

**Santos v Barry**

2019 NY Slip Op 30134(U)

January 9, 2019

Supreme Court, Westchester County

Docket Number: 64321/2016

Judge: Terry J. Ruderman

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This opinion is uncorrected and not selected for official publication.

[\*1]

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PAUL DOS SANTOS,

Plaintiff,

-against-

DECISION AND ORDER  
Motion Sequence No. 1  
Index No. 64321/2016

NEW YORK STATE GAMING COMMISSION, and  
BRIAN BARRY, in his official and individual capacity,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the defendants' motion for summary judgment dismissing plaintiff's complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - K	1
Affirmation in Opposition, Exhibits 1 - 10	2
Affirmation in Reply, Exhibit A	3

This age employment discrimination action relates to the termination of plaintiff Paul Dos Santos' employment with defendant New York State Gaming Commission ("NYSGC"). Plaintiff had worked for the New York State Racing and Waging Board since 1981. Defendant Brian Barry, Director of Racing Officials at the NYSGC, helped to interview, hire, and train plaintiff, who eventually became the Supervising Inspector at Yonkers Raceway in 1995. In 2013, the Racing and Waging Board merged with the New York State Division of the Lottery and began operating as the New York State Gaming Commission.<sup>1</sup>

Plaintiff's responsibilities as a Supervising Inspector included maintaining payroll records and overseeing the staff of inspectors to ensure that blood and urine samples were taken from race horses after each race. In 1992, NYSGC began issuing at-will appointments for plaintiff's position renewable every three to four months. Thereafter, plaintiff's employment with NYSGC was renewed every three to four months for over 20 years. When his last appointment term ended on

<sup>1</sup> Even for events occurring before 2013, plaintiff's employer is referred to throughout as NYSGC.

[\*2]

December 18, 2014, NYSGC informed plaintiff that it was not renewing his appointment. Plaintiff, 69 years old at the time, alleges that the decision not to renew his appointment was based on his age, in violation of the New York State Human Rights Law, Executive Law § 296 (“NYSHRL”), the Age Discrimination in Employment Act, 29 U.S.C. § 623 (“ADEA”), and 42 U.S.C. § 1983.

In moving for summary judgment dismissing plaintiff’s complaint, defendants argue that the decision not to reappoint plaintiff was not an adverse employment action because the at-will appointment came to its natural end. They also maintain that the decision was based on plaintiff misusing sick days, collecting low sample sizes, and violating established policy by moving the employee sign-in book and signing in for another employee to cover up her tardiness. Finally, defendants contend that plaintiff’s ADEA and § 1983 claims are barred by the Eleventh Amendment, which grants states and state agents acting in their official capacity immunity from claims for monetary damages against them.<sup>2</sup>

#### Analysis

To prevail on a cause of action for age discrimination under NYSHRL and § 1983, plaintiff has the burden of establishing a prima facie case for discrimination by showing that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Cotterell v State of New York*, 129 AD3d 653 [2d Dept 2015]). Plaintiff may raise an inference of discrimination by showing that he was replaced by a person younger than himself (*Mayer v. Manton Cork Corp.*, 126 AD2d 526 [2d Dept 1987]).

Once plaintiff has made out a prima facie case for discrimination, defendants have the burden of establishing a legitimate, independent, and nondiscriminatory reason for its decision (*id.*). Finally, the burden shifts back to plaintiff to raise a question of material fact as to whether the defendants’ nondiscriminatory reason was merely a pretext (*Keceil v Yonkers Racing Corp.*, 155 AD3d 1014, 1015 [2d Dept 2017]). In the context of a summary judgment motion, defendants bear the initial burden to show that plaintiff failed to prove his prima facia case of age discrimination.

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<sup>2</sup> Plaintiff did not respond to defendants’ immunity argument under the ADEA claim and indicated that he would seek to stipulate to its dismissal. In the absence of a valid argument in support of the claim, the third cause of action under the ADEA is dismissed.

[\*3]

Here, the first element of plaintiff's prima facie case is satisfied. It is not disputed that plaintiff was a member of a protected class at the time of the alleged adverse employment action because he was over 40 years old (*see* 29 U.S.C. § 631[a]). Regarding the second element, defendants concede that plaintiff was qualified for the position when he was hired in 1995. Additionally, plaintiff had worked for the NYSGC as a supervising inspector for approximately 20 years.

In response to the third element, defendants argue that the decision not to reappoint plaintiff was not an adverse employment action because his appointment had arrived at its natural end. However, "[a]n adverse employment action requires a materially adverse change in the terms and conditions of employment ... [that] might be indicated by a termination of employment ... unique to a particular situation" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004] [internal quotation marks and citations omitted]). Here, defendants' decision not to reappoint plaintiff as supervising inspector was similar to the refusal to rehire an employee who filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which was held to be an adverse employment action for the purposes of a retaliation claim (*see Weissman v Dawn Joy Fashions, Inc.*, 214 F3d 224, 234 [2d Cir 2000]). Thus, the third element of plaintiff's prima facie case is satisfied.

Finally, the fourth element, that an adverse inference may be drawn, can be established by evidence that NYSGC replaced plaintiff with someone younger (*see Mayer*, 126 AD2d at 526). NYSGC concedes that plaintiff's replacement was approximately 18 years younger than him. Therefore, plaintiff has successfully raised a prima facie case of discrimination against NYSGC.

