| **Kenney v Trinity Sch.** |
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| 2016 NY Slip Op 32598(U) |
| December 20, 2016 |
| Supreme Court, New York County |
| Docket Number: 161600/2013 |
| Judge: David B. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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GREGORY KENNEY,

Plaintiff,

-against-

TRINITY SCHOOL, PAT KRIEGER, ANN GRAVEL

Defendants.

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**DECISION/ORDER**
**Index No. 161600/2013**

HON. DAVID B. COHEN, J.:

Gregory Kenney ("plaintiff") is a 53-year-old male, who is married with children and is heterosexual. In 1998, he began working as a teacher of physical education for the Trinity School ("Trinity") on a part-time basis pursuant to a one-year offer of employment. For the next several years, plaintiff continued to be employed by Trinity on a part-time basis pursuant to one-year offers. In February 2003, Trinity extended plaintiff an offer for full time employment. Plaintiff accepted the annual appointments by co-signing a yearly offer letter. Plaintiff accepted his appointment for the academic year for 2012-2013 on February 21, 2012. In February 2013, plaintiff was offered an appointment for the academic year for 2013-2014 and on March 10, 2013, plaintiff accepted this offer. The full-time offer letter signed by plaintiff for the 2012-2013 and the 2013-2014 academic school years state "Trinity School reserves the right to terminate your appointment for cause prior to the end of the contract term, as described in the employee manual. The final decision as to any dismissal for cause resides with the Head of School, after consultation with the members of the senior staff and the President of the Board of Trustees." Although pursuant to the offer letter, full-time physical education teachers were also required to coach each year for two sports seasons, nearly all teachers coached three sports seasons.

Throughout his employment, plaintiff received performance reviews. Some portions of these reviews were positive and some negative. Plaintiff was also talked to about rules, communication issues, absences and missing meetings. During 2001 and again in late 2003, plaintiff was placed in "Serious Concern" status based upon a number of issues that Trinity had with plaintiff's abilities. Despite these issues, plaintiff was offered reappointment each year. On July 1, 2010, Pat Krieger ("Krieger"), a gay

female, married without children, was hired by Trinity as its Athletic Director. Krieger was responsible for Trinity's various athletic teams and was plaintiff's supervisor with respect to plaintiff's coaching duties. Ann Gravel ("Gravel"), an unmarried female heterosexual, is the director/head of the physical education department for the upper and middle school divisions at Trinity and was plaintiff's supervisor with respect to plaintiff's physical education teaching duties for those divisions.

Prior to the golf season in Spring 2012, plaintiff and a co-worker approached Krieger about their coaching duties for the upcoming golf season. Pursuant to school rules, both a coach and an assistant coach were to be present at all golf matches. Plaintiff wanted to get home earlier and he and the co-worker worked out that if they would both be co-coaches only one of them would need to be present at a match. Plaintiff explained to Krieger his desire to be home more often and be with his children and that he lived far away. Krieger denied the request for a change to the policy and continued to require that two coaches be present. During the discussion Krieger stated that they all had choices to make. During a separate conversation relating to his coaching of golf, plaintiff reminded Krieger that his contract only required that he coach two sport seasons, Krieger responded that such an attitude would detract from his value to the school.

In January 2013, following an athletic competition at another school, plaintiff left two students behind and did not follow Trinity rules by insuring that the students had a note from the parents allowing them to stay behind. Plaintiff did not attempt to contact the parents trusting what the children told him. Following this incident, on March 1, 2013 during a meeting with Trinity Head of School, John Allman and Krieger, plaintiff was issued a final warning that any lapses in appropriate supervision would result in immediate termination. Shortly after this meeting, plaintiff accepted and co-signed the employment offer letter for the 2013-2014 academic school year. On April 8, 2013, plaintiff failed to attend to his assigned locker room duty. In his deposition, plaintiff acknowledged that he had notice of the assignment but failed to fulfill the required duty. Following this incident, John Allman terminated plaintiff's employment based upon the past incidents and plaintiff's lapse of supervision following his final warning.

Plaintiff commenced the instant suit alleging that his termination was based upon discrimination and not for cause. Plaintiff alleged that the Trinity violated New York State Human Rights Laws, New York State Executive Laws 296 and 297, New York City Administrative Code 8-107 et seq., as well as breach of contract.[1] Specifically, plaintiff alleges that he was terminated based upon his gender as he was treated differently than his female coworkers in violation of both state and city laws. Plaintiff further alleged that his termination was based upon his age, sexual orientation and marital status in violation of both state and city laws. Plaintiff alleged that all of the acts were aided and abetted by and with the knowledge and consent of defendants Krieger and Gravel. Finally, plaintiff alleged that the Trinity was contractually obligated to employ plaintiff through August 31, 2014 and by prematurely terminating plaintiff, breached the contract between the parties.

