

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Kirby v. Carlo's Bakery 42nd & 8th LLC

2023 NY Slip Op 00059 (App. Div. 2023) · No. Appeal No. 17044; Case No. 2022-01806; Index No. 655227/21
· Decided January 10, 2023

SUMMARY

The Appellate Division, First Department reversed an order dismissing the plaintiff's first through fourth causes of action. The court held that the plaintiff sufficiently pleaded employment discrimination under the New York State and New York City Human Rights Laws, unpaid overtime, failure to pay weekly wages, and failure to provide a wage notice.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Acosta, P.J.; Webber, J.; Moulton, J.; Shulman, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	January 10, 2023
DOCKET	Appeal No. 17044; Case No. 2022-01806; Index No. 655227/21
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiff appealed an order granting defendants' motion to dismiss her first through fourth causes of action.
STANDARD OF REVIEW	On a motion to dismiss, the court accepted the pleaded facts as true, afforded plaintiff the benefit of every possible favorable inference, and determined whether the complaint sufficiently stated causes of action.
PRECEDENTIAL VALUE	Published Appellate Division opinion
PARTIES	Chontay Kirby v. Carlo's Bakery 42nd & 8th LLC, John Pernini, Defendants-Respondents

TOPICS

- employment discrimination
- racial discrimination
- wage and hour
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the complaint sufficiently stated a claim for employment discrimination under the New York State and New York City Human Rights Laws despite labeling the claim as one for a hostile workplace.
2. Whether the complaint sufficiently stated a claim for unpaid overtime under the New York Labor Law.
3. Whether the complaint sufficiently stated a claim for failure to pay a manual worker weekly under New York Labor Law § 191.
4. Whether the complaint sufficiently stated a claim for failure to provide a wage notice under New York Labor Law § 195(1)(a).

HOLDINGS

1. The complaint sufficiently stated a cause of action for employment discrimination even though the first cause of action was labeled as one for a hostile workplace.
2. The complaint sufficiently stated a claim for unpaid overtime under the Labor Law.
3. The complaint sufficiently stated a claim based on defendants' alleged failure to pay plaintiff weekly.
4. The complaint sufficiently stated a claim for failure to provide a wage notice under New York Labor Law § 195(1)(a).

KEY QUOTATIONS

“Although plaintiff’s first cause of action is labeled as one for “hostile workplace,” Supreme Court was not bound by that designation and plaintiff has sufficiently stated a cause of action for employment discrimination under both the New York State and New York City Human Rights Laws” ([*1])

“Specifically, plaintiff, a Black woman, alleges that her supervisor, defendant John Pernini, irritated that she had telephoned Human Resources for advice, allegedly stated to her the night before her termination, “Why did you call HR? Blacks . . . I should have never hired her.”” ([*1])

FACTUAL BACKGROUND

Chontay Kirby, a Black woman, alleged that she was qualified for her position based in part on approximately a decade of leadership experience. She alleged that her supervisor made a racially charged remark after she contacted Human Resources and that she was terminated the following day. She also alleged that she worked more than 40 hours per week without receiving overtime, was a nonexempt manual worker who was not paid weekly, and did not receive the required wage notice.

PROCEDURAL HISTORY

Supreme Court, New York County, granted defendants' motion to dismiss the first through fourth causes of action. The Appellate Division unanimously reversed on the law, denied the motion, and reinstated those causes of action.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The motion to dismiss was denied and the first through fourth causes of action were reinstated.

CASES CITED

- Matter of Local 621 v New York City Dept. of Transp., 178 AD3d 78, 81 [1st Dept 2019], lv dismissed 35 NY3d 1106 [2020]
- Vig v New York Hairspray Co., L.P., 67 AD3d 140, 145 [1st Dept 2009]
- Moore v Bronx-Lebanon Hosp., 50 AD3d 286, 286 [1st Dept 2008]
- Gutierrez v Bactolac Pharmaceutical, Inc., 210 AD3d 746 [2d Dept 2022]
- V. Groppa Pools, Inc. v Massello, 106 AD3d 723, 724 [2d Dept 2013]
- Leon v Martinez, 84 NY2d 83, 88 [1994]

OPINION

PER CURIAM.

Kirby v Carlo's Bakery 42nd & 8th LLC (2023 NY Slip Op 00059) Kirby v Carlo's Bakery 42nd & 8th LLC 2023 NY Slip Op 00059 Decided on January 10, 2023 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: January 10, 2023 Before: Acosta, P.J., Webber, Moulton, Shulman, Higgitt, JJ. Index No. 655227/21 Appeal No. 17044 Case No. 2022-01806 [*1]Chontay Kirby, Plaintiff-Appellant, vCarlo's Bakery 42nd & 8th LLC et al., Defendants-Respondents. Bergstein and Ullrich, New Paltz (Stephen Bergstein of counsel), for appellant. Litchfield Cavo LLP, New York (Joseph Dimitrov of counsel), for respondents.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 28, 2022, which granted defendants' motion to dismiss the first through fourth causes of action, unanimously reversed, on the law, without costs, the motion denied, and those causes of action reinstated.

Although plaintiff's first cause of action is labeled as one for "hostile workplace," Supreme Court was not bound by that designation and plaintiff has sufficiently stated a cause of action for employment discrimination under both the New York State and New York City Human Rights Laws (see Matter of Local 621 v New York City Dept. of Transp., 178 AD3d 78, 81 [1st Dept 2019], lv dismissed 35 NY3d 1106 [2020]; Vig v New York Hairspray Co., L.P., 67 AD3d 140, 145 [1st Dept 2009]).

Plaintiff alleges that she is a member of a protected class; that she was qualified for the position by, among other things, having a decade of experience in leadership roles; and that she was subject to an adverse employment action under circumstances giving rise to an inference of discrimination (*Moore v Bronx-Lebanon Hosp.*, 50 AD3d 286, 286 [1st Dept 2008]).

Specifically, plaintiff, a Black woman, alleges that her supervisor, defendant John Pernini, irritated that she had telephoned Human Resources for advice, allegedly stated to her the night before her termination, "Why did you call HR? Blacks... I should have never hired her."

In addition, affording plaintiff the benefit of every possible favorable inference, we find that she has sufficiently stated a claim for unpaid overtime under the Labor Law by alleging that she worked more than 40 hours per week and that defendants never paid her for the overtime (*CPLR 3013*; see *Gutierrez v Bactolac Pharmaceutical, Inc.*, 210 AD3d 746, [2d Dept 2022]; *V. Groppa Pools, Inc. v Massello*, 106 AD3d 723, 724 [2d Dept 2013]).

Plaintiff's claim based on defendants' failure to pay her weekly also is sufficiently pleaded, as she alleges that she was a nonexempt employee under Labor Law § 190, and that defendants were required to pay her each week as a manual worker under New York Labor Law § 191. Further, plaintiff submitted an affidavit explaining her job duties in greater detail — for example, she stated that she was responsible for opening and closing the store, sorting and moving inventory, cleaning the store, and waiting on customers — and stating that she spent more than 25% of her working time performing physical labor.

To the extent the complaint omits an explanation of the nature of plaintiff's work, this affidavit properly fills any defects in the complaint (see *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Plaintiff also states a claim based on defendants' failure to give her a wage notice in accordance with Labor Law § 195(1)(a) by alleging that defendants failed to give her a notice apprising her of her regular pay day.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: January [*2]10, 2023