Sanders v Cooperatieve Rabobank U.A.
2022 NY Slip Op 34188(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 158104/2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

James Sanders

INDEX NO. 158104/2018

MOT. DATE

- v -

MOT. SEQ. NO. 002

Cooperatieve Rabobank U.A.

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s).____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s).____
Replying Affidavits	ECFS DOC No(s).____

In this age discrimination action, defendant, Cooperative Rabobank U.A. ("Rabobank" or "the company"), moves pursuant to CPLR 3212, for summary judgment pursuant to the New York City Human Rights Law.[1] Plaintiff, James Sanders, opposes. The motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The relevant facts are as follows.

Defendant hired plaintiff as a consultant in its compliance department in January 2016, when plaintiff was 55 years old (complaint, New York St Cts Electronic Filing System [NYSCEF] Doc No. 1 ¶¶ 2,7). Plaintiff was hired to provide Rabobank with support in connection with its efforts to obtain a swap dealer license with the Commodity Futures Trading Commission (*id.* ¶¶ 7-8). In August 2016, plaintiff was offered a full-time, at-will position as "Executive Director, Swap Dealer Compliance Officer", within the Market Compliance Group of the company with an annual salary of $265,000 (Sanders offer letter, NYSCEF Doc No. 40 at 1-2; Sanders Aff, NYSCEF Doc No. 40 ¶ 3). Plaintiff's salary at the time of his termination, two years later, was $276,042 (Webb aff, NYSCEF Doc No. 53 ¶ 6). Plaintiff also received a bonus of $25,000 in 2016 and 2017 (Sanders deposition, NYSCEF Doc No. 32 at 86, 90).

In early 2018, the company believed that it would soon be acquiring a swap dealer license and began to focus on post-registration compliance and "business as usual" ("BAU") (Pocock deposition, NYSCEF Doc No. 36, 80-82). The company's focus would shift from designing the compliance program and obtaining a license phase, to a "BAU" or an operational phase (*id.* at 80-81). In February 2018, Rabobank began interviewing candidates for a full-time compliance position, which would have the title of

Dated: 12/8/22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[1] Plaintiff's complaint alleges causes of action of age discrimination under both the New York State and New York City Human Rights Law but has abandoned his New York State claim (*see* plaintiff's memorandum of law in opposition to defendant's summary judgment motion, NYSCEF Doc No. 86).

"Executive Director, Markets Compliance Professional" (Swartz deposition, NYSCEF Doc No. 38 at 53-54).

The role would be a grade level lower than the one held by plaintiff, and with a salary of $220,000 (NYSCEF Doc No. 53 ¶ 8). In May 2018, Sidney Vidaver was hired for the position, at the age of 41. On April 19, 2018, plaintiff was notified by his manager at the time, David Pocock, that plaintiff was being terminated and that his last day of employment would be April 30, 2018. Rabobank became a registered swap dealer one year later, on April 1, 2019.

While Rabobank maintains that the elimination of plaintiff's position was due to plaintiff's expertise no longer being needed because the swap dealer registration was "imminent," plaintiff claims that he was terminated due to his age and that his duties were reassigned to four employees, including Vidaver, whose ages at the time ranged from 31 to 41. Plaintiff was 57 years old at the time of his termination (NYSCEF Doc No. 1 ¶ 29). He claims that he was unlawfully terminated due to his age, pursuant to the New York City Human Rights Law ("NYCHRL") (Administrative Code of the City of New York § 8-107[1][a]).

DISCUSSION

The standards of summary judgment are well settled. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]). While "[t]he moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case" (*Ferluckaj v Goldman Sachs & Co.,* 12 NY3d 316, 320 [2009]), the movant must come forth with proof in admissible form to warrant granting is summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

The court's function in a summary judgment motion is issue-finding rather than issue-determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Sillman,* 3 NY2d at 404).

NYCHRL § 8-107 (1) (a) provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age . . . (2) . . . to discharge from employment such person; or (3) [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment.

In evaluating causes of action under the NYCHRL, the court applies both the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792, 802-804 [1973]), and the mixed-motive framework (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016] *citing Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]), where plaintiff has the initial burden to establish a prima facie case of discrimination. The First Department has reaffirmed that "an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed under both the McDonnell-Douglas framework and the somewhat different 'mixed-motive' framework" (*Melman*, 98 AD3d at 113).