In support of the motion for summary judgment, defendants have submitted the affidavits of John Allman and Pat Kreiger, as well as relevant potions of the deposition transcripts of plaintiff, John Allman and Pat Krieger. Defendants argue that this matter should be dismissed as a matter of law, because the evidence establishes that plaintiff's termination was not based upon any discriminatory basis, was based upon plaintiff's repeated performance issues and was done pursuant to plaintiff's contract. Defendants argue that the evidence establishes that for many years, various school personnel had issues with plaintiff's performance and that reviews and conversations with plaintiff constantly raised such issues. Defendants also argue that nearly all teachers coached three sports seasons and that plaintiff was no different than anyone else. To the extent that there were three exceptions, each one had a specific reason; one teacher also served a department head and had extra responsibilities, one teacher had a special needs child that required extra attention and one teacher coached an extra after school activity aside from coaching higher level teams which required a greater time commitment. Defendants further state that to the extent a certain female teacher seemed to receive extra attention in the form of extra meetings, such attention was due to the specific request of the teacher who sought assistance in her transition as a new teacher. Defendants

[1] Plaintiff also alleged retaliation and unjust enrichment but withdrew those causes in its opposition to the instant motion.

explained that Gravel was permitted to miss spring training while plaintiff was required to attend because Gravel was taking care of her mother following the death of her father. Finally, John Allman stated that the decision to terminate plaintiff following the April 8, 2013 incident was solely his, and was not based upon any recommendation of the defendants Krieger and Gravel. Further, neither defendant Krieger or Gravel had any involvement in John Allman's decision to terminate plaintiff. Defendants also argue that the breach of contract cause of action should be dismissed as the contract permitted the termination of plaintiff if after the issuance of a warning, plaintiff continued the behavior about which he was warned.

Plaintiff argues that based upon the facts discovered during depositions and discovery, there remains triable issues of material fact that indicate a discriminatory basis for the termination and preclude summary judgment. Plaintiff's opposition sets forth several facts it believes requires denial of the motion. First, plaintiff argues that he was qualified to coach and teach based upon his history of employment with Trinity. Plaintiff also argues that he does not need direct evidence of discrimination but may rely on facts supporting an inference of discrimination. Plaintiff also states that other facts lead to an inference of discrimination based upon marital status arising from the fact that he approached Krieger with a proposal regarding his golf coaching duties that would increase plaintiff's ability to be home with his family and that the request was denied. During the discussion, when plaintiff discussed his desire to be home earlier to spend more time with his children and the long commute, Krieger responded that we all have choices. During a further conversation about golf coaching in Spring 2013, Krieger stated that coaching two sports would detract from plaintiff's value at Trinity. As his requests to eliminate his golf coaching duty was denied, plaintiff was required to continue coaching three sports despite only be contractually required to coach two seasons.

Plaintiff also argues that triable issues remain regarding his age discrimination claim because Trinity hired two new, younger teachers in Trinity's physical education department following plaintiff's termination. Similarly, plaintiff argues that that triable issues remain regarding his sexual orientation discrimination claim because one of the persons hired in Trinity's physical education department following plaintiff's termination is a homosexual female, whereas he is male and heterosexual. As further evidence, plaintiff argues that his supervisor, defendant Krieger, is a homosexual female and was the one who

reported the incident of him leaving two children behind. Plaintiff also argues that the facts suggest gender discrimination as his previous supervisor had been male before being switched to two females and that a female colleague received extra weekly meetings, whereas none were offered to him.

Plaintiff further argues that to the extent defendants attempt to demonstrate non-discriminatory reasons for any of the complained about actions, such reasons are just a pretext for the discrimination, as he was not given enough time to address concerns with his performance. Finally, plaintiff argues that the breach of contract claim should not be dismissed because the written warning and the later conduct for which plaintiff was dismissed were dissimilar and an isolated incident. Plaintiff acknowledges that none of the defendants, nor any of his coworkers ever made any negative comment or statement because of his age, gender, sexual orientation or marital status.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). The 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 from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In *McDonnell Douglas Corp. v Green*, (411 US 792 [1973]), the Supreme Court set forth a three-prong burden-shifting approach in discrimination cases. It requires plaintiffs to make a prima facie showing of membership in a protected class and that an adverse employment action has been taken against plaintiff. Once that showing is made, the burden shifts to the defendant to demonstrate non-discriminatory reasons for

the actions in question. If defendant is successful in meeting its burden, then plaintiff must show those reasons to be false or pretextual (*id.* at 802).

