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

PRESENT: MARCY S. FRIEDMAN PART 57/60
Justice

THOMAS GODBOLT,

Plaintiff,

-against-

VERIZON NEW YORK INC.,

Defendant.

INDEX NO. 09/109611

MOTION DATE

MOTION SEQ. NO. 005

The following papers, numbered 1 to M3 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). 1
Answering Affidavits — Exhibits	No (s). 2, 2a-c
Replying Affidavits	No (s).
Memoranda of law M1, M2, M3	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendant's motion for summary judgment is granted to the extent set forth in the accompanying decision/order dated January 22, 2013.

FILED

JAN 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 22, 2013

MARCY S. FRIEDMAN, J.S.C.

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

1. Check one: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

THOMAS GODBOLT,

Plaintiff(s),

- against -

VERIZON NEW YORK INC.

Defendant(s).

Index No.: 109611/09

DECISION/ORDER

In this action arising out of termination of plaintiff Thomas Godbolt's employment with defendant Verizon New York Inc. (Verizon), plaintiff asserts causes of action for discrimination under the New York Corrections Law, the New York State Human Rights Law, and the New York City Human Rights Law. Defendant moves for summary judgment dismissing the complaint in its entirety.

The following material facts are undisputed unless otherwise stated: Plaintiff initially applied for a position with Verizon in 1996. His job application (D.'s Ex. G) (1996 job application) left blank the section on Convictions, which inquired as to whether the applicant had ever been convicted of a felony or a misdemeanor. Plaintiff was offered a job in connection with this application but did not accept it. He again applied for a job in 1998. The application (D.s' Ex. H) (1998 job application) also left blank the section on whether the applicant had ever been convicted of a misdemeanor. The answer "No" was circled next to the question as to whether the applicant had ever been convicted of a felony. Plaintiff claims that someone else filled in the "No" circle, but he does not deny that he signed the application at the end. In connection with this

application, he was offered and accepted the temporary position of Escort. In applying for the permanent position of Field Technician for which he was hired, plaintiff filled in an update, dated January 22, 1999 (D.'s Ex I) (update application). This application contained the statement that "I have reviewed my original application which is attached." After the words: "The information it contains is," plaintiff checked off the box: "Complete and accurate and no changes or supplements are required." Plaintiff claims that the original application was not in fact attached, but does not deny that he signed the updated application.

As of the time of plaintiff's 1996 job application, he had two felony convictions for possession of a weapon, 2nd Degree and Menacing, 3rd Degree, for which he was incarcerated for approximately three and four years, respectively. Plaintiff testified that he left the conviction section on the application blank because he believed that if he put his convictions down, he would not have received an interview and wanted to be able to explain the convictions to his interviewer. (P.'s Dep. at 80.) There is no evidence in the record that plaintiff in fact explained the convictions to the interviewer. At the time of plaintiff's 1999 updated application, he did not set forth the prior felony convictions and did not disclose that he had been indicted in 1997 for sexual assault and pleaded guilty for which he received a sentence of two years probation.

On November 22, 2008, an anonymous caller reported to Verizon Security that Godbolt was intoxicated while on duty. Verizon's Senior Investigator, David Busse, was assigned to investigate the allegation. Busse located plaintiff's vehicle, which was at the garage, and did not find any evidence of alcohol use. (Busse Dep. at 104-106.) He then left the garage and told the local managers to observe plaintiff when he returned to assess whether he had been drinking. (Id. at 104-106, 122.) One of the managers contacted Busse shortly afterward and told him that plaintiff had returned to the garage and was "stone cold sober." (Id. at 106.) Busse testified that

he nevertheless continued his investigation to determine whether plaintiff had any prior alcohol-related incidents. (Id. at 146.) He performed a search using plaintiff's name on Google, an investigative tool that he "usually" uses. (Id. at 195-196.) This search revealed newspaper articles implicating plaintiff in the drug trade in Queens and suggesting a possible connection to the killing of a police officer. (Id. at 107.) Further investigation revealed that plaintiff had been imprisoned for coercion and criminal possession of a weapon. (Id. at 108.) Mr. Busse then contacted defendant's employment office and was provided with plaintiff's employment applications. (Id.) Mr. Busse completed an Investigative Report, dated January 6, 2009 (D.'s Ex. L), which concluded that the intoxication allegation was unsubstantiated but that plaintiff failed to disclose his felony convictions on his 1996 and 1998 employment applications. The report was forwarded to Richard Coulton, Acting Director for Labor Relations, who recommended termination, which was approved by John Quadrino, Director of Operations for Bronx and Queens Installation and Repair Cable Maintenance. Both Coulton and Quadrino testified that termination for falsification of an employment application was non-discretionary. (Coulton Dep. at 53-57; Quadrino Dep. at 149-150.)

