

**Mete v New York State Office of Mental Retardation
and Developmental Disabilities**

2004 NY Slip Op 30168(U)

January 14, 2004

Supreme Court, New York County

Docket Number: 0115683/2000

Judge: Paula J. Omansky

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

PRESENT: PAULA J. OMANSKY

PART 47

Justice

*Mele J.L. & Mrs. Kottler and
1019 Lippitt of Main Restaurant
Development, Dist. Ct. etc*

INDEX NO. 114687-1000
MOTION DATE 10/17/08
MOTION SEQ. NO. 04
MOTION CAL. NO. 99

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided*

*in accordance with the
a company's memorandum
decision*

JUSTICE

Dated: 11/17/08 _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X

JOHN L. METE and MERRILL J. GOTTLIEB,
individually and on behalf of all other
persons similarly situated

Index No. 115683/2000

Plaintiffs,

DECISION AND ORDER:

-against-

NEW YORK STATE OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES and NEW YORK STATE
DEPARTMENT OF CIVIL SERVICE

Defendants.

— — — — — X — — — — —

PAULA J. OMANSKY, J.:

In this action for age discrimination under the Human Rights Law (Executive Law, Article 15, 8296, et seq.), defendants, the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") and the New York State Department of Civil Service ("DSC") move, pursuant to CPLR 3212, to dismiss plaintiffs' first through third causes of action on the ground that plaintiffs have failed to state a claim for age discrimination based on the theory of disparate treatment

FACTS

In mid 1989, defendant OMRDD undertook a staff reduction which involved complete elimination of the Chief of Service job title, followed by a demotion or retirement of all incumbents holding that job title. As a result all 46 incumbents, including plaintiffs, each of whom was over the age of 40, were demoted, or allegedly forced to retire from State service.

Plaintiffs John L. Mete and Merrill J. Gottlieb, individually

and on behalf of all other persons similarly situated, allege that prior to September 20, 1989, each of the Chiefs held a salary grade of DCS-5 or GS-32. After September 20, 1989, 40 of the former Chiefs, i.e., those who did not resign or retire as a result of the Reduction in Force ("RIF"), were demoted to salary grades DCS M-1, M-3 or GS-25. This resulted in a loss of base salary and other compensation-related benefits in the approximate amount of \$30,000 per annum per affected person. Plaintiffs also allege that each of the duties being performed by the Chiefs were reassigned to Team Leaders and Deputy Directors.

Plaintiffs maintain in this action that older workers over 40 were adversely effected by layoffs and that of the 117 non-Chief OMRDD employees affected by the reduction, 69 or 59%, were age 40 and older. According to plaintiffs, of the 163 employees who were ultimately affected by the reduction, 74% were 40 and over. On the other hand, the total percentage of OMRDD's employees aged 40 and over in July 1989 was only 46.5%. In further support of **this** action, plaintiffs have submitted evidence of a "chi-square test" by Dr. David F. Greenberg who concluded that the results were statistically significant and indicated a disparity based on age.

In opposition to plaintiffs' allegation, defendants have presented affidavits and a budget report from 1989 (the "1989 Budget Report") which states that the Chief of Services officer's position had been under scrutiny prior to the reduction in force in September 1989. An earlier document dated 1981 entitled "Alternative Organization Structures for Office of Mental

Retardation and Developmental Disabilities Borough and District Disabilities Services Offices" (the "1981 Organization Report") concluded that the management staff at the service level have inappropriate and inadequate responsibilities for the current levels of compensation (see, defendants' Ex. 1). The 1981 Organization Report proposed that the current Chief's title should be changed and that the new positions be given a more appropriate level of compensation.

Defendants have also submitted the affidavit of Barbara Howes, the Deputy Commissioner for Program Operations at GMRDD in 1989, who states that the agency acted upon the recommendations in 1985 and "earmarked" the Chief's title. In addition, defendants presented the affidavit of Arthur Y. Webb, the former OMRDD Commissioner, who explains that the reduction in force had three priorities; the streamlining of OMRDD's organization, the reduction of unnecessary positions and functions, and the better utilization of resources for consumer needs.