Nevertheless, defendants contend that they have established as a matter of law that plaintiff was unqualified for reappointment due to his misuse of sick days and poor performance. However, since at this stage plaintiff is entitled to every reasonable inference that may be drawn in his favor (*Nicklas v. Tedlen Realty Corp.*, 204 AD2d 385 [2d Dept 2003]), it is reasonable to infer that plaintiff was qualified for his position, and defendants' contention that plaintiff was rendered unqualified based on his misuse of sick days and other issues fails to negate plaintiff's prima facie showing.

Since defendants did not establish that plaintiff has failed to make a prima facie case of age discrimination, to prevail on its motion for summary judgment defendants must establish as a matter of law a legitimate nondiscriminatory reason for its decision not to reappoint plaintiff.

[\*4]

Defendants offer several grounds in this regard: (1) misuse of sick days; (2) moving the employee sign-in book; (3) signing in for another employee to cover up her tardiness; and (4) performance issues relating to a low number of test samples.

Defendants contend that they did not reappoint plaintiff because he used 29.5 sick days between June and December 2014, 11 of which were improper as adjacent to scheduled days off, known as "dark days." They cite the portions of plaintiff's deposition in which he conceded that he used 10 sick days in 2014 that were immediately before or after a dark day.

Counsel for defendants asserts in his affirmation that Jolene Masterson, a representative from the NYSGC's Office of Human Resources, confronted plaintiff via emails and phone calls about his suspicious pattern of sick leave, and that plaintiff admitted to her that he used those sick days to babysit his granddaughter. Counsel further alleges that when plaintiff was advised that sick days were to be used only when the employee or an immediate family member was sick, plaintiff responded that he was entitled to use his sick leave at his own discretion. However, defendants failed to submit an affidavit or testimony by Masterson or other direct evidence of the alleged exchange, but instead, defendants attempt to prove their allegation through a letter from Mark Stuart, Assistant Counsel for NYSGC, to Paul Young of the EEOC referencing the emails and telephone calls between Masterson and plaintiff. This hearsay fails to establish the claimed nondiscriminatory reason as a matter of law. In any event, plaintiff denies that any such conversations with Masterson took place, asserting that no one from NYSGC, including Masterson, has ever informed him that his use of sick days was a problem, creating an issue of fact.

Defendants also allege that plaintiff violated policy by moving the employee sign-in book from the commission office to the test barn area. However, plaintiff explains that he moved the book for the safety of his employees following complaints that the commission office was unsafe at night and that he did so with the approval of the Presiding Judge, Nick Ferreira, who was responsible for the entire staff of New York State workers at the raceway. After a few weeks, the Presiding Judge told plaintiff to stop moving the book, and he complied. Plaintiff also denies defendants' allegation that he signed in for another employee. Therefore, this allegation also fails to establish a legitimate nondiscriminatory reason as a matter of law.

Defendants' final basis for the claim that their non-renewal of plaintiff's employment was nondiscriminatory arises out of the deposition testimony of defendant Brian Barry, Director of

[\*5]

Racing Officials at the NYSGC. Barry testified that the number of samples taken under plaintiff's supervision after the April 13, 2013 race was notably low. From this, defendants argue that plaintiff exhibited poor performance which influenced defendants' decision not to reappoint him. However, plaintiff testified in his deposition that he remembers Barry confronting him on this issue in 2013 and explained that the hot weather resulted in lower-than-normal sample sizes. Plaintiff further testified that, following this explanation, Barry responded "thank you, Paul. Keep up the great work." Moreover, plaintiff continued to work in the same position for over a year and a half following this incident with no other complaints relating to low sample sizes.

For each of defendants' alleged nondiscriminatory reasons for not reappointing plaintiff, plaintiff has either denied the allegation or offered an explanation sufficient to raise a triable issue of fact. Plaintiff's opposition and defendants' failure to substantiate key points of its argument with admissible evidence raise issues of credibility and questions of fact as to whether defendants' assertions are merely pretexts. Such issues can only be determined at trial.

Finally, defendants argue that the fourth cause of action against Brian Barry for age discrimination under § 1983 should be dismissed because the claim is barred by the Eleventh Amendment (US Const Amend XI). "State officials acting in their official capacities may only be sued for injunctive or prospective relief" (*Giaquinto v Commr. of NY State Dept. of Health*, 11 NY3d 179, 188 [2008]). Here, plaintiff seeks reinstatement, not monetary damages, under § 1983. Since the relief sought by this cause of action is prospective, plaintiff's claim is not barred by the Eleventh Amendment (*id.*).

Based upon the foregoing, it is hereby,

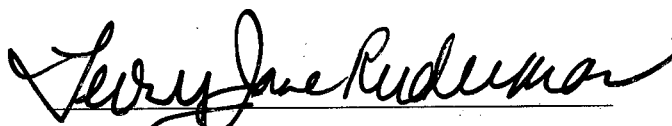
ORDERED that defendants' motion for summary judgment is granted to the extent that the third cause of action is dismissed, and is otherwise denied, and it is further

ORDERED that all parties are directed to appear on Tuesday, February 5, 2019 at 9:15 a.m., in the Settlement Conference Part, room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601 to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

January 7, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.