Browne v Board of Educ.
2013 NY Slip Op 34038(U)
July 3, 2013
Supreme Court, Nassau County
Docket Number: 008318/11
Judge: Randy Sue Marber

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

ROBERT BROWNE,

Plaintiff,

-against-

Index No.: 008318/11
Motion Sequence...02, 03, 04
Motion Date...05/03/13

THE BOARD OF EDUCATION, OYSTER BAY-EAST NORWICH CENTRAL SCHOOL DISTRICT and PHYLLIS S. HARRINGTON,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 02).....x
Affidavit of Phyllis Harrington.....x
Memorandum of Law.....x
Notice of Cross-Motion (Mot. Seq. 03).....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Affidavit of Robert Browne.....x
Memorandum of Law.....x
Notice of Motion (Mot. Seq. 04).....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 02) by the Defendants, The Board of Education, Oyster Bay-East Norwich Central School District and Phyllis S. Harrington (the "Defendants"), seeking an order pursuant to CPLR § 3212 granting summary judgment in favor of the Defendants, dismissing the Plaintiff's complaint, the Cross-motion

(Mot. Seq. 03) by the Plaintiff seeking summary judgment in favor of the plaintiff; and the motion (Mot. Seq. 04) by the Defendants seeking renewal of the prior motion for dismissal of the first cause of action asserted in the complaint based upon the defenses of *res judicata*, judicial estoppel and collateral estoppel and/or in the alternative, granting leave for the Defendants to amend their answer to assert the affirmative defenses of *res judicata*, judicial estoppel and collateral estoppel are determined as provided herein.

In *Browne v. Board of Educ.*, 2012 N.Y. Misc LEXIS 785, 2012 NY Slip Op 30417(U) (Sup. Ct, Nassau County Feb. 6, 2012) this Court dismissed the causes of action of the Plaintiff's complaint sounding in malicious prosecution, abuse of process, negligence and *prima facie* tort and allowed the Plaintiff to proceed on the remaining claims sounding in discrimination and defamation (*see* CPLR § 3211[a]).

The Plaintiff worked as a teacher for the Defendant school district since 1992 and as a public school teacher since 1985. He has been a social studies teacher for over 22 years. The Defendants brought disciplinary charges pursuant to Education Law § 3020-a against the Plaintiff which resulted in a hearing on June 19, 2007, based on scoring errors which occurred in the 2006 New York State Global History Regents Exam. After a full hearing on the merits between January 18, 2008 and February 23, 2010, the Hearing Officer found in the Plaintiff's favor on the merits on August 13, 2010. The Hearing Officer did not find that the charges were frivolous or brought in bad faith.

In *Browne v. Board of Education, supra*, this Court stated that:

In the First Cause of Action the Plaintiff alleges a violation of a New York Human Rights Law (Executive Law § 296) by discriminating against the Plaintiff because of his gender and treating him disparately in favor of female teachers.

The State requires that individual rating sheets used by teachers who score the Regents exams be retained by the District for at least one year. The Plaintiff alleges that although Sara Anderson, Director of the Social Studies Department, was responsible for maintaining the rating sheets, and failed to do so, Ms. Anderson was not disciplined in any way for this violation of the State's guidelines. (¶ 19). The Plaintiff alleges that he discovered that Ms. Anderson, a female, had improperly scored 16 exams on the 2007 Global History Regents, and through his union representative, sent a detailed letter in March, 2008 to the Defendants regarding his findings. The Plaintiff alleges no one from the Defendants' office spoke to the him about his findings or conducted an investigation. Ms. Anderson acknowledged that she had graded the 16 exams improperly in her testimony during the Plaintiff's administrative hearing in June 2008. Further, the Plaintiff alleges the District and the Defendant, Harrington, gave Ms. Anderson the opportunity to explain her actions and that the Defendants gave her a letter of counseling, but issued no disciplinary charges against Ms. Anderson like they did with respect to the Plaintiff. In fact, it was just the opposite, Ms. Anderson received tenure based on Dr. Harrington's recommendation 45 days after her testimony against the Plaintiff, wherein she admitted under oath to violating numerous regulations with respect to the 2006 Regent's Exam, and that she improperly scored 16 exams during the 2007 Regent's Exam. The Plaintiff asserts the foregoing was clearly disparate treatment because the allegations against him concerned only three exams, yet he was never given an opportunity to discuss the allegations with the District or the Defendant, Harrington, but rather was immediately formally charged. (¶¶ 41-48).

