Sharpe v Bronx Community Coll. of the City Univ. of N.Y. Sys.
2020 NY Slip Op 32838(U)
July 15, 2020
Supreme Court, Bronx County
Docket Number: 25111/2017E
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

.....X

Lawrence Sharpe,

Plaintiff,

- against -

DECISION and ORDER
Index No. 25111/2017E

Bronx Community College of the City University of New
York System,

Defendants.

.....X

Robert T. Johnson, J.

Upon the foregoing papers, the motion of defendant Bronx Community College of the City University of New York System is decided as follows:

This is an action alleging age discrimination in violation of the New York State (NYSHRL) and the New York City Human Rights Law (NYCHRL). On July 24, 2014, plaintiff, then age 67, was offered the position of Interim Assistant Vice President for Workforce Development, Continuing Education and Assistant Administrator Pre-College Programs at Bronx Community College (BCC). Plaintiff accepted the offer and commenced his employment with BCC on August 4, 2014. Sometime after August 15, 2015, when Dr. Thomas A. Isekenegbe was appointed President of BCC, plaintiff was offered and accepted the position of Assistant Vice President, Workforce Development and Continuing Education and Pre-College Programs. In April of 2016, a reorganization of divisions and titles took place within the college. Plaintiff's position as Assistant Vice President, Workforce Development and Continuing Education and Pre-College Programs was eliminated, and plaintiff was appointed Interim Dean for Workforce and Economic Development which fell under the Office of the President.[1]

[1] Plaintiff's employment was governed by the Executive Compensation Plan indicates that individuals serving in the titles of "Senior Vice President, Vice President, Assistant Vice President, Dean, Associate Dean, Administrator, Associate Administrator, Assistant Dean and

Since Plaintiff was serving in an interim role, BCC, as required by the rules of the City University of New York, posted the position for the permanent Dean for Workforce and Economic Development position. Plaintiff applied for the Dean for Workforce and Economic Development position. He was not ultimately granted an interview for that position.[2]

On June 27, 2016, Plaintiff met with President Isekenegbe and Karla Williams, Esq., Executive Legal Counsel and Deputy to the President, and was informed that his last day of employment with BCC would be June 30, 2016. During that meeting, President Isekenegbe told Plaintiff that his position as Interim Dean for Workforce and Economic Development "no longer exists."

Defendant now moves for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety on several grounds. First, defendant argues that plaintiff has failed to meet his burden of establishing a prima facie case of disparate treatment on the basis of age under the SHRL and CHRL. Defendant maintains that there is no evidence, direct or circumstantial, creating a triable issue of fact that the decision to discharge plaintiff from his interim position occurred under circumstances that give rise to an inference of discrimination. Plaintiff specifically testified at his examination before trial, and conceded, that there were no comments from any supervisor or co-worker concerning his age.

Defendant further argues that assuming that plaintiff can establish a prima facie case of discrimination based on animus against his age, his claims must still fail because defendant has articulated legitimate, non-discriminatory reasons for its actions. In this regard, the plaintiff's

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Assistant Administrator shall be at the pleasure of the President." Further, individuals in positions covered by the plan could be terminated from their employment without cause.

[2] The search committee ultimately interviewed six applicants and recommended three applicants to be interviewed by President Isekenegbe. The search committee did not participate in any of those interviews. President Isekenegbe selected Kenneth Adams for the position because, as President Isekenegbe testified, Mr. Adams had an "excellent background in workforce and economic development."

department was re-structured, and further, that cannot be shown to be a pretext. Further, President Isekenegbe testified that beyond his ability to discharge plaintiff without cause, he had issues with plaintiff's performance and decided that plaintiff was not the best person to lead the Workforce and Economic Development Department based on his vision for the department. Defendant maintains that there is no genuine issue of material fact that could establish that plaintiff was subjected to discrimination on the basis of his age, and that defendant has articulated legitimate, non-discriminatory reasons for its actions that cannot be shown to be pretextual as a matter of law.

Plaintiff, in opposition, maintains that the new president Isekenegbe hired a younger person (56 year old) to replace him, and that the replacement failed to meet the minimum qualifications for the position (he lacked a post-graduate degree in a related field). Further, Isekenegbe refused to fire two other younger persons in plaintiff's department whose work performance, according to Sharpe's supervisor Eddy Bayardelle, was unsatisfactory. In addition, plaintiff maintains that Isekenegbe's deposition testimony was replete with contradictory reasons for firing plaintiff – that he was reorganizing the college, that Bayardelle stated that Sharpe's work performance was unsatisfactory, and that he himself was "appalled" at Sharpe's performance based on his own observations. Moreover, contrary to Isekenegbe's testimony, Bayardelle testified that Sharpe's work performance was always highly satisfactory, and he denied telling Isekenegbe that Sharpe's performance was unsatisfactory.

