Brown v Transport Workers Union, AFL-CIO, Local 100
2010 NY Slip Op 33132(U)
October 22, 2010
Supreme Court, New York County
Docket Number: 104901/10
Judge: Alexander W. Hunter Jr

[* 1]

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

PRESENT: Alexander M. Tisch, J.S.C. **PART** 33

Index Number : 104901/2010

BROWN, KELVIN

VS

TRANSPORT WORKERS UNION

Sequence Number : 001

DISMISS ACTION

INDEX NO. 104901/10

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 – 3
Answering Affidavits — Exhibits	4 – 5
Replying Affidavits	6

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and order attached hereto.

Dated: 10/22/10

_____
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/JUDG.** ☐ **SETTLE ORDER /JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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Kelvin Brown,

Index No.: 104901/10

Plaintiff,

Decision/Order

-against-

Transport Workers Union, AFL-CIO, Local 100,

Defendants.

----------X

HON. ALEXANDER W. HUNTER, JR.

The motion by defendants for an order dismissing plaintiff's causes of action pursuant to C.P.L.R. §3211(a)(7), for age discrimination and for intentional infliction of emotional distress, is granted.

Plaintiff alleges in his complaint that he was terminated from his employment as a Network Administrator in charge of information technology and a Systems Engineer for the union's information technology department due to his age. He further alleges severe and extreme intentional infliction of mental distress as a result of defendants' behavior.

Defendants move to dismiss plaintiff's complaint and allege that plaintiff fails to plead a cause of action for age discrimination. Specifically, defendants assert that the New York State Human Rights Law provides that it is unlawful discriminatory practice for an employer to discharge an individual for, among other things, age. Plaintiff bears the initial burden of establishing a prima facie case of age discrimination. In order to support a prima facie case of age discrimination, plaintiff must show: that he is a member of the class protected by statute; that he was actively or constructively discharged; that he was qualified to hold the position from which he was terminated; that the discharge occurred under circumstances giving rise to an inference of age discrimination.

Defendants contend that even though the allegations in the complaint meet the first three elements of a prima facie age discrimination case, plaintiff's claim fails because he has not pled any facts that give rise to an inference of age discrimination. Plaintiff claims he was 53 at the time of his termination and is a member of a class protected by statute. He also alleges that he was actively discharged from employment with defendants and that he was qualified to hold the position from which he was terminated in that he did "excellent work." However, the only allegations plaintiff makes about age discrimination is that he was 53 at the time he was fired, that he was the oldest person in his department and that he was replaced by someone "considerably younger." (Plaintiff's complaint, para. 3-4). Defendants cite to case law wherein courts have denied employment discrimination claims in which a plaintiff merely asserts that he or she is a member of a protected class without making factual allegations which give some indicia of discrimination.

Defendants further argue that plaintiff admits that defendant Local 100 offered a performance-based reason for his termination. He also acknowledges that he provided the union attorneys with incorrect information about his performance. His allegations that he was "set up" and that he was "used as a scapegoat" are conclusory and unsupported by any facts. Since

plaintiff's claim is not supported by any facts that give rise to an inference that he was fired because of his age, his cause of action for age discrimination should be dismissed.

Next, defendants assert that the complaint fails to plead a cause of action for intentional infliction of emotional distress. The elements for that cause of action are: extreme and outrageous conduct; intent to cause or disregard of a substantial probability of causing severe emotional distress; a causal connection between the conduct and injury; severe emotional distress. Defendants argue that New York courts have consistently dismissed intentional infliction of emotional distress claims in suits alleging wrongful termination. In the case of **Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983)**, an at will employee sued his former employer for wrongful discharge and intentional infliction of emotional distress. The lower court dismissed the claims. The Court of Appeals refused to recognize a cause of action for wrongful discharge of an at-will employee and found that the complaint in that case did not state a cause of action for intentional infliction of emotional distress.

Defendants contend that intentional infliction of emotional distress is reserved solely for conduct that is so extreme and outrageous as to go beyond all possible bounds of decency. Since plaintiff herein has failed to allege that Local 100's decision or subsequent conduct was extreme or outrageous, his claim must fail. Nowhere in his complaint does plaintiff allege that anyone at Local 100 had intent to cause him severe emotional distress. Therefore, that cause of action should be dismissed.

Plaintiff opposes the motion and argues that he was 53 years old when he was terminated and he was replaced by a much younger person. He was also the only person in his department who was fired. He cites to case law regarding dismissal of a complaint for insufficiency and argues that the court's role is to determine whether the complaint states a cause of action not whether the party has artfully drafted the pleading.