This action was brought under the New York State Human Rights Laws, New York State Executive Laws 296 and 297 and the New York City Human Rights Law ("City HRL") contained within the New York City Administrative Code (8-107 et. seq.). The City HRL offers more protection than federal and state laws and "explicitly requires an independent liberal construction analysis in all circumstances." It requires an analysis that "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial purposes,' which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv. denied* 13 N.Y.3d 702 [2009]). HRL 8-130 provides that the "provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed." The Court of Appeals has emphasized that the amendment to Section 8–130 of the HRL was enacted to ensure the liberal construction of the HRL by requiring that *all* provisions of the HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York,* 16 NY3d 472, 477–78 [2011]). HRL 8-130 further provides that "cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v City of New York*, 16 NY3d 472 [2011], *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], and the majority opinion in *Williams v New York City Housing Authority*, 61 AD3d 62 [1st Dept 2009]" (N.Y.C, Code § 8-130(c)).

In *Bennett v Health Mgt. Sys., Inc.*, the Appellate Division, First Department provided guidance on how to address summary judgment motions under the City HRL in light of the three-step burden-shifting approach set forth in *McDonnell Douglas* and its requirement of the establishment of plaintiff's *prima facie* case. The *Bennet* court first stated "[w]here a defendant in a discrimination case has moved for summary judgment and has offered evidence in admissible form of one or more non-discriminatory motivations for its

actions, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place. Instead, the court should turn to the question of whether the defendant has sufficiently met its initial burden" (*Bennet*, 92 AD3d at 39, 40). The *Bennet* Court then instructed:

> To summarize, then, for purposes of consideration of summary judgment motions in discrimination cases brought under the City HRL:
>
> (1) If a court were to find it necessary to consider the question of whether a prima facie case has been made out, it would need to ask the question, "Do the initial facts described by the plaintiff, *if not otherwise explained,* give rise to the *McDonnell Douglas* inference of discrimination?"
>
> (2) Where a defendant has put forward evidence of one or more non-discriminatory motivations for its actions, however, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out. Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party, of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas,* mixed motive, "direct" evidence, or some combination thereof.
>
> (3) If the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.

*Bennett*, 92 AD3d at 45 [1st Dept 2011]. Even in those instances where plaintiff establishes a *prima facie* case, once the employer meets the burden by providing a legitimate reason for its action, the *prima facie* case does not necessarily entitle the employee to go to trial (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107 [1st Dept 2012]).

Guided by the above principals, here, the Court will not find it necessary that plaintiff establish a *prima facie* case but rather asks whether defendants have set forth evidence of non-discriminatory motivations for its actions and finds that defendants have done so. Namely, that plaintiff, throughout his employment, has had issues with rules, communication, absences and missed meetings and was previously placed on "serious concern." That because of his prior history of lapses in his supervision and despite several meetings to discuss issues, following the incident in January 2013 where he left two children behind, plaintiff was issued a final warning and despite that final warning, not six weeks later, plaintiff again failed to attend to his supervisory duties. Based upon this extensive history and plaintiff's failure after being given

one last chance to perform his supervision duties as required, Trinity terminated plaintiff. The Court must now determine whether after drawing all reasonable inferences in plaintiff's favor, a jury could find defendants liable under any of the evidentiary routes (pretext under *McDonell*, mixed motive, "direct" evidence, or some combination thereof).

Plaintiff has not provided any direct evidence or mixed motive evidence of discrimination. To the contrary, defendants showed that despite several issues throughout the years, Trinity provided plaintiff with feedback and multiple opportunities to correct any deficient performance issues. Trinity continued to do so right up until it placed plaintiff under a final warning status. Plaintiff offered no explanation for his failure to comply with Trinity rules in January 2013, nor any reason why he missed his supervision duties on April 8, 2013, the final straw actions proffered by defendants for the dismissal. Plaintiff has put forward no direct evidence of discrimination, nor any evidence that a discriminatory motive co-existed with the legitimate reasons supported by defendants' evidence. Plaintiff acknowledged that there was no direct or overt comments or negative attitudes because of his gender, age, sexual orientation or marital status.

