

**Stephenson v Hotel Employees and Restaurant
Employees Union Local 100 of AFL-CIO**

2003 NY Slip Op 30072(U)

January 14, 2003

Supreme Court, New York County

Docket Number: 0011415/1995

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Jane S. Solomon
Justice

PART a

Stephenson, Albert
- v -
Hotel Employees

INDEX NO. 114158/95
MOTION DATE 11/14/02
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for Set Aside the Verdict

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-8</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

**SCANNED
JAN 27 2003**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 1/14/03

JANE S. SOLOMON
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55
-----X
ALBERT STEPHENSON and LEROY HODGE,

Plaintiffs,

INDEX NO. 114158/95

-against-

DECISION AND ORDER

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION LOCAL 100 OF THE
AFL-CIO and HOTEL EMPLOYEES AND
RESTAURANT EMPLOYEES INTERNATIONAL
UNION,

Defendants.

-----X
JANE S. SOLOMON, J.

Defendants Hotel Employees and Restaurant Employees
Union Local 100 of the AFL-CIO and Hotel Employees and Restaurant
Employees International Union, pursuant to CPLR 4404(a), move for
an order setting aside the verdict in favor of plaintiffs, and
directing judgment in their favor.

In the alternative, Defendants seek a new trial on
three grounds. They are: (i) the jury charge constituted
prejudicial error; (ii) the court excluded admissible probative
evidence which exclusion prejudiced them; and (iii) the damages
awarded should be reduced because they were excessive, contrary
to law and against the weight of the competent evidence.
Defendants also seek an order pursuant to CPLR§ 2201 staying
entry of the judgment, a matter which is moot since judgment has
been entered.

Plaintiffs Leroy Hodge (Hodge) and Albert Stephenson

(Stephenson) oppose the relief sought by Defendants and cross-move for an additur of damages for mental anguish or, **in the** alternative, for a new trial on damages. The motions are decided as follows.

Background

This is a lawsuit for employment discrimination based on age. Defendants argued to the jury that Hodge and Stephenson were not fired because of their age, but because their employer had reason to believe that they were engaged in serious misconduct, which included bribery. They also disputed the plaintiffs' claim that they would have continued to work for any significant period of time had they not been terminated.

As relevant here, the jury was instructed that:

I instruct you that, as a matter of law, by virtue of their age, the plaintiffs were members of a protected class, that they were actively discharged within the meaning of what I just said, and that also within the meaning of what I just said, they were qualified for the positions they were holding; that is each was able to perform the duties of that position. Trial Transcript (Tr.) at p. 828.

Also at issue on this motion is the following jury charge:

If you find that plaintiff has shown evidence that his discharge occurred under circumstances giving rise to an inference that age was a determining factor in the decision to discharge him, then you must consider whether the defendants have presented evidence that Mr. Sirabella had a legitimate, independent and nondiscriminatory reason to discharge that plaintiff on June 11, 1992.

If you find that defendants have presented such evidence, you shall take this evidence into account in deciding whether age was a determining factor in the decision to discharge each plaintiff. Tr. at p. 829.

The jury returned a verdict in favor of Hodge for \$666,761 and Stephenson for \$586,950.

Discussion

1. Directed Verdict

Defendants argue that they are entitled to a directed verdict because Hodge and Stephenson failed to establish that the reason given by Defendants for the discharges was a pretext.

Defendants' assertion is easily disposed of because a plaintiff does not have a burden of proof on the issue of pretext if the jury does not believe the defendant's reasons for the discharge.

See Ferrante v American Lung Ass'n, 90 NY2d 623, 630 (1997)

(stating that if the fact finder believes the plaintiff's explanation of intentional discrimination and rejects the defendant's proffered reasons for the employment decision, that it is permissible "for the trier of fact to infer the ultimate fact of intentional discrimination" [citation omitted]).

Because it was not unreasonable for the jury to believe that Hodge and Stephenson were discharged because of their age, rather than for misconduct as alleged by Defendants, there is no basis for disturbing the verdict. Therefore, that portion of Defendants' motion which seeks a directed verdict in their favor is denied.

Similarly, there is no support for Defendants' claim

that the jury's verdict was against the weight of the substantial evidence of a non-discriminatory reason supporting the plaintiffs' discharge. A jury's verdict should not be set aside unless it is clear that the verdict could not be reached upon any fair interpretation of the evidence. Loushman v A.W. Flint Co., Inc., 132 AD2d 507 (1st Dept 1987). The standard for setting aside a jury's verdict is whether the verdict is palpably incorrect. Id at 508. The verdict here was not.

2. The Charge

Defendants also contend that it was error for the jury to be charged that, as a matter of law, Hodge and Stephenson were qualified for the positions they held. And, they argue that the jury was given a charge that improperly permitted it to evaluate whether the reasons Defendants gave for terminating plaintiffs were "legitimate."

Defendants' argument that the court improperly instructed the jurors regarding the elements of the prima facie case misstates the law. In a jury trial, matters of law are decided by the judge, while issues of fact generally are determined by the jurors. (CPLR §4101). At trial, only the facts which are in issue go to the jury. In this case there was no dispute that plaintiffs, by virtue of their ages, were in the protected class. Nor was there any dispute that their firing was "a discharge from employment" within the meaning **of** the statute. Accordingly, those issues were not put to the jury.

