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SHORT FORM ORDER md,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

ROBERTA MILLER,

Plaintiff(s),

-against-

INDEX NO.:28936/92
CAL. NO.: 2005H1225
MOTION DATE: 9/18/09
MOTION SEQ. NO.14,15

THE COUNTY OF NASSAU and THE NASSAU COUNTY CIVIL SERVICE COMMISSION,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....1-3
Notice of Cross Motion.....4-6
Answering Affidavits.....7
Replying Affidavits.....8,9
Briefs: 10

Upon the foregoing papers, it is ordered that this motion by by defendants for leave to reargue their motion for judgment as a matter of law is denied. Motion by plaintiff for leave to reargue defendants' motion to set aside verdict and order a new trial is denied.

This is an action by a former Nassau County employee for reinstatement with back pay pursuant to § 77 of the Civil Service Law. Plaintiff alleges that she was laid off in bad faith based upon her being a member of the Democratic Party. At the conclusion of plaintiff's case, defendants moved pursuant to CPLR 4401 for judgment as a matter of law, and decision was reserved by the court. After the jury returned a verdict for plaintiff, defendants renewed their motion for judgment as a matter of law and, in the alternative, moved for a new trial. The court

determined that the jury could have inferred that the layoffs were based upon partisan considerations from the evidence that party affiliation effected the initial hiring process. Thus, the court denied defendants' motion for judgment as a matter of law because there was a rational process by which the jury could have reached its verdict.

However, the court granted defendants a new trial on the ground that the verdict in favor of plaintiff was contrary to the weight of the evidence. The court noted the absence of statistical evidence that Democrats were more adversely effected by the layoffs than were Republicans. The court also noted that plaintiff was hired, rehired, and promoted under Republican administrations. Thus, the court concluded that there was no fair interpretation of the evidence by which the jury could have found that plaintiff's layoff was in bad faith.

Defendants move pursuant to CPLR § 2221 for leave to reargue their motion for judgment as a matter of law. Defendants argue that they received insufficient notice of plaintiff's claim that she was laid off based upon her political party affiliation and, in any event, there was insufficient evidence to support the verdict. In their original complaint filed in 1992, plaintiff and eight other employees alleged that they were laid off in violation of the Civil Service Law. In 1996, following the Court of Appeals' ruling in *Torre v Nassau*, (86 NY2d 421 [1995]), Justice DiNoto issued an order permitting plaintiffs to serve an amended complaint asserting a claim that their layoffs violated the doctrine of "legislative equivalency." In essence, this doctrine provides that if a position is created by legislative act, it must be abolished in an equivalent manner (Id at 426).

In 2005, all the plaintiffs except Ms. Miller settled their claims for the amount of compensation which they would have earned from the time of the layoff to the time that their positions were abolished by the legislature. At her examination before trial held that year, Ms. Miller testified as to her claim that she was laid off in bad faith based upon her political party affiliation. Although defendants subsequently moved to preclude plaintiff from offering evidence as to this bad faith claim, their motion to preclude was denied by the court. In moving for leave to reargue

their motion for judgment as a matter of law, defendants assert that the court overlooked the fact that the complaint was not amended to allege a claim that plaintiff's layoff was based upon her political party affiliation.

CPLR 3025(c) provides that the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances. This rule reflects the policy of the CPLR "to diminish the importance of pleadings and to direct effort instead to the substantive rights involved" (McKinney's practice commentary C3025:15). Whether the motion to amend is before or after judgment, the primary consideration is to avoid surprise and prejudice. Because of the court's established authority to permit amendment of the pleadings to conform to the proof at trial, plaintiff's failure to amend prior to trial was not a bar to the proving of her claim (*Ainetchi v 500 West End*, 51 AD3d 513, 516 [1st Dept 2008]). Since the court ruled prior to trial that plaintiff could offer proof that she was laid off based upon her political party affiliation, defendants were not surprised or prejudiced. Accordingly, the complaint is deemed amended to assert a claim that plaintiff was laid off in bad faith based upon her political party affiliation. Although plaintiff did not move for leave to amend the complaint, she did request this relief in her trial memorandum of law. Defendants' motion for leave to reargue their motion for judgment as a matter of law based upon plaintiff's failure to amend her complaint to assert this claim is denied.

Defendants further assert that the court overlooked plaintiff's failure to prove the lack of a bona fide financial reason for the abolition of her position or that another person was hired to replace her. § 80(1) of the Civil Service Law provides that if positions in the competitive class are abolished because of economic austerity, layoffs must be made in inverse order of seniority. Although a public employer has implicit discretion to abolish positions, it must avoid fraud, collusion, or bad faith (*Chautauqua v CSEA*, 8 NY3d 513, 521 [2007]). Where an employee is laid off based upon his political affiliation, the public employer will have acted in bad faith (*Ambrose v Tompkins*, 208 NY 353 [1913]; *Ause v Regan*, 59 AD2d 317 [4th Dept 1977]).

As defendants note, a claim for bad faith may also be established by proof that there was no bona fide financial reason for the abolition of plaintiff's position or that no cost savings was accomplished because another person was hired in plaintiff's place (*Piekielniak v Axelrod* , 92 AD2d 968 [3d Dept 1983]). However, the absence of a bona fide financial reason for a layoff is not the exclusive means of establishing a bad faith claim. In the case at bar, it was undisputed that Nassau County experienced a $115 million budget deficit. The County had discretion to abolish positions in response to this revenue shortfall. However, it could not use austerity as a pretext for laying off an employee based upon political party affiliation, or otherwise laying off an employee in bad faith.

Because there was no evidence as to when plaintiff's replacement began employment, there was no rational process by which the jury could have found that plaintiff's seniority rights were not respected. However, to target an employee for layoff based upon her political affiliation is to act in bad faith, irrespective of seniority considerations.