Plaintiff's claim that the proffered reason for termination, plaintiff's failure to comply with school policy, is simply a pretext is also without merit. Plaintiff also argues that a number of facts and actions taken by defendants demonstrate that the proffered reason is a pretext. Specifically, plaintiff contends that (1) Krieger's reaction to his golf coaching proposal was based upon his marital status and that he had children, (2) that Trinity hired two new, younger teachers in Trinity's physical education department following plaintiff's termination, (3) that one of the persons hired in Trinity's physical education department following plaintiff's termination is a homosexual female, whereas he is male and heterosexual, (4) that his supervisor, defendant Krieger, is a homosexual female and was the one who reported the incident of him leaving two children behind, that (5) his previous supervisor had been male before being switched to two females, (5) that a female colleague was not required to attend spring training whereas he was, and (6) not all coaches were required to coach three sports, and (6) that a female colleague received extra weekly meetings, whereas none were offered to him.

However, contrary to plaintiff's assertions none of these actions in fact demonstrate any pretext. As a threshold matter, some of plaintiff's facts are incomplete. Defendants established a sufficient non-discriminatory basis why certain coaches only coached two sport seasons, why Gravel was permitted to miss one spring training and why a new teacher received extra weekly meetings and attention. Plaintiff's mere assertion that defendants' explanations were pretextual is not enough (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]. "Although sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated . . . [a] prima facie case, combined with *no* evidence that the stated justification is false other than plaintiff's unsupported assertion that this is so, may not" (*id.* at 308). Although, several of the above claims tend to establish plaintiff's *prima facie* case (for instance that Trinity hired two new, younger teachers in Trinity's physical education department following plaintiff's termination and that one of the persons hired in Trinity's physical education department following plaintiff's termination is a homosexual female, whereas he is male and heterosexual), they do not establish any pretext in the absence of any other evidence. Merely because plaintiff feels that he was discriminated against because he is male, straight, 50 years old and married does not satisfy his burden that defendants' proffered reason is a pretext.

The evidence consistently shows that plaintiff was terminated solely because, despite constant warnings and an ultimate final warning, plaintiff failed to perform his duties. "[I]t matters not whether the [employer's] stated reason for [the challenged action] was a good reason, a bad reason, or a petty one. What matters is that the [employer's] stated reason for [the action] was nondiscriminatory" (*Forrest,* 3 NY3d at 308).

Further, the fact that Allman did not meet with plaintiff each time an issue arose does not show that the March 1, 2013 meeting followed by the ultimate reason for termination was a pretext. The decision to meet is not one reviewed by the Court. "The court in an employment discrimination case should not sit as a super-personnel department that reexamines an entity's business decisions" (*Melman*, 98 AD3d at 121 [1st Dept 2012]). The questioning of a defendant's business judgment is insufficient to give rise to an inference of discrimination (*Kosarin-Ritter v Mrs. John L. Strong, LLC*, 117 AD3d 603 [1st Dept 2014]). Here, there

is no evidentiary route that could allow a jury to find that discrimination played a role in plaintiff's termination. Plaintiff has also not met his burden to show that at least one of the reasons proffered by defendants are false or a pretext for discrimination. Similarly, as the Court is granting summary judgment on the various discrimination causes of actions, the cause of actions against Kreiger and Gravel for aiding and abetting in the "discriminatory conduct taken against" plaintiff is dismissed.

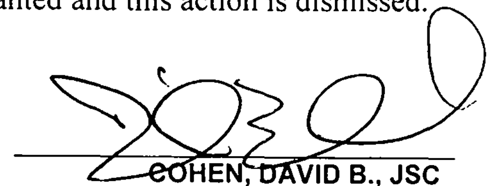
Plaintiff also argues that his breach of contract claim should not be dismissed. In the complaint, plaintiff alleges that Trinity was contractually required to employ plaintiff until August 31, 2014 and that his "employment was prematurely terminated" in violation of the employment contract. Defendant has met its burden on summary judgment that plaintiff's termination was for cause and that the termination was due to plaintiff's pattern of improper supervision and his failure to perform his supervisory locker room duties following receipt of a final warning on March 1, 2013. Accordingly, plaintiff's argument that the missed locker room supervision was a dissimilar violation from what he had been warned about and an isolated incident is without merit. Since the termination was for cause, pursuant to the offer letter, Trinity was permitted to terminate plaintiff "prior to the end of the contract term."

For the above reasons, it is hereby

ORDERED that defendants' motion for summary judgment is granted and this action is dismissed.

This constitutes the decision and order of the Court.

**DATE :** **12/20/2016**



**COHEN, DAVID B., JSC**