CV146050777S
Superior Court of Connecticut

Forgione v. Skybox Barber Lounge, LLC

Decided Mar 2, 2016

CV146050777S

03-02-2016

Gayle Forgione v. Skybox Barber Lounge, LLC et al

Salvatore C. Agati, J.

UNPUBLISHED OPINION

MEMORANDUM OF DECISION

Salvatore C. Agati, J.

The trial of this matter took place on January 20, 2016.

The plaintiff's claims against the defendants were limited to counts one and three of her amended complaint after summary judgment was entered by Judge Nazzaro on November 10, 2015 as to Count Two. Count one claims discrimination based on age and sexual orientation as a result of the plaintiff being terminated from her employment by the defendant Skybox Barber Lounge, LLC. Count three claims negligent infliction of emotional distress as a result of being terminated against Joseph Barraco, Jr.

The facts ascertained by the court at trial are as follows.

The plaintiff, Gayle Forgione (Forgione), is over the age of 40. She obtained her cosmetician's license in 1979. She testified that she is a lesbian and has lived with her partner for over twenty years.

Skybox Barber Lounge, LLC (Skybox) is a limited liability company whose sole member/manager is Joseph Barraco, Jr. and the business is a barber shop.

On May 29, 2013, Forgione met with the defendants, Joseph Barraco, Sr. and Raffaella Barraco. She had been referred to them by a mutual acquaintance, Attorney Joseph Alterman.

The reason for the meeting was to determine if Forgione would be interested in working at Skybox as a barber. The defendant, Joseph Barraco, Jr. was incarcerated at the time and his parents were attempting to find a barber to fill in at the barber shop while he was unavailable to work.

An agreement was reached to have Forgione work at Skybox. She commenced work on May 30, 2013. She was to be paid on commission for each haircut as an independent contractor. The agreed rate was she would get 60% of the total for each haircut performed. Each haircut would be charged $20.00.

Joseph Barraco, Jr. was released from incarceration and returned to work at Skybox on June 11, 2013.

Initially, Barraco, Jr. thanked Forgione for helping out while he was unavailable. He advised her that she could continue to work on the same terms, the 60/40 split for each haircut. Barraco, Jr. also advised Forgione that he wanted to train her on his methods for cutting hair, but she refused indicating she was an experienced barber.

During the next two days, Barraco, Jr. reprimanded Forgione on at least two occasions for allegedly violating sanitary standards, i.e. she dropped clippers on the floor and did not clean them before using them to cut a patron's hair and she blew on the clippers to clean them rather than use a disinfectant.

On June 15, 2013 Barraco, Jr. confronted Forgione about monies being short for the haircuts done by Forgione. Forgione had done seven haircuts. At $20.00/cut and 60/40 or $12.00/$8.00 split; the amount that Skybox should have received was $56.00. The envelope Forgione left with Skybox's cut had only $36.00. Barraco, Jr. confronted Forgione about the discrepancy and accused her of shorting him and therefore, stealing. An argument ensued and became heated. Forgione claims Barraco, Jr. called her " a stupid, old dyke." Barraco, Jr. denies using those words. Forgione then left. Forgione first claimed she was fired, then claimed she quit because Barraco, Jr. could not fire her.

In Forgione's haste to leave, she left behind some personal items. She met Barraco, Sr. the next day at the Ocean State Job lot parking lot in East Haven to retrieve her personal items and return the shop key. At that meeting, Forgione made no mention of the comments made to her by Barraco, Jr. the day before to Barraco, Sr., nor did she discuss her reason for leaving employment.

Forgione did apply for unemployment compensation. Skybox objected claiming she stole from the shop. She was not granted unemployment compensation.

Forgione had applied for Social Security Disability benefits based on long-term depression issues she suffered from prior to her beginning to work at Skybox. She subsequently received Social Security benefits after leaving Skybox and continues to do so at this time.

The plaintiff's first count claims that Skybox discriminated against her based on her age and her sexual orientation. Age discrimination claims are permitted pursuant to General Statutes § 46a-60(a)(1).[1] Sexual orientation claims are permitted pursuant to General Statutes § 46a-81c(1).[2]

[1] § 46a-60: (a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, learning disability or physical disability, including, but not limited to, blindness.

[2] § 46a-81c: It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation or civil union status.

The definitions for terms used in these statutes are found in General Statute § 46a-51. Subsection (9) defines employee as: " Employee" means any person employed by an employer but shall not include any individual employed by such individual's parents, spouse or child. Subsection (10) defines employer as: " Employer" includes the state and all political subdivisions thereof and means any person or employer with three or more persons in such person's or employer's employ.

