SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX IA- PART 27

PAUL KREBAUM,

Plaintiff,

-against-

CAPITAL ONE, N.A. and JASON MOORE,
Defendants,

Index No. 304087-2012

DECISION & ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion to dismiss noticed on May 1, 2014 and submitted on Oct. 30, 2014:

Papers Submitted	Numbered
Notice of Motion, Affirmation, Affidavits & Exhibits	1 to 6
Affirmation in Opposition, Affidavits & Exhibits	7 to 14
Plaintiff's Memorandum of Law	15
Defendants' Memorandum of Law and Reply Memorandum of Law	16 to 17

Plaintiff commenced this action alleging age discrimination and retaliation at his work place. In his complaint Plaintiff alleges he was employed by Defendant Capital One as a Relationship Banker from March 10, 2008 to July 28, 2011 [¶12]. Plaintiff alleges he performed all tasks with great expertise and efficiency [¶17]; he was successful in building a solid customer base resulting in substantial profits for Defendant [¶18], and that his termination was solely due to his age and experience [¶26].

Defendants interposed their Answer denying, *inter alia*, that they violated any federal, state or local law [¶54], asserting that Plaintiff was terminated because he breached Bank policy concerning transactions with relatives, and consequently, the actions towards Plaintiff were taken for legitimate, non-discriminatory business reasons regardless of Plaintiff's age [¶56].

In the broader landscape, discrimination claims are reviewed under a burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421 (2004); *Forrest v. Jewish Guild for Blind*, 3 N.Y.3d 295 (2004). A plaintiff alleging discrimination has the initial burden of establishing, *prima facie,* that: (1) he was a member of a class protected by statute; (2) he was actively or constructively discharged or suffered adverse employment action; (3) he was qualified to hold the position from which he was terminated; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. *See Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623 (1997); *Balsamo v. Savin Corporation,* 61 A.D.3d 622 (2nd Dept 2009);

Nelson v. HSBC Bank, 41 AD3d 445 (2nd Dept 2007).

Once the plaintiff satisfies this burden, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse action taken. *Stephenson v. Hotel Emples. & Rest. Emples,* 6 N.Y.3d 265 (2006). If the defendant produces such evidence, the plaintiff must then show that the proffered reason was a pretext for discrimination. *Ferrante,* 90 N.Y.2d at 629–630. The mere disagreement with an employer's assessment of work performance or decision to terminate an employee is not sufficient to state a claim of discrimination because, even where the employer's decision is unwise or ill-founded, an employee claiming discrimination must show a causal connection between the employee's protected class and the adverse decision. See *Gray v. New England Tel. & Tel. Co.,* 792 F.2d 251 (1st Cir1986); *Ioele v. Alden Press,* 145 A.D.2d 29 (1st Dept 1989). And, as with any claim, vague, conclusory assertions, unsupported by factual allegations, are insufficient to sustain a cause of action under the Human Rights Laws. *Scarfone v. Village of Ossining,* 23 A.D.3d 540 (2d Dept 2005); *Vanscoy v. Namic USA Corp.,* 234 A.D.2d 680 (3d Dept 1996).

In the instant matter, Plaintiff established that he is a member of a protected class; that he was qualified to hold the Relationship Banker position as he had done so for several years; and that he suffered adverse employment action. Defendants submitted evidence that Capital One has a nondiscriminatory policy which forbids employees from performing transactions involving family members for reasons, including but not limited to, avoiding the appearance of impropriety. Capital One also submitted evidence of other employees in the Relationship Banker position who were the same age (or about the same age) as Plaintiff and who did not suffer adverse employment action, *in addition* to evidence of other employees being terminated for breach of the Code of Ethics who were younger than Plaintiff.