New York Corrections Law § 752 provides, in pertinent part, that "no employment or license held by an individual . . . shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses" unless there is a "direct relationship" between the criminal offense and the employment or license or there would be an unreasonable risk to property or safety of specific individuals or the general public. New York State Human Rights Law, Executive §296(15) similarly provides, in pertinent part, that "[i]t shall be an unlawful discriminatory practice . . . to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . .

when such denial is in violation of the provisions of article twenty-three-A of the correction law." New York City Human Rights Law § 8-107(10) also prohibits denial of employment based upon a criminal conviction when the denial violates Corrections Law § 23-A. The State and City Human Rights Laws, §§ 296(1)(a) and 8-107(1)(a), respectively, also prohibit adverse employment actions based on race and other enumerated classifications.

Defendant contends that plaintiff was terminated from employment based on his falsification of his employment applications, and that there is no evidence in the record of disparate treatment of any similarly situated individuals who have falsified their employment applications regarding prior criminal convictions. Plaintiff contends that Mr. Busse's investigation of plaintiff exceeded his authority, that his bias tainted the investigation, that other Verizon employees who were terminated for falsification of applications were not similarly situated, and that an issue of fact exists as to defendant's discriminatory motive in terminating plaintiff.

As defendant correctly argues, there is substantial authority that it is not a violation of Corrections Law section 752 to terminate employment based on an employee's failure to disclose a criminal record truthfully and completely. (Matter of Smith v Kingsboro Psychiatric Ctr., 35 AD3d 751, 752 [2d Dept 2006]; see also Matter of Russell v New York Citywide Admin. Servs., 55 AD3d 614, 615 [2d Dept 2008; Matter of Stewart v Civil Serv. Commn. of the City of New York, 84 AD2d 491, 494 [1st Dept 1982].) However, this authority does not preclude inquiry into whether the termination was in fact based not on the failure to disclose but, rather as alleged here, on discrimination predicated on the criminal record itself or on race.

In determining whether an issue of fact exists as to such discrimination under the New York State Human Rights Law, the courts generally apply the burden shifting analysis developed

in McDonnell Douglas Corp. v Green (411 US 792 [1973]) in the context of Title VII of the Civil Rights Act of 1964. (See Zakrzewska v The New School, 14 NY3d 469, 479 [2010]; Ferrante v American Lung Assn., 90 NY2d 623, 629 [1997].) This analysis requires the plaintiff to demonstrate initially that he or she is a member of a protected class, that he or she was actively or constructively discharged, that he or she was qualified to hold the position, and that the discharge occurred under circumstances giving rise to an inference of discrimination. (McDonnell Douglas Corp., 411 US at 802; Ferrante, 90 NY2d at 629.) The burden then shifts to the employer to rebut the presumption of discrimination by producing competent evidence that it had a legitimate, nondiscriminatory reason for the adverse employment decision. (McDonnell Douglas Corp., 411 US at 802; Ferrante, 90 NY2d at 629.) If the employer meets this burden, then the burden shifts to the plaintiff to raise a triable issue of fact as to whether the asserted reason was a pretext for discrimination. (Id. at 629-630; Melman v Montefiore Med. Ctr., 98 AD3d 107 [1st Dept 2012]; Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 35-36 [1st Dept 2011], lv denied 18 NY3d 811 [2012].)

A "mixed motive" analysis may also be applied in Title VII cases. (See generally Price Waterhouse v Hopkins, 490 US 228 [1989]; Desert Palace, Inc. v Costa, 539 US 90 [2003].) The Appellate Division of this Department has emphasized that at least under the New York City Human Rights Law, which must be liberally construed in order to advance its "uniquely broad and remedial purposes" (Bennett, 92 AD3d at 34 [internal quotation marks and citation omitted]), both the McDonnell Douglas and the mixed motive analyses must be applied. (See Melman, 98 AD3d at 113; Bennett, 92 AD3d at 41.)

In a New York City Human Rights Law action, once the defendant meets its burden of going forward on its summary judgment motion with proof of a legitimate reason for its action,

"[t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." (Bennett, 92 AD3d at 39.) Put another way, after the defendant has met its burden, a court should "turn to the question of whether the defendant has sufficiently met its evidentiary burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action." (Id. at 40.)

