SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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MARTIN SMITH,

Plaintiff,

-against-

FEDERAL DEFENDERS OF NEW YORK, INC. and DAVID PATTON,

Defendants.

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DECISION AND ORDER
Index Number: 152449/2014
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits, and Memo of Law	1-21
Opposition Affirmation, Exhibits, and Memo of Law	22-30
Reply Affirmation, Exhibits and Memo of Law	31-37

In this age discrimination action, defendants, Federal Defenders of New York "FDNY" and David Patton "Patton" move for an Order, pursuant to CPLR 3212, for a summary judgment dismissing the complaint against them.

Factual Background

Defendant FDNY is a federally funded, independent, non-profit organization, that provides defense counsel services to persons charged with federal crimes who cannot afford to hire an attorney. Defendant's Memorandum of Law, 1. Plaintiff Smith was employed by FDNY from April 13, 1992 through September 13, 2013 as an Administrative Officer. Id. at 3. In this position, plaintiff had certain management and administrative duties as determined by the executive director. Id. In 2005, plaintiff hired Nancy Mao "Mao" as an Administrative Assistant. Id. at 4. Mao assumed some of plaintiff's responsibilities upon her hire. Id.

Defendant Patton has been employed by the FDNY in the position on Executive Director since 2011. Patton replaced Leonard Joy "Joy", who retired in 2011 when he was in his early eighties. Plaintiff's Memorandum of Law, 2.

In 2013, FDNY received a mid-year budget cut as a result of federal budget sequestration. Defendant's Memo, 4. To navigate through this mid-year budget cut, FDNY employed various measures including mandatory furloughs and layoffs for its attorneys and non-attorney staff. Id. at 5. In July 2013, Defendant Patton informed the employees that he expected to receive the baseline budget for fiscal year 2014 (which began October 1, 2013) by the end of that month. Plaintiff's Memo, 3.

In July 2013, FDNY terminated the employment of FDNY's two oldest non-unionized employees Martin Smith (81) and Alfred Havemann (70) as well as a younger employee Seth Orman (41). Plaintiffs Memorandum of Law, 5. Plaintiff was 81 years old at the time he was terminated. Id. at 3-4.

In late September 2013, Patton "received word that the actual cut would be roughly 9 percent." Id. As a result, the FDNY rescinded all layoff notices that it had issued to attorneys, and no one else's employment was terminated. Id. In addition, no furloughs were implemented in fiscal year 2014. Id. Ultimately, the budget for fiscal year 2014 was cut by 5 percent. Id.

Plaintiff brings claims under New York City Human Rights Law "NYCHRL" alleging discrimination and retaliation based on age.

Defendants contend that the termination of Plaintiff was a result of the federal funding reductions.

Arguments

FDNY's Executive Director Patton states that he had to make the decision to terminate

some employees in Spring 2013, because of the existing and anticipated budget cuts. Patton Dep. 57. There was also a hiring freeze due to the budget cuts, disabling the organization from filling positions of the leaving employees. Id. FDNY was already losing some 1199 staff paralegals, and some relocating attorneys. Id. Therefore, Patton considered IT and administrative staff to lay off. Id.

At the time, FDNY had four IT employees: Havemann, Gyurisko, Trabosci and Orman. Patton explains that he had to keep either Havemann or Gyurisko in the IT department because they had similar functions. He chose Havemann for termination because Havemann was discussing retirement. If he had the other employee go, and Havemann would retire, the organization would not be able to fill the position because of the hiring freeze. Similarly, he had to have either Trabosci or Orman go. He chose Orman to terminate because Orman was the more junior staff member, and Trabosci was more competent. Id. at 69.