On a claim based on Executive Law § 296, the plaintiff has the initial burden to prove a *prime facie* case of discrimination based on the preponderance of evidence. To support a *prima facie* case, the plaintiff must demonstrate: (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was qualified to hold the position for which he held; and, (4) that the

adverse employment action occurred under circumstances giving rise to discrimination. *See Ferrante v. Am. Lung Assoc.*, 90 N.Y.2d 623 (1997). The Plaintiff must demonstrate that he is similarly situated in all material aspects with Ms. Anderson. *Mandell v. County of Nassau*, 316 F3d 368. Proof that similarly situated employees have been treated differently has been described by courts as "[t]he most probative means of proving pretextual [discrimination]." *Francis v. Runyon*, 928 F.Supp. 195, 202-03. Accepting all the facts alleged in the complaint as true, the Plaintiff has satisfied this burden. Moreover, "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island R.R.*, 230 F3d 34, 39. The Defendants argue that because Ms. Anderson's errors occurred a year later precludes a finding that the Plaintiff was "similarly situated" with Ms. Anderson. In *McDonnell Douglas Corp. v. Green*, 411 US 792, 092, the Court stated that the employer's future conduct toward similarly situated individuals is directly relevant as proof of discrimination.

This Court further stated in *Browne v. Board of Education, supra*, that:

> As a result of the Defendants' false charges, the Plaintiff lost his Top Secret Clearance with the United States Army while the Defendant's charges were pending. The Plaintiff contends the temporary loss of this Top Secret Clearance caused the United States Army to deny his application to War College, and to ultimately cause him to not be promoted to Colonel in the United States Army in or around July 2010. As a result, the Plaintiff suffered a significant financial loss. (¶ 49). The Defendants' treatment of the Plaintiff also caused him to lose his positions as women's Cross-Country Coach, men's Cross-Country Coach, and as the shot clock operator and announcer for the Oyster Bay High School basketball teams. The Plaintiff also intended to reapply for the Spring Track Coach position that he had previously held. However, as a result of being reassigned by the Defendants, and despite having been found innocent of all the Defendants' charges, the Defendants replaced the Plaintiff as coach of these teams. The Defendants did not reinstate the Plaintiff as coach of any of these teams, or as shot clock timekeeper and announcer of the basketball teams after his return to Oyster Bay High School.

The Plaintiff has satisfied the minimal burden of establishing a *prima* facie

case of discrimination (*Ferrante v. Am Lung Assoc.*, 90 N.Y.2d 623). On a motion for summary judgment, once the plaintiff establishes his minimal burden of demonstrating a *prima facie* case of discrimination, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for the adverse action" (*Norville v. Staten Island Univ. Hosp.*, 196 F3d 89, 95. If the defendant does so, then the plaintiff must prove "that the articulated justification is in fact a pretext for discrimination" (*Id.*)

Courts must exercise particular caution in determining whether to grant summary judgment because direct evidence of an employer's discriminatory intent is rare and at times can be inferred from circumstantial evidence. A plaintiff cannot defeat a summary judgment motion simply by presenting conclusory allegations or unsubstantiated speculation. Under this framework the evidentiary burden shifts back and forth. However, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff (*Desir v. BOCES Nasau County*, 803 F Supp 2d 168).

The Defendants have offered a legitimate, non-discriminatory reason for the adverse action. The Plaintiff must now come forward with evidence that reasonably supports a finding of discrimination. The Plaintiff may show that the Defendants apparently legitimate reasons were pretextual or that the Defendants proffered reason was not the sole reason and unlawful discrimination was a least a motivating factor (*see Holcomb v. Iona Coll.*, 521 F3d 130). The Plaintiff is a member of a protected class, suffered an adverse

employment action, and is qualified to hold the position. The Defendants argue summary judgment is appropriate because they have set forth legitimate, non-discriminatory reasons for the adverse employment determination and the Plaintiff cannot show that these reasons are pretextual.

