

**Cannon v New York City Police Dept.**

2016 NY Slip Op 30657(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 107033/2005

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 5

JAMES CANNON

INDEX NO. 107033/05

MOT. DATE

- v -

MOT. SEQ. NO. 002

NEW YORK CITY POLICE DEPARTMENT et al.

The following papers, numbered 1 to <u>3</u> were read on this motion to/for <u>summary judgment</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). <u>1</u>
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). <u>2</u>
Replying Affidavits	No(s). <u>3</u>

This action arises from alleged age discrimination. Defendants New York City Police Department (“NYPD”), The City of New York (the “City”) and Raphael Pineiro (“Chief Pineiro”) move for summary judgment dismissing the amended complaint in its entirety. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed; therefore summary judgment relief is available (CPLR § 3212 [a]). The court’s decision follows.

Plaintiff’s amended complaint alleges that he was discriminated against and subjected to harassment because of his age, and was forced to retire on May 4, 2004. In a decision/order entered November 22, 2011, the Hon. Geoffrey D. Wright granted defendant’s cross-motion for summary judgment dismissing plaintiff’s complaint. On March 12, 2013, the Appellate Division, First Department reversed Justice Wright’s decision/order and denied the motion without prejudice to renewal after the completion of discovery.

Plaintiff testified as follows at his deposition. Plaintiff began working for the NYPD in or about September 1982 as a Computer Systems Manager. Plaintiff ultimately retired as a Computer Systems Manager, but he explained that he had a “pseudo position” or “in-house title” at various times. From 1982 to approximately 1991-1992, plaintiff was a manager of the Special Police Radio Internet Network (“sprint”). After that time, plaintiff stated that he “was just shipped out of sprint and [he] really wasn’t anything. [He] was just thrown in a corner and [he] was there for a period of time.” At some point thereafter, plaintiff became the “financial manager” and he “purchased all of the computer equipment and software for the entire [NYPD]” for a couple of years.

Plaintiff claimed that he was discriminated against because of his age and was subjected to a hostile

Dated: April 13, 2016

  
HON. LYNN R. KOTLER, J.S.C.

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

work environment. Plaintiff was born on December 26, 1935. He stated that Captain Andrew Chisara discriminated against him because he moved plaintiff out of the sprint section and then Chief Pineiro “was really the one that really pushed me out the front door.” Chief Pineiro “gave [plaintiff] a real hard time. He told me that I did not know what I was doing. I was not a – what do you call it – a financial man.” Plaintiff illustrated with the following examples:

Q. Now, when you say he gave you a hard time, what exactly did he do to give you a hard time?

A. He turned around one time in a meeting and, I think, I had mentioned that we had staff meetings once a week, once every two weeks. He would ask me something off the top of his head without me knowing and I didn't have the answer.

One time he says, "You don't know what the fuck you are doing." That was one time, and there was another time that there was another chief there, which was a different meeting. And he told -- he hollered out, "You still don't know what you are doing" or something to that effect. It was Chief Jaffe and she just put her head down and it was real demeaning for me and emotional.

I am a computer professional. I have been for since 1957. So I go back to the dinosaur ages of computer science. I have a computer science degree. I have probably had more education than anybody in that department dealing with computer applications and computer science. I was a teacher at NYU. I had more experience than anybody there, and he was treating me like I was an idiot.

Plaintiff claimed that the incident where Chief Pineiro said plaintiff didn't know what he was doing occurred in “about 2001 to 2002, somewhere in that area” and that May 2001 “sounds about right.” Plaintiff further stated that Pineiro would “give [him] dirty looks all the time” and “did not want [plaintiff] there.” Chief Pineiro also “sent out a memo at that time placing a sergeant” over plaintiff who “had just been a sergeant a week.” Plaintiff claims that this “was literally a demotion” however it is undisputed that plaintiff's salary and benefits were never reduced and his title never changed.

Otherwise, plaintiff could not recall any derogatory comments that Captain Chisara or Chief Pineiro said to him. He couldn't remember a time when Chief Pineiro mentioned plaintiff's age but when asked why he believed he was discriminated against on the basis of his age, plaintiff stated:

A. They just were. What do you call it? The people that worked for Chief Pineiro that he brought in were sniping at me in no particular terms. Um, Lieutenant Post would ask me at meetings why I was still using the old technology.

