

Ruderman v Doe

2022 NY Slip Op 30927(U)

March 17, 2022

Supreme Court, New York County

Docket Number: Index No. 650940/2011

Judge: Richard Latin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN PART 46V

Justice

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IRVING RUDERMAN,

Plaintiff,

- v -

JOHN JANE DOE I-XX, NEW YORK STATE INSURANCE FUND

Defendant.

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INDEX NO. 650940/2011

MOTION DATE N/A

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants New York State Insurance Fund and John/Jane Does, I-XX's (collectively "NYSIF") motion for summary judgment is determined as follows:

Plaintiff, Irving Ruderman, commenced this action against defendants NYSIF for age discrimination in denying him employment. Defendants now move for an Order pursuant to CPLR 3212 for summary judgment, dismissing the claims against them.

Facts

In March 2008, NYSIF, a New York State agency, sought to fill 15 vacancies for two civil service positions: claims services representative trainee 1 and underwriter trainee 1. These positions were entry-level traineeships, requiring a bachelor's degree and a score of 70 or greater on the New York State Professional Careers Test (the "Exam"). Claims services representative trainee 1 involved processing workers' compensation claims. Underwriter trainee 1 involved

tasks in all phases of workers' compensation and disability benefits underwriting. Ruderman received canvass letters from NYSIF because he was qualified for the two positions, having obtained a bachelor's degree and scores of 95, 95, and 90 on the three Exam "tracks." Additionally, Ruderman had more than 27 years of work experience, most recently as a Jewish studies instructor and as an editor for various publications. Ruderman returned the canvass letters, along with his resume, indicating his interest in the positions. On his resume, Ruderman listed his previous employment but did not provide the years he worked in each position. He also listed his education but did not provide the year in which he received his bachelor's degree. It is undisputed that at the time Ruderman was 60 years old.

Ruderman's interview with NYSIF was scheduled for April 10, 2008, at 1:30 p.m. On the day of the interview, Ruderman did not arrive at the building until 1:30 p.m. Before he was called into the interview, Ruderman was provided with an employment application (the "Application") to fill out. According to Ruderman, he was told not to fill out the education and employment sections of the Application.

The Application asked for the candidate's educational and employment background. In terms of education, the Application asked for the name and address of undergraduate and post-graduate schools attended, whether the candidate graduated, years completed, degree type, degree date, credit hours, and major/minor. In terms of employment, the Application asked for candidates' previous employment over the past five years, including dates of employment, salary, name and address of employer, title and duties, name and title of supervisor, and reason for leaving. Ruderman did not include on the Application the date he obtained his undergraduate degree or the dates of his previous employment. The Application did not ask for candidates' age or date of birth.

Ruderman was called into the interview at 1:55 p.m. Ruderman was interviewed by a panel of NYSIF managers, who received his resume, which lacked basic information, and his incomplete Application. Ruderman recalls that there were 14-16 interviewers. However, according to the affidavit of NYSIF Human Resource Specialist Dale Losee, there were 11 interviewers. Of those 11, nine were over 50 years old. The interview itself lasted for about an hour. According to Ruderman, the interviewers did not ask about his work experience or skills, but rather the interview consisted almost exclusively of discussion related to his age. He alleged that one interviewer said, “[J]ust tell us your age, you can tell us your age” (Ruderman Affidavit at ¶ 14). He recalled that another interviewer said, “[J]ust give it to us. Do as we tell you, even if it is inappropriate” (*id.*). By Ruderman’s account, he was told in various forms that he would not be hired because he refused to give his age or any information that might reveal his age. Ruderman also claimed that he was expressly told that he would be denied employment because of his age. “And they said we are not going to hire you because you won’t give us your age and because of your age” (Ruderman Deposition at 98; *see also* Ruderman Affidavit at ¶ 14). Ruderman never revealed his age during the interview and refused to answer any question that he believed would reveal his age. Immediately after Ruderman’s interview, he amended his Application to include more details but still left out the start and end dates of his employment and the date he obtained his bachelor’s degree.