From the evidence that party affiliation effected the hiring process, the jury might have found that plaintiff was selected for layoff based upon partisan considerations. Statistical evidence, comparing the percentage of Democrats laid off from plaintiff's department to the percentage of Republicans, would have strengthened the inference of bad faith. However, statistical evidence is not an essential element of a prima facie bad faith claim (See *Baldwin v Cablevision Systems Corp.*, 2009 N.Y. App. Div. LEXIS [1st Dept 2009]). Since defendants have not established that the court overlooked or misapprehended any matter of fact or law in determining the motion for judgment as a matter of law, defendants' motion for leave to reargue is denied.

Plaintiff cross-moves for leave to reargue to the extent that the court set aside the verdict as contrary to the weight of the evidence and granted a new trial. Although plaintiff claims that defendants never moved to set aside the verdict as against the weight of the evidence, defendants did in fact request this relief in their post trial memorandum of law. Moreover, CPLR 4404 provides that the court may set aside a verdict, where it is

contrary to the weight of the evidence, and order a new trial on the court's "own initiative," without the need for a motion.

Plaintiff argues that the court overlooked or misapprehended that fact that plaintiff was the "only Democrat at the supervisory level of [her] Department." Plaintiff asserts that because she was the only supervisor who was a Democrat, reliable statistical evidence was not available. Thus, plaintiff argues that the court should not have considered the lack of statistical evidence in determining there was no fair interpretation of the evidence by which the jury could have reached its verdict.

Statistics based on a small sample will often be excluded, unless the proponent offers expert testimony that the results are significant (*McAlester v United Air Lines*, 851 F.2d 1249, 1258 [10th Cir. 1988]). However, when the number of employees within a particular unit is small, the reliability of statistics based upon the unit may be confirmed by comparing them to statistics based upon total employment in the facility (Id). While plaintiff was the only supervisor in Senior Citizen Affairs who was a Democrat, there may have been Democrats in other titles within Senior Citizen Affairs, and Democrats serving as supervisors or non-supervisors in other Departments. Thus, plaintiff might have offered evidence as to the percentage of Democrats laid off as compared to the percentage of Republicans, in Senior Citizen Affairs, or in other departments, or in the entire County. The absence of such evidence may properly be considered in determining whether the finding of bad faith was supported by a fair interpretation of the evidence.

Plaintiff further argues that there was a fair interpretation of the evidence that she was laid off based upon her political affiliation. Plaintiff argues that the court overlooked the fact that she was initially hired under the Comprehensive Employment and Training Act. Plaintiff asserts that CETA was a "federal program" and the Republican administration had "no control" over her hiring. Plaintiff further argues that the court overlooked the fact that she was rehired from a "preferred hiring list." Plaintiff argues that because she was rehired from this list, the County had "no choice" but to rehire her. Finally, plaintiff argues that the court overlooked the fact that she sought the aid of Bruce Nyman, a Democratic member of the Board of Supervisors, to obtain her

promotion. Plaintiff argues that because Nyman helped her to obtain the position, the fact that she was promoted is not evidence that the Republican administration acted in good faith.

Although the CETA program was federally funded, the County retained the power to hire and fire all employees (*CSEA v Nassau*, 53 NY2d 559, 563 [1981]). Thus, plaintiff was in fact hired by a Republican administration.

Civil Service Law § 81(1) provides for the establishment of a "preferred list" of employees who have been suspended or demoted from the same or similar positions in the same "jurisdictional class." Except as otherwise provided in the statute, the names of persons on a preferred list shall be certified for reinstatement to a vacancy in an "appropriate position" in the order of their original appointments (Civil Service Law § 81[2]). Upon the occurrence of a vacancy in an appropriate position, the names of persons on the preferred list shall be certified to fill the vacancy in the following order: 1) persons suspended from the department or agency within which such vacancy occurs, and 2) persons suspended from other departments and agencies in such civil division (Id § 81[2][a]). While, generally speaking, the County is required to reinstate employees in order of seniority, the public employer retains discretion to determine whether positions are similar, particularly where the positions are within different agencies (*Banko v Bahou*, 69 AD2d 933 [3d Dept 1979]).

Plaintiff was terminated as a Job Developer in the Nassau County Office of Employment and Training and was reinstated as a Job Developer with the Department of Senior Citizen Affairs. While plaintiff was presumably the most senior person on the preferred list at the time she was reinstated, the court cannot conclude that the County had no choice but to rehire her. Before reinstating plaintiff to the position of Job Developer in the Department of Senior Citizen Affairs, the County was required to determine that the position was similar to the corresponding title in the Office of Employment and Training. The County was also required to determine that reinstating plaintiff to this position was consistent with "staffing and budgetary needs...to effectively deliver uninterrupted services to the public" (*Chautauqua v CSEA*, supra, 8 NY3d at 521). Since the County had ample discretion to

decline to reinstate plaintiff to a position with another agency, its rehiring of plaintiff is evidence of the County's good faith.

While plaintiff asserts that Bruce Nyman, a member of the Board of Supervisors, helped her to gain promotion to the position of Special Program Coordinator, the employment decision would have been made by the Senior Citizens Affairs Commissioner. Moreover, the fact that Mr. Nyman was a Democrat is itself evidence that in promoting plaintiff the County acted in good faith.

Thus, plaintiff has failed to establish that the court overlooked or misapprehended any matter of fact or law in determining that the verdict in favor of plaintiff was not supported by a fair interpretation of the evidence. Plaintiff's motion for leave to reargue defendants' motion to set aside the verdict as contrary to the weight of the evidence is denied.

This shall constitute the decision and order of the court.

Dated: NOV 25 2009

J.S.C.