Kalola v New York City Dept. of Info. Tech. & Telecom.
2024 NY Slip Op 30344(U)
January 26, 2024
Supreme Court, New York County
Docket Number: Index No. 157691/2017
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**
Justice

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PURUSHOTTAM KALOLA,

Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY & TELECOMMUNICATIONS, ANNE ROES, HARRIET KING, DINA DESIDERIO, MS BROWN, ANNETTE HEINTZ, PAUL HERZFELD, CITY OF NEW YORK,

Defendant.

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INDEX NO. 157691/2017

MOTION DATE 03/29/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 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

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Purushottam Kalola brings this action for discrimination and retaliation based on his age, national origin and race under the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL").[1] Plaintiff alleges he was discriminated and retaliated against on the basis of his age (56 years old), national origin (Indian) and race.

Defendants The New York City Department of Information Technology & Telecommunications ("DoITT") and the City of New York ("City") (collectively, "defendants") move for summary judgment pursuant to CPLR §3212 dismissing the complaint.[2] On the record,

[1] In his complaint, plaintiff makes vague claims alleging defendants violated sections of the NY Penal Law, the U.S. Code and various other State and Federal Laws which are not pled with the required particularity (CPLR §§ 3013, 3014).
[2] Plaintiff has failed to submit proof that any of the individually named defendants have been served with process in this matter, and as such, are not properly before this Court.

this Court dismissed plaintiff's federal claims under the ADEA and Title VII (NYSCEF Doc. No. 45).[3]

BACKGROUND FACTS

On June 18, 2014, DoITT posted a notice for a job titled "Strategic Sourcing Analyst" under Job ID 151843 (NYSCEF Doc. No. 98). The Job ID 151843 listing set forth a 'preferred skills' section which included (i) strong negotiation skills and experience with large IT providers and resellers; (ii) significant experience and skills influencing senior management, business users, key stakeholders and vendors; (iii) ability to interface with clients and coordinate staff; (iv) familiarity with certain software and equipment; (v) familiarity with NYC Procurement Rules; and (vi) the ability to multitask under tight deadlines. The Job ID 151843 listing also included a 'minimum qualifications' section that specified that a candidate must have either (i) a master's degree in a related field, plus two years of full-time professional experience in a related field, including eighteen months of experience in an executive, managerial, administrative or supervisory capacity; or (ii) a baccalaureate degree and four years' experience of professional experience set forth in the listing's preferred skills requirements, including eighteen months of experience in an executive, managerial, administrative or supervisory capacity. The Job ID 151843 listing also included a New York City residency requirement which provided in bold face type "NYC Residency is required within 90 days of appointment."

Sometime thereafter, it is undisputed that plaintiff applied for Job ID 151843 (NYSCEF Doc. No. 100 [Plaintiff Deposition] at 37). In or about late August 2014, former Strategic Sourcing Manager Harriet King ("King") contacted plaintiff for a phone screening interview in relation to Job ID 151843 (*id.* at 40; NYSCEF Doc. No. 104 [State Division of Human Rights

[3] By Order, dated October 28, 2019, this Court granted plaintiff's motion to amend the complaint to add the City as a defendant (NYSCEF Doc. No. 53).

("SDR") No Probable Cause Letter at 2]). At the time of the interview, plaintiff lived in Wappinger Falls, New York, not New York City (NYSCEF Doc. No. 100 [Plaintiff Deposition] at 47). Plaintiff testified at his deposition that he told King that he would move to NYC if he was hired for the position but he also mentioned that his daughter lived in NYC, and he could provide her address instead (*id.* at 46, 67-68).

Thereafter, plaintiff made multiple phone calls and sent letters to various individuals at DoITT inquiring about the status of his application (*id.* at 64). Plaintiff testified that his repeated phone calls and letters regarding his application for Job ID 151843 is the basis of his retaliation claim (*id.* at 64). Moreover, at his deposition, plaintiff was asked if he was subject to any disparaging remarks based on his age, national origin or race. Plaintiff responded that 'Miss King' told him that he had too many years of experience and that he was overqualified (*id.* at 54-55). Plaintiff also testified that King intentionally discriminated against [him], intentionally failure [sic] [me], intentionally refused to hire me, intentionally age discrimination [sic] and because of my accent" (*id.* at 55). Plaintiff stated that he was discriminated against because "[p]eople can recognize me, that I'm a foreigner and I'm Indian" (*id.*).