In a decision and order dated May 6, 2003 (the May 2003 order), this court dismissed plaintiffs' disparate impact claims finding that defendants had presented sufficient documentary evidence that a reduction in force was a budgetary necessity and the Chief of Service Title was outmoded under the planned reorganization. This court also declined (in the May 2003 order) to modify the prior holding on September 18, 2002 (the September 2002 order) where the court ruled that

A reduction in work force due to economic conditions is a legitimate, independent and non-discriminatory reason

for an employment decision (Laverick & Hines, Inc. v New York State Division of Human Rights, 88 NY2d 734, 738 [1996]). If the law permits an employer the right to reduce the number of employees in a job title (ibid.), there is no legal basis for this court to find that defendants are prohibited from eliminating an entire job title as the result of reorganization of the supervisory structure of the OMRDD.

(September 2002 order, at 12)

In the May 2003 order, this court granted defendants leave to renew to dismiss plaintiffs' disparate treatment claims as well as any other remaining cause of action.

The remaining facts of the alleged discrimination and the procedural history are fully outlined in this court's prior May 2003 and September 2002 orders and shall not be restated here.

DISCUSSION

In order to succeed on their claim that they suffered disparate treatment, plaintiffs must eventually establish a prima facie case by showing that they were members of a protected class, were qualified for the position, had experienced an adverse employment act giving rise to an inference of discrimination (Brennan v Metropolitan Opera Assocs., 192 F 3d 310, 316 [2d Cir 1999]). Thereafter, the employer must articulate a legitimate non-discriminatory reason for the adverse action it took against the employee (ibid.). Plaintiff must then show that the proffered reason was pretextual (ibid.).

Here, there is no dispute that the plaintiffs are members of a protected class and that they were qualified for their positions. Plaintiffs can also reasonably argue that their retirement and their drop in pay grade was an adverse employment action. As to

the inference of discrimination, the United States Supreme Court has found that disparate treatment is the most easily understood type of discrimination where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]" (Raytheon Co. v Hernandez, _____ US _____, 124 S Ct 513, ____ [2003], quoting Teamsters v United States, 431 US 324, 335, n. 15 [1977] [remaining citation omitted]). Evidence of an employer's subject intent to discriminate is required to sustain a disparate-treatment claim (Raytheon Co. v Hernandez, supra).

"In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision" (Hazen Paper Co. v Biggins, 507 US 604, 610 [1993]). "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome" (ibid.). The United States Supreme Court has held that when conducting a rational basis review the court should not overturn a governmental action unless the varying treatment of different groups or persons is so unrelated to

¹ "By contrast, disparate-impact claims 'involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity'" (Raytheon Co. v Hernandez, supra, at _____, 124 S Ct, at ____, quoting Teamsters v United States, supra, 335-336, n. 15). Under disparate-impact theory of discrimination a facially neutral employment practice may be deemed illegally discriminatory without evidence of an employer's subject intent to discriminate (Raytheon Co. v Hernandez, supra).

the achievement of any combination of legitimate purpose that the court can only conclude that the government's actions were irrational (Kimmel v Florida Bd. of Regents, 528 US 62, P4 [2000])!

The standard for recovery under New York's Human Rights Law is in accord with Federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 20003, et seq.) (Miller Brewing Co. v State Division of Human Rights, 66 NY2d 337, Y3E [1985]). Similarly, in reviewing a claim under the State Human Rights Law the issue is whether the firing of the plaintiffs raises material questions concerning whether the defendants' reasons for termination plaintiffs were pretextual (Landwehr v Grey Advertising, Inc., 211 AD2d 583, 584 [1st Dept 1995]²).

In the September 2002 order this court held that submitted statistical evidence was not dispositive, ruling that

plaintiffs' statistical evidence does not disprove defendants' explanation for the layoff. The common employment factor here is not age but years of experience. Employees with more time on the job have a greater chance of being promoted to higher grade levels. In fact, "promotions" to higher GS grades based on "longevity" (years in a particular State job title) are features of many State positions and are often the result of collective bargaining agreements.