By the way, 911 is a mainframe operation compared to today's environment of PCs and laptops, but that was in 1991. There were PCs just coming in at that time. And they would constantly mention – what do you call it – at meetings that I was still running old technology, which I was. I was running mainframe operations for the financial aspects of it when I was a financial manager and for the inventory control systems that I had set up. They were mainframe operations, rather than PC.

In 2002, plaintiff filed an internal complaint with the NYPD's Office of Equal Employment Opportunity (“OEEO”). Defendants have provided a copy of the OEEO complaint. In that complaint, plaintiff

stated in pertinent part that he was discriminated against and harassed based upon his age. Specifically, plaintiff alleged that “[i]n or about April-May 2001, [he] was repeatedly, verbally harassed by humiliating and denigrating comments directed to me in front of others. These comments related to my age, and continually linked me with the “old technology.” Plaintiff further complained that Chief Pineiro posed specific questions to plaintiff at a staff meeting that plaintiff did not have a ready answer to and claimed that a co-worker named Mr. White “was also subjected to this process.” Plaintiff noted that Mr. White is in his late 50s.

Otherwise, in his OEEEO complaint, plaintiff complained that his duties and responsibility had decreased “along with the respect of my co-workers and supervisors.” Plaintiff also complained of an incident in early January 2002 when his office was “ransacked by police officers as part of an office transfer.”

Plaintiff retired from the NYPD on May 4, 2004 at the age of 68. When asked why he retired, plaintiff stated:

A. I – aside from – what do you call it? I finally had my pension time and I had lost all interest in – what do you call it – furthering my career and – what do you call it – I was distraught. I was fully distraught. I was not being – I had nothing, really. I was not doing what I was supposed to be doing. I was unhappy. I was emotionally distressed and I left.

Q. You were unhappy with your job duties?

A. Yes, yeah.

Q. Any other reasons that you retired?

A. Um, well, aside from that, I had fulfilled my pension obligations. That's why I stayed the last couple of years to fulfill that and I had to go through all of this trauma and I just left after that and I said that was it.

Chief Pineiro testified at his deposition that he didn't recall speaking about plaintiff's age or connecting plaintiff to “old technology.” Chief Pineiro admitted that “[t]here were a number of times [he] posed specific questions to [plaintiff] that [plaintiff] didn't have ready answers to.” Further, at “[m]any meetings [Chief Pineiro] asked [plaintiff] specific questions regarding tasks that [plaintiff] was supposed to be performing which he was not performing appropriately.” Chief Pineiro admitted that he “called [plaintiff and Mr. White] to task” Chief Pineiro maintained that his reprimands of plaintiff had nothing to do with plaintiff's age.

Chief Pineiro acknowledged that he communicated at a meeting that Sergeant Gazis would become [plaintiff] and Mr. White's boss and also admitted that Sergeant Gazis was younger than both plaintiff and Mr. White. Chief Pineiro explained that plaintiff “needed supervision because he couldn't carry out his tasks” and that Sergeant Gazis “was a very good manager and supervisor to ensure that [plaintiff] in fact did carry out his tasks.”

Chief Pineiro further stated:

Q. Would you please explain why on the occasions that you did you called him to task?

A. Because [plaintiff] invariably failed to either complete whatever task he was given from a previous meeting, because we used to have follow-up

meetings, and he also did not have answers to questions that I thought were kind of basic questions that he should have the answers to. So he did not – wasn't able to complete any tasks that were assigned to him at previous meetings. He didn't have the knowledge of the meetings. He was a very poor communicator, he was hard to understand even when he was I guess – in his attempts to explain something they invariably failed, you know, so – that's my answer.

Further, Chief Pineiro stated that plaintiff was required to attend meetings, but “often times we would have to look for him” and “[h]e dodged meetings, just like he dodged work responsibility.” However, Chief Pineiro admitted he never wrote up plaintiff but that he “verbally warned and admonished several times.” On or about October 22, 2001, Chief Pineiro issued a memo detailing plaintiff's job task and responsibilities because he felt plaintiff had to be told in writing what his job responsibilities were to make sure that he did them.

Defendants have provided the minutes of the May 2001 meeting where Chief Pineiro allegedly “be-rated” plaintiff.

Meanwhile, plaintiff's attorney has asserted that a number of employees replaced plaintiff in terms of his various job functions during the course of his employment and these employees were younger than plaintiff and less qualified for the tasks they were assigned. Yet plaintiff has not provided any affidavit from anyone with personal knowledge in support of these claims. Plaintiff has also provided copies of a two federal complaints brought by unrelated parties where Chief Pineiro is named a defendant in suits for age discrimination. Plaintiff has also provided copies of his performance evaluation for the year 2000 in which he received an exceptional rating. That evaluation was signed off by Chief Pineiro.