Over the course of three days, NYSIF interviewed 25 candidates for the 15 vacant positions. At least one NYSIF interviewer took notes on the approximate ages of some of the candidates (*see* Exhibit S (Martha Golden Notes)). According to Jeff Epstein, a NYSIF Manager and one of the interviewers, he did not recall ever asking about an applicant’s age.

After Ruderman interview, Nancy Layne, who worked in human resources for NYSIF, attempted to verify Ruderman's employment by contacting Columbia University and Modern Media, the two most recent employers for which he had a supervisor. In an email sent by Layne dated April 11, 2008, before she had called the two previous employers, she expressed a desire to have Ruderman's application "removed from the list" or at least to "put his down as a non-select" (Exhibit S (HR Emails)). Layne wrote that they should contact Ruderman's past supervisors. "If he's lied, then we have a case," she wrote (*id.*). When she called the employers, both said they had not heard of Ruderman.

Ruderman was informed that he was not selected for either of the NYSIF positions on May 9, 2008. The 15 selected candidates, out of 25 who were considered, included six individuals who at the time were 40 or older, including four who were 50 or older and one who was 60 (Losee Affidavit at ¶ 7). The ages of two of the selected candidates are unknown. Ruderman received higher scores on the Exam than each of the selected candidates. According to NYSIF, they selected candidates based on, among other things, their skills, experience, attributes, familiarity with NYSIF's work, and interest in the position.

Age Discrimination

New York State Human Rights Law (NYSHRL) prohibits an employer "because of an individual's age . . . to refuse to hire or employ . . . such individual" (Executive Law § 296 [1] [a]). Employment discrimination claims brought under NYSHRL are analyzed using a burden-shifting framework. To establish a prima facie case of age discrimination, a plaintiff must show, "(1) [plaintiff] is a member of a protected class; (2) [plaintiff] was qualified to hold the position; (3) [plaintiff] 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 (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

If a plaintiff makes a prima facie showing, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason to support its decision (*see Forrest*, 3 NY3d at 305). A defendant needs only to articulate that such a reason exists (*see Ioele v Alden Press, Inc.*, 145 AD2d 29, 39 [1st Dept 1989]). If the defendant articulates a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered reason for its action was pretext for unlawful discrimination (*Forrest*, 3 NY3d at 305). It is not enough for the plaintiff to show pretext; rather, it must show "both that the stated reasons were false and that discrimination was the real reason" (*id.*).

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). The movant has the initial burden of proving a prima facie entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, on a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). In an employment discrimination case, "[c]onclusory allegations of discrimination are insufficient to defeat a motion for summary judgment" (*Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005]).

To prevail on summary judgment in an action alleging discrimination under NYSHRL, "defendants must demonstrate either 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 their explanations were pretextual” (*id.*).

New York courts have found federal cases instructive in applying the NYSHRL because it is analyzed under the same standard as Title VII and the Age Discrimination in Employment Act (*see Lightfoot v Union Carbide Corp.*, 110 F3d 898, 913 [2d Cir 1997]; *Ferrante*, 90 NY2d at 629).

Discussion

The first three elements of Ruderman’s prima facie case are not disputed. At issue is the fourth element, whether NYSIF’s decision not to hire Ruderman occurred under circumstances giving rise to an inference of age discrimination. NYSIF argues that there is no proof of discriminatory intent, noting that plaintiff’s primary evidence of discrimination is his own testimony and the fact that NYSIF requested information that may reveal his age (Defendant’s Memorandum of Law at 20). Defendant cites to federal cases that have found that asking for a job applicant’s age or date of birth, by itself, is insufficient to establish an inference of age discrimination (*see Chudnovsky v Prudential Sec., Inc.*, 98 CIV. 7753 SAS, 2000 WL 1576876 [SDNY Oct. 23, 2000], *affd*, 51 Fed Appx 901 [2d Cir 2002] (request for applicant’s age); *Smiarowski v Philip Morris USA Inc.*, 04 CIV. 00074 (PKC), 2005 WL 1575002 [SDNY July 5, 2005], *affd sub nom. Smiarowski v Phillip Morris USA*, 197 Fed Appx 56 [2d Cir 2006] (question about first year working professionally); *Landau v Bolger*, 1988 WL 69939 [EDNY June 17, 1988], *affd*, 867 F2d 1424 [2d Cir 1988] (request for date of birth); *Jang v Biltmore Tire Co., Inc.*, 797 F2d 486 [7th Cir 1986] (asked applicant’s age)).