After discovery Defendants move for an Order granting summary judgment pursuant to CPLR 3212 dismissing Plaintiff's complaint. Defendants present that Plaintiff was terminated in July 2011 for violating Capital Bank's Code of Business Conduct and Ethics, specifically, the section titled "Self Dealing", which provides that "Associates may not search for, access or modify accounts held by themselves, friends, relatives or co-workers." In May 2011 Plaintiff' s bank manager Moore directed Plaintiff to stop conducting any transactions on behalf of an

account titled "Physical Therapy of the Bronx" because Plaintiff's brother, Howard Krebaum, was an authorized user of the account. Moore advised Plaintiff that said activity on behalf of family members was a conflict of interest, and warned Plaintiff that said activity could lead to Plaintiff's termination. Thereafter, Plaintiff processed requests from Physical Therapy on July 14 and July 19, 2011. Upon discussion with Plaintiff regarding the transactions with Physical Therapy, on July 28, 2011 Defendants made the decision to terminate Plaintiff.

After consideration of Defendants' submission, the Court finds that defendants met their burden of proof that the Plaintiff was not treated differently than other employees due to his age, that they established a legitimate non-discriminatory reason for his termination, and that there did not exist a hostile working environment. *Winegrad v. New York Univ. Med. Ctr.*, 64 N..Y.2d 851, 853, 487 N.Y.S.2d 316 (1985) (proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact). The Court further finds that Plaintiff failed to meet his burden of rebuttal to defeat summary judgment in Defendants' favor. *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228, 812 N.Y.S.2d 12 (1st Dept. 2006) (once the proponent has made a prima facie showing, the burden shifts to the opposing party to present evidentiary facts to raise a genuine triable issue of fact).

In opposition to summary judgment Plaintiff contends that the Physical Therapy account did not name his brother as a corporate Owner and that he had permission of a prior bank manager, *to wit*: Damon Ralph, to open and access the account. Plaintiff also submitted affidavits of former Capital One employees who either describe their own experience with Capital One, or support Plaintiff's claim that his brother, Howard G. Krebaum, did not own shares or hold ownership interest in Physical Therapy. Apparently, when the Physical Therapy account was opened in May 2010 it named Howard Krebaum and Frederick Daniels; Daniels was the authorized signatory. Frederick Daniels died in March 2011 and the transactions by Plaintiff in July 2011 were by request of a Margaret Barta and signed by Plaintiff's brother Howard Krebaum.

Plaintiff argues that the transactions he processed for Physical Therapy in July 2011 were

not transactions on "my brother's accounts" because his brother was never an Owner or authorized user, but only an "authorized signer" [¶¶21 & 22 of Plaintiff's Affidavit]. However, it remains undisputed that Plaintiff was made aware that he was not supposed to perform transactions involving family members, that he received a warning to refrain from doing so, and that he did so anyway. It is of no avail that Plaintiff's brother was not the account owner or officer of the business. It is sufficient that Plaintiff's brother had authority to conduct transactions on the account, in whatever capacity, and that Plaintiff defied his bank manager's directive to refrain from processing transactions on the account in accordance with Bank policy. Under these circumstances, Defendants established a non-discriminatory basis for Plaintiff's termination, precluding Plaintiff from establishing a causal connection between his age and the adverse decision to terminate him.

Plaintiff's retaliation cause of action is premised upon the claim that he was terminated on July 28, 2011 after he complained *in July 2011* to Mr. Chatham of Human Resources about age discrimination exercised by Moore as of February 2011. However, Plaintiff's submission does not establish any conduct by Moore which interfered with Plaintiff's work. *Ferrer v. New York State Div. Of Human Rights*, 82 A.D.3d 431, 918 N.Y.S.2d 405 (1st Dep't 2011). At best, in brief six month period between February and July 2011 Moore interrupted a conversation with a customer, criticized Plaintiff's eyeglasses and pointed a finger a rude manner. Cf. *Kosarin-Ritter v. Mrs. John L. Strong, LLC*, 117 A.D.3d 603, 986 N.Y.S.2d 453 (1st Dep't 2014) (isolated remarks and incidents are insufficient to support Plaintiff's claim of hostile work environment).

For the foregoing reasons, the Court finds that Plaintiff failed to raise an issue of fact that he was terminated solely due to his age, or that Moore engaged in persistent, abusive and discriminatory conduct which resulted in a hostile work environment. Consequently, Defendants' motion for an Order granting summary judgment is hereby **granted**, and it is

ORDERED that the complaint is dismissed.

Dated: March 12, 2015

Hon. Julia I. Rodriguez, J.S.C.