In support of its motion, the City argues that plaintiff's claims, except for the constructive discharge claim, are barred by the statute of limitations. Otherwise, the City generally maintains that they are entitled to summary judgment. In turn, plaintiff contends that his discrimination claims are not barred under the continuing violation doctrine, that he established a *prima facie* claim of age discrimination, was subjected to a hostile work environment, and was constructively discharged by defendant.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

For the reasons that follow, the court finds that the defendants are entitled to summary judgment as a matter of law. A three-step burden shifting analysis is used to evaluate employment discrimination claims including claims of age discrimination, under New York State and New York City Human Rights Laws (*McDonnell Douglas Corp. v. Green*, 411 US 792, 802-04 [1973]; see *Forrest v. Jewish Guild for the Blind*, 3 N.3d 295, 316 [2004]; see also *Ioel v. Alden Press, Inc.*, 145 AD2d 29 [1st Dept 1989]). The plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. Then the defendant must articulate a legitimate, non-discriminatory reason for the challenged employment de-

cision. If the defendant articulates a legitimate reason for the adverse action, the burden shifts back to the plaintiff to show that defendant's stated reason was merely a pretext for discrimination.

To succeed in an age discrimination case, plaintiff must show that "age was the 'determining factor'" in his alleged ill treatment, that "but for his employer's motive to discriminate against him because of his age, he would not have been [constructively] discharged" (*Joele v. Alden Press, Inc.*, 145 AD2d 29 [1st Dept 1989] quoting *Pena v. Brattleboro Retreat*, 70 F2d 322, 323 [2d Cir 1983] quoting *Loeb v. Textron, Inc.*, 600 F2d 1003, 1019 [1 Cir 1979]). Here, a fact finder could not reasonably conclude based upon this record that plaintiff's retirement constituted a constructive discharge, or otherwise, that there were any adverse actions taken by the NYPD because of plaintiff's age. Plaintiff could not recall at his deposition any specific statements made by Chief Pineiro or anyone else at NYPD which were specifically derogatory regarding plaintiff's age. To the extent that plaintiff claims Chief Pineiro or others linked him to "old technology", plaintiff admitted that this was true. In any event, actionable discrimination must arise from discriminatory animus and standing alone this statement does not give rise to a cause of action for age discrimination.

Further, plaintiff has not substantiated his claim that there was an adverse employment action. It is undisputed that plaintiff was not actually demoted nor did his pay or benefits decrease. To the extent that plaintiff complains that his responsibilities decreased or that other employees took over his responsibilities and were younger and less qualified than him, defendants have offered legitimate non-discriminatory reasons for these actions. Chief Pineiro testified that plaintiff often did not have answers to work-related questions at meetings and plaintiff corroborated that claim. Further, Chief Pineiro maintains that plaintiff's work was deficient in material ways and that plaintiff was verbally warned. The First Department has cautioned that when determining whether the reason for an adverse action was pretextual, "[i]t is not for the Court to decide whether the[] complaints [against plaintiff] were truthful or fair, as long as they were made in good faith" (*Melman v. Montefiore Med. Ctr.*, 98 AD3d 107, 125 [1st Dept 2012] quoting *Saenger v. Montefiore Med. Ctr.*, 706 FSupp2d 494, 508 [SDNY 2010]). The fact that plaintiff took offense with Chief Pineiro's tone and/or choice of words is insufficient to rebut defendants' showing and establish that defendants' acts were pretextual. Further, while plaintiff did not receive a negative evaluation while Chief Pineiro was his supervisor is of no moment because plaintiff has otherwise failed to demonstrate an adverse act by the defendants based upon his age.

Plaintiff's remaining arguments are unavailing. Once a party moving for summary judgment has established entitlement to judgment as a matter of law, the burden shifts to the opponent of the motion who must lay bare his or her proofs and establish a triable issue of fact. Plaintiff's attorney's factual claims in his affirmation and memorandum do not warrant a different result since they are not based on personal knowledge of the underlying facts. Otherwise, plaintiff's reliance upon federal complaints by unrelated non-parties for age discrimination do not raise a triable issue of fact as to plaintiff's own claims. Accordingly, defendants' motion must be granted and the complaint dismissed.

## CONCLUSION

In accordance herewith, it is hereby **ORDERED** that defendants' motion is granted and the complaint is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 13, 2016  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.