Fischl v New York State Gaming Commn.
2021 NY Slip Op 31280(U)
April 8, 2021
Supreme Court, Suffolk County
Docket Number: 608530/2015
Judge: Paul J. Baisley, Jr.
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MARLA J. FISCHL,

Plaintiff,

-against-

NEW YORK STATE GAMING COMMISSION and BRIAN BARRY,

Defendants.

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INDEX NO.: 608530/2015
CALENDAR NO.: 2019002660T
MOTION DATE: 11/5/2020
MOTION SEQ. NO.: 001 MotD

PLAINTIFF'S ATTORNEYS:
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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants, including a Memorandum of Law, dated June 28, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff dated November 12, 2019; Replying Affidavits and supporting papers by defendants, including Memorandum of Law, dated October 30, 2020; Other ___; it is

ORDERED that the motion by defendants (motion sequence no. 001) for summary judgment dismissing the complaint is decided as set forth herein.

This is an age discrimination action arising out of plaintiff's termination of employment in December 2014 with defendant New York State Gaming Commission (the "Commission"). Plaintiff worked for the Commission since 2003 as a Supervising Racing Veterinarian ("SRV") at Yonkers Raceway. Defendant Brian Barry ("Barry"), the Director of Racing Officials for the Commission, had the authority to hire and fire employees.

Plaintiff's employment as an SRV was an at-will appointment, which was continuously renewed every three to four months from September 2003 through December 2014. Yonkers Raceway offers year-round live harness racing; so plaintiff worked year-round throughout her employment with the Commission. The only exceptions occurred when Yonkers Raceway was closed for renovations from June 2005 through November 2006, during which time she was a back-up veterinarian for Belmont Park and Aqueduct racetracks, and from September 15, 2014 through November 2, 2014, when she was on sick leave due to a wrist injury.

Plaintiff's responsibilities as an SRV included taking pre- and post-race urine and blood samples from race horses, assisting with the supervision of test-barn personnel, assisting in investigating positive drug tests and acting as an expert witness at positive drug test hearings, assisting with determining the fitness of a horse to race, and evaluating the physical condition of a

horse to race. When her last appointment term ended, she was notified in December 2014 that her employment was terminated due to habitual tardiness. Plaintiff, who was 60 years old at the time, maintains that defendants' decision was based on age discrimination and that the purported reason for her termination was pretextual.

Plaintiff commenced this action seeking reinstatement, declaratory relief and money damages. In her complaint, plaintiff alleges in the first cause of action that the Commission and Barry treated her differently from other employees and discriminated against her due to her age in violation of the New York State Human Rights Law, Executive Law § 296 ("HRL"); in the second cause of action that Barry aided, abetted, compelled and coerced the unlawful treatment in violation of the HRL by actually participating in the discriminatory conduct; in the third cause of action that the Commission and its agents discriminated against her based on age in violation of the Age Discrimination in Employment Act, 29 USC § 621, *et seq.*, ("ADEA"); and in the fourth cause of action that without any rational basis, Barry altered the terms and conditions of her employment in violation of 42 USC § 1983 ("Section 1983"). Issue has been joined, discovery completed and the note of issue filed.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff cannot demonstrate a *prima facie* case of age discrimination. As to the first and second causes of action, defendants argue that the Commission's decision not to reappoint plaintiff was not an adverse employment action under the HRL as she was an at-will employee whose seasonal appointment came to an end. Defendants argue that the decision was based on habitual tardiness which resulted in plaintiff being unable to perform her pre-race responsibilities. They also argue that plaintiff falsified the sign-in sheet by indicating that she arrived on time, and that she misused a day of sick leave when she was not sick. Defendants also contend that plaintiff's job performance declined, as insufficient blood and urine test samples were being collected from the horses, and her conduct became unprofessional by engaging in disputes with a trainer and a groom. As to the third and fourth causes of action, defendants argue that the Eleventh Amendment grants state agencies and employees acting in their official capacity immunity from claims seeking monetary damages.

Plaintiff's age discrimination claims, brought under both the HRL and the ADEA, are analyzed under the same standard and subject to the burden-shifting framework established by *McDonnell Douglas v Green* (411 US 792, 93 S Ct 1817 [1973]) (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *Matter of Miller Brewing Co. v State Div of Human Rights*, 66 NY2d 937, 498 NYS2d 776 [1985]; *Chefalas v Taylor Clark Architects, Inc.*, 283 AD2d 174, 724 NYS2d 153 [1st Dept 2001]). To make out a *prima facie* case of age discrimination, plaintiff must demonstrate that she was a member of the protected class, prove that she was discharged or suffered other adverse employment action, prove that she was qualified for the position, and either (a) show that she was replaced by a person younger than herself, (b) produce direct evidence of discriminatory intent, or (c) produce statistical evidence of discriminatory conduct (*see Stephenson v Hotel Employees and Rest. Union*, 6 NY3d 265, 270, 811 NYS2d 633 [2006];

