[* 1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

MATTHEW LUBIN,

Plaintiff,

- v -

L.H.EMERGENCY MEDICAL SERVICES, P.C.,

Defendant.

Index No.: 117259/08

Motion Date: 08/12/10

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5 - 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendant moves for summary judgment dismissing plaintiff's complaint.

Plaintiff alleges that defendant violated New York State Human Rights Law (NYSHRL) as set forth in Executive Law § 296 (1)(a), pursuant to which it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual on the basis of age.

Plaintiff asserts that his dismissal from the position of

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

☐ SETTLE/SUBMIT ORDER/JUDG.

emergency room physician by defendant on October 21, 2008, at which time the plaintiff was 51 years old, violated the statute because he was replaced shortly thereafter by a new 38 year-old doctor.

Plaintiff states that he worked for defendant from February 2, 1996 until his termination on October 21, 2008 and that he had been reappointed to his position most recently on January 1, 2007. Plaintiff contends that any allegations that his termination was performance-based are unsupported by the record.

Plaintiff initially argues that the defendant's failure to submit an affidavit in support of the motion is fatal to its application. This is incorrect. As noted by the Court the "affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form, e.g., documents, transcripts." Zuckerman v City of New York, 49 NY2d 557, 563 (1980). Therefore, the court shall consider the interrogatory responses, deposition transcripts and other documents properly submitted in support of the motion.

"To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified

to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination." Ferrante v American Lung Assn., 90 NY2d 623, 629 (1997) (citation omitted). Defendant does not dispute that plaintiff meets the first two prongs of the test but argues that plaintiff will be unable to demonstrate his qualifications to hold the position or circumstances giving rise to any inference of discrimination. "To establish its entitlement to summary judgment in an age discrimination case, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for its challenged actions, the absence of a material issue of fact as to whether the explanations proffered by the defendant were pretextual." Hemingway v Pelham Country Club, 14 AD3d 536, 537 (2d Dept 2005).

In this case, the deposition testimony and record evidence submitted by the defendant in support of its motion sets forth non-pretextual reasons for plaintiff's dismissal.

By electronic mail message sent to plaintiff on July 29, 2008 that appended a nurse's note, defendant's president wrote-

> As you can see, your continued lack of compliance with our process has a ripple effect on others and therefore patient care. It has been stated many times that it is important to have a sign out note and a transfer of name to the next provider. Please comply immediately.

A little over two months after that communication, in a letter dated October 10, 2008 defendant's president informed plaintiff that he was on probation for his failure to timely complete his medical records. He instructed plaintiff that he had five days to do so.

At his deposition, defendant's president testified that a peer review of plaintiff's performance indicated that plaintiff had a disproportionate number of cases where adequate care was not provided, including a case where the plaintiff refused a request by a nurse to see a critically ill patient in the emergency room. He further testified that there were many instances where plaintiff stopped seeing patients when there were still two hours left on his shift, which was against "explicitly verbalized" standards.

Defendant's associate chairman stated at his examination before trial that on many days plaintiff was seeing less than one patient per hour, which was far below the productivity of other doctors. He stated that in April 2008, plaintiff failed to respond to requests to talk about the clinical care he was providing. He also asserted that plaintiff never turned in a sedation module test, which was requested in August 2008.

Defendant's president testified that these deficiencies when combined with the fact that plaintiff did not have a certification in either emergency medicine or any of the other

specialities required for the cases typically seen by plaintiff led to his decision to terminate plaintiff's employment.

The court finds that as was the case in Hemingway, supra, the defendant's submissions are sufficient to establish its entitlement to relief.

> In support of its motion, the defendant presented evidence that it terminated the plaintiff's employment for reasons that were not related to his age. In response, the plaintiff failed to raise a triable issue of fact as to whether the defendant's explanation for its action was pretextual; that is, the plaintiff did not raise a question of fact concerning either the falsity of the defendant's proffered basis for the termination or that discrimination was more likely the real reason.

Hemingway, 14 AD3d at 537.

This court concurs with defendant that Berner v Gay Men's Health Crisis, 295 AD2d 119, 120 (1st Dept 1992) is apposite. The Berner court determined that plaintiff's disagreement with defendant's assessment of [his] performance was insufficient to raise an issue of fact as to whether defendant's legitimate non-discriminatory reason for terminating [him] were pretextual. So too here, where the plaintiff offers no disagreement with the defendant's accounts of his substandard performance, there is no issue of fact.

Plaintiff even fails to address at all the most serious case involving his refusal to respond to a nurse's request that he see a critically ill patient in the emergency room. Likewise, plaintiff offers no refutation of the deficiency listed in the October 10, 2008 probation letter, which he merely brushes aside

as "administrative minutia". He is silent as to whether he attempted to address the directive in that letter and offers no explanation for his apparent failure to abide by it.

The incidents cited by defendant, when considered as a whole, establish legitimate non- discriminatory reasons for the defendant's decision to terminate plaintiff irrespective of the issue of plaintiff's lack of board certification.

Plaintiff's assertions that his performance did not result in any malpractice suits or professional disciplinary claims raise no issue of fact that the real reason for his termination was his age. Nor has plaintiff established a prima facie case of disparate impact of the board certification requirement, a claim that he does not allege in his complaint, for he has not demonstrated that the board certification policy had a discriminatory impact on physicians over fifty years old or that the asserted disproportionate impact on physicians over fifty years old was the result of the board certification policy. See Becker v City of New York, 249 AD2d 96 (1st Dept 1998).

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is GRANTED; and it is further

ORDERED that the plaintiff's complaint is dismissed in its entirety and the Clerk is directed to enter judgment dismissing the complaint.

This is the decision and order of the court.

Dated: May 19, 2011 ENTER:

J.S.C.
DEBRA A. JAMES