

**Pickering v Uptown Communications & Elec. Inc.**

2013 NY Slip Op 33201(U)

December 23, 2013

Supreme Court, Queens County

Docket Number: 27095/11

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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KWESI PICKERING,  
Plaintiff(s),

Index No.: 27095/11

Motion Date: 7/31/13

- against -

Motion Cal. No.: 110

Motion Seq. No: 1

UPTOWN COMMUNICATIONS & ELECTRIC INC.,  
and NELSON FELICIANO, DANNY GREENBERG  
and JONATHAN SMOKLER *individually and as*  
*aiders and abettors,*  
Defendant(s).

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The following papers numbered 1 to 11 read on this motion by defendants, Uptown Communications & Electric, Inc. (Uptown), Danny Greenberg, Nelson Feliciano and Jonathan Smokler, for summary judgment dismissing the complaint pursuant to CPLR §3212.

|   | <u>Papers<br/>Numbered</u> |
|---|----------------------------|
| Notice of Motion-Affirmation-Exhibits-Memorandum<br>of Law-Service..... | 1 - 5                      |
| Affirmation in Opposition-Exhibits-Memorandum of Law<br>-Service.....   | 6 - 9                      |
| Reply Memorandum-Service.....   | 10 - 11                    |

Upon the foregoing papers it is **ORDERED** that the motion is determined as follows:

Plaintiff in this discrimination action seeks damages based upon his alleged wrongful termination of employment. In the verified complaint, plaintiff alleges that defendants terminated him after they learned of prior criminal convictions and that defendants discriminated against plaintiff based upon his race. Defendants move for summary judgment in their favor dismissing the complaint. Plaintiff opposes the motion.

### Facts

Uptown is a contractor engaged by Time Warner Cable of New York City (TWCNYC), to install cable and cable-related services into the homes of TWCNYC subscribers. TWCNYC is Uptown's only customer. Uptown is owned by co-defendants Daniel Greenberg and Jonathan Smokler. Nelson Feliciano is a general foreman at Uptown.

In or around July of 2006, Uptown hired plaintiff as a cable technician to install cable-related services in the homes of TWCNYC subscribers. Cable technicians work both inside and outside of TWCNYC subscribers' homes, installing cable boxes, cable modems and VOIP telephones. Customers must be home at the time of installation, and must permit cable technicians widespread access to the home to run wires and install equipment.

In or around 2007, plaintiff's driver's license was suspended. This precluded plaintiff from working as a cable technician because they are required to drive to and from subscribers' homes. Rather than discharging plaintiff, Uptown transferred him to a dispatch position. A dispatcher coordinates cable installation appointments with subscribers. To do so, dispatchers access TWCNYC'S proprietary computer systems (from Uptown computers), which contain the personal and confidential information of TWCNYC subscribers. For security reasons, dispatchers must log in to the system using their unique identification numbers (and passwords), which are assigned by TWCNYC. Dispatchers may not operate a computer that is logged in under another employee's I.D. number. Plaintiff violated this rule when he operated another dispatcher's logged-in computer to "modify" a work order for a cable technician. As a result, plaintiff was prohibited access to TWCNYC's system, and could no longer work as a dispatcher. By the time of this incident, plaintiff's driving privileges had been re-instated. Uptown returned plaintiff to his cable technician position rather than discharging him for computer misuse.

In June or July of 2010, in an unrelated matter, an Uptown cable technician assaulted a TWCNYC customer with a hammer. The story made headlines in the local newspaper. This prompted TWCNYC to conduct criminal background checks on all cable technicians. The background checks revealed that several Uptown employees, including plaintiff, had a criminal conviction history. Two Uptown supervisors had been convicted of crimes but Uptown determined that they could continue in their positions because their convictions were not job-related, including that they did not enter the homes of TWCNYC subscribers. Two cable technicians had also been charged with weapons possession but Uptown did not terminate their employment, citing that the charges were older than those of

plaintiff and that the cable technicians were young at the time of the incidents.

Plaintiff's background check revealed that he was charged with two crimes related to the possession and sale of concealed firearms, and for this he was convicted of Criminal Facilitation in 2004. In evaluating what to do about plaintiff's background check, Uptown considered several factors including the severity of the charges and conviction, plaintiff's age at the time of the crimes (20), the date of the conviction and whether the conduct underlying the crime presented a risk of safety to the TWCNYC subscribers. Uptown decided to terminate plaintiff in July 2010.

Plaintiff commenced the instant action alleging discrimination based upon his race and criminal convictions.

#### Discussion

The branch of the motion which is to dismiss all claims against defendant Nelson Feliciano, is granted as unopposed and otherwise on the merits.

The branch of the motion which is to dismiss the discrimination claim based upon plaintiff's prior conviction is denied.

Section 296(15) provides in pertinent part:

It shall be an unlawful discriminatory practice for any person ... corporation or association ... to deny any license or employment of any individual by reason of his having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of Article 23-a of the N.Y. Correction Law.

