

Cannon v Local 333 United Mar. Div.

2010 NY Slip Op 30222(U)

January 29, 2010

Supreme Court, Richmond County

Docket Number: 100544/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 100544/06
Motion No.:002**

JEAN CANNON,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**LOCAL 333 UNITED MARINE DIVISION,
INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,
AFL-CIO, and
JOHN HEALY,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3,4,5,6
Exhibits	Attached to Papers
Memoranda of Law	2, 7, 8

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves pursuant to CPLR § 3212 for an order granting summary judgment on the first through seventh causes of action contained in the plaintiff's complaint. The defendant's motion is granted to the extent that plaintiff's claims alleging age and gender discrimination under New York State and New York City statutes, breach of contract, and implied covenant of fair dealing are dismissed.

Facts

The plaintiff's complaint alleges that she first began working for the defendant in 1970 as a staff clerk. During that time period she received numerous promotions until she received the title "office manager"—a position she held for seventeen years until her dismissal ended her employment.

In her complaint the plaintiff alleges that her job duties included but were not limited to, supervising and managing staff employees, processing insurance claims and coverage matters, dealing with vendors, and supporting the union membership in countless other ways. During her deposition the plaintiff elaborated that her specific job title was Office Manager/Administrator. The plaintiff testified that her title “administrator” was given to her by the local union leadership to reflect her designation as Administrator of the City Funds. While the plaintiff testified that it was her belief that this title did not carry any additional responsibilities, she stated that she would interface with the City auditors to supply them with information and answer questions with respect to various funds.

Furthermore, the plaintiff testified that approximately forty percent of her time was spent entering local union dues information into the computer that was used to determine the per capita amount to be paid to the international union. The plaintiff also was tasked with maintaining lists to ensure that eligible employees received proper benefits. In executing her duties with respect to benefits, the plaintiff testified that she would prepare checks in the course of processing benefits claims. According to the plaintiff, the President and Secretary Treasurer of the local union instructed her to write out the checks, but not record the checks on the register stub. Instead, the plaintiff averred that photocopies of every single check was taken prior to mailing them to union members. In one instance, the plaintiff confirms that she wrote a check out to her son who had previously been employed by the Staten Island Ferry, even though she had personal knowledge that his employment had terminated. However, the plaintiff claims that she received permission to do this from local union leadership that indicated her son’s name appeared on the list of current city employees.

In 2005, the defendant John Healy was elected as local union president. According to the affidavit of the former president of the local union, Jay Dady, Healy said “he would fire that old bitch” referring to the plaintiff. Another employee, Fran Malone, avers in her affidavit that she overheard Healy say that he would “get” that “old bitch” referring to the plaintiff. Healy does not acknowledge that this statement was ever made during his deposition, but he does state that he

inherited a mismanaged organization which he intended to fix.

Healy testified that during the course of his employment with the local union as a delegate from approximately 1994 until his election as local union president in 2005 he had made numerous complaints about the plaintiff's professional performance. It was his further testimony that prior executive leadership failed to keep records or take any action regarding his complaints. To substantiate his claims of poor work performance on the part of the plaintiff, the defendant submits audit reports issued by the City of New York Office of the Comptroller Bureau of Financial Audit for the period January 1, 2004 through December 31, 2004 for the active and retiree insurance fund.

The audit report for the active fund summarizes the following pertinent failings of the defendant "paid claims for dependents whose eligibility was not documented" and "did not properly authorize checks." The audit report for retirees summarizes similar failings in that the defendant "paid claims for dependents whose eligibility was not documented" and "did not properly authorize checks." In both instances the city auditors recommended that the union "ensure that only authorized personnel sign program checks."

Healy wrote a letter dated October 8, 2005 to the plaintiff informing her that "her services were no longer required" thereby terminating her employment of approximately 35 years. In response to this letter, Jean Cannon, the plaintiff contacted John Bowers, President of the International Longshoremen's Association – AFL- CIO in which she stated:

I am very much aware of the "firing at will" law in New York State for non-union workers and frankly, I am disinclined to work for Mr. Healy anyway, however, I believe that I am entitled to certain benefits which as yet have not been offered to me.

The plaintiff, who was over forty years of age at the time of her termination, now asserts claims that her termination constitutes a breach of contract and was based on age and gender

discrimination. The defendant states that while the plaintiff was terminated upon Healy's assumption of the duties of president, he kept Marie Saraceno as a bookkeeper, who happens to be two years older than the plaintiff. Furthermore, the plaintiff's replacement, while a man, was fifty-nine years old. In addition, Healy hired a fifty seven year old retiree on a part time basis to help handle retiree benefits.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

Discrimination Claims

“On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination. . . . A plaintiff claiming employment discrimination must demonstrate: (1) membership in a protected class; (2) that he or she was qualified to hold the position; (3) termination from employment or other adverse employment action; and (4) that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination 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[s]. If the defendant’s evidence successfully rebuts plaintiff’s initial presumption of discrimination, plaintiff may prove that the purportedly legitimate reasons proffered by defendant were merely a pretext for discrimination, by demonstrating that (1) the articulated reasons are false, and (2) discrimination was the real reason.”⁶

The Court of Appeals has repeatedly stated that “discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means.”⁷ But a defendant may still be entitled to summary judgment. “To establish entitlement to summary judgment in a case alleging discrimination, a defendant ‘must 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. . . .’”⁸

In this case the defendant’s moving papers demonstrate a prima facie entitlement to

⁶ *Forrest v. Jewish Guild for the Blind*, 309 AD2d 546, [1st Dept 2003]. (internal citations omitted).

⁷ *Ferrante v. American Lung Ass’n*, 90 NY2d 623 [1997]. (internal citations omitted).

⁸ *Apiado v. North Shore University Hosp.*, 66 AD3d 929, [2d Dept 2009].

summary judgment by offering both a legitimate, nondiscriminatory reason for the plaintiff's discharge and a failure to demonstrate every element of intentional discrimination. The audit reports prepared by the City of New York Office of the Comptroller Bureau of Financial Audit demonstrate that lackluster job performance of the plaintiff during her tenure as Administrator of City Funds. Furthermore, the plaintiff's reliance on a single statement "old bitch" to substantiate claims of age and sex discrimination is suspect in light of the clear facts that the defendants maintained the employment of Ms. Saraceno, a woman older than the plaintiff; and employed two additional employees of similar ages, albeit men.

The burden then shifts to the plaintiff to establish her claims of discrimination. The plaintiff has not come forward with any admissible evidence that her dismissal was a pretext to cover up employment discrimination. Aside from the solitary statement allegedly made by the defendant John Healy, the plaintiff has failed to come forward with any evidence to demonstrate either age or gender based animus directed toward the plaintiff. "Generally, isolated remarks or occasional episodes of harassment will not merit relief under the New York Executive Law or the New York City Administrative Code."⁹ Here, the sole statement allegedly made by the defendant Healy and overheard by Dady and Malone; and the fact that the plaintiff was replaced by a man does not merit relief. As such, the plaintiff's first, second, third and fourth causes of action are dismissed.

Breach of Contract and Breach of the Covenant of Fair Dealing Claims

The plaintiff's fifth and seventh causes of action seek damages against the defendants for an alleged breach of an employment contract. "It is well settled law that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party. . . It is only where a plaintiff can establish the existence of an express written agreement limiting the employer's right of termination, that the principles

⁹ *San Juan v. Leach*, 278 AD2d 299, [2d Dept 2000](citations omitted).

governing employment at will are inapplicable.”¹⁰

The defendant has come forward with sufficient evidence in the form of deposition testimony and the plaintiff’s own letter that an employment agreement did not exist between the parties. The plaintiff’s letter dated October 14, 2005 to John Bowers, President International Longshoremen’s Association– AFL CIO, specifically references her knowledge of the law of “at will employment.” Such evidence is sufficient to demonstrate defendant’s entitlement to judgment as a matter of law.

The burden therefore shifts to the plaintiff to come forward with evidence of the existence of an employment agreement. In opposition, the plaintiff submits an affidavit as well as her deposition testimony, which indicates that Al Cornette, the former President of Local 333 from the years 1982 through 2002, indicated that the plaintiff would have a job as long as she wanted. Such evidence is insufficient to demonstrate a question of fact to be resolved by a jury. As such, the plaintiff’s fifth and seventh causes of action are dismissed.

Accrued Vacation, Sick Pay and Pension Benefits

The defendants move for summary judgment dismissing the plaintiff’s sixth cause of action for entitlement to earned sick pay, accrued vacation pay and pension benefits. The defendants assert that as there are no written policies concerning employee benefits, including sick pay, accrued vacation or holiday pay, and pension benefits this claim must be dismissed. This court does not agree. Absent a showing by admissible evidence that the plaintiff is not entitled to accrued vacation and sick pay, along with any payments into the pension system, the defendants did not meet their prima facie burden. As such, the defendants’ motion is denied.

¹⁰ *Feeney v. Marine Midland Banks, Inc.*, 180 AD2d 477, [1st Dept 1992].

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment by defendants, Local 333 United Marine Division, International Longshoreman's Association, AFL-CIO and John Healy, is granted with respect plaintiff's first, second, third, fourth, fifth and seventh causes of action; and it is further

ORDERED, that the Local 333 United Marine Division, International Longshoreman's Association, AFL-CIO and John Healy, motion for summary judgment is denied with respect to plaintiff's sixth cause of action; and it is further

ORDERED, that the parties shall return to DCM Part 3 for a pre-trial conference on **Monday, March 8, 2010 at 10:00 A.M.**

ENTER,

DATED: January 29, 2010

Joseph J. Maltese
Justice of the Supreme Court