Accordingly, the fact that older employees, who generally accumulate more years on the job, are more often supervisors does not automatically prove age-based discrimination when those positions are eliminated for budgetary reasons

(September 2002 order at 13, citing Becker v City of New York,

(cf., Cella v Fordham University, 228 AD2d 300 [1st Dept 1996] ["Defendant's favorable evaluations of plaintiff's job performance for over a decade and up until the time plaintiff turned 60 years of age raise an issue of fact as to whether poor job performance was a pretext for age discrimination"]).

supra, 249 AD2d, at 98 and Hazen Paper Co. v Biggins, 507 US 604, 611 [1993]).

The present submissions and arguments relating to the statistical data do not require this court to modify its earlier findings so as to conclude that the statistical evidence now supports a claim of disparate treatment.

As to the remaining allegations in support of their claim of intentional age discrimination, plaintiffs maintain that defendants illegally and negatively stereotyped older workers and that this animus was the true reason behind the reorganization. Plaintiffs submit affidavits of various individuals who state that they heard managers disparaging older workers, In particular, plaintiffs submit the affidavit of Fiorello Cicero, defendant OMRDD's Chief of Service, who stated that during the summer of 1989 he met with commissioner Webb and discussed

that zhe Chiefs were the veteran employees of the state system and were the individuals responsible for the overall good operation of the facility programs. Mr. Webb said that he was aware of this and that he wanted to keep the chiefs, but his staff persuaded him that the Chiefs were the old guards of the system and that OMRDD needed new and younger employees to take over the leadership of the agency as OMRDD moves more strongly into the community

(Cicero 8/30/1994 at 2, ¶ 3). Cicero also states that Elin Howe, Acting Commissioner

acknowledged that OMRDD need to make room for younger employees to advance in the system, and that with the contraction of staff, OMRDD needed to remove the old guard who was standing in the way of the 'community movement. She, of course, later denied thaz the Chiefs were part of this old guard.

(id. at 2, ¶ 4).

Joseph Moskowitz, the permanent Chief of Service for OMRDD, stated that in 1988, he met with Mr. Robidoux, the Director of the Letchworth Village Developmental Center to discuss the former's evaluation. According to Moskowitz, Robidoux discussed his age and asked if he had enough years to retire. Moskowitz further avers that

I told him that I had no intention of discussing my years of service or retirement plans with him. He then said that he thought my current position required someone who was younger, had more energy, and was more committed to his goal of aggressively de-institutionalizing the individuals who resided in the Pre-placement Unit. He again suggested that I consider retiring, but that if I didn't he was re-assigning me immediately to the position of Evening Administrator. I objected, but accepted this appointment

(Moskowitz 9/31/1994 a 2 ¶4). Moskowitz further states that

I discussed this re-assignment with representatives from OMCE, the managerial association for state employees, and was told that I had no possible grievance, since my salary was not being affected. I worked in this position for the next year and one-half, during which time I had satisfactory evaluations. Often staff from the facility would talk to me on my rounds and would indicate that Mr. Robidoux often referred to me as "the old man" in such derogatory statements to them as "how's the old man faring" and "Is he ready to retire yet?"

(id. at 2, ¶ 5). According to Moskowitz, the Associate Director, Ms. Wheeler also made comments to him such as "Aren't you tired of this stuff yet; and "aren't you eligible to retire?" (id. at 3, ¶6).

Mark Davis also stated that Fred McCormack, Director of the Long Island Development Center, stated in 1981 that the Chiefs of Service were "old, lazy and overpaid."

