

Natofsky v City of New York

2020 NY Slip Op 30537(U)

February 10, 2020

Supreme Court, New York County

Docket Number: 158401/2017

Judge: Verna Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 5

Justice

INDEX NO. 158401/2017

RICHARD NATOFSKY, Plaintiff,

MOTION SEQ. NO. 001

- against -

THE CITY OF NEW YORK, SUSAN POGODA, SHAHEEN ULON, MARK PETERS, and JOHN and JANE DOE (said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named Defendants),

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for

SUMMARY JUDGMENT

Defendants, The City of New York, Susan Pogoda, Shaheen Ulon, Mark Peters, and John and Jane Doe (hereinafter collectively "City") move for summary judgment pursuant to CPLR § 3212 seeking an order dismissing plaintiff's complaint.

Plaintiff Richard Natofsky opposes the motion contending that there are material facts in dispute and summary judgment is not warranted.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 [NY 1986] and Winegrad v New York University Medical Center, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See Assaf v Ropog Cab Corp., 153 AD2d 520 [1st Dept 1989].

Plaintiff, a former Director of Human Resources and Budget for the New York City Department of Investigations, ("DOI") asserts that on the basis of his age and disability he was subjected to disparate treatment, was unfairly assessed, and was deprived of a reasonable accommodation in violation of the New York City Human Rights Law (NYCHRL). Plaintiff further asserts retaliation in the form of his removal, reduction in salary, and demotion to his underlying civil service title of Associate Staff Analyst. Plaintiff, now 60 years old, was diagnosed with severe sensorineural hearing loss in both ears which impairs his hearing,

1 Plaintiff initially commenced an action in federal court wherein summary judgment was granted dismissing plaintiff's federal causes of action. The court declined to exercise supplemental jurisdiction over plaintiff's remaining claims of disability, age, and retaliation under the relevant state/city laws. (See Natofsky v City of New York, 2017 US Dist LEXIS 127289 [SD NY, Aug. 8, 2017, No. 14-CV-5498 (NSB)], affd on other grounds 921 F3d 337 [2d Cir 2019].)

speaking/listening skills, and requires periodic audiological evaluations to monitor his sensitivity and hearing aid functioning.² Specifically, plaintiff alleges a course of conduct by senior staff and the named defendants throughout plaintiff's employment at DOI from 2012 to 2014.

In support of his contentions, plaintiff alleges various instances demonstrating defendants' discriminatory treatment towards him. Specifically, plaintiff avers that on or before March of 2013, DOI Deputy Commissioner Shaheen Ulon³ complained about his email response time.⁴ To address this, plaintiff asserts that he requested that the joint secretary alert him to time sensitive e-mails. He claims that defendant Ulon failed to acknowledge this request which plaintiff asserts was a reasonable accommodation request. Thereafter, in June of 2013, Ulon ordered plaintiff to arrive at work between 9:00 A.M. and 10 A.M. as opposed to his normal arrival time of 8:00 A.M. to 8:30 A.M.⁵ Plaintiff also claims that Ulon improperly denied his leave requests. Plaintiff then met with DOI Commissioner Gill Hearn⁶ concerning Ulon. As a result, Ulon granted plaintiff's leave requests and retracted her order for plaintiff to arrive between 9:00 A.M. and 10 A.M.

Plaintiff further asserts discriminatory treatment at the hands of Susan Pogoda. In February of 2014, Susan Pogoda became DOI's Chief of Staff and Deputy Commissioner for Agency Operations. Plaintiff alleges that upon Pogoda's arrival at DOI she began targeting plaintiff by demanding that plaintiff speak faster in meetings, stared at plaintiff's ears, and, in apparent disgust, uttered remarks such as plaintiff "should not expect to remain in his current office for much longer." Plaintiff also alleges that during a meeting on March 13, 2014, Pogoda whispered in plaintiff's ear and when he did not respond, yelled "I am talking to you, why don't you respond to me?"

In April or May of 2014,⁷ Deputy Commissioner Ulon issued a performance evaluation which rated plaintiff as "*needs improvement*." Plaintiff contends that, despite a request made in 2013, Ulon never provided Tasks & Standards⁸ which she used as the basis of his 2013 performance evaluation. Further, plaintiff contends that Ulon's evaluation improperly blamed him for systemic issues at DOI which were not his responsibility and/or predated his tenure at DOI. For example, plaintiff asserts that timeliness issues raised in the evaluation were due to understaffing; that as to his alleged belated e-mail responsiveness, same was due to Ulon's failure to address plaintiff's reasonable accommodation request; finally, that he was responsible for performance of two director positions without adequate supportive staff.