In the administrative department, the selection came down to two employees: Martin Smith and Nancy Mao. Patton states that he was leaning towards keeping Mao because of the positive feedback from the Administrative Office regarding Mao, and because of Mao's comprehensive and straightforward input in connection with Patton's efforts to navigate the budget crisis. Patton also alleges that FDNY employees commented to Patton about Plaintiff's personality that "there were a lot of people in the office that didn't like the plaintiff very much" Id. at 54-55. Havemann testified that Plaintiff "wasn't a friendly person." Havemann Dep. 25. Mao also allegedly confided in Patton that the plaintiff could be demeaning towards her and she found him difficult to work with. Patton Dep. 51-52. Patton alleges that the decision to terminate Plaintiff's employment was made before he met the Plaintiff on July 26th, and the sole purpose of the meeting was to communicate the decision to the Plaintiff. Patton Dep. 109-110. In his

deposition, Plaintiff agreed that Patton's decision was already made at the time of the meeting, though Patton sated that Plaintiff could characterize his leave from FDNY to his colleagues as a retirement rather than layoff. Pl. Dep. 149-150; 153-154; 154-155.

On Monday, July 29, 2013 Patton emailed FDNY to announce Plaintiff's layoff, in the same way he announced the layoffs of Havemann and Orman. Id.

Plaintiff alleges that the severe budget cuts for fiscal year 2014 that Patton allegedly acted upon in terminating these three employees in fact never came to pass. Plaintiff's Memo, 10. Upon Smith's termination, his position of Administrative Officer was assumed by Mao. Patton Dep.,123.

Discussion

Summary Judgment Standard:

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

"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 University Medical Center, 64 NY2d 851 [1985]; Tortorello v Carlin, 260 AD2d 201 [1st Dept 1999]).

In Bennett v Health Mgt. Sys., Inc, affirming a summary judgment decision to dismiss a complaint, the 1st Department held that an action brought under the NYCHRL must be, on a motion for summary judgment, analyzed both under the McDonnell Douglas framework and the somewhat different "mixed-motive" framework recognized in certain federal cases. Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 41, 936 N.Y.S.2d 112, 2011. The analysis under the McDonnell Douglas framework requires a plaintiff alleging employment discrimination in violation of the NYCHRL "has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) [he] is a member of a protected class; (2) [he] was qualified to hold the position; (3) [he] was terminated from employment or suffered another adverse employment action; and ***(4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination***. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. Melman v Montefiore Med. Ctr., 2012 NY Slip Op 4111, ¶ 4. In order to nevertheless succeed on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" (Forrest, 3 NY3d at 305 [2004] [footnote, citations, and internal quotation marks omitted]).

Discrimination Claim:

Defendants do not dispute that Smith satisfies the first three elements of a prima facie

case of age discrimination.

To satisfy the fourth element, "[i]n the absence of direct or statistical evidence, a plaintiff must 'show [his] position was subsequently filled by a younger person or held open for a younger person.'" Hamburg v. N.Y. Univ. Sch. Of Med., No. 153572/2012, 2016 N.Y. Slip Op. 31095(U), at *7.

Plaintiff argues that Mao's assumption of Smith's duties upon his termination is sufficient to satisfy the fourth element. While Mao (60) was younger at the time, she was also in the age protected class. Additionally, Mao was not hired to replace the defendant, she just assumed additional duties of the defendant's position after his termination.

Even if the plaintiff was able to satisfy the elements of his prima facie case based on the replacement person, he would have to offer evidence that the legitimate reasons the defendant offers were just a pretext. Defendant offers that: 1) The organization had to lay off one of the employees in an administrative position to endure the budget cuts, and 2) Patton chose Smith to lay off over Mao because Mao was significantly more responsive to the organization's needs. Smith was neither able to show that the organization did not anticipate budget cuts, nor the decision to keep Mao was an aged based one, given that Mao was within said protected class.