On September 17, 2014, DoITT replaced Job ID 151843 with Job ID 167689 (NYSCEF Doc. No. 99), increasing the salary range but generally maintaining the same qualification requirements. In September 2014, plaintiff applied for Job ID 167689 (Tr. Oral Argument at 11; (NYSCEF Doc. No. 100 [Plaintiff Deposition] at 52, 56).[4] However, plaintiff never received a phone screening or interview for Job ID 16789 (*id.* at 56). There were four finalists for the position and one, Guy Oliveri, was chosen and appointed to the position of Strategic Sourcing Analyst on December 22, 2014 (NYSCEF Doc. No. 102 [DoITT Position Statement] at 4). Mr.

[4] Plaintiff may have made additional phone calls after he applied for Job ID 167689, but he could not identify when these calls were made (*id.* at 64).

Oliveri's experience included working for a city agency, the New York City Department of Citywide Administrative Services ("DCAS") since 2007 and managing and coordinating a wide variety of city and agency projects. Mr. Oliveri was also a certified public accountant (NYSCEF Doc. No. 103 [Mr. Oliveri's resume] at 1-2). At plaintiff's deposition, plaintiff admitted that he lacked prior experience working for the City, and that Mr. Oliveri was a certified public accountant while plaintiff was not (NYSCEF Doc. No. 100 [Plaintiff Deposition] at 60-61); NYSCEF Doc. No. 103 [Oliveri Resume]; Doc. No. 105 [Plaintiff Resume]).

New York State Division of Human Rights Complaint

Plaintiff filed a complaint with the New York State Division of Human Rights ("SDHR") on August 10, 2015 (NYSCEF Doc. No. 101 [SDHR Complaint]) alleging that defendants engaged in discriminatory practices in violation of the NYSHRL. On the form provided by SDR, plaintiff checked boxes indicating he was discriminated and retaliated against on the basis of creed/religion as a Hindu, national origin, race/color or ethnicity, due to the refusal of defendants to hire him (NYSCEF Doc. No. 101 at 3). Plaintiff stated that he "was more qualified for all job positions (more than 30 job positions from 2013-2015" (*id.* at 5). DoITT issued a statement in response, dated September 8, 2015 (NYSCEF Doc. No. 102).

On November 30, 2015, SDHR issued a No Probable Cause Finding and dismissed the case (NYSCEF Doc. No. 104 [SDHR Finding]). SDHR determined that "there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of" (*id.* at 1). The SDHR Complaint alleged that DoITT refused to hire him because he was 56 years old, Hindu, Indian and Asian. SDHR concluded however, there was a lack of evidence in support of plaintiff's allegation that he was subject to discrimination and retaliation based on age, creed, national origin or race/color.

SDHR found that respondent (defendants herein) provided nondiscriminatory reasons for not hiring plaintiff, *to wit*, that plaintiff indicated he would not comply with the New York City residency requirements, and another candidate had qualifications and experience that more closely matched the subject job requirements. SDHR also stated that "during a prescreening interview … [plaintiff] told Human Resources representative Harriet King, that he would not move to New York City and did not believe her when she stated that the position required New York City residency within 90 days of appointment (*id.* at 2). The SDHR Finding provided that "[plaintiff] also admitted calling Ms. King a liar and telling her that he would use his daughter's address to satisfy the residency requirement" (*id.*). The SDHR Finding also noted that plaintiff did not "identify his age, race, national origin or creed" on his resume (*id.*).[5] With respect to retaliation, the SDHR determined that plaintiff "has not shown, or even alleged, that he opposed discrimination prior to his being denied the Strategic Sourcing Analyst position" (*id.*). SDHR concluded that "the record does not support a finding of probable cause in this case" (*id.*).

DISCUSSION

Summary Judgment

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-

[5] In fact, the SDHR noted that the candidate chosen may have been older than plaintiff based on that candidate's work experience (NYSCEF Doc. No. 104 [SDHR Finding] at 2). However, it was noted in the Position Statement issued by the SDHR, that Oliveri was 42 at the time (NYSCEF Doc. No. 102 at 4). In addition, the SDHR identified Ms. King as Asian (NYSCEF Doc. No. 104 [SDHR Finding] at 2).

moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

New York State Human Rights Law

Under the NYSHRL, claims for discrimination are governed by the standard set forth in *McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973] (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).[6] Under the *McDonnell Douglas* framework, plaintiff

> "has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) [he] is a member of a protected class; (2) [he] was qualified to hold the position; (3) [he] 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. In order to nevertheless succeed on [his] claim, the plaintiff must 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" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 305 [internal citations and quotations omitted]).

To demonstrate that the reasons proffered by a defendant were a pretext for discrimination, plaintiff must show "both the reason was false, *and* that discrimination was the real reason" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997] [internal quotation and citation omitted).

New York City Human Rights Law

"[A]n 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 recognized in certain federal cases" (*Melman v Montefiore Med. Ctr.*, 98

[6] With respect to claims made under the NYCHRL, *Forrest* was superseded by *Bennett v Health Mgt, Sys., Inc.*, 92 AD3d 29 n 1 [1st Dept 2011]); *see Fletcher v Dakota, Inc.*, 99 AD3d 43, n. 2 [1st Dept 2012].

AD3d 107, 113 [1st Dept 2012] citing *Bennett v Health Mgt, Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011]). "The *McDonnell Douglas* framework and the mixed motive framework diverge only after the plaintiff has established a prima facie case of discrimination … and the defense has responded to that prima facie case by presenting admissible evidence of legitimate, independent, and nondiscriminatory reasons to support its employment decision. At that point, under *McDonnell Douglas*, the burden shifts to the plaintiff to produce evidence tending to prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination. By contrast, under the mixed motive analysis, the plaintiff may defeat the defendant's evidence of legitimate reasons for the challenged action by coming forward with evidence from which it could be found that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 [1st Dept 2017] [internal quotations and citations omitted]).[7]

Analysis under both the NYSHRL & NYCHRL

"[T]he first step in both the *McDonnell Douglas* analysis and the mixed motive analysis is to determine whether plaintiff has met [his] burden of establishing a prima facie case of discrimination. 'To meet this burden, plaintiff must show that (1) [he] is a member of a protected class; (2) [he] was qualified to hold [his] position; (3) [he] was terminated from employment or suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d at 73-74 *quoting Forrest v Jewish Guild for the Blind*, 3 NY3d at 305). Plaintiff's burden to make out a prima facie case of discrimination is "de

[7] To oppose a motion for summary judgment, a plaintiff need not prove pretext but need only raise an issue of fact as to whether a defendant's proffered reasons for the adverse action were pretextual (*id.*, fnt 7).

minimis" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d at 74; *Melman v Montefiore Med. Ctr.*, 98 AD3d at 115).

Here, it is undisputed that plaintiff is part of protected classes given he is 56 years old and identifies as Hindu, Indian, or Asian descent. Defendants concede that plaintiff was also qualified for the positions that he applied for as demonstrated by his resume and by the findings of the SDR. In addition, failure to hire can constitute an adverse employment action (*see generally Ruderman v New York State Ins. Fund*, 215 AD3d 505 [1st Dept 2023]).

Defendants argue however that plaintiff fails to meet the fourth requirement, namely, that defendants' failure to hire plaintiff occurred under circumstances that give rise even to a minimal inference of age, national origin or race discrimination. In support, defendants contend that plaintiff's resume fails to identify his age, race or national origin. Defendants argue further that during plaintiff's deposition testimony, plaintiff failed to identify that he was subject to any disparaging remarks based on age, national origin or race throughout the process of applying for Job ID151843 (NYSCEF Doc. No. 100 at 53-55) [when asked a question at his deposition as to whether plaintiff was subject to such disparaging remarks, he continually repeated that Ms. King told him that he "had too many years of experience"]). There is no evidence in the record to support plaintiff's vague allegation that he was discriminated solely based on his voice and tone as being recognizable as Indian.

Likewise, with respect to plaintiff's allegation that he was discriminated based on age, plaintiff's allegation that Ms. King told him he had too many years of experience and was overqualified is not supported by the record, and in any event, does not establish age discrimination. In fact, plaintiff's resume did not include his age and the candidate ultimately chosen for Job ID167689 had work history that pre-dated plaintiff's work history by

approximately six years. As such, plaintiff failed to establish prima facie that defendants' failure to hire him occurred under circumstances giving rise to an inference of discrimination based on age, national origin or race.

However, even if plaintiff met the minimal requirement of establishing a prima facie case of discrimination, defendants have proffered "legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d at 74-74 quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d at 305). "Making out a prima facie case signals nothing more than the shift of burden of production of evidence to the employer" (*Melman v Montefiore Med. Ctr.*, 98 AD3d at 128).

Defendants proffered legitimate nondiscriminatory for not hiring plaintiff for the subject positions at DoITT. It is undisputed that Job ID 151843 was never fulfilled but closed in September 2014 and reopened with Job ID 167689 at a higher salary. Plaintiff was never screened for Job ID 167689 and there is no evidence in the record that defendants' failure to screen plaintiff was due to age, national origin or race. The chosen candidate for Job ID 167689, Guy Oliveri, had better qualifications and skills that plaintiff did not possess. Oliveri worked for the City for several years (and was still a City employee when he was hired), and was a Certified Public Accountant ("CPA"). Plaintiff however testified at his deposition that he had not worked for the City ([NYSCEF Doc. No. 100] at 61) and was not a CPA (*id.* at 60).[8] As such, defendants proffered legitimate nondiscriminatory reasons for not hiring plaintiff.