Ruderman, however, contends that he was not merely asked to reveal his age on the Application or asked just a single question. By his account, the interviewers were fixated on his

age for nearly the entire one-hour interview. Ruderman recalled that he was told expressly that he would not be hired on account of his age (Ruderman Deposition at 98 (“And they said we are not going to hire you because you won’t give us your age and because of your age”); Ruderman Affidavit at ¶ 14 (“When I objected, the interviewers expressly told me that they would not hire me because of my age”). As facts must be viewed in light most favorable to the moving party, this alleged statement satisfies the fourth element of Ruderman’s prima facie case, that NYSIF’s failure to hire him occurred under circumstances giving rise to an inference of discrimination.

NYSIF has the burden at this juncture to articulate a legitimate, nondiscriminatory reason for not hiring Ruderman. NYSIF points to (1) Ruderman arriving late for the interview, (2) Ruderman’s failure to complete the Application and provide adequate information on his resume, (3) the ability to hire other qualified candidates with skills and interests more aligned with the vacant positions, and (4) NYSIF’s inability to verify Ruderman’s past employment (Defendant’s Memorandum of Law at 24). NYSIF has thus met its burden at this stage.

Since NYSIF has articulated legitimate, nondiscriminatory reasons for its decision not to hire Ruderman, the burden shifts back to Ruderman to demonstrate that NYSIF’s basis for his non-selection was pretext and that the real motive was discrimination (*see Ferrante*, 90 NY2d at 630; *Forrest*, 3 NY3d at 305; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; *Mete v New York State Off. of Mental Retardation and Dev. Disabilities*, 21 AD3d 288, 290 [1st Dept 2005]). As an initial matter, weighing against a finding of pretext is that NYSIF selected candidates from a broad age group, including those within roughly the same age range as Ruderman (*see Weit v Flaum*, 258 AD2d 286, 286-287 [1st Dept 1999]; *Miller v News Am.*, 162 AD3d 422 [1st Dept 2018]). Here, six of the candidates selected were over the age of 40. Additionally, there is an inference against pretext where decisionmakers were part of

the same protected class as the plaintiff (*see Marlow v Off. of Ct. Admin. of State of N.Y.*, 820 F Supp 753, 757 [SDNY 1993], *affd sub nom. Marlow v Off. of Ct. Admin.*, 22 F3d 1091 [2d Cir 1994], and *affd*, 513 US 897, 115 S Ct 252, 130 L Ed 2d 173 [1994]). Here, 9 of the 11 NYSIF interviewers were over 50 years old.

Ruderman argues that NYSIF's first three proffered reasons — Ruderman's late arrival, his failure to complete the Application, and the ability to hire other candidates who were more qualified — were pretextual. In support of this contention, Ruderman claims that he "timely arrived" for the interview at 1:30 p.m. and was delayed by security for five minutes. He claims that when he arrived, he was instructed not to complete the portions of the Application related to education and employment. He subsequently amended the Application after the interview. Further, Ruderman claims that the NYSIF positions were awarded entirely based on the Exam, for which Ruderman had a higher score than each of the selected candidates. Moreover, Ruderman claims that although no work experience was required for the entry-level NYSIF positions, he had "more than twenty-seven (27) years of extensive employment experience demonstrating a broad skill-set well-suited for Defendant's positions" (Ruderman Affidavit at ¶ 8).