On April 2, 2014, Staff Chief Pogoda told plaintiff that she preferred someone younger, who would earn less money as replacement for Deputy Commissioner Ulon who left DOI on or around May 1, 2014. Pogoda further explained that she wanted to fill the agency with "younger blood" [purportedly people who can advance in salary as they progress with the agency] and tasked plaintiff with examining older employees and their retirement dates.⁹ On that same date, Pogoda purportedly told plaintiff that he had nothing to worry

² Plaintiff sustained severe nerve damage in his ears at six weeks old. As a result of the nerve damage, plaintiff indicates that even with hearing aids, sounds are magnified but not clear. Thus, plaintiff relies on lip-reading and is limited in his ability to discriminate between sounds.

³ Shaheen Ulon was the Deputy Commissioner of Administration, DOI's Equal Employment Opportunity Officer, and plaintiff's supervisor when he started at DOI in 2012.

⁴ Plaintiff asserts that he informed Deputy Ulon that he could not respond to emails immediately as telephone calls and in-person meetings required his full concentration due to his hearing impairment.

⁵ Plaintiff avers that he arrived to work earlier to catch up on work/answer e-mails that he could not respond to during meetings.

⁶ Rose Gill Hearn served as Commissioner of DOI from 2002 to 2013 under Mayor Michael Bloomberg.

⁷ Plaintiff avers that Susan Pogoda asked Deputy Ulon to write performance evaluations for all of her supervisees, including plaintiff in April of 2014. Plaintiff also avers that Deputy Ulon raised plaintiff's e-mail responsiveness in a performance evaluation on May 1, 2014.

⁸ Tasks & Standards are provided to employees to alert them to which tasks they are to perform and the respective standards by which they will be evaluated.

⁹ Pogoda denies this interaction. Plaintiff also cites the termination and replacement of 62 year-old Victor Olds with a 45 year-old woman.

about at DOI, that he was going to keep his Director positions and salary, Ulon's performance violations were flaky, and that Ulon needed to take responsibility for her own actions and not "throw other people under the bus."¹⁰ However, despite same, Pogoda supported Ulon's evaluation of plaintiff, did not rebut plaintiff's contention that Pogoda herself never expressed dissatisfaction with plaintiff's work, and ultimately, only informed plaintiff of his right to appeal the evaluation.

On May 20, 2014, plaintiff received a letter from Staff Chief Pogoda notifying him of his demotion to his underlying civil service title, Associate Staff Analyst. (See *Plaintiff's Exhibit 11*.) As a result, plaintiff's annual salary was reduced from \$129,000.00 to \$68,466.00. The letter did not provide a basis for the demotion. Pogoda testified that she had the authority to demote or reassign employees without the involvement of DOI Commissioner Mark Peters;¹¹ however, Peters testified that it was ultimately his decision to demote plaintiff.¹² Subsequently, plaintiff met with Staff Chief Pogoda and was informed that the demotion was due to agency reorganization and no mention was made of plaintiff's performance. Thereafter, on May 28, 2014, plaintiff e-mailed Commissioner Peters and Staff Chief Pogoda to assert that his demotion and salary cut was illegitimate and contrary to law. (See *Plaintiff's Exhibit 27*.)

On June 18, 2014, plaintiff submitted a letter to (then) Department of Citywide Administrative Services (DCAS) Commissioner Stacey Cumberbatch to appeal his demotion and reduction of salary. (See *Plaintiff's Exhibit 39*.) In the appeal, plaintiff contended that his demotion violated the New York City Personnel Services Bulletin (PSB), Article 3, Section 320-R which provides that managers should not lose more than 20% of their salary guidelines if they are reassigned to a lower managerial level or to their permanent leave line. *Id.* Then, on June 23, 2014, DCAS informed Edgardo Rivera (DOI Assistant Commissioner of Administration),¹³ Staff Chief Pogoda, and others that plaintiff's salary needed to be increased from \$68,466.00 to \$88,649.00, in accordance with the former manager salary guidelines and the salary cap of plaintiff's permanent title. (See *Plaintiff's Exhibit 39*.) Thereafter, on June 27, 2014, DCAS responded to plaintiff's appeal indicating that DOI was in violation of PSB 320-2R and that DOI would adjust his salary accordingly. (See *Plaintiff's Exhibit 40*.) DOI did not adjust plaintiff's salary until July 23, 2014. *Id.*

