; 796 N.Y.S.2d 706, **;
2005 N.Y. App. Div. LEXIS 6684, ***

City of New York § 8-107, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Rosenberg, J.), dated May 18, 2004, as granted those branches of the defendant's motion which were for summary judgment dismissing the first, second, third, fourth, and fifth causes of action.

Ordered that the order is modified, on the law, by deleting the provisions thereof granting those branches of the motion which were for summary judgment dismissing so much of the first and [*457] third causes of action as alleged a hostile work [***2] environment and constructive discharge based on religion and national origin and substituting therefor provisions denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiffs, and so much of the first and third [**707] causes of action as alleged a hostile work environment and constructive discharge based on religion and national origin are reinstated.

The plaintiff Umit Kaptan (hereinafter the plaintiff) and her husband Akin Kaptan (collectively the plaintiffs) are Turkish and practicing Muslims. The plaintiff previously was employed by the defendant. The plaintiffs commenced this action, inter alia, to recover damages for employment discrimination pursuant to *Executive Law § 296* and *Administrative Code of the City of New York § 8-107*, alleging, among other things, that the plaintiff was subjected to a hostile work environment, constructively discharged, and unlawfully retaliated against. The plaintiffs claimed that the defendant subjected the plaintiff to constant and repeated disparaging comments related to her sex, religion, and national origin, which significantly increased after the September 11, 2001, terrorist [***3] attacks, culminating in the defendant giving the plaintiff a denigrating "gag gift" during the 2001 Christmas holiday season. The defendant successfully moved for summary judgment dismissing the complaint.

Contrary to the plaintiffs' contention, the Supreme Court properly granted those branches of the defendant's motion which were for summary judgment dismissing the second and fourth causes of action, alleging that the defendant was liable for unlawful retaliation. After the defendant established its prima facie entitlement to summary judgment on those causes of action, the plaintiffs failed to raise a triable issue of fact as to whether

there was a causal connection between a protected activity and any alleged adverse employment action (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313, 819 NE2d 998, 786 NYS2d 382 [2004]).

However, contrary to the defendant's contention, the Supreme Court improperly granted summary judgment dismissing so much of the first and third causes of action as alleged hostile work environment and constructive discharge based on religion and national origin. The defendant's alleged repeated comments about the plaintiff's religion were more than insulting and insensitive, [***4] especially during Ramadan (*see Spence v Maryland Cas. Co.*, 995 F2d 1147, 1155 [1993]; *O'Dell v Trans World Entertainment Corp.*, 153 F Supp. 2d 378, 389 [2001]), and her alleged comments about Muslims, which escalated after September 11, 2001, occurred more than a few isolated times (*see Snell v Suffolk County*, 782 F2d 1094, 1103 [1986]). The defendant failed to satisfy her prima facie burden with respect to so much of the first and third causes of action as alleged a hostile work environment based on religion and national origin, as the plaintiff's workplace was "permeated with discriminatory [*458] intimidation, ridicule, and insult" that was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, *supra* at 310, quoting *Harris v Forklift Systems, Inc.*, 510 US 17, 21, 126 L Ed 2d 295, 114 S Ct 367 [1993]; *see Stetson v NYNEX Serv. Co.*, 995 F2d 355, 361 [1993]). Further, although the defendant demonstrated a prima facie entitlement to summary judgment with respect to so much of the first and third causes of action as alleged constructive [***5] discharge, in opposition, the plaintiffs raised a triable issue of fact as to whether the plaintiff's resignation was prompted by an intolerable [**708] work environment (*see O'Dell v Trans World Entertainment Corp.*, *supra* at 393-394).

Nevertheless, the Supreme Court properly determined that the defendant demonstrated her entitlement to summary judgment dismissing so much of the first and third causes of action as alleged hostile work environment based on sex, as the isolated "prostitute" comment was insufficient to sustain such a claim. In opposition, the plaintiffs failed to raise a triable issue of fact. Cozier, J.P., Ritter, Santucci and Luciano, JJ., concur.