In turn, given defendants' submission of legitimate, nondiscriminatory reasons for not hiring plaintiff, the burden shifted to plaintiff to come forward with evidence raising a triable issue as to whether under the *McDonnell Douglas* framework, defendants' explanation was

[8] There is also evidence in the record that plaintiff refused to comply with the New York City residency requirement as to Job 151843. Plaintiff mentioned that he would use his daughter's address to satisfy the residency requirement.

pretextual, or whether, under the mixed motive analysis, defendants' refusal to hire plaintiff was motivated, at least in part, by discriminatory bias (*see Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d at 76); *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 n. 27 [2009], *lv. denied* 13 NY3d 702 [2009]).

Plaintiff has failed to raise an issue of fact as to whether the foregoing explanation for defendants' failure to hire plaintiff was pretextual or motivated even in part by discriminatory intent. Plaintiff has proffered only conclusory statements, as outlined above, without factual evidence (*see McIntosh v Department of Educ. of the City of N.Y.*, 202 AD3d 481, 482 [1st Dept 2022]). [A] court "should not sit as a super-personnel department that reexamines an entity's business decisions" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d at 77 *quoting Baldwin v Cablevision Sys. Corp.* 65 AD3d 961, 966 [1st Dept. 2009], *lv. denied*, 14 NY3d 701 [2010]).

Retaliation

Under the NYSHRL and NYCHRL, "In order to make a prima facie showing of retaliation, [plaintiff] must show: (1) participation in a protected activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 327). Under the NYCHRL (Administrative Code § 8-107[7]) plaintiff "need not establish that the alleged retaliation … result[ed] in an ultimate action with respect to employment … or in a materially adverse change in the terms and conditions of employment so long as the retaliatory … act … [was] reasonably likely to deter a person from engaging in protected activity" (*Brightman v Prison Health Serv, Inc.* 108 AD3d 739, 739 [2d Dept 2013]; Administrative Code § 8-107 (7)).

Here, the record is devoid of evidence that plaintiff engaged in any protected activity and how or what retaliatory conduct was committed by defendants. Plaintiff's complaint filed at the SDHR on August 10, 2015, cannot form the basis of a retaliation claim for defendants' failure to hire plaintiff prior thereto (in 2014). Plaintiff fails to specify what positions he may have applied for or was denied subsequent to the SDHR filing.

To the extent plaintiff is claiming that he was retaliated against by failing to be considered for any positions with the City and at DoITT after plaintiff followed up on his prior job applications under Job ID 151843 and Job ID 167689, plaintiff's retaliation claim still lacks merit. There is no evidence that these inquiries constituted complaints that plaintiff was being discriminated against based on a protected characteristic or that defendants were aware of any such complaints. The evidence reveals that such inquiries related to plaintiff's pending applications for the subject job positions and were not complaints of discrimination,

Moreover, even if plaintiff demonstrated he engaged in a protected activity, he fails to establish any causal connection between whatever he deems his complaint and any adverse action. To the extent, plaintiff alleges that not being considered for Job ID 167689 was a retaliatory act, there is no connection to any act he engaged in or "complaint" he made and defendants' choice of a different candidate. To the extent that plaintiff alleges defendants retaliated against him by denying him interviews and phone screenings for other jobs with the City or DoITT specifically, such allegations are conclusory and devoid of merit. Plaintiff has failed to proffer any facts that would establish defendants denied him employment in retaliation for any protected activity. "Plaintiff cannot link [the failure to hire him] to a retaliatory motivation" (*Williams v New York City Hous. Auth.*, 61 AD3d at 71).[9]

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[9] Although this Court has dismissed the instant case on the merits, to the extent that plaintiff's claims herein are based on the same alleged discriminatory conduct asserted in the complaint made before the SDHR which was

CONCLUSION

On the basis of the foregoing, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted and the complaint is dismissed.

The Clerk shall enter judgment accordingly.

January 26, 2024
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
	X	GRANTED		DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE

likewise dismissed on the merits, the instant matter would be precluded by the doctrine of election of remedies. "[Plaintiff's causes of action are based on the same alleged discriminatory conduct asserted in the NYSDHR complaint, which were ultimately dismissed on the merits. Therefore, the plaintiff is barred from asserting those claims under the New York City Human Rights Law in this action" (*Klaper v Cypress Hills Cemetery*, 184 AD3d 813, 815 [2d Dept 2020] [internal citations omitted]; *see Craig-Oriol v Mount Sinai Hosp.*, 201 AD2d 449, 450 [1st Dept 1994]; *Magini v Otnorp, Ltd.*, 180 AD2d 476, 476-477 [1st Dept 1992]).