The case of *Thibodeau v. Design Group One Architects, LLC*, 260 Conn. 691, 802 A.2d 731 (2002), provides controlling precedent on the issue of which employers may be sued and subject to discrimination claims. The court stated the following:

Although the legislative history of the act is silent as to why the legislature chose to exempt small employers from the purview of the act, the primary reason for the exemption cannot be doubted; the legislature did not wish to subject this state's smallest employers to the significant burdens, financial and otherwise, associated with the defense of employment discrimination claims. *Id.*, at 706-07.

The court further stated and concluded:

The purpose of the statutory definition of " employer" is neither to condone nor to encourage sex discrimination but, rather, to relieve small employers from the burdens of defending against sex discrimination claims. In other words, the policy underlying the definition recognizes that some otherwise meritorious sex discrimination claims may go unremedied. It also reveals the legislature's recognition, however, that small employers should not have to litigate unmeritorious claims. Thus, the policy underlying the definition is not to permit sex discrimination. The definition, rather, reflects a considered legislative judgment that it is the public policy of this state to shield small employers from having to bear the costs of litigating sex discrimination claims regardless of their merit. *Id.*, at 709.

Based on the Supreme Court precedent and the case law, the initial consideration for the court is to determine if the defendant Skybox is an " employer" that is subject to suit for these discrimination claims.

The court finds that the evidence does not support a finding that Skybox meets the definition of employers defined by General Statutes § 46a-51(10). The only employee based on the testimony and evidence was Forgione. Baracco, Jr., as the sole manager/member of Skybox was clearly the employer, as he had sole control of the business. Mr. Baracco, Sr. and Mrs. Baracco do not meet the definition of employee under General Statutes § 46a-51(9). Therefore, Skybox did not have " three or more persons in such person's or employer's employ" as required by the definition in General Statutes § 46a-51(10). The precedent in *Thibodeau* supports this court's finding that the plaintiff's claim against the defendant, Skybox, in count one for discrimination fails. Judgment for the defendant enters as to count one.

The remaining count, count three, is a claim for negligent infliction of emotional distress against the defendant, Baracco, Jr.

> " [N]egligent infliction of emotional distress in the employment context arises only where it is 'based upon unreasonable conduct of the defendant in the termination process.'" *Parsons v. United Technologies Corp.*, 243 Conn. 66, 88, 700 A.2d 655 (1997).

In *Perodeau v. City of Hartford*, 259 Conn. 729, 792 A.2d 752 (2002), the Supreme Court analyzed prior precedent for negligent infliction of emotional distress claims as a result of the termination process of an employee. The court held as follows:

Accordingly, read together, *Morris* and *Parsons* merely stand for the proposition that, in cases where the employee has been terminated, a finding of a wrongful termination is neither a necessary nor a sufficient predicate for a claim of negligent infliction of emotional distress. The dispositive issue in each case was whether the defendant's conduct during the termination process was sufficiently wrongful that the " defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that [that] distress, if it were caused, might result in illness or bodily harm." (Internal quotation marks omitted.) *Id.*, at 88, 700 A.2d

655; *Morris v. Hartford Courant Co., supra*, 200 Conn. at 683, 513 A.2d 66; *Montinieri v. Southern New England Telephone Co., supra*, 175 Conn. at 345, 398 A.2d 1180. *Id.*, at 751.

The *Perodeau* court further explained:

> In negligent infliction of emotion distress claims, unlike general negligence claims, the foreseeability of the precise " nature of the harm to be anticipated [is] a prerequisite to recovery even where a breach of duty might otherwise be found . . ."

Maloney v. Conroy, 208 Conn. 392, 398, 545 A.2d 1059 (1988). *Id.*, at 754.

And concluded:

> An individual making an emotional distress claim must show that a reasonable person would have suffered " emotional distress . . . that . . . might result in illness or bodily harm"; *Montinieri v. Southern New England Telephone Co., supra*, 175 Conn. at 345, 398 A.2d 1180; as the result of the defendant's conduct.

Id., at 755.

The court having reviewed the testimony and evidence finds that crediting the plaintiff's testimony as to the comments made by the defendant at the time of the termination; those comments, although wrongful and uncalled for; were not " sufficiently wrongful" to give rise to a negligent infliction of emotional distress claim.

In addition, the plaintiff's testimony does not substantiate that she had any adverse reaction or affect from the comments that created any illness, bodily harm or emotional distress. The evidence presented supports the fact that the plaintiff suffered from long-term depression prior to working at Skybox for the two-week period in 2013. The plaintiff's testimony did not support her claim that these comments made her more depressed and/or ill. The plaintiff provided no medical records to support her claim and testified that she did not seek treatment as a result of the comments and/or termination.

The court concludes that the plaintiff has failed to provide credible evidence to substantiate a claim for negligent infliction of emotional distress as to the defendant, Baracco, Jr. Judgment enters for the defendant on count three.