On the issue of their qualifications, Defendants

confuse the distinction between an employee's qualifications for a job and the quality of his performance. In order to establish that he is qualified, a plaintiff need only show that he possesses the necessary basic skills. See Aquirre v New York State Police, 156 FSupp2d 305 (S.D.N.Y.2001). That an employee has held the job for a long period of time supports an inference that he has these required basic skills. Id. at 318. Moreover, neither Hodge nor Stephenson failed to fulfill any licensing, physical, educational, or other specific job requirement. Consequently, here too, there was no issue for the jury. See Nallan v Helmslev-Spear. Inc. 50 NY2d 507, 517 (1980) (stating that a trial court may make a legal determination on a question of fact where no valid line of reasoning exists that could permit a contrary view of the facts on the evidence presented). Thus, the portion of Defendants' motion addressed to the charge is meritless.

3. Excluded Evidence

Defendants seek a new trial on the grounds that the court improperly denied admission of (i) two letters purportedly written and mailed by a deceased declarant, (ii) testimony by Mr. Granfield (staff director of Defendant Local 100 at the time of the discharge) concerning a conversation with the same declarant. (iii) a report that was filed in Federal Court under seal, and (iv) records purportedly establishing the age and names of employees who were fired or retained at or around the time plaintiffs were terminated. Defendants claim that the exclusion

of this evidence prevented them from establishing "after-acquired evidence" that would have led inevitably to the termination of both men.

However, Defendants have failed to demonstrate that the evidence they sought to admit was wrongfully excluded. First, they have not established that any of their witnesses could have provided competent testimony that Mr. Sirabella (Defendants' deceased Trustee who discharged plaintiffs) actually wrote, signed and mailed the subject letters. Second, the testimony of Mr. Granfield, relating to his alleged conversation with the decedent, was stricken as non-responsive to the question posed, and not on the grounds of hearsay as Defendants suggest. And, because only a brief portion of Mr. Granfield's testimony is provided here, there is no method of evaluating whether Defendants were hindered from offering admissible testimony.

The report itself is not attached to the motion, but the annexed portions of the transcript and the court's recollection indicate that the references to misconduct were patently hearsay and did not constitute admissible evidence justifying why Defendants could have fired Hodge and Stephenson. As a result, there is no support for Defendant's claim of after-acquired evidence based on the report. Moreover, the court is confident of the trial ruling pertaining to the issue of admissibility of the report itself.

Last, it cannot be said that this court erred in excluding documents Defendants sought to introduce as business

records. This is because it is unclear from the motion papers which documents are at issue.

4. Damages

Defendants argue that Stuart Sachnin, the witness called by plaintiffs to establish their economic losses, was not qualified as an expert in any field and that the jury should not have been permitted to consider his opinion on damages. This court cannot properly revisit this issue because that portion of the trial transcript pertinent to Sachnin's education and professional background was not submitted for review on these motions. In any event, there was enough material for the jury to evaluate his testimony in connection with the charge given as to expert witnesses.

Defendants next assert that the damages awarded should be reduced because offsets should have been made for unemployment insurance, social security payments and pension benefits received. However, Defendants failed to offer evidence of any amount by which the jury or the court could have measured such reduction.

They also contend that Hodge and Stephenson failed to mitigate their damages by seeking reasonable employment. Defendants are correct that a plaintiff in an employment discrimination case must use reasonable efforts to find suitable employment. However, it is the defendant employer who "has the burden of proving that suitable work existed in the marketplace and that its former employee made no reasonable efforts to find

it." Greenway v Buffalo Hilton Hotel, 143 F3d 47, 53 (2d Cir. 1998). Indeed, the request to charge submitted by Defendants sought a charge consistent with Greenway in this respect. See Exh. A to Plaintiffs' cross-motion, at 5. Defendants' failure to meet their burden on this issue undoubtedly was a factor in the jury's verdict.

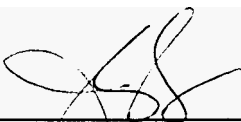
4. Cross-Motion

Hodge and Stephenson did not plead emotional distress sufficiently in the complaint or the bill of particulars (copies of which are not submitted in support of the cross-motion), and they offered no expert testimony of mental distress. Their claims for "pain and suffering" damages properly were denied at the end of trial. Plaintiffs rely on a catch-all allegation in the pleadings that they sustained injuries and diminished self-esteem. They contend that an employment discrimination suit brought under the Human Rights Law includes the right to recover such damages. Under the Human Rights Law, "any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages." (Executive Law §297(9)). No specific remedy or limitation of remedies is identified in the statute, and plaintiffs' vague allegation of emotional harm is inadequate. The evidence at trial did not support a claim for damages based upon emotional injuries and none is shown in these papers.

Accordingly, it hereby is

ORDERED that the motion and cross-motion are denied.

Dated: 1/14/03



J.S.C.

JANE S. SOLOMON
J.S.C.