Viewing the evidence in light most favorable to Ruderman, there is no material issue of fact as to whether NYSIF's first three reasons were pretextual. It is undisputed that Ruderman arrived at the building at 1:30 p.m. for an interview that was scheduled to start at that time, and he did not initially provide a completed Application to the panel of interviewers. While it is undisputed that a bachelor's degree and an Exam score of "70" were prerequisites for the positions, that was not the entirety of NYSIF's process, and a high score was certainly not a guarantee of employment (*see Cassidy v Mun. Civ. Serv. Com. of City of New Rochelle*, 37

NY2d 526, 529 [1975] (no right to civil service appointment based on test score); *see also* Hatala v McCaul, 253 AD2d 666, 667 [1st Dept 1998] (use of interview process well within authorization of Civil Service Law)). Part of NYSIF's process was to determine which candidates were most qualified based on, among other things, their skills, experience, attributes, familiarity with NYSIF's work, and interest in the position, as demonstrated by their resume, Application, and interview. Ruderman's argument for pretext incorrectly portrays all aspects of the candidate selection process as mere formalities that have no bearing on an employer's consideration of a job candidate. The Court therefore finds that the first three of NYSIF's proffered reasons were not pretextual.

Ruderman argues that NYSIF's fourth proffered reason — their inability to verify his employment after contacting Ruderman's two previous employers — was pretextual. Ruderman submitted emails from Nancy Layne, who worked in NYSIF's human resources department, written before she made calls to Ruderman's previous employers. Layne wrote, "We can put his down as a non-select but if we can get him removed from our list . . . we may be able to move farther down the list and reach other acceptable candidates" (Exhibit S (HR Emails)). Ruderman thus claims that the employment verification process was essentially a sham because a decision not to hire him had already been made prior to those calls taking place. At the pretext stage of the burden-shifting analysis, plaintiffs must show both that defendant's explanation was pretextual and that the real motivation was discrimination (*Ferrante*, 90 NY2d at 630; *Forrest*, 3 NY3d at 305; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; *Mete v New York State Off. of Mental Retardation and Dev. Disabilities*, 21 AD3d 288, 290 [1st Dept 2005]). While plaintiff has raised an issue of fact as to falsity of NYSIF's proffered reason, there is no indication that the real motivation behind the employment verification was to deny

Ruderman employment on account of his age. The Court thus finds that Ruderman failed to demonstrate pretext as to NYSIF's fourth proffered reason.

Since the Court finds each of Ruderman's arguments for pretext to be unpersuasive, Ruderman's case at this stage relies solely on the statement he recalls from the interview, that "they" told him that NYSIF would not hire him due to his age. Parts of plaintiff's prima facie case can be used in the pretext stage (*see Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 330-331 [2003]), but this single, vague hearsay statement is unsubstantiated and appears tailor-made to defeat summary judgment. While the court on a summary judgment motion generally does not resolve issues of credibility, there are rare instances where credibility may be determined as a matter of law (*see Carthen v Sherman*, 169 AD3d 416, 417-418 [1st Dept 2019]; *see also Raymond James Bank NA v Greenberg*, 69 Misc 3d 1209(A) [Sup Ct 2020] (court does not determine issues of credibility on summary judgment motion "unless it clearly appears that the issues are not genuine, but feigned")). Here, the Court finds Ruderman's recollection that "they" told him he would not be hired due to his age to be incredible. The statement is self-serving and is inconsistent with rest of his description of the interview, in which Ruderman was asked about his failure to provide his age but not about his age itself. Additionally, Ruderman has previously brought two age discrimination cases, both of which were dismissed for failure to state a claim (*see Ruderman v Police Dept. of City of New York*, 857 F Supp 326 [SDNY 1994]; *Ruderman v New York City Human Resources Admin*, Sup Ct, New York County, Sept. 17, 2014, Chan, M., index No. 651466/2013). A court that had the opportunity to assess Ruderman's credibility found him to be entirely lacking in credibility (*see 190 Claremont Realty, LLC v Ruderman*, 39 Misc 3d 144(A) [App Term 2013] ("It is clear . . . that [Ruderman] will testify to any set of facts he believes will result in him getting what he

wants”) (quoting the trial court order)). In light of the record as a whole and Ruderman’s proclivity for tailoring the facts to reach a particular result, this vague and self-serving remark cannot be relied upon.

Plaintiff has thus failed to raise a triable issue of fact and defendants have demonstrated the absence of material fact as to whether defendants’ proffered reasons were pretext for age discrimination.

Accordingly, it is hereby ordered that defendants’ motion for summary judgment, dismissing plaintiff’s complaint, is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

March 17, 2022

DATE



RICHARD LATIN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE