Hurly v Advance Publs., Inc.
2019 NY Slip Op 34447(U)
September 23, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 2017EF300
Judge: Gregory R. Gilbert

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ONONDAGA

PATRICK HURLEY,

Plaintiff,

vs.

ADVANCE PUBLICATIONS, INC. d/b/a SYRACUSE MEDIA GROUP AND TIMOTHY KENNEDY, WILLIAM ALLISON, AND GERARD CARROLL, AS AIDERS AND ABETTORS,

Defendants.

DECISION & ORDER
Index No.: 2017EF300
RJI #: 33-18-0169
HON. G. GILBERT, JSC

PROCEDURAL HISTORY

Plaintiff, Patrick Hurley (Hurley), age 51, commenced this action for age related discrimination in his former employment with defendant, Advance Publications, Inc. d/b/a Syracuse Media Group (SMG) by filing a summons and complaint on January 19, 2017. Also included in the complaint were Timothy Kennedy, President of SMG (Kennedy), William Allison (Allison) and Gerard Carroll (Carroll) as aiders and abettors.

Issue was joined by answer filed March 13, 2017. Hurley filed a request for judicial intervention asking for a preliminary conference on January 16, 2018 and the Honorable Deborah H. Karalunas, J.S.C., was at that time assigned in the matter. A Preliminary Conference Stipulation and Scheduling Order was filed by Judge Karalunas on February 12, 2018.

The trial note of issue was to have been filed by September 28, 2018 but came to be given a final extension by Judge Karalunas to October 1, 2018, further extended to October 5, 2018 and then to October 12, 2018. The same was filed by Hurley on

October 12, 2018. This was met with a motion to vacate.

The motion to vacate the trial note of issue and a pretrial conference were adjourned at Hurley's request and new dates set by Order entered November 20, 2018. Eventually, the parties agreed to keep the trial note of issue in place but extended the disclosure and dispositive motion scheduling by Order of Judge Karalunas filed January 3, 2019. The trial of the action was set for July 8, 2019.

The present motion for summary judgment was filed on April 10, 2019 following submission of the additional discovery by plaintiff to defendants and made returnable May 8, 2019. Hurley requested an adjournment of the motion to May 22, 2019 on consent and this was granted by Judge Karalunas. Hurley made a further request to adjourn the motion to June 26, 2019 but, given the approaching trial date, an extension to June 5, 2019 was granted.

Hurley wrote to his counsel on May 23, 2019 indicating that he was no longer able to pay for his services and requested to postpone both the trial and the motion. That letter came to be filed with the Court on May 29, 2019 at which time Hurley's counsel filed an Order to Show Cause seeking to withdraw from continued representation. The motion to withdraw as counsel was denied by Judge Karalunas by Order filed June 4, 2019.

Hurley's counsel filed papers in opposition to the summary judgment motion on June 5, 2019. SMG requested an extension to reply and at this point the motion and trial dates were cancelled with the matter being transferred to this Court.

This Court gave the motion a July 25, 2019 return date and directed reply papers to be filed in accordance with CPLR §2214. The same were timely filed and the motion was argued as scheduled with decision being reserved.

COMPLAINT

Hurley's claims take place against the backdrop of the restructuring and reorganization of the Syracuse newspaper, The Post Standard, starting in 2012. Hurley alleges that SMG "took a number of actions intended to derailed (sic) Hurley's job performance and ultimately drive him from the company". [Complaint par. 20].

The first issue raised [Complaint par. 21] is that his base salary was reduced on October 1, 2012 to $65,813.05. The complaint proceeds to describe various ways in which SMG made it more difficult to earn incentive compensation.

The second issue raised [Complaint par. 26] is that when SMG split the paper into print media and digital sections, it promoted newer and younger digital employees but these claims then merely restate the first premise that SMG reduced Hurley's salary and then made his incentive compensation targets unachievable. Hurley claims [Complaint par. 29] that the disparate treatment he received in comparison to younger employees in the digital section of SMG resulted in a nervous breakdown requiring a disability leave of absence from June 1, 2014 through September 10, 2014.

The third claim [Complaint par. 39] made by Hurley is that when he did return to work on September 11, 2014, he became a target of discrimination for age and disability based on his claim bi-polar disorder and previous nervous breakdown. This claim is stated [Complaint par. 40] to be based on promotions and pay provided to the digital section of the company and Hurley's perception that his incentive compensation targets were still unreasonable and unachievable. Hurley also claims [Complaint par. 39, 41] that his position as local market manager had been assigned to a co-worker, Ken Henry, and he returned to some other print media position and his request to take on more responsibility was refused.

The fourth claim made by Hurley is that SMG deliberately rearranged its sales force to target him due to his age, disability and in retaliation for his previous complaints of age discrimination. Hurley notes that SMG divided its business into two segments, Enterprise (which focused on digital sales) and Solutions (which focused on local print accounts). Hurley asserts [Complaint par.43] that Enterprise had larger accounts and Solutions had smaller local accounts. A younger employee was again promoted to manage digital sales which was largely made up of younger employees and had three times the revenue of Solutions that Hurley headed. [Complaint par. 42, 43 & 44]. Stronger performers were said [Complaint par. 45, 46] to be transferred to Enterprise while underperforming employees were moved to Solutions. The complaint [Complaint par. 46] then goes on to note the industry and local trend showing the decline in print media sales while digital sales were growing at a fast pace. Hurley complained to his superiors at SMG [Complaint par. 49,50] about the division of the business as being related to age discrimination.

The fifth claim by Hurley is that SMG retaliated against him and forced his resignation. He alleges "an increasing amount of animosity" from his supervisors [Complaint par. 51] claiming that three business ideas that he had proposed were frustrated in one form or another. [Complaint par. 51, 52 & 53]. Hurley alleges [Complaint par. 54, 55] that due to "this increasingly hostile work environment" he resigned by letter of September 1, 2015 which formally terminated on October 1, 2015 and that he suffered a second nervous breakdown on September 30, 2015.

Based on the foregoing allegations, the complaint asserts causes of action for age discrimination, disability discrimination, retaliation and hostile work environment under Executive Law §296. The complaint adds a fifth cause of action that SMG violated Labor Law §195 by failing to provide written notice of his rate of pay and basis for pay.

DEFENDANTS' MOTION

SMG argues that Hurley was never subject to an adverse employment action, that there is no inference to be had of discrimination from anything that Hurley has alleged and that SMG had legitimate business reasons for what it did. Further, SMG asserts that Hurley has failed to plead and prove a prima facie case of retaliation or intent to retaliate. Lastly, SMG seeks the dismissal of the complaint as to those who have been individually named and as to the claim under Labor Law §195 as having no basis. Additional argument is offered as to failure to mitigate damages but this only becomes relevant if the complaint survives the initial parts of the motion.

Labor Law §195

There is no dispute that Hurley was provided with pay stubs which showed his pay rate and basis for compensation each and every time he was paid by SMG. The precise claim being made by Hurley is that he was not given the notice required by Labor Law §195(1)(a) "at the time of hiring". The record shows that Hurley was continuously employed at The Post Standard starting in February 1995 until the resignation effective date of October 1, 2015. [See Wenger Affirmation, Exhibit J]. The statute has no application. See Franco v. Jubilee First Avenue Corp., 2016 US Dist LEXIS 114191 (SDNY 2016).

Hurley's employment pre-dates the statute and, in any event, he was fully

familiar with his compensation package, including the incentive compensation based on target sales goals. Hurley received a letter dated October 1, 2012 describing the nature and basis of his compensation at the time he accepted the position of Manager, Local Sales for SMG. He also subsequently received a copy of the incentive plan effective July 1, 2013. Both documents are attached as part of the exhibit package to the Facciponte Affirmation.

Lastly, this part of the motion is also not defended by Hurley and has, thus, been abandoned. Oberly v. Bangs Ambulance, Inc., 96 NY2d 295 (2001); Ellis v. Emerson, 34 AD3d 1334 (4th Dept 2006). Hurley states no basis for a claim under Labor Law §195 and, accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss the 5th cause of action of the complaint asserting a violation of Labor Law §195 shall be and the same is hereby **GRANTED** in all respects and the 5th cause of action of the complaint is **DISMISSED** on the merits and with prejudice.