Ferrante v American Lung Assn., *supra*; *Dzikowski v J.J. Burns & Co., LLC*, 98 AD3d 468, 949 NYS2d 426 [2d Dept 2012]; *Mayer v Manton Cork Corp.*, 126 AD2d 526, 510 NYS2d 649 [2d Dept 1987]). Such a showing raises an inference of discrimination which serves to shift the burden to defendants to rebut the presumption with evidence that plaintiff's discharge was based on legitimate, non-discriminatory reasons independent of age considerations (*see Stephenson v Hotel Employees and Rest. Union*, *supra*; *Ferrante v American Lung Assn.*, *supra*; *Lichtman v Martin's News Shops Mgmt., Inc.*, 81 AD3d 696, 917 NYS2d 222 [2d Dept 2011]; *Mayer v Manton Cork Corp.*, *supra*). Plaintiff must then show by a preponderance of the evidence that the defendants' reasons were merely a pretext for discrimination (*see Stephenson v Hotel Employees and Rest. Union, supra; Ferrante v American Lung Assn., supra*). The burden of proof on the ultimate issue of discrimination always remains with the plaintiff (*see Stephenson v Hotel Employees and Rest. Union, supra*; *Ioele v Alden Press, Inc.*, 145 AD2d 29, 536 NYS2d 1000 [1st Dept 1989]).

Plaintiff has demonstrated that she is in a protected class as it is undisputed that she was over 40 years old at the time of the alleged adverse employment action (*see* 29 USC § 631[a]). Defendants conceded that plaintiff was qualified for the position when she was hired in 2003, was reappointed to the position for 11 years, and received positive job performance evaluations during those years. Additionally, defendants' decision not to reappoint plaintiff was an adverse employment action as it was a "material[ ] adverse change in the terms and conditions of employment....unique to [the] particular situation" (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306, 786 NYS2d 302 [2004]). Finally, an adverse inference may be drawn as plaintiff was replaced by someone 20 years younger (*see Mayer v Manton Cork Corp.*, *supra*; *see also Grella v St. Francis Hosp.*, 149 AD3d 1046, 53 NYS3d 330 [2d Dept 2017]; *Dolgon v Standard Motor Prods., Inc.*, 251 AD2d 281, 671 NYS2d 1023 [2d Dept 1998]). Therefore, plaintiff has successfully raised a *prima facie* case of age discrimination against the Commission.

Viewing the evidence in the light most favorable to plaintiff as the non-moving party and according her the benefit of every reasonable inference without making any credibility determinations (*see Jacobsen v New York City Health & Hosp. Corp.*, 22 NY3d 824, 988 NYS2d 86 [2014]; *Negri v Stop & Shop*, 65 NY2d 625, 491 NYS2d 151 [1985]; *Grella v St. Francis Hosp.*, *supra*) defendants have failed to raise an issue of fact to negate plaintiff's *prima facie* showing. Thus, to prevail on their motion for summary judgment, defendant must establish as a matter of law a legitimate, non-discriminatory reason for the decision not to appoint plaintiff.

In support of the motion, defendants submit, among other things, the affidavits of Barry and Ronald Ochrym, who essentially make the same assertions to establish that the decision not to reappoint plaintiff was based on legitimate, independent and nondiscriminatory reasons. Barry asserts that on a total of five days at the beginning of August 2014, plaintiff arrived at the paddock between 6:32 p.m. and 6:41p.m., when she was required to report by 6:10 p.m. Barry contends that because she was late on these five days, plaintiff was unable to draw pre-race blood samples and check the fitness of the horses scheduled for the first race at 7:10 p.m., that the number of blood

samples drawn from racing horses decreased during this time, and that plaintiff falsely entered on the sign-in sheet that she arrived on time. Barry also contends that plaintiff's conduct became unprofessional by getting into a dispute with a trainer and a groomer concerning testing the horses and cooling them down after a race. Finally, he alleges that plaintiff took one day of sick leave when she was not actually sick, but working at a second job.

Ochrym, an acting executive director for the Commission whose authority included making decisions on SRV appointments, avers that in April 2013 there was a concern that insufficient blood testing was being performed on the horses in violation of state regulations and Yonkers Raceway's rules. He states that the blood testing was discussed with plaintiff, and although testing improved, the problem resurfaced in January 2014, and again in June 2014, prompting additional discussions with plaintiff. Ochrym states this history regarding inadequate testing, together with her tardiness, influenced the decision not to reappoint plaintiff.