Under the McDonnell-Douglas analysis, plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to proffer evidence of a legitimate, non-discriminatory reason for

the adverse employment action (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Listemann v Philips Components,* 13 AD3d 494, 494 [2d Dept 2004]). If the employer produces such evidence, the burden shifts back to the employee to establish that the employer's proffered reason is a mere pretext for discrimination (*Ferrante,* 90 NY2d at 629; *Listemann,* 13 AD3d at 494). While the ultimate burden of proof to show discrimination has occurred lies with the plaintiff, it is the moving defendant's burden to "demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for [its] challenged actions, the absence of a material issue of fact as to whether [its] explanations were pretextual" (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305-306 [2004]).

Under the mixed-motive framework, the court must consider "whether there exists triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct" (*Hudson*, 138 AD3d at 514 [internal quotations and citations omitted]).

In order to establish a prima facie case of discrimination under the McDonnell-Douglas framework, plaintiff must show: (1) membership in a protected class; (2) qualification for the position held; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination (*Ferrante,* 90 NY2d at 629). It is undisputed that plaintiff has met the first three elements of a prima facie case. Plaintiff contends that he has also established the final element, that he was terminated under circumstances that give rise to an inference of age discrimination because he was the oldest employee at the company and was replaced by younger employees. Moreover, plaintiff argues that this was part of a pattern by the company to replace older employees with those who are younger.

Even if the court were to find that plaintiff established a prima facie case, summary judgment would be warranted, because defendants proffered a legitimate, business reason for terminating plaintiff, *i.e.,* that plaintiff's termination was not only a cost-cutting measure, but he did not have the experience the company needed once Rabobank returned to business as usual. Plaintiff admits that at no time during his employment did anyone ever reference his age and he never complained to anyone about any form of discrimination (NYSCEF Doc No. 32 at 119; 122). According to defendant, plaintiff was hired to obtain a swap dealer license and was terminated because he had nearly completed the registration. Moreover, as one of the highest paid employees at Rabobank, defendant also saw eliminating plaintiff's position at the company as a cost-cutting measure. Defendant claims that Vidaver was hired in proximity to plaintiff's termination not to replace plaintiff with a younger employee, but because Vidaver fulfilled a specific skillset the company was looking for: post-registration experience, BAU experience and "Volcker Rule"[2] compliance; none of which plaintiff had (plaintiff's response to defendant's statement of material facts, NYSCEF Doc No. 89 at No. 63).

Under the McDonnell-Douglas framework, the burden shifts back to plaintiff to prove that the reason proffered by Rabobank for terminating him was merely a pretext for discrimination (*Ferrante,* 90 NY2d at 629-630). Further, under the mixed-motive framework, the court will also consider whether there exist triable issues of fact that discrimination was one of the motivating factors for the company's termination of plaintiff as an employee (*see Melman* 98 AD3d at 128).

Plaintiff argues that defendant's supposed cost-cutting and elimination of his position is pretext for age discrimination. He maintains that his duties were not eliminated but rather reassigned to four younger employees, including Vidaver, and that the swap dealer license was not "imminent" because it took another year after his termination for Rabobank to obtain the license. Plaintiff points to emails referencing the swap dealer registration as a "long process," and not one that was "imminent," but fails to place the words in context. The full sentence reads:

---

[2] The Volcker rule prohibits banking entities from engaging in proprietary trading or investing in or sponsoring hedge funds or private equity funds (Federal Reserve Board-Volcker Rule, https://www.federalreserve.gov/supervisionreg/volcker-rule.htm [last accessed Nov. 12, 2022]).

> During the past few months[,] it has become clear that, rather than hire a full-time role to replace the consultant work that Aydin [Bonabi][3] is undertaking so well, we actually needed to restructure the Markets Compliance team, in light of the long process towards eventual Swap Dealer registration and our other BAU [business as usual] needs, especially with respect to Volcker and our support to Head Office in that regard
>
> (email correspondence re: long process, NYSCEF Doc No. 84).