Individual Liability

Hurley seeks to establish individual liability as to Kennedy, Allison and Carroll. This presumes that there is a viable claim against SMG, but even making that assumption, Hurley must show that each individual had direct and purposeful participation in specific acts of discriminatory misconduct. George v. Professional Disposables International, Inc., 221 FSupp3d 428 (SDNY 2016); Fried v. LVI Services, 2011 US Dist LEXIS 57639 (SDNY 2011).

SMG's motion seeks dismissal of the individual claims but only as to Kennedy. Hurley's complaint articulates no specific claim of purposeful direct participation in discriminatory conduct by Kennedy. Presumably, Kennedy was individually named solely by reason of the fact the he was at all relevant times president of SMG. [Defendants' Statement of Material Facts, par. 8; Complaint par. 13]. This is insufficient. Robbins v. Panitz, 61 NY2d 967 (1984); PDK Labs, Inc. v. G.M.G. Trans West Corp., 101 AD3d 970 (2nd Dept 2012); Olszewski v. Waters of Orchard Park, 303 AD2d 995 (4th Dept 2003); Clark v. Pine Hill Home, Inc., 112 AD2d 755 (4th Dept 1985).

One statement attributed by the complaint [Complaint par. 37] to Kennedy is

to the effect that "Hurley would receive a small portion of his incentive compensation for three months upon his return to work in order to make his transition easier". This is not discriminatory in any fashion. Hudson v. Delphi Energy and Engine Management Systems, Inc., 10 FSupp2d 256 (WDNY 1998).

There is further reference [Facciponte Affirmation par. 18] to an e-mail from Kennedy to the effect that there needed to be a discussion with the "team" concerning Hurley's disability leave. This is not discriminatory. Belle v. Zelmanowicz, 305 AD2d 272 (1st Dept 2003).

The last reference to any statement by Kennedy [Facciponte Affirmation par. 88 referencing Allison's deposition testimony at pages 123-124] was to suggest that Hurley's doctor should be contacted as to the duration of the disability leave and "getting advice from EAP" and this does not constitute adverse employment action. See Mejia v. Roosevelt Island Medical Associates, 95 AD3d 570 (1st Dept 2012) leave to appeal dismissed 20 NY3d 1045.

Plaintiff presents no proof of direct and purposeful participation in specific acts of discriminatory misconduct on the part of Kennedy as an individual for which he may be held to individual liability. Accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss the individual claims against Timothy Kennedy shall be and the same is hereby **GRANTED** in all respects and the complaint is **DISMISSED** in relation to claims against Timothy Kennedy on the merits and with prejudice.

Adverse Employment Action

The papers on SMG's motion carefully analyze each and every element of Hurley's claims of hostile work environment but the basic consideration is that there was no adverse employment action in this case to serve as a predicate for Hurley to leave SMG's employment.

Hurley is required to show a materially adverse change to his working conditions. As stated in Messinger v. Girl Scouts of U.S.A., 16 AD3d 314 (1st Dept 2005):

> "To be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.' . . . 'A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation' " (Galabya v New York City Bd. of Educ., 202 F3d 636, 640 [2d Cir 2000], quoting Crady v Liberty Natl. Bank & Trust Co. of Ind., 993 F2d 132, 136 [7th Cir 1993]).

Thus, in Messinger when plaintiff was only able to show a change in his duties with no change in his work space, title, hours, earnings and he continued to perform functions consistent with his job title, no adverse employment action was stated.

As pointed out in Mejia v. Roosevelt Island Medical Associates, 95 AD3d 570 (1st Dept 2012) leave to appeal dismissed 20 NY3d 1045; Silvis v. City of New York, 95 AD3d 665 (1st Dept 2012) leave to appeal denied 20 NY3d 861 and Furfero v. St. John's University, 94 AD3d 695 (2nd Dept 2012), the mere change of job duties is not an adverse employment action. Mejia contended that his transfer from a pulmonary unit to a regular ward caused him to be frequently assigned more difficult cases at inconvenient times. Similarly, Silvis was transferred from literacy coach to classroom teacher which she considered more difficult. In Furfero the claim was one of an unfavorable classroom teaching schedule. None of these plaintiff was able to show an actual reduction in pay or terms and conditions of employment. In this case, Hurley was performing the same functions involving print media as he had for the previous 20 plus years of employment.