Plaintiff argues that the complaint makes out a prima facie claim for age discrimination in that defendants concede that plaintiff's complaint has met the first three elements of a prima facie age discrimination case. With respect to the fourth element, plaintiff contends that the mere allegation that he was the oldest person in his department and that he was the only person fired and was replaced by a much younger person, is sufficient to give rise to an inference of age discrimination.

With respect to the cause of action for intentional infliction of emotional distress, plaintiff argues that a cursory examination of plaintiff's complaint reveals a pattern of "outrageous hostility and animus" that rises to the level to permit his claim of intentional infliction of mental distress to proceed. Plaintiff asserts that the fact show "great harassment leading to the painful termination" of the plaintiff. Plaintiff contends that given "recent trends in the field," the allegations made by plaintiff in his complaint are sufficient to make out the tort of intentional infliction of emotional distress and the complaint should not be dismissed.

In reply, defendants point out that plaintiff's only allegation with respect to age discrimination is that he was 53 when he was terminated, no one else but him was terminated and that the person who took over plaintiff's responsibilities was Robert Taylor, who was considerably younger than plaintiff. Those allegations are not sufficiently specific or particular to support an inference of age discrimination. In addition, the fact that plaintiff conceded that Local 100 proffered a performance-based, non-discriminatory reason for his termination, directly contradicts his claim that he was terminated solely because of his age.

Defendants further assert in reply that Local 100's alleged actions do not constitute extreme or outrageous conduct. Plaintiff alleges that he was put on call 24 hours a day, seven days per week and he was not able to leave town during his 2004 vacation. He also complains that his last raise was in 2005 and was less than he expected. Plaintiff also alleges that he was "set up" by the program director. However, plaintiff does not allege in his complaint that he was harassed by anyone at Local 100 nor does he provide any facts to support his claim that he was "set up." Since the allegations in the complaint do not rise to the level of extreme or outrageous conduct that go beyond all possible bounds of decency, the complaint must be dismissed.

C.P.L.R. §3211(a)(7) states that a party may move to dismiss one or more causes of action against it on the ground that the pleading fails to state a cause of action.

It is well established that on a motion to dismiss pursuant to C.P.L.R. §3211, the court is to, "...accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory." **Leon v. Martinez, 84 N.Y.2d 83 (1994)**. The complaint should be liberally construed in favor of the plaintiff. **Robinson v. Robinson, 303 A.D.2d 234, 235 (1st Dept. 2003)**. Moreover, on a motion to dismiss for failure to state a cause of action, it is not the function of the court to evaluate the merits of a case. **Carbillano v. Ross, 108 A.D.2d 776 (2nd Dept. 1985)**.

In the case at bar, plaintiff has failed to establish that he was terminated from his employment due to his age. While plaintiff alleges that he was 53 years old at the time he was fired, that he was the oldest person in his department, that no one else in his department was terminated and that the person who took over his responsibilities was considerably younger, those allegations are vague and conclusory and do not support an age discrimination claim. In the case of **Vanscoy v. Namic USA Corp., 234 A.D.2d 680 (3rd Dept. 1996)**, cited by defendants, the court ruled with respect to plaintiff's age discrimination claim that, "Asserting that she was a qualified 39- year- old woman replaced by an 'unnamed younger male', without more, is insufficient in light of defendant's continued assertion that she was discharged for her poor attitude and her breach of its rules" (citations omitted).

Likewise, in the case at bar, plaintiff contends that he was replaced by a "considerably younger" individual. That allegation is insufficient to prove a claim of age discrimination. Moreover, his claim that he was a "scapegoat" and was deliberately deceived by the program director is also vague and insufficient to support his claim of age discrimination. Plaintiff also concedes that Local 100 gave a performance-based reason for his termination which contradicts his claim that he was terminated solely because of his age. Accordingly, plaintiff's complaint fails to state a cause of action for age discrimination and that claim is dismissed.

With respect to plaintiff's cause of action for intentional infliction of emotional distress, plaintiff claims that the complaint reveals a pattern of "outrageous hostility" and "great harassment" leading to his termination. However, the complaint does not demonstrate or allege that plaintiff was harassed by anyone at his employment. The fact that he was on call 24 hours per day, seven days per week, that his responsibilities increased and that his work days grew longer, do not establish a pattern of outrageous hostility toward him and do not rise to the level of extreme and outrageous conduct. He admits that his department was reduced to three people and that his workload further increased when the union was preparing for a "lock out" due to a Transit Union strike.

Accordingly, since plaintiff's complaint fails to make out a cause of action for intentional

infliction of emotional distress, that claim is also dismissed. **See, Murphy v. American Home Products Corp., (supra)**.

Defendants are directed to serve a copy of this order with notice of entry upon the plaintiff and file proof thereof with the clerk's office.

This constitutes the decision and order of the court.

Dated: October 22, 2010

J.S.C.