Plaintiff maintains that his purported performance issues were never discussed until after he protested his May 2014 demotion. Additionally, plaintiff asserts that following his appeal of the demotion, various instances of retaliatory conduct occurred. Some examples cited include plaintiff being moved to the cubicle previously used by his receptionist when he was a director; plaintiff being removed from direct deposit pay; plaintiff being instructed to include the HR generalist office title in his e-mail signature; Staff Chief Pogoda mocking plaintiff's doctor's note which plaintiff obtained as a basis for a reasonable accommodation request; and plaintiff's request for union retroactive pay being repeatedly improperly denied.

The City contends that contrary to plaintiff's assertions, plaintiff lacks evidence beyond his subjective conclusions to demonstrate that his performance evaluation or purported treatment by the named defendants was motivated by discrimination. Further, the City asserts that any argument as to the purported denial of plaintiff's reasonable accommodation request should be disregarded as plaintiff served as DOI's Disability Rights Coordinator and did not follow the formal procedure to obtain same. Finally, the City maintains that it had legitimate and nondiscriminatory reasons to remove plaintiff from his position as Commissioner Peters, who was then newly appointed, was tasked with reorganizing the agency and plaintiff had a record of unsatisfactory performance in his managerial position.

¹⁰ Pogoda also denies this interaction.

¹¹ Mark Peters became the Commissioner of DOI in February of 2014 under Mayor Bill de Blasio. He was later relieved of his position in 2018 for abuse of power.

¹² See *Plaintiff's Exhibit 4*; Tr at 105; lines 18-22. See *Plaintiff's Exhibit 6*; Tr at 15; lines 21-23.

¹³ Edgardo Rivera was the DOI Assistant Commissioner of Administration from June 2014 to April 2016. Rivera purportedly replaced Shaheen Ulon. Plaintiff avers that Rivera had no human resource background or experience managing agency-wide operating budgets when hired by DOI, but he was considered because he was in his thirties and had no disabilities.

The standard for recovery under the New York City Human Rights Law (NYCHRL) is analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green*, 411 US 792 [1973]. (See also *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. (See *Stephenson*, 6 NY3d at 270, citing *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Forrest*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

After careful review of the papers submitted, the motion is denied.


As to plaintiff's claim of age discrimination, the court finds that the plaintiff has proffered evidence suggesting that he was discriminated against on the basis of his age. To establish a *prima facie* case for discrimination, a plaintiff must show that he or she is a member of a protected class; was qualified for the position held; suffered an adverse employment action; and the adverse action occurred under circumstances giving rise to an inference of discrimination. Plaintiff points to Staff Chief Pogoda's disputed testimony of seeking younger employees who will be able to advance within the agency; an assignment to review older employees and their potential retirement dates; the firing of Victor Olds (a 62 year-old DOI employee) and immediate replacement with a younger employee; and the hiring of younger staff by the new administration, including DOI Assistant Commissioner Edgardo Rivera, who purportedly did not have any background or relevant experience for the position which encompassed plaintiff's former role,¹⁴ to show that his demotion/reassignment was motivated by age discrimination.

With regard to plaintiff's remaining claims of disability discrimination, reasonable accommodation, and retaliation, the court finds that it is clear from the record, which includes conflicting testimony from the City's own witnesses,¹⁵ that there is extensive dispute as to the facts. Ultimately, the nature of a summary judgment motion is to ascertain whether triable issues of fact exist. Under the facts and circumstances present here, whether or not the plaintiff's age and disability gave rise to the treatment he experienced, and his subsequent demotion are issues of fact appropriate for a jury to decide. Accordingly, it is hereby

ORDERED that the City's motion for summary judgment is denied in its entirety; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied and this constitutes the decision and order of the Court.

February 10, 2020


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE

¹⁴ As Assistant Commissioner of Administration, Edgardo Rivera's role included overseeing budget, procurement, human resources, fiscal, and records management.

¹⁵ It is unclear from this record whether Commissioner Peters or Staff Chief Pogoda made the ultimate decision to demote the plaintiff.