Finally, Joan Margiotta, the Associate General Counsel for CUNY, told the EEOC in the BCC Position Statement that Isekenegbe fired Sharpe only due to a reorganization without any mention of performance. Margiotta also, under oath, signed BCC's Interrogatory Responses, and said Sharpe was fired only due to the alleged reorganization.

Further, Burton Sacks, then the Deputy Chief Operating Officer of CUNY, wrote Sharpe a letter of recommendation on July 1, 2016, after Sharpe was fired and stated, in part, "I strongly recommend

Mr. Sharpe for any endeavor he wishes to pursue. I believe he would be an asset to any institution of which he is a member."

"To prevail on a motion for summary judgment in a discriminatory employment action, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether [its] explanations were pretextual" (*Cotterell v State of New York*, 129 AD3d 653, 654, 10 NYS3d 558, *citing Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2015]).

"Notwithstanding the differing burdens of proof at trial under the NYSHRL and the NYCHRL, an employer moving for summary judgment with respect to an employee's claims under both statutes still has the burden of showing that the employee's evidence and allegations present no triable material issue of fact (see Ferrante v American Lung Assn., 90 NY2d 623, 630, 687 NE2d 1308, 665 NYS2d 25 [1997] [concluding that an employer must carry its burden on a summary judgment motion with respect to an employee's age discrimination claim under the State HRL, notwithstanding that the employee bears the ultimate burden at trial]; see also Romanello v Intesa Sanpaolo S.p.A, 22 NY3d 881, 885, 998 NE2d 1050, 976 NYS2d 426 [2013] [requiring an employer to satisfy its burden under CPLR 3211 to obtain dismissal of a City HRL claim])." (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833, 11 N.E.3d 159, 166, 988 N.Y.S.2d 86, 93 [2014].)

In an action brought under the NYCHRL, on a motion for summary judgment, the inquiry must be analyzed both under the framework set forth in *McDonnell Douglas Corp. v. Green* (411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 [1973]), as well as the "mixed-motive" framework recognized in certain federal cases. (*Melman v Montefiore Med. Ctr.*, 98 A.D.3d 107, 113, 946 N.Y.S.2d 27, 30 [1st Dept. 2012].) As set forth in *Melman*, under the *McDonnell Douglas* framework as applied in New York, the 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 or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she 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. The plaintiff must then 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. (*Melman v Montefiore Med. Ctr., supra,* 98 A.D.3d 107, 113-114.)

Under a "mixed-motive" analysis, plaintiff should prevail in an action under the CHRL 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. (*See Melman v Montefiore Med. Ctr., supra, supra*, 98 A.D.3d 107, 127 [1st Dept. 2012]; *Williams v New York City Hous. Auth., supra*, 61 AD3d 62, 78 [1st Dept. 2009].)

Plaintiff has met all of the four factors set forth in *McDonnell Douglas*, and has raised a prima facie case under the NYSHRL and the NYCHRL. As to the fourth factor, the fact that a younger person replaced a plaintiff supports an inference that termination was motivated by age-based animus. (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114-115, 946 N.Y.S.2d 27 & n 2 [1st Dept 2012]). Defendant argues that the age difference of 13 years (69 as compare to 56) does not raise an inference of discrimination. "In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker *insignificantly* younger." (O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433, 439 [1996] [emphasis added].) This court does not find that the age difference was insignificant.

Age difference, standing alone, does not suffice to establish a prima facie case. (*Hosking v Memorial Sloan-Kettering Cancer Ctr.*, 2020 N.Y. App. Div. LEXIS 3557, *16, 2020 NY Slip Op 03484, 4 [1st Dept. 2020].) However, plaintiff also points to evidence that the person hired for the permanent position failed to meet the minimum qualifications for the position, and that younger persons in plaintiff's department whose work performance was unsatisfactory were not terminated.

The burden thus shifts to the defendant to advance legitimate, independent, and nondiscriminatory reasons to support its employment decision. Defendant has failed to do so, as the record contains conflicting evidence of the reasons for the termination/refusal to hire. While re-structuring has been advanced as the sole basis, there is also evidence that plaintiff was incompetent, which conflicts with evidence by plaintiff's supervisor and a letter of recommendation that plaintiff was a competent employee. Assuming that defendant met its burden, plaintiff has raised issues of fact as to whether the 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. (*DeFreitas v Bronx Lebanon Hosp. Ctr.*, 168 A.D.3d 541, 92 N.Y.S.3d 27 [1st Dept. 2019].)

Accordingly, it is hereby,

ORDERED that the motion is denied.

This is the Decision and Order of the Court.

Dated: July 15, 2020

RTJ

Robert T. Johnson, J.S.C.