While defendants in response to plaintiff's *prima facie* showing have produced evidence that plaintiff's appointment was not renewed for legitimate, nondiscriminatory reasons, plaintiff's evidence is sufficient to raise an issue of fact as to whether the justification offered by defendants for her discharge was a mere pretext to conceal an improper, discriminatory motive (*see Chefalas v Taylor Clark Architects, Inc.*, *supra*). In opposition, plaintiff submits, among other items, the transcript of her deposition testimony and that of Scott Palmer ("Palmer"), the equine medical director.

Plaintiff testified that while she was on leave with the wrist injury, Stephanie Wolf and another retired veterinarian were assigned to cover for her. Plaintiff alleges that upon returning to work, Barry showed preference to Wolf, and asked plaintiff to watch over the young veterinarian. Upon being informed that she was not being reappointed, plaintiff contacted Palmer, who contacted Ochrym to advocate for plaintiff's reinstatement. Palmer was concerned that Wolf, whose experience as a veterinarian was with small animals and not with equines, was replacing plaintiff who was very experienced. Ochrym informed Palmer that plaintiff's habitual tardiness was the reason for plaintiff's termination, not her job performance.

According to plaintiff, she arrived at work on or before her required start time of 6:10 p.m., picked up required paperwork from the judge's office where she signed in, and then proceeded to the paddock where there was a second sign-in sheet. Plaintiff testified that she never missed any early races nor was she unavailable to perform her responsibilities before a race. Moreover, plaintiff avers, she was never counseled or reprimanded for being late, her job performance, testing or decisions as an SRV. She also provided an explanation for the one sick day which purportedly helped to inform defendants' decision not to reappoint her. According to plaintiff, she had a real estate closing early in the day which would not have interfered with her arriving to work on time. She testified that she attended the closing feeling sick and thereafter felt too sick to go to Yonkers Raceway.

Plaintiff also explained that testing decreased as there were not enough inspectors, and Palmer testified that a lack of inspectors, which existed at many of the racetracks, could cause a decrease in the number of blood and urine tests performed. Plaintiff testified that younger employees were given preferential treatment by being offered opportunities for promotions, were often late without any consequences, and that at least two older employees at Yonkers Raceway were demoted. As to the disputes, plaintiff testified that after a race, it was the responsibility of the SRV to set the cool down and exercise protocol for the horses in order to take post-race blood and urine samples. The groomers and trainers, who Barry testified usually were the owners of the horses, wanted to set the protocol, and complained about plaintiff. Palmer confirmed during his testimony that it was the SRV's responsibility to establish the cool down and exercise protocol.

Barry also testified that on August 4, 2014, he was at Yonkers Raceway in an office watching the live feed from a surveillance camera at the entrance to the paddock. Barry testified that he saw plaintiff arrive late, but could not recall the time of her arrival. He also testified that he did not recall having a discussion with plaintiff regarding her tardiness and admitted he was unaware that there were two sign-in sheets. His testimony further revealed that the judge's office where plaintiff alleges she signed in upon arriving at work did not have a surveillance camera. Moreover, defendants concede that there are no writings to memorialize their conversations or decisions.

Therefore, as plaintiff's submissions raised a question as to whether her termination was based on legitimate, independent, and nondiscriminatory reasons, the branch of the motion for summary judgment dismissing the first cause of action is denied.

Although Barry is not an "employer" within the meaning of Executive Law § 292(5), and thus cannot be held personally liable for a violation of the HRL, plaintiff alleged facts sufficient to state a cause of action against Barry pursuant to Executive Law § 296(6), which imposes liability upon individuals who aid and abet an employer that commits employment discrimination in violation of the statute (*see Patrowich v Chemical Bank*, 63 NY2d 541, 483 NYS2d 659 [1984]; *Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 805 NYS2d 704 [3d Dept 2005]). Thus, the branch of the motion seeking dismissal of the second cause of action is denied.

Plaintiff does not oppose the branch of defendants' motion to dismiss the third cause of action. Thus, the third cause of action is severed and dismissed.

As to the fourth cause of action, plaintiff cannot recover money damages against defendants (*see Dinerman v NY State Lottery*, 58 AD3d 669, 870 NYS2d 792 [2d Dept 2009]). However, as plaintiff also seeks reinstatement under Section 1983, and the relief sought is prospective, the cause of action against defendants is not barred by the Eleventh Amendment (*see Giaquinto v Commissioner of NY State Dept of Health*, 11 NY3d 179, 867 NYS2d 716 [2008]). Thus, the branch of the motion to dismiss the fourth cause of action is denied.

Accordingly, the third cause of action in the complaint is hereby severed and dismissed, and the motion is otherwise denied.

Dated: April 8, 2021

J.S.C.