

**Brooks v City of New York**

2015 NY Slip Op 32097(U)

March 9, 2015

Supreme Court, New York County

Docket Number: 114543/2011

Judge: Margaret A. Chan

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

EA  
3/11/15  
E

Index Number : 114543/2011

BROOKS, THEODORE

PART 52

vs

CITY OF NEW YORK

INDEX NO. \_\_\_\_\_

Sequence Number : 001

MOTION DATE \_\_\_\_\_

SUMMARY JUDGMENT

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 6, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1-2

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 3-4

Replying Affidavits \_\_\_\_\_ No(s) 5-6

Upon the foregoing papers, it is ordered that this motion is

**MOTION DETERMINED PURSUANT TO  
ANNEXED DECISION AND ORDER**

**FILED**  
MAR 12 2015  
NEW YORK  
COUNTY CLERKS OFFICE

**RECEIVED**  
MAR 11 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

**HON. MARGARET A. CHAN**

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

Dated: 3/9/15

- 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  
NEW YORK COUNTY: PART 52**

*INDEX 114543/2011*

**DECISION and ORDER**

**THEODORE BROOKS,**  
**Plaintiff,**

- v -

**CITY OF NEW YORK, NEW YORK CITY POLICE  
PENSION FUND, and ANTHONY GARVEY,  
EXECUTIVE DIRECTOR OF THE NEW YORK  
PENSION FUND, Individually and in his official  
capacity,**

**Defendants.**

**MAR 12 2015**

**FILED**

**NEW YORK  
COUNTY CLERKS OFFICE**

Margaret A. Chan, J.:

Plaintiff, an African-American man born in 1938, was a civilian employee of the New York City Police Pension Fund (PPF). Defendants are the City of New York, PPF and its Executive Director, Anthony Garvey (collectively, defendants). Plaintiff was hired by PPF in 2002, when he was 64 years old as the Director of Security and was terminated on April 6, 2009. After his termination, plaintiff brought suit in this court for age and race discrimination. The action was removed to federal court but during litigation plaintiff withdrew all of his federal claims (Deft Mot, Exhs E and F). The federal court remanded the matter to state court on May 17, 2013 (Deft Mot, Exh F). In the instant motion, defendants moved for summary judgment. Plaintiff submitted opposition, to which defendants replied. The decision and order are as follows:

**FACTS**

Plaintiff held a managerial position at PPF as the Director of Security. His duties included securing the physical space of PPF offices, and scheduling and supervising security officers. In December 2008, plaintiff supervised four security officers, including Ana Cruz, who was assigned to a reception desk. On December 30, 2008, Cruz informed plaintiff that she had to attend to a personal matter outside of work but did not have enough compensated time to take a whole day off work. To accommodate her, plaintiff delayed Cruz's start time that day by 2 hours to from 7:00 AM to 9:00 AM. Cruz called plaintiff several times that morning to update him as to when she can report to work. At about 11:45 AM when Cruz called, plaintiff instructed her not to report to work that day. Plaintiff signed Cruz in and out on her timesheet for the day even though she was not there. A sergeant assigned to PPF noticed that the reception desk was not staffed and asked plaintiff about Cruz's absence. Plaintiff provided false information that Cruz had an emergency and had left early for the day. The sergeant reviewed the time sheets at about 1:00 PM and observed that Cruz was signed out for 2:00 PM that day. The

sergeant then reviewed video security tapes and observed that Cruz did not report for work at all, and adduced that plaintiff made entries to the timesheet on Cruz's behalf. Plaintiff admitted to the false entries and statements during an internal investigation. Plaintiff was terminated as a result of his actions. Plaintiff reported to work until the end of that week and then used his sick and annual leave until his termination on April 6, 2009.

Plaintiff claims his termination was based on age and race discriminatory animus and he was disciplined more harshly than Caucasian employees. He asserts that Caucasian men, younger than himself, were accused of unethical and illegal conduct while employed by PPF, yet they were not terminated. Plaintiff gave a few examples: a younger Caucasian male employee who was found unconscious from alcohol or drug use at work was not disciplined; two other younger Caucasian employees – Anthony Bonelli and Kenneth Pece, who were involved in an altercation between themselves were disciplined, but not terminated. In fact, Pece succeeded him as PPF's Director of Security, which he infers was a pretext for his termination.

As to plaintiff's hostile workplace claim, plaintiff alleged that defendant Garvey made discriminatory comments to him. Plaintiff claims that in 2008, Garvey asked him when he was going to retire, stating "you know you are the oldest guy here," and "oh man, you are older than me, and I had to retire from the Police Department." Plaintiff also claims that prior to Garvey's appointment as Executive Director plaintiff was permitted to attend executive meetings, but after his appointment he was excluded from those meetings.