Plaintiff next offers that a jury could conclude Smith's age played a role in his termination by alleging that the next-oldest employee, Havemann was also terminated. In Melman v Montefiore, the Court reversed a decision that imposed on a defendant, additional burden of justifying its conduct in collateral matters involving nonparty former employees, when plaintiff has established only that those employees may have been able to satisfy the minimal requirements of a prima facie case in lawsuits of their own. The Court held that the plaintiff should have developed an evidentiary record of actual age discrimination against other

employees to be able to rely on a pattern. Melman v. Montefiore Med. Ctr., 2012 NY Slip Op 4111, ¶¶ 11-12, 98 A.D.3d 107, 123-24, 946 N.Y.S.2d 27, 37-38 (App. Div.)

Here, the Plaintiff offers termination of Havemann, one of the nonparty former employees as evidence of a pattern of actual age discrimination. Havemann does not contend that his separation from FDNY was an aged based decision. Havemann Dep. 39:13-41:25. In Accordance with the ruling of the Court in Melman, Plaintiff does not satisfy his burden of proof needed to support an alleged pattern of discrimination based on "age".

Under the mixed motive analysis, a plaintiff prevails "in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision … or, stated otherwise, [the action] was **more likely than not based in whole or in part on discrimination**." Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 127 (1st Dept. 2012) (emphasis added) (internal citation omitted).

Plaintiff asserts that Patton had an age based animus, allegedly evidenced by comments regarding his predecessor, to satisfy his burden of proof under the the mixed motive analysis. With regard to Joy's last years at the FDNY, Patton testified that "it was rare that you would go in to [his] office and he wouldn't be sound asleep with a mystery book on his desk. He just had checked out." (Patton Tr. 103) Patton also stated that Joy "was AWOL for many years he was running our office, and he simply did not ask for what we needed." (Palmieri Aff., Ex. C). However, these remarks were made in a context of comparing FDNY's heavy workload and limited resources to Federal Defender's Offices in different locations such as Nashville, Los Angeles and Las Vegas. Patton stated that Joy failed to ask for the resources the organization needed, without making any references to his age. (Patton Tr. 103) This Court finds that a

reasonable jury, with no information on Joy's age, could not infer an age based animus from these comments.

Retaliation Claim:

In his Complaint, Plaintiff asserts he suffered unlawful retaliation in the form of 1) his layoff, 2) his separation date and 3) his pay for his last day at work.

To assert a retaliation claim, plaintiff has to come forward with evidence that his employer took action against him after July 26th, 2013, that constituted retaliation for his objecting to FDNY's alleged discrimination within the meaning of Administrative Code § 8-107(7) (defining retaliation as action "reasonably likely to deter a person from engaging in protected activity"). See Melman.

On July 26, 2013, while still employed by FDNY, Smith – through his counsel – raised a complaint of age discrimination with regard to his termination. In response, Patton sent out an email to the entire FDNY organization of Smith's complaint, asking all employees to preserve any documents that could potentially be relevant to Smith's employment. (Palmieri Aff., Ex. F)

Here Plaintiff alleges that Patton's communication dated August 13, 2013 constitutes an adverse action for the purposes of his retaliation claim because it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006) (internal citation omitted). Plaintiff alleges that he was embarrassed by the public announcement that he had made an age discrimination complaint. Plaintiff also alleges that this communication was made to dissuade others and keeping them "in line." Defendant claims that this communication addressed the preservation of documents. This Court does not see how the preservation of documents could have been achieved without notifying the employees. Facts about the

organization-wide communication, as alleged by the Plaintiff, occurred both after his termination and last day was announced. At that point in time, Plaintiff's first two retaliation claims were unsubstantiated.

As for the last day of pay issue, Plaintiff admits that he notified FDNY that he would take a vacation day on his last day, and he never retracted that vacation day notification. Pl. Dep. 180:19- 182:18. Plaintiff claims that he had come in to the office to drop off his keys but he left shortly after because there was nothing for him to do. Id 178:14-179:15. These facts, as alleged do not support a retaliation claim.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss, pursuant to CPLR 3212, is granted, and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendants FDNY and David Patton, and against plaintiff Martin Smith, dismissing the complaint.

Dated: March 6, 2017

ENTER:

Joan M. Kenney, J.S.C.