

<b>Hair v City Univ. of N.Y.</b>
2010 NY Slip Op 32842(U)
October 12, 2010
Supreme Court, New York County
Docket Number: 111327/06
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

*Justice*

*Hair*

INDEX NO. 111327106

MOTION DATE \_\_\_\_\_

- v -

*City University of New York  
et al*

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

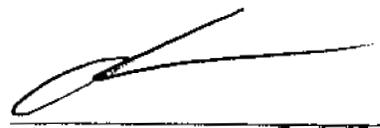
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Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment  
by defendants is granted in accordance with  
the attached memorandum decision.

**FILED**  
OCT 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/12/10

  
**JUSTICE DORIS LING-COHAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----x  
ROBERT A. HAIR,

Plaintiff,

Index No.111327/06

-against-

CITY UNIVERSITY OF NEW YORK, JOHN JAY  
COLLEGE OF CRIMINAL JUSTICE and  
MAKI HABERFELD,

Defendants.

Motion Seq. No.: 001

-----x  
DORIS LING-COHAN, J.:

Defendants John Jay College of Criminal Justice (John Jay) and City University of New York (CUNY), and Maki Haberfeld (Haberfeld) move, pursuant to CPLR 3212, for an order granting leave to defendants to move for summary judgment more than 60 days after the filing of the note of issue, and upon granting such leave, granting summary judgment dismissing the complaint.

Plaintiff commenced this action to recover damages against defendants for age discrimination in employment, claiming a violation of his rights under the New York State and New York City's Human Rights Law.<sup>1</sup>

As a threshold matter, this court will first address that branch of defendants' motion which seeks an order granting leave to defendants to move for summary judgment more than 60 days after the filing of the note of issue.

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<sup>1</sup> New York Executive Law §§296 and 297 and the Administrative Code of the City of New York §8-107.

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CPLR 3212 (a) permits a motion for summary judgment no later than the 120<sup>th</sup> day following the filing of the note of issue. The statute also allows the court to set a shorter time limit than the 120 days. New York County Supreme Court, Civil Branch Rules of the Justices, Local Rule 17, provides that:

[u]nless otherwise provided in a particular case in the preliminary conference order or other directive of the Justice assigned, a motion for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court for good cause shown.

This Part's rules state that all motions for summary judgment must be filed within 60 days of filing a note of issue. In general, deadlines are strictly construed; however, they can be extended upon a demonstration by movant of "good cause" for the untimely summary judgment motion (see *Brill v City of New York*, 2 NY3d 648 [2004]).

Defendants note that, between August 9, 2006 when the complaint was filed, and March 7, 2008, when the note of issue was filed, the parties completed discovery without judicial intervention. Thus, the case was never assigned to an IAS Part or Justice of this Court. Defendants filed their motion for summary judgment on or about June 4, 2008, within the 120 days of the filing of the note of issue, under CPLR 3212 (a).

Under these circumstances, defendants have shown good cause for failing to file their summary judgment motion within 60 days after they filed the note of issue. Specifically, there was no

[\*4]

preliminary conference order or other directive from this court providing that a motion for summary judgment must be filed within 60 days from the filing of a note of issue; thus, defendants reasonably relied on the CPLR and Local Rule 17 in filing their summary judgment motion within 120 days of filing the note of issue. Based upon the aforesaid, that branch of defendants' motion, which seeks leave to move for summary judgment more than 60 days after the filing of the note of issue, is granted.

Defendant John Jay is a senior college in the CUNY system, with no separate corporate existence (see NY Education Law §§ 6202 [5], 6203). Defendants explain that John Jay is organized into various academic departments, one of which is the Department of Law, Police Science, and Criminal Justice (the Department). A chairperson is elected every three years by the Department's full-time tenured faculty members, and has the discretion to appoint faculty members as coordinators for the Department's various majors.<sup>2</sup> The coordinators assist the chairperson with his or her administrative duties.

Plaintiff, an 87-year-old male, was hired by CUNY as an assistant professor at John Jay in September 1970. Thereafter, he received tenure, and was promoted to his present position as Associate Professor. Plaintiff claims that, in or about 1973, he initiated John Jay's Security Major Associates Degree Program,

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<sup>2</sup>The five areas offered by the Department are: criminal justice, legal studies, police science, correctional studies, and security management.

[\*5]

later developed John Jay's Security Management Institute (SMI), and helped develop its four-year Security Major degree program. He contends that he has served as Security Major Coordinator since its inception.

By memorandum dated December 23, 2004, Haberfeld, then chairperson of the Department at John Jay,<sup>3</sup> notified plaintiff of her decision to remove him as Security Major Coordinator, effective January 1, 2005. The memorandum advised plaintiff that he was being removed "[d]ue to the insurmountable differences in opinion regarding the way the Security Major should be handled [and that]...the time has come to pursue a different direction for the benefit of the Department and the College."

Plaintiff claims that Haberfeld discriminated against him because of his age when she removed him as coordinator for the Department's Security Major. He alleges that he has been a valuable and productive member of the faculty of John Jay, and that his removal as the Security Major Coordinator caused him humiliation and severe emotional distress.