The pertinent section of the New York Correction Law, Section 752, provides that no application for any license or employment shall be denied by reason of the applicant having been previously convicted of a criminal offense unless (I) there is a direct relationship between the previous criminal offense and the specific license or employment sought, or (ii) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

The legal framework governing burdens of proof in an employment discrimination action is well-settled, and was recently clarified by the Second Circuit in *James v New York Racing Assoc.*,

233 F.3d 149 (2d Cir.2000). A "minimal" *prima facie* case of employment discrimination requires a showing of (I) membership in a protected class, (ii) qualification for the position, (iii) an adverse employment action, and (iv) preference for a person not in the protected class. See *id.* at 153-54 (construing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). If the plaintiff makes out the *prima facie* case, a presumption of discrimination arises. This shifts the burden of production to the defendant to proffer a nondiscriminatory reason for its challenged action or actions (See *id.* at 154). If the defendant provides such a nondiscriminatory reason, the presumption of discrimination is eliminated (See *id.*). The burden of persuasion remains with the plaintiff at all times; ultimately it is the plaintiff's responsibility to convince the trier of fact that illegal discrimination occurred (See *id.*). Thus, if the defendant proffers a nondiscriminatory reason for his actions and the plaintiff cannot "point to evidence that reasonably supports a finding of prohibited discrimination," the defendant is entitled to summary judgment. *Id.* (citing *Fisher v Vassar College*, 114 F.3d 1332 (2d Cir.1997)); cf. *Kravit v Delta Air Lines*, No. CV-92-0038, 1992 WL 390236, at 2 (E.D.N.Y. Dec.4, 1992) [applying the above legal framework to a Section 296(15) claim]; *Ferrante v Am. Lung Assoc.*, 90 NY2d 623, 629-31 [1997] (applying the above framework to a Section 296 claim for age discrimination).

Here, Uptown concedes, for the purposes of its motion, that plaintiff has stated a *prima facie* case with regard to Uptown's termination of plaintiff's employment. Uptown then proffers a non-discriminatory reason for its action, namely that, as a result of his criminal convictions, plaintiff may pose a safety risk to its customers when he goes into their homes. Thus, the Court's analysis properly centers on plaintiff's ability to present evidence that would allow a reasonable jury to conclude that the termination of plaintiff's employment resulted from prohibited discrimination, i.e. Uptown's consideration of the fact and/or details of the conviction itself. Interestingly, both plaintiff and Uptown's witness testified that there were at least four (4) other employees with similar criminal convictions who were not terminated when Uptown learned of their criminal backgrounds.

Examining the entire record, construing the facts implicated by the four points above in the light most favorable to plaintiff, and resolving all inferences and ambiguities in his favor, plaintiff has raised questions with regard to the truth of Uptown's proffered explanation. Therefore, the branch of the motion which is to dismiss plaintiff's claim for discrimination based upon plaintiff's prior conviction, is denied.

The standards for recovery for racial discrimination under the NYSHRL, Executive Law § 296, and the NYCHRL, Administrative Code §§ 8-101, *et seq.*, are the same as the federal standards under Title VII of the Civil Rights Act of 1964 (*see* 42 USC § 2000-e [2], *et seq.*; *Forrest v Jewish Guild For the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante*, 90 NY2d 623 [1997]). A plaintiff alleging racial discrimination in employment has the initial burden to establish a *prima facie* case of discrimination (*see Forrest*, 3 NY3d at 305). To meet this burden, a plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*id.*, *citing Ferrante v American Lung Assn.*, 90 NY2d 623 [1997]). The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through, the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Forrest*, 3 NY3d at 305, *citing Ferrante*, 90 NY2d 623). If the evidence rebuts the presumption of discrimination, plaintiff must then prove that such reasons were "merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" (*Harrison v Chestnut Donuts, Inc.*, 60 AD3d 1130, 1132 [2009], *citing Forrest*, 3 NY3d at 305).

In order to establish entitlement to judgment as a matter of law dismissing the cause of action which alleged discrimination based on race in violation of Executive Law § 296(1)(a), the "defendants [had to] demonstrate either plaintiff's failure to establish every element 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 NY3d 295, 305 [date] *see Morse v Cowtan & Tout, Inc.*, 41 AD3d 563 [date]; *Cesar v Highland Care Ctr., Inc.*, 37 AD3d 393, 394 [date]; *DelPapa v Queensborough Community Coll.*, 27 AD3d 614 [date]; *Hemingway v Pelham Country Club*, 14 AD3d 536 [date]). The defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the racial discrimination cause of action by submitting evidence that plaintiff failed to establish that his termination occurred under circumstances giving rise to an inference of discrimination. Indeed plaintiff produced no evidence, aside from his unsubstantiated assertions, of any *animus* toward him as a result of his race. Furthermore, plaintiff failed to rebut defendants' proof that the purported termination did not arise

under circumstances giving rise to an inference of discrimination" (*Mete v New York State Off. of Mental Retardation and Dev. Disabilities*, 21 AD3d 288, 290 [2005] [affirming summary judgment dismissing discrimination claims although plaintiffs established a prima facie case]; *Roberts v Philip Morris Mgt. Corp.*, 288 AD2d 166, 166 [2001] [same]; *Schwaller*, 249 AD2d at 196-197 [same]; *Broome v Keener*, 236 AD2d at 498 [same]; see also *Abdu-Brisson v Delta Air Lines, Inc.*, 239 F.3d 456, 470 [2d Cir. 2001], cert. denied 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 [2001] ["Although Plaintiffs met their *de minimis* burden of establishing a *prima facie* case of age discrimination, they have failed to produce sufficient evidence to support a rational finding that the nondiscriminatory business reasons proffered by the defendant for the challenged employment actions were false."]; *Saenger*, 706 F.Supp.2d at 507-508 [granting employer summary judgment although age discrimination plaintiff made out a *prima facie* case] ). Accordingly, the branch of the motion which seeks summary dismissal of plaintiff's racial discrimination claim, is granted.

#### Conclusion

The branch of the motion which is to dismiss all claims against defendant Nelson Feliciano, is granted as unopposed and otherwise on the merits.

The branch of the motion which is to dismiss the discrimination claim based upon plaintiff's prior conviction is denied. The branch of the motion which seeks summary dismissal of plaintiff's racial discrimination claim, is granted.

Dated: December 23, 2013

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**JANICE A. TAYLOR, J.S.C.**

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