

Bennett v Health Mgt. Sys., Inc.
2010 NY Slip Op 33753(U)
March 2, 2010
Supreme Court, New York County
Docket Number: 115015/08
Judge: Marylin G. Diamond
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3-11-10

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

PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

KENNETH BENNETT,

Plaintiff,

-against-

HEALTH MANAGEMENT SYSTEMS, INC.,

Defendant

FILED

MAR 11 2010

NEW YORK COUNTY CLERK'S OFFICE

INDEX NO. 115015/08

MOTION SEQ. NO. 002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this action, the plaintiff, Kenneth Bennett, alleges that he was discharged from his position with the defendant Health Management Systems, Inc. ("HMS") because of his age and race. Mr. Bennett is a Caucasian who was forty seven years old at the time of his termination in 2008. He was hired by HMS on February 2, 2004 as a computer operator in the Data Processing Operations department ("DPO"). According to HMS, at the time he was hired, Bennett was provided with an Employee Handbook and signed a form which indicated and acknowledged, inter alia, that his employment was at-will and that either HMS or Bennett could terminate his employment with or without cause or advance notice. At some point, Bennett was asked and/or agreed to be transferred to the Technical Operations Support department ("TOS"). Bennett was transferred to TOS on February 5, 2008. On or around May 13, 2008, the defendant terminated the plaintiff's employment on the ground that his performance was unsatisfactory and that he had been observed sleeping at his post and reeking of alcohol.

The complaint asserts five causes of action against HMS. The first cause of action is for breach of contract and alleges that the defendant refused to honor a prior agreement that the plaintiff would be given a three month grace period during which he could reject his transfer to TOS and return to his former position. The second cause of action is brought under section 296 of the New York State Executive Law ("State Human Rights Law") and alleges that the defendant discriminated against him and ultimately terminated his employment because of his age. The third cause of action is brought under section 8-107(1)(a) of the New York City Administrative Code ("City Human Rights Law") and alleges that the plaintiff was discriminated against because of his age. The fourth cause of action is brought under the State Human Rights Law and alleges that the plaintiff was discriminated against and ultimately terminated because of his race. The fifth cause of action is brought under the City Human Rights Law and alleges that the plaintiff was discriminated against because of his race. By decision and order dated May 19, 2009, this court granted the defendant's motion to dismiss the complaint to the extent of dismissing the first cause of action for breach of contract. In refusing to dismiss the other four causes of action, the court stated that if the defendant wished to submit evidence to rebut the allegations of age and race discrimination and establish that its termination of the plaintiff was based on reasons that were legitimate and non-discriminatory, it could do so after issue was joined on a motion for summary judgment. Issue having been joined, the defendant now moves for summary judgment dismissing the remainder of the complaint.

Discussion

On a motion for summary judgment in a discrimination case, a defendant must show that the plaintiff has failed either to establish a prima facie case of discrimination or to raise a material issue of fact as to whether the defendant's proffered legitimate nondiscriminatory reason for the challenged action was a pretext for unlawful discrimination. See *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004); *Bailey v. New York Westchester Square Medical Centre*, 38 AD3d 119, 123 (1st Dept. 2007). To establish a prima facie case, a plaintiff must show that (1) he is a member of a protected class, (2) he was qualified to hold his position, (3) he was terminated from employment or he suffered other adverse employment action and (4) circumstances exist suggesting that the discharge was taken because of his protected status. See *Forrest v. Jewish Guild for the Blind*, 3 NY3d at 305; *Ferrante v. American Lung Assn.*, 90 NY2d 623, 629 (1997); *Bailey v. New York Westchester Square Medical Centre*, 38 AD3d at 119. If the plaintiff meets this burden, the defendant must then offer a legitimate, nondiscriminatory reason for the challenged employment decision. See *Forrest v. Jewish Guild for the Blind*, 3 NY3d at 304; *Ferrante v. American Lung Assn.*, 90 NY2d at 629. Upon the submission of such evidence, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's stated reasons for its actions are only a pretext. See *Ferrante v. American Lung Association*, 90 NY2d at 630. To survive summary judgment at that juncture, the plaintiff must establish the existence of a material issue of fact as to whether 1) the employer's asserted reason for the challenged action is false or unworthy of belief and (2) more likely than not the employee's age or race was the real reason. See *Id.* at 630.