Defendants submit that plaintiff has not made a *prima facie* case of discrimination based on age or race. Alternatively, defendants argue that even if plaintiff satisfied his initial burden, there was evidence of a legitimate, nondiscriminatory reason for termination that was not rebutted by plaintiff. Defendants argue that without a showing that their reason was a pretext for age or race discrimination, summary judgment dismissing the complaint is warranted. Defendants also point to the lack of evidence of a hostile work environment.

## DISCUSSION

A cause of action invoking protections under both the New York State and City Human Rights Laws Executive Law § 296 *et seq.*, and Administrative Code of the City of New York § 8-107 *et seq.*, respectively, requires plaintiff to assert that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action was due to circumstances that could be deemed discriminatory (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). The burden then shifts to the employer to rebut a presumption of discrimination by producing evidence establishing legitimate, independent, and non-discriminatory reasons to support the challenged employment action (*id. citing Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). If defendants' evidence successfully rebuts the presumption of discrimination, the burden shifts again to plaintiff to demonstrate both

that the articulated reasons are false, and that defendants' actions were motivated by discrimination (*id.* at 338). Although the question of whether discrimination occurred generally presents an issue of fact, summary judgment may be granted in discrimination cases when defendants demonstrate the absence of a *prima facie* case, and plaintiff is unable to raise an issue of fact (*see Forrest v Jewish Guild for the Blind*, 3 NY3d at 305–306).

While there is no dispute that plaintiff is a member of protected classes based on his age and race, was qualified for his position, and suffered an adverse employment action when he was terminated, he failed to demonstrate that the adverse action was due to circumstances that could be deemed discriminatory. Plaintiff's attempt to show as discriminatory that younger white employees were not terminated for similar behavior was not persuasive. At the onset, the behavior of the younger Caucasian employees was not similar to that of plaintiff. The first employee pointed out by plaintiff was not terminated for his substance abuse; rather, he was referred to the Employee Assistance Program for drug and alcohol abuse counseling. This employee also was not in a managerial position like plaintiff. He was a part-time probationary employee whose responsibilities were limited to restocking the photocopier, maintaining the soda machine, and filling in for various odd jobs (Def Mot, Exh G, pp 106-107). "The individuals being compared must be similarly situated in all material respects" (*Shah v Wilco Systems, Inc.*, 27 AD3d 169 [1<sup>st</sup> Dept 2005] quoting *Shumway v United Parcel Serv.*, 118 F3d 60, 64 [2d Cir 1997][internal quotations omitted]). As to the two fighting employees, their misdeed did not involve trust. However, Bocelli was terminated later not for the fight but for his untrustworthy conduct – theft of company property (Def Mot, Exh H, pp 79-80). Thus, both Bocelli and plaintiff were terminated upon their conduct that betrays trust.

As for the allegation that seems to argue that his termination was a pretext for replacing him with Kenneth Pece, who is junior to him and Caucasian, the argument loses ground given Garvey's testimony. Garvey testified that Pece was only temporarily given plaintiff's responsibilities while PPF went through the hiring process for another Director of Security (*id.* at pp 71-72). He was never hired as Director of Security and he was not given additional salary for temporarily taking on additional duties (*id.*).

As to the isolated statements made by Garvey that he should consider retirement or that he was older than other staff members, the statements were neutral. Isolated remarks, even if voiced by a supervisor are insufficient, without more, to support a claim of age discrimination (*see Almanzar v Collegiate Church Corp.*, 255 AD2d 230, 240–241 [1<sup>st</sup> Dept 1998]).

Finally, as to the hostile work environment claim, plaintiff must plead facts tending to show "that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile

or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's . . . protected characteristic." (*Patane v Clark*, 508 F3d 106, 113 [2d Cir 2007][internal quotations omitted]). Plaintiff articulated that once Garvey became the Executive Director plaintiff was excluded from executive meetings. Plaintiff stated that under the prior director he was invited to all executive meetings (Def Mot, Exh G, pp 157-158). Plaintiff's duties were limited to security of the physical space of PPF's offices. Without more facts regarding how the exclusion weighed upon his work, the exclusion from executive meetings appears neutral.

Accordingly, as plaintiff failed to meet a *prime facie* case, summary judgment is granted in favor of defendants. The action is dismissed.

This constitutes the decision and order of the court.

Dated: March 9, 2015



Margaret A. Chan , J.S.C.

**FILED**  
MAR 12 2015  
NEW YORK  
COUNTY CLERKS OFFICE

FILED

CLERK OF DISTRICT COURT  
COUNTY OF BERNICIA  
STATE OF MICHIGAN