While this suggests that Pocock acknowledges that the swap dealer license is indeed a long process, his emphasis was on post-registration, an area that plaintiff himself admits he had no prior experience. That the license took another year after plaintiff was terminated is not, as plaintiff argues, pretextual, when contemporaneous conversations surrounding the swap dealer license suggests that there was a possibility it would be completed by the end of May, a month after plaintiff was terminated (email correspondence from Pocock, NYSCEF Doc No. 75 at 1). Plaintiff is correct that Vidaver then commenced his employment with Rabobank the same month, but with a different title, different duties, and at a salary grade and title lower than plaintiff's own. "Since plaintiff's position was eliminated and [he] was not replaced, [he] cannot maintain a cause of action for age discrimination" (*Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 124 [1st Dept 2007] [internal citations omitted]).

Plaintiff also argues that there was no cost-cutting gained by plaintiff's termination since plaintiff's annual compensation was reallocated to the four younger employees. Plaintiff's calculations are as follows: (1) Sanders' salary was "approximately" $275,000; (2) Vidaver's salary was $220,000 with a $30,000 "welcome" bonus; and (3) two of the other younger employees received $5,000 raises each (NYSCEF Doc No. 86 at 20). However, without utilizing simple math, it is clear that plaintiff's counsel fails to acknowledge Sanders' yearly bonuses of $25,000, while at the same time asking the court to calculate in Vidaver's one-time payment of $30,000. Rather, using those figures, it is clear that terminating Sanders' position would in fact save the company money, especially in the long term.

Finally, plaintiff claims that there was a pattern where the company was terminating older employees, including three members within the compliance department: Larry Candido, Jonathan Weinberg, and Stuart Meher. All three employees were terminated under a restructuring plan called "Project Columbus" in 2017, when the company streamlined its rural business, based in Missouri, and wholesale business, based in New York, to primarily the Missouri office (NYSCEF Doc No. 38 at 23). Plaintiff admits he has no knowledge of how or why decisions were made regarding the restructuring (NYSCEF Doc No. 89 at No. 23). However, the record reflects that the majority of employees who were terminated under "Project Columbus" were under the age of 40 (*id.* at No. 24). Further, communications between plaintiff and Aydin Bonabi, plaintiff's former colleague before Rabobank, shows that plaintiff was aware that employees who were younger and older than himself were being terminated (*see* text messages exchanged between Sanders and Bonabi, NYSCEF Doc No. 50 at 6). Plaintiff's unsupported conclusions and speculations that older employees were terminated and replaced by younger individuals is insufficient to defeat a motion for summary judgment (*Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005] ["(c)onclusory allegations of discrimination are insufficient to defeat a motion for summary judgment"]).

None of plaintiff's allegations can establish that his termination was motivated, even in part, by age discrimination. Even after seven contentious and lengthy depositions, including that of Larry Candido, a former employee that plaintiff alleges was also terminated due to age discrimination, plaintiff fails to establish that his termination was discriminatory or raises any triable issues of fact. Even under the broad standards of NYCHRL, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury" (*Melman* 98 AD3d at 131). The court, in an employment discrimination case, "should not sit as a su-

[3] In December 2016, plaintiff requested assistance with his swap dealer compliance role and Rabobank allowed him to retain a consultant, Aydin Bonabi. Plaintiff and Bonabi had worked together in the past and plaintiff was involved with his solicitation and retention as a consultant by Rabobank.

per-personnel department that reexamines an entity's business decisions" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 966 [1st Dept 2009] [internal quotation marks and citation omitted]). Thus, having analyzed the matter under both the McDonnell-Douglas and mixed motive framework, plaintiff's claim fails and there is no evidence from which a reasonable factfinder could infer that his age played any role in defendant's decision to terminate him (*see Joseph v Owens & Minor Distribution, Inc.*, 5 F Supp 3d 295, 321 [ED NY 2014], *affd*, 594 Fed Appx 29 [2d Cir 2015]).

As such, defendant is entitled to summary judgment dismissing plaintiff's cause of action for age discrimination under the NYCHRL.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendant Cooperative Rabobank U.A. for summary judgment (motion sequence no. 002) is granted in its entirety and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of defendant, and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/8/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.