Here, the record is devoid of any evidence which supports a claim of age discrimination. The affidavit which plaintiff has submitted in opposition to the defendant's summary judgement motion does not contain any factual allegations that support a claim for age discrimination other than that he was forty seven years old at the time of his discharge. The plaintiff does not allege that anyone made derogatory comments concerning his age or that individuals younger than the plaintiff were treated more favorably. Although the complaint alleges that the plaintiff was replaced by a younger employee, the defendant has submitted an affidavit from Claude Phipps, its DPO director, who asserts that the plaintiff was replaced by a 54 year old man. The plaintiff does not refute this assertion. Under the circumstances, he has failed to establish a prima facie case of age discrimination. The second and third causes of action must therefore be dismissed.

As to racial discrimination, the plaintiff claims that both his supervisor and his unit co-workers were black and that his termination therefore raises an inference of discrimination. In turn, the defendant asserts that the plaintiff was fired because (1) he performed his job poorly, (2) he was found sleeping on the job and (3) he brought a bottle of alcohol to work in violation of company policy and reeked of alcohol. The plaintiff asserts that these reasons are pretextual and suggests that the real reason for his termination was that he was white. However, the defendant has submitted numerous affidavits which indicate that it had genuine concerns about the plaintiff's performance and was displeased about the way he conducted himself in the workplace. Specifically, the plaintiff's supervisor, Cynthia Bowen, has submitted an affidavit in which she states that the plaintiff's job performance had been constantly criticized and that she believed he lacked sufficient focus for the job. She also claims the plaintiff had been caught sleeping several times on the job and, on a number of occasions, had left his shift early without permission and without any explanation. Another supervisor, Maria Hernandez, states in an affidavit that the plaintiff had difficulty performing his duties. In addition, a number of co-workers, including Raffaele Iuliano, a Caucasian, have submitted affidavits in which they state that the plaintiff frequently reeked of alcohol, exhibited slurred speech, had difficulty walking and could not engage in conversation without appearing distracted and/or unfocused. Although the plaintiff's affidavit in opposition calls criticism of his work "unfounded," he offers no facts or evidence which would suggest it was racially motivated. As to sleeping on the job, the plaintiff admits

that he had done so but claims only that other employees also slept during their shifts. As to alcohol, the plaintiff does not deny that he brought a bottle of alcohol to the workplace without permission. His only response to the detailed and numerous charges included in his co-workers' affidavits is to state that he is not an alcoholic and that he would have been willing to take a blood test if the defendant had demanded that he do so. However, even if the defendant mistakenly believed that the plaintiff was under the influence of alcohol while at work, the plaintiff has not offered any evidence which suggests that the defendant's concern was pretextual. Nor has the plaintiff suggested that any non-white employees of the defendant were treated differently with regard to suspected alcohol use.

Finally, the plaintiff suggests that since there has been little or no discovery in this action, the defendant's motion for summary judgment is premature. This argument is without merit. Even if discovery would create an issue of fact as to whether his performance was deficient and whether he consumed alcohol while on the job, the plaintiff cannot survive summary judgment without demonstrating an issue of fact as to whether the defendant honestly believed in the nondiscriminatory reasons offered to support his termination. *See Cameron v. Community Aid for Retarded Children Inc.*, 335 F3d 60, 65 (2nd Cir. 2003). In this respect, the plaintiff has not produced any evidence which indicates that the defendant was not genuinely dissatisfied with his performance after he was transferred to TOS. In the absence of any evidence to the contrary, the plaintiff's fourth and fifth causes of action, which allege racial discrimination, must also be dismissed.

Accordingly, the defendant's motion for summary judgment is granted and the complaint is hereby dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 3-2-10

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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