A materially adverse change includes a termination of employment, demotion evidenced by a decrease in salary, the loss of a distinguished title from that previously enjoyed, a material loss of benefits and/or significantly diminished job responsibilities. See Forrest v. Jewish Guild for the Blind, 3 NY3d 295 (2004) which, although superseded by changes to the New York City Human Rights Law, is still relevant at the State level. SMG asserts that none of these changes were imposed on Hurley and there was no adverse employment action, material or otherwise.

SMG shows, and Hurley does not dispute, that his base annual pay was $62,246.60 as of 9/1/11. His base annual pay was higher than that earned for 9/1/11

every year thereafter: $71,248.84 as of 9/1/12; $65,813.05 as of 10/7/13; $66,800.24 as of 9/11/14 and $67,511.67 as of 2/22/15. One of the "digital natives" that Hurley complains about as receiving preferential treatment and greater pay is Cody Hooper. SMG has shown that Hooper had base annual pay of $51,200.24 as of 12/10/12; $57,500.00 as of 7/1/13; $58,650.00 as of 3/2/14 and $59,529.75 as of 2/22/15.

Hurley points to the $71,248.84 base pay as of 9/1/12 and that the base pay thereafter was lower. While this is obviously true, it gives rise to no inference of adverse treatment by SMG. Hurley's employment for SMG started with a base annual salary of $65,813.05 commencing 2/1/13 [Wenger Affirmation, Exhibit K] and this is not disputed by Hurley. His annual base salary only increased thereafter and this is also not disputed by Hurley. Hurley's claim that SMG reduced his base annual salary has no merit.

Hurley's job title with SMG was Manager, Local Sales, and it never changed. His title with the Herald Publishing Company prior to that was Retail Group Manager - Local. Hurley does not assert that the change in title constituted an adverse employment action.

Hurley also does not allege that his job responsibilities were significantly diminished. The Court's review of the record indicates that his functions as Manager, Local Sales were predominantly the same as those he performed as Sales Manager. It is noted that these was some small reduction in the number of Hurley's sales territories and the number of people he was managing after he had a nervous breakdown. SMG has shown that this was based on Hurley's insistence that he could not return to the same conditions he had been working under. SMG has also shown that it also reviewed the incentive compensation issue and determined that no change was warranted.

The repeated basis asserted by Hurley for his claim of discrimination is that it was harder to earn an incentive bonus managing the print media side of the business than he could have earned on the digital media side. Even assuming that his job was more difficult or less desirable, that does not give rise to a claim of discrimination under Mejia v. Roosevelt Island Medical Associates, 95 AD3d 570 (1st Dept 2012) leave to appeal dismissed 20 NY3d 1045; Silvis v. New York, 95 AD3d 665 (1st Dept 2012) leave to appeal denied 20 NY3d 861; or Furfero v. St. John's University, 94 AD3d 695 (2nd Dept 2012). Hurley simply has not demonstrated that the incentive

bonus program put in place by SMG discriminated against older workers.

SMG has demonstrated, contrary to Hurley's claims, that the average increase in revenue required from his group for incentive compensation was generally and substantially less than that required from other sales segments of SMG. Contrary to Hurley's claims, the revenue goals and targets were also adjusted downwards over time.

The Court does not ascertain a basis for Hurley's claim that there was any adverse change to his employment and, accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss plaintiff's complaint on the basis that there was no material adverse employment action shall be and the same is hereby **GRANTED** in all respects and the complaint is **DISMISSED** on the merits and with prejudice.

Legitimate Business Reasons

The complaint concedes [par. 15] that "dramatic changes...have been taking place in the news media industry within the last ten(10) years" and that "news media began to transition away from print toward digital media". The Court is generally aware of these changes as countless newspapers and print magazines have come to meet their demise in this age of electronic media. The restructuring of The Post Standard initiated by SMG should have come as no surprise to anyone.