Applying these standards, the court holds that defendant meets its burden of showing a nondiscriminatory reason for terminating plaintiff's employment -- namely, his failure to disclose his prior criminal convictions on his employment applications. In opposition, plaintiff fails to raise a triable issue of fact as to whether that reason was pretextual or false. In so holding, the court rejects plaintiff's claim that the investigator exceeded his authority. The Verizon handbook on investigations (P.'s Ex. O) provides that investigators should never "exceed[] their authority." However, it also provides that "[a]n effective investigation extends well beyond identifying wrongdoers and correcting inadequacies in company procedures," and that an effective investigator must "[e]valuate all reports to determine if a Security investigation is necessary, "[b]e aware of all resources available," and "[p]repare an investigative plan that is comprehensive, yet flexible." Plaintiff cites no legal authority or factual basis for his assertion that Mr. Busse exceeded his authority, after the local managers reported that plaintiff was sober when he returned to work, by doing a google search for prior alcohol-related offenses. That the search revealed evidence of unrelated criminal convictions did not render the search unreasonable.

The court also rejects plaintiff's claim that in continuing the investigation after the local

managers reported plaintiff's sobriety, the investigator was animated by racial bias – in particular, bias based on plaintiff's nickname, which plaintiff characterizes as "a common Muslim name in the African-American community." (P.'s Memo. of Law In Opp. at 8.) This assertion is not supported by any evidence regarding the investigator's motivations or Verizon's practices, and is therefore based solely on speculation. Plaintiff's further contention that defendant departed from practice in notifying his supervisor of his findings (id. at 22) is also lacking any evidentiary foundation.

The court finds that defendant produces evidence, consisting not merely of testimony from Verizon Department heads Coulton and Quadrino but also of its termination records (P.'s Ex. Q-1), showing that Verizon terminated similarly situated employees who falsified information on their employment applications regarding criminal convictions. Plaintiff does not dispute that Verizon repeatedly terminated employees for such falsification and does not, despite full discovery in this action, cite any instances in which employees were not terminated due to such falsification. Rather, plaintiff argues that the terminated employees were not similarly situated because they were arrested on the job or were the subject of anonymous complaints that they had made misrepresentations on their applications. (P.'s Memo. of Law In Opp. at 14-15, 22.) These distinctions are not material. Nor is the court persuaded by plaintiff's contention that termination for falsification is proper based only on an employee's affirmative misrepresentation that there was no criminal conviction, as opposed to an omission to provide information that there was a conviction. (See Matter of Russell, 55 AD3d at 615; Matter of Smith, 35 AD3d at 752.)

Finally, plaintiff fails to raise a triable issue of fact as to defendant's alleged discriminatory intent based on an email exchange between John Quadrino, who terminated

plaintiff, and Stephen Cappabianca, Verizon's Director of Labor Relations, dated February 19, 2009 (D.'s Ex. O), regarding plaintiff's grievance proceeding. In this exchange, Mr. Quadrino rejected suspension as the penalty for plaintiff's falsification. He recognized that plaintiff had been a good employee but reasoned that based on the "nature of [his] arrests," Verizon would "assume a great deal of liability" should plaintiff become involved in a similar crime while on company time.

"Verbal comments constitute evidence of discriminatory motivation when a plaintiff demonstrates that a nexus exists between the allegedly discriminatory statements and a defendant's decision to discharge the plaintiff." (Schreiber v Worldco, LLC, 324 F Supp 2d 512, 518 [SD NY 2004].) In determining whether a comment evidences an intent to discriminate, as opposed to a non-probative "stray remark," courts will consider the following factors: "(1) who made the remark . . . ; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory; (4) the context in which the remark was made, i.e., whether it was related to the decisionmaking process." (Id. at 519.) While none of the factors is dispositive, the framework is useful in considering the probative value of remarks not directly related to the adverse action. (Henry v Wyeth Pharmaceuticals, Inc., 616 F3d 134, 149 [2d Cir 2010], cert denied sub nom 131 S Ct 1602 [2011].)

While this email evidences that Quadrino, the decision-maker, considered the nature of plaintiff's criminal offenses, and not merely plaintiff's falsification of his employment applications, it is a post-termination statement made in the context of a discussion about possible settlement of plaintiff's grievance proceeding. There is no evidence in the record to connect this post-termination remark to the decision-making process. (See Equal Empl. Opportunity Commn.

v National Broadcasting Co., 753 F Supp 452 [SD NY 1990], affd 940 F2d 648 [1991].) Nor is there any evidence that Verizon ever exercised discretion not to terminate an employee who gave false information on an employment application about criminal convictions. Under these circumstances, a jury's finding that the email evidences discriminatory intent at the time of the decision to terminate could be based only on speculation.

The court recognizes the important rehabilitative purpose of Corrections Law § 752, but finds that this statute is not implicated here, as plaintiff has failed to offer competent evidence to show that defendant's discriminatory intent, as opposed to plaintiff's falsification of his employment applications, was the basis for plaintiff's termination.

It is accordingly hereby ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing the complaint with prejudice; and it is further

ORDERED that the Clerk shall enter judgment in defendant's favor.

This constitutes the decision and order of the court.

Dated: New York, New York
January 22, 2013

MARCY S. FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.