Although evidence of slurs, either alone or in conjunction with other factors, may support a discrimination claim (Ferrante v American Lung Assn, 230 AD2d 685, 686 [1st Dept 1996] aff'd 90 NY2d 523 [1997]), plaintiffs must still demonstrate a causal relationship between the remarks and the termination (Hardy v General Electronic Co., 270 AD2d 700, 703-704 [3d Dept 1, ly denied 95 NY2d 755 [2000]). Stray remarks spoke over a number of years are insufficient to raise a question as to whether the defendants' determination to eliminate a level of management was pretextual (Moon v Clear Channel Communications, Inc., 307 AD2d 628, 632 [3d Dept 20321]). In this instance some of the alleged comments occurred years earlier whereas other remarks were not contemporaneous with either the lay off or the task force report (Harcv v General Electronic Co., supra). Moreover, the sporadic occurrence of the alleged statements is not sufficient in this context to show that the work place was permeated with pervasive discriminatory intimidation and ridicule to support a claim that the conditions of plaintiffs' employment were altered (Brennan v Metropolitan Opera Assocs., supra, 192 F 3d, at 317-318). None of the litigants who submitted affidavits alleging disparaging remarks complained about the statements to anyone in authority nor did they take any immediate action based on their belief that they were harassed because of their age (Brennan v Metropolitan Opera Assoc., Inc., 284 AD2d 66, 77-78 [1st Dept 2001]). The one individual who seems to have tried to complain, Moskowitz, states that his collective bargaining unit refused to take up the issue that his shift was

changed to evening hours because of age discrimination when there was no annual salary change.

There is nothing in the present record which shows that the agency managers who made the actual determination to eliminate the Chiefs title took that action because they believed that the Chiefs were incompetent or unnecessary because of their age. In contrast., the submitted documents show that the State task force found that a different method of organization would be better and more cost effective. Disparate treatment does not exist when the factor motivating the employer is some feature other than the employee's age (Hazen Paper Co. v Biggins, supra, 507 US, at 609). Moreover, a reduction in work force due to economic conditions is a legitimate, independent and nondiscriminatory reason for an employment decision (Laverack & Haines, Inc. v New York State Div. of Human Rights, 88 NY2d 734, 739 [1996]).

The court further rejects plaintiffs' assertion that the underlying budget reports do not support defendants' decision to eliminate the chief of service job title (cf., Equal Employment Opportunity Commission v Dandia Corp., 656 F2d 500, 627 [10th Cir 1980] [elimination of jobs based on the likelihood of personnel taking advantage of an early retirement program is impermissible). The submitted evidence shows that the reduction in work force was due to economic conditions and the changing needs of the defendant agencies. These policy changes resulted from both market trends and decision of the executive branch to shift the State's service focus from institutional care to community based programs. For

example, the affidavit of William McChesney, the Chief Classification and Pay Analyst in the Division of Classification and Compensation in the New York State Department of Civil Service, notes that the State task force reviewing the supervisor position found that

the Chief of Service positions, which comprised management staff at the service level, appeared to have inappropriate and inadequate responsibilities, functions and workload for their level of compensation. This was evidenced by the involvement of the chief of service in day-to-day management problems and administrative details which could be performed more appropriately by line managers

(McChesney 5/30/2003, Aff at 4, § 15). McChesney also stated that the task force recommended that

the title of Chief of Service be changed to Developmental Service Manager and that the positions be reallscated from the M-V to the M-III level, placing these positions in a more appropriate level of compensation relative to management positions immediately above and below in the developmental center hierarchy and resulting in an improved program management career ladder

(McChesney 5/30/2003, Aff at 5-6, § 23).

McChesney's statement is not a recent fabrication intended for litigation since the record show decades of reports and analyses to support the State's actions. The initial 1981 Organizational Report clearly noted that the existing administrative management staff is not assigned responsibility which is commensurate with the pay grade levels of those positions (1981 Organizational Report at 16) and recommended that any future organizational arrangement "[r]edefine the DC management structure to ensure that position descriptions and grade levels are commensurate with current responsibilities" (1981 Organizational Report at 18)

The 1989 Budget Report (see, Flamm 7/28/2003, Aff, Ex 13) also outlined New York's decision to replace costly in-residence facilities, some of which were later found to be substandard (e.g., the scandal of the Willowbrook State School in Staten Island) with cost effective and less restrictive community-based centers for treating the mentally or developmentally disabled. The submitted budget report noted that the budget "signals a more limited developmental pipeline for 1990-91" (1989 Budget Report at 26). Furthermore, the 1989 Budget Report found that

OMRDD and the voluntary sector will be challenged by the restricted fiscal circumstances under which all State-funded programs will operate, and will need to coordinate and consolidate their collective resources to cope with this environment. New ways of doing business need to be explored and advanced, including the development of low-cost service alternatives to high-cost, medically intensive models.