SMG has shown how the restructuring and reorganization of the business was conducted and revised. Even if the Court were to assume adverse employment decisions of some kind as to Hurley and other "legacy employees" as claimed, the actions taken have legitimate, independent and nondiscriminatory reasons to allow SMG and The Post Standard to stay in business. Laverack & Haines, Inc. v. New York State Division of Human Rights, 88 NY2d 734 (1996); Keith v. Carrier International Corporation, 132 AD2d 926 (4th Dept 1987) appeal denied 70 NY2d 613.

The change of bonus pay to an incentive based system from the previous non-incentive system has been accepted as being legitimately instituted. Siri v. Princeton Club of New York, 59 AD3d 309 (1st Dept 2009); American Tobacco Co. v.

Patterson, 456 US 63 (1982). Merit or incentive bonus systems are recognized by statute [42 USC §2000e-2(h)] as providing no basis for a claim of discrimination.

Given that Hurley concedes that some restructuring of the business was necessary, SMG's legitimate and non-discriminatory reasons for restructuring is also conceded. This effectively removes any presumption raised by a prima facie case even assuming that Hurley had presented a prima facie case in the first instance. Mittl v. New York State Division of Human Rights, 100 NY2d 326 (2003); Ferrante v. American Lung Association, 90 NY2d 623 (1997).

As a matter of law, Hurley has to submit evidence raising a question of fact that the restructuring was pretextual in order to avoid SMG's entitlement to summary judgment. Melman v. Montefiore Medical Center, 98 AD3d 107 (1st Dept 2012). He has failed to do so as a basic premise. That basic premise is that SMG felt that Hurley was best suited to manage local sales in which he had been involved for over 23 years rather than let him be one of the more than one hundred employees let go. How the business of sales was then structured by SMG following that decision was a uniquely business driven decision. Albert v. Beth Israel Medical Center, 230 AD2d 695 (1st Dept 1996). Hurley fails to pinpoint any evidence of pretext.

Accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss plaintiff's complaint on the basis that it had a legitimate business reason for what it did shall be and the same is hereby **GRANTED** in all respects and the complaint is **DISMISSED** on the merits and with prejudice.

RETALIATION

A prima facie claim of retaliation requires evidence of participation in a protected activity, defendant's knowledge of the protected activity, adverse employment action and a causal link between the protected activity and the adverse employment action. Forrest v. Jewish Guild for the Blind, 3 NY3d 295 (2004); Calhoun v. Herkimer, 114 AD3d 1304 (4th Dept 2014). Viewed in a light most favorable and giving every inference to Hurley, there may be seen protected activity created by Hurley's accusation of discrimination and the showing of a letter from counsel as to the assertion of discrimination.

What has not been shown is that there was any adverse employment action taken in relation to such a disclosure. All that Hurley alleges is a continuation of the same actions previously undertaken by SMG, none of which were adverse employment actions in the first instance. The point made by SMG is that there was no further employment action, adverse or otherwise, and nothing related to the claimed protected activity. There is no showing of temporal or other connecting factors between the claimed protected activity and any subsequent employment action. Vassenelli v. City of Syracuse, 174 AD3d 1439 (4th Dept 2019); Abram v. New York State Division of Human Rights, 71 AD3d 1471 (4th Dept 2010); Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP, 120 AD3d 18 (1st Dept 2014).

Accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss the third cause of action of plaintiff's complaint for retaliation shall be and the same is hereby **GRANTED** in all respects and the third cause of action of plaintiff's complaint is **DISMISSED** on the merits and with prejudice.

The Court does not reach the issue of failure of mitigation of damages raised by SMG. The Court determines that Hurley has failed to meet his transferred burden of proof on the motion for summary judgment in any respect and, accordingly, it is

ORDERED, defendants' motion for summary judgment to dismiss plaintiff's complaint shall be and the same is hereby **GRANTED** in all respects and plaintiff's complaint is **DISMISSED** in its entirety on the merits and with prejudice.

IT IS SO ORDERED.

ENTER

Dated: September 23, 2019
Syracuse, NY

HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE