

DeFreitas v Bronx-Lebanon Hosp. Ctr.

2011 NY Slip Op 33853(U)

June 13, 2011

Sup Ct, Bronx County

Docket Number: 307223/09

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17
-----X

PAULA DeFREITAS, MERLE WALKER and
JOY SINCLAIR,

Plaintiffs,

-against-

Index No.: 307223/09

THE BRONX-LEBANON HOSPITAL CENTER,

Defendant.
-----X

HON. DIANE A. LEBEDEFF:

In this discrimination action, defendant the Bronx-Lebanon Hospital Center (“Bronx-Lebanon”) moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), on the grounds that plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs oppose and cross-move to amend their complaint.

Plaintiffs Paula DeFreitas, Merle Walker and Joy Sinclair were terminated from their employment as patient care managers at Bronx-Lebanon.¹ In the complaint, plaintiffs assert two causes of action, alleging wrongful termination on the basis of age, in violation of the Executive Law § 296, *et seq.*, and the New York City Administrative Code. Plaintiffs allege that defendant manipulated its performance review system to provide low evaluations to elderly employees and, following plaintiffs’ terminations, defendant advertised to fill the same positions.

¹ Patient care managers: a) are responsible for the daily operation and clinical supervision of the staff in their respective departments; b) work in conjunction with the clinical directors to ensure that all clinical and administrative needs are being met; and c) ensure that delivery of patient care in their department meets all regulatory standards.

Plaintiff Sinclair

Defendant asserts that plaintiff Sinclair (date of birth July 9, 1944) was terminated for poor performance during a six-month probationary period. Hired by Bronx-Lebanon in October 1990, Sinclair requested and received an internal transfer, on December 10, 2007. Defendant further asserts that it was standard policy that all employees were subject to mandatory probationary periods upon hire or transfer and that the probationary period could be extended if further evaluation was required. According to a performance review conducted in July 2008, Sinclair failed to meet performance standards in 16 of 62 categories. An improvement plan was implemented, and Sinclair's probationary period was extended by three months. A performance review conducted in September 2008 noted that Sinclair failed to meet performance standards in 27 areas. She was terminated on September 12, 2008.

Sinclair contends that, aside from defendant's manipulation of its performance review system to provide a low evaluation, her termination was also in violation of defendant's Employee Handbook, which entitled an employee to return to her former position, provided that it was vacant. Sinclair claims that her former position was vacant at the time of her termination.

Plaintiffs Walker and DeFreitas

Defendant asserts that, in 2009, it undertook several waves of reductions in force which resulted in the loss of many hospital positions, including those of plaintiff Walker (date of birth May 12, 1937) and plaintiff DeFreitas (date of birth November 16, 1938). Defendant further asserts that the selection for lay-offs was based solely on productivity and disciplinary history. Walker's employment was terminated on March 30, 2009. DeFreitas' employment was terminated on March 31, 2009.

Specifically, as to plaintiff DeFreitas, defendant contends that her termination resulted from her failure to meet performance standards in two areas, she was excessively absent, had not completed mandatory education, had allowed basic life support education to expire and failed to submit staff evaluations in a complete and timely manner (defendant's exhibit H).

As to plaintiff Walker, defendant contends that her termination resulted from her failure to meet performance standards in eight areas and was noted to be perceived by her staff as non-responsive (defendant's exhibit I). In addition, she was written up for unprofessional behavior as a result of a December 2008 incident (defendant's exhibit J).

Defendant's Motion

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the claimant is afforded the "benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*, 84 NY2d at 88). Under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, 84 NY2d at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Defendant argues that its motion should be granted and the complaint dismissed because it contains nothing more than plaintiffs' unsupported conclusory allegations, which defendant contends are contradicted by documentary evidence. Specifically, defendant argues that the terminations were the result of either well documented disciplinary reasons (as to plaintiff Sinclair) or a reduction in force for business purposes (as to plaintiffs DeFreitas and Walker).

Defendant submits various human resource documents, contending that they demonstrate plaintiffs' failure to meet performance evaluations, that 84 percent of employees terminated as part of its reductions in force were younger than plaintiffs, that only 15 percent were in plaintiffs' age group and Bronx-Lebanon's retention of employees in positions of Patient Care Managers who were in plaintiffs' age group and older (defendant's exhibits B, E, F, G, H, I and J).

The documents submitted by defendant include selected personnel lists, recent selected performance reviews of plaintiffs and a memo to plaintiff Walker regarding an incident of unprofessional behavior. However, these documents do not "conclusively establish" Bronx-Lebanon's defense to plaintiffs' claims of discrimination (*Leon v Martinez, supra*, 84 NY2d at 87). Indeed, the documents do not speak to plaintiffs' allegations that defendant manipulated its performance review system in favor of younger employees or that plaintiffs Walker and DeFreitas were terminated for legitimate business purposes.

In opposition, plaintiffs argue that defendant's motion should be denied because the complaint sufficiently states causes of action to recover damages for discrimination. They further argue that "a court may freely consider evidentiary material submitted on the motion to remedy any defects in the complaint" (*Vorel v NBA Properties, Inc.*, 285 AD2d 641, 641-42 [2d Dept 2001], citing *Leon v Martinez, supra*, 84 NY2d at 88). In support of their position, plaintiffs submit affidavits, wherein they attest to additional facts related to their discrimination claims, and documentary evidence that further substantiates their claims.

On this record, the Court finds that plaintiffs have alleged facts sufficient to defeat a motion to dismiss (*see Guggenheimer v Ginzburg, supra*, 43 NY2d at 275). Accordingly, defendant's motion is denied.

Plaintiffs' Cross-Motion

Plaintiffs move to amend their pleadings to include more specific allegations, including that defendant was engaged in a program of phasing out older employees, defendant advertised to hire at the time of and within a few months of the terminations, defendant hired at least two nurses since plaintiffs' terminations, plaintiffs were not given an opportunity to dispute their evaluations, they previously performed very well on evaluations and extrinsic conversations with Bronx-Lebanon personnel indicates that they were terminated because of their age.

"Leave to amend is freely given absent prejudice or surprise resulting from the delay" (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001], citing CPLR 3025[b]).

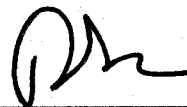
"Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case" (*id.*, 289 AD2d at 29). "The party opposing a motion to amend ... must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient" (*Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]).

In opposition, defendant does not assert any prejudice or surprise resulting from plaintiffs' request. Rather, defendant asserts arguments based upon the merits of plaintiffs' proposed amended complaint. Thus, the cross-motion is granted.

Accordingly, defendant's motion to dismiss is denied, and plaintiffs' cross-motion to amend the complaint is granted.

This decision constitutes the order of the Court.

Dated: June 13, 2011



Diane A. Lebedeff, J.S.C.