The Plaintiff argues that the Defendants subjected the Plaintiff to disparate treatment, that is, treated him less favorably than Ms. Anderson, a similarly situated employee, outside of his protected class. Where a plaintiff chooses such a course of action, the evidence offered must demonstrate the co-employees were subject to the same performance evaluation and discipline standards and that they were not disciplined despite engaging in comparable conduct (*see Graham v. LIRR*, 230 F3d 34). "Comparable" is not equivalent to "identical," but rather to conduct of "comparable seriousness" (*see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804.

Ms. Anderson's conduct in grading the 2006 and 2007 Global History Regents came into question. Ms. Anderson's role as supervisor of the Social Studies Department was to tabulate scores after the tests had already been graded by individual teachers. Ms. Anderson would "round up" the total average of the scores. According to Ms. Anderson, she was following a procedure in place in her former school district and did not realize the Defendant, School District, did not follow this procedure. After an investigation, the Defendant confirmed that due to an error in rounding, Ms. Anderson computed students' final scores resulting in a three to four point increase for each paper.

A letter dated March 26, 2008, by Ms. Harrington to Ms. Anderson stated that:

> "Nevertheless, the manner in which these examinations were scored was inconsistent with the mandate in the NYSED Information Booklet for Scoring Regents Examinations in Global History and Geography and United States History and Government. All state and local assessments must be administered and scored in a thorough and accurate manner. As the supervisor of the Social Studies Department, you are responsible to see that this mandate is followed for all assessments. Failure to do so may lead to disciplinary charges." (Affidavit of Phyllis Harrington sworn to on December 12, 2012, Exhibit D)

The Plaintiff asserts merely giving Ms. Anderson a "letter with reprimand" while filing charges under § 3020-a of the Education Law satisfies his burden that the decision was based on gender discrimination.

A reasonable jury could find that the Plaintiff and Ms. Anderson were "similarly situated" and that the treatment of the Plaintiff vis-a-vis that of Ms. Anderson demonstrates evidence of gender discrimination (*see Graham v. LIRR, supra*). Issue finding, rather than issue determination is the key to summary judgment (*In re Cuttitto Family Trust*, 10 A.D.3d 656; *Greco v. Posillico*, 290 A.D.2d 532). The court should refrain from making credibility determinations and scrutinize the papers carefully in the light most favorable to the party opposing the motion (*Glover v. City of New York*, 298 A.D.2d 428; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444). As such, the branch of Defendants' motion seeking an order granting summary judgment dismissing the cause of action sounding in discrimination should be **DENIED**. In the submission now before this Court, the Plaintiff has not opposed the Defendants' *prima facie* showing that the alleged defamatory statements fail to meet the

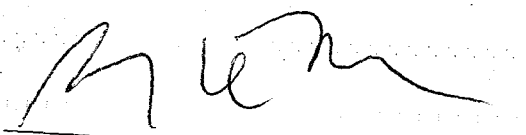
CPLR § 3016 (a) pleading standard. Therefore, the cause of action sounding in defamation is **DISMISSED** with prejudice. Thus, the Cross-motion by the Plaintiff seeking summary judgment is moot.

Counsel have raised the issue of collateral estoppel which precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v. New York Tele Co.*, 62 N.Y.2d 494). In the within action, the Hearing Officer did not reach the question of whether the Defendants had engaged in discriminatory conduct and there has been no final judgment on the merits of this claim. Collateral estoppel does not bar the Plaintiff's claim for *discrimination (Chiara v. Town of New Castle,* 61 A.D.3d 915*; Cooks v. NYC Tr. Auth.*, 289 A.D.2d 278). *Compare Smith v. New York City Department of Educ.*, 808 F Supp 2d 569, 580 cited by the Defendants, where the arbitrator, unlike the hearing officer in the within action, affirmatively ruled that the termination was not based on discrimination.

Accordingly, the motion by the Defendants (Mot. Seq. 04) seeking renewal and/or leave to amend the answer is **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
July 3, 2013



Hon. Randy Sue Marber, J.S.C.