The Security Major Coordinator is an unpaid, voluntary position that is selected by the chairperson on an *ad hoc* basis. Coordinators do not receive any additional compensation or other benefits, nor is there a written job description for the position. Haberfeld notes that, under her direction, the

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<sup>3</sup>Haberfeld is a tenured Professor at John Jay, and served as chairperson of the Department from September 2003 until November 2007.

[\* 6]

coordinators would assess and evaluate the courses within their major, prepare initial schedules for those courses, and advise students about the requirements for the major. She claims that the duties of the coordinators required, at most, a few hours a week.

Haberfeld recounts that, when she became chairperson, she gradually replaced the five tenured faculty members, who had served as coordinators under her predecessor, with untenured faculty. She explains that she did this in order to assist the non-tenured faculty in fulfilling a tenure requirement that they demonstrate service to the academic department. By the end of 2004, Haberfeld had replaced four of the five coordinators, with plaintiff as the last coordinator held over from the prior chairperson. She notes that she had not yet replaced plaintiff because there were no tenure-track, untenured faculty members teaching in the Security Management major at that time.

Haberfeld further alleges that there were various instances where plaintiff opposed efforts to revise the Security Management major in accordance with recommendations of a college committee (the Security Committee), and refused to cooperate with the recommended changes, which Haberfeld was mandated to implement.

In support of their motion, defendants argue that plaintiff fails to establish a prima facie case of discrimination because his removal as coordinator was not an adverse employment action, and there are no circumstances supporting an inference of

unlawful discrimination. Moreover, they argue that defendants have proffered legitimate, non-discriminatory reasons for plaintiff's removal as Coordinator. They point out that neither plaintiff's teaching responsibilities, activities, title, salary, nor other benefits, were affected by his removal as Coordinator.

In support of his cause of action for age discrimination, the plaintiff must demonstrate, prima facie, that: (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the termination, or other adverse employment action, occurred under circumstances giving rise to an inference of age discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

To prevail on their motion for summary judgment dismissing the complaint based upon age discrimination, defendants have the burden to show either that plaintiff cannot establish the elements of intentional discrimination "or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual" (*Forrest v Jewish Guild for the Blind*, 3 NY2d at 305, *supra*). "In that event, summary judgment would constitute 'a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources'". *Id*

(citations omitted). Here, defendants have satisfied their burden.

It is undisputed that plaintiff satisfies the first two elements of a cause of action for age discrimination, i.e., that he is a member of a protected class, and was qualified to assist the chairperson of the Department as Coordinator for the Security Management Major. However, upon the within submissions, it has not been established that plaintiff suffered an adverse employment action based upon his removal as Coordinator. In particular, it is undisputed that as a result of his removal, plaintiff's salary, benefits, job title as Associate Professor, and tenure status were unaffected (*id.* at 306). Further, plaintiff "retained his work space [and] job hours and ... continued to perform functions consistent with his job title" (*Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314 [1<sup>st</sup> Dept 2005]; see also *Galabya v New York City Bd. Of Educ.*, 202 F3d 636, 640 [2d Cir 2000]). Upon the within record, it cannot be said that plaintiff suffered any "material adverse change in the terms and conditions of [his] employment" that was "more disruptive than a mere inconvenience or an alteration of job responsibilities". *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 (2004). Plaintiff has offered no evidence to substantiate that the removal as Coordinator constituted materially adverse change to the terms and conditions of his employment; it is noted that such

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a position is a voluntary, unsalaried position, with no additional benefits or privileges.

Moreover, even assuming, arguendo, that plaintiff's removal as Coordinator could be considered an adverse employment action, defendants established, prima facie, that plaintiff did not suffer such alleged adverse employment action under circumstances giving rise to an inference of age discrimination. Defendants clearly set forth legitimate, independent and nondiscriminatory reasons for the challenged action.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether defendants' asserted reasons for removing him as Coordinator were false or that plaintiff's age was more likely the real reason (*Ferrante v American Lung Assn.*, 90 NY2d at 630). In particular, it is undisputed that plaintiff was not singled out for replacement, but rather, since becoming the chairperson, Haberfeld replaced each of the other four (4) coordinators, with plaintiff being replaced last. Further, plaintiff's very own testimony support the circumstances surrounding defendants' decision to remove him as Coordinator. It is undisputed that plaintiff opposed efforts to revise the Security Management major and disagreed with the findings of the Security Committee. [Exh. H, Hair Deposition at 39, lines 19-23].

Even under New York City's Human Rights Law which has been more liberally construed than its state counterpart, plaintiff's

employment discrimination claim cannot survive, as plaintiff failed to raise a factual issue with respect to the elements necessary to establish his age discrimination claim. See *Williams v. New York City Housing Authority*, 61 AD3d 62, 74-75 (1<sup>st</sup> Dept 2009). Thus, this court is constrained to grant defendants' motion.<sup>4</sup>

Accordingly, it is

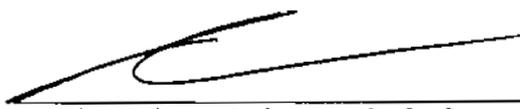
ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed without costs and disbursements to defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff, with notice of entry.

Dated:

10/12/10

  
Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\HAIR\final.wpd

**FILED**  
OCT 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>4</sup> The court notes that prior to the disposition of the within motion, this court attempted to settle this matter.