(ibid.). The 1989 Budget Report also recognized that

the Agency can best determine the distribution of available staff, and that the Commissioner must have the ability to reduce staffing levels, through selected layoffs if appropriate, to ensure the optimal mix of staff and clients as institutional census decreases. In this vein, OMRDD abolished approximately 230 positions in 1988-1989, many of which were converted to more appropriate client direct-care positions. It is anticipated that up to 200 positions will be similarly affected in 1989-90. OMDRR will make every effort to redeploy or find new employment for affected employees while minimizing the disruption of service pattern.

(ibid.)

The mere fact that OMRDD made fewer cuts than initially predicated does not, by itself, show that respondents' staffing reorganization was unnecessary and based on improper motives. Plaintiffs have failed to produce evidence sufficient to raise an

issue of fact as to whether the respondents' asserted justification for the staff reduction and reorganization were false. The submitted record fails to show that the budget reports, themselves, were generated to hide discriminatory intent (Reeves v Sanderson Plumbing Products, Inc., 530 US 133 [2000]).

Contrary to plaintiffs' arguments, there is no basis for this court to modify that portion of the prior holding in September 2003 which found that

[i]n budgetary matters, the essential process is detailed by the State Constitution, and the role of each branch of government is distinctly treated (Katter of County of Oneida v Berle, 49 NY2d 515, 137 [1980]). Plaintiffs do not show that defendants violated any budgetary law concerning the appropriation or allocation of State funds when they eliminated the plaintiffs' Civil Service title (cf., City of New York v New York State Division of Budget, 160 Misc2d 1028 [Sup Ct, NY County [1994]). The record does not indicate that the Legislature eliminated OMRDD's discretion to allocate funds or to reorganize its work force. Thus, plaintiffs have presented no authority which would justify judicial interference with defendants' rational budgetary determinations because "[b]road policy choices, which involve the ordering of priorities and the allocation of finite resources, are matters for the executive and legislative branches if the government and the place to question their wisdom lies not in the courts but elsewhere" (Jiqgetts v Grinker, supra, 75 NY2d, at 414).

(September 2003 order at 14)

Accordingly, plaintiffs are unable to demonstrate that the actions taken by defendants to eliminate the Chief of Service title are devoid of any substantial legitimate justification (Becker v City of New York, supra, 249 AD2d, at 98, citing Campaign for Fiscal Equity, Inc. v State of New York, 86 NY2d 307, 322-323 [1995])

Plaintiffs do not offer any evidence indicating that

defendants discriminated on the basis of age in terms of rehiring or re-assigning staff to other positions (cf., Landwehr v Grey Advertising Inc., supra, 211 AD2d, at 584 [plaintiff dismissed during a reduction of workforce may have been qualified for other position in organization which were awarded to younger employees]) There is no evidence that the younger managers received higher pay-grade levels or were accorded better treatment in job placement than older workers after the Chief's title was eliminated (Peskin v New York City Transit Authority, 304 AD2d 634 [2d Dept 2003]; cf., Classic Coach v Mercado, 283 AD2d 164, 170-171 [2d Dept] [lv denied 97 NY2d 601 [2001] [Commissioner justified in finding that employer's claim that plaintiff lacked experience was proffered reason for disparate treatment based on sex discrimination]).

The court has considered plaintiffs' remaining objections to the defendants' application and finds that the record does not raise an issue of fact sufficient to require a trial of plaintiffs' disparate treatment claims.

Defendants' motion to dismiss plaintiffs' first through third causes of action on the ground that plaintiffs have failed to state a claim for disparate treatment, is granted.

Accordingly, it is


CRCERED that defendants' motion for summary judgment on the remaining claims is granted and the entire complain! is dismissed

without costs; and it is further

ORDERED that the Clerk of the court is to enter judgment accordingly.

DATED: January 14, 2004

ENTER:



PAULA F. GMANSKY
J.S.C.