

Dominguez v Department of Educ. of City of N.Y.

2012 NY Slip Op 32500(U)

September 28, 2012

Supreme Court, New York County

Docket Number: 118037/2009

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: SALIANN SCARPULLA
Justice

PART 19

VICTOR DOMINGUEZ

INDEX NO. 118037/2009

-v-

MOTION DATE _____

DEPARTMENT OF EDUCATION OF THE
CITY OF NEW YORK

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____


Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN
ACCORDANCE WITH THE ACCOMPANYING DECISION /ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
OCT 01 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/28/2012


_____, J.S.C.
SALIANN SCARPULLA
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X
VICTOR DOMINGUEZ,
Plaintiff,

Index Number: 118037/09
Submission Date: 7/25/12

- against -

DECISION and ORDER

THE DEPARTMENT OF EDUCATION OF THE CITY
OF NEW YORK and THE CITY OF NEW YORK

Defendants.

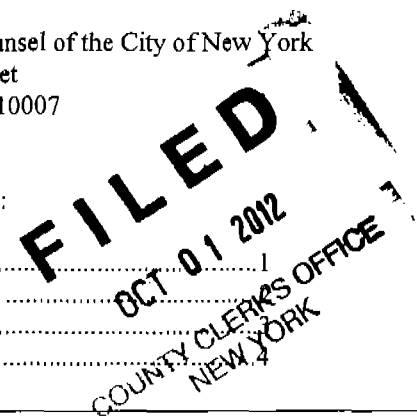
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Papers considered in review of this motion for summary judgment:

- Notice of Motion/Affid/Memo. in Supp. of Mot..... 1
- Affirm. of Counsel in Opp. to Defendant's Mot. 1
- Memo. in Opp. of Mot/Affid..... 1
- Reply Memo. in Further Supp..... 1



HON SALIANN SCARPULLA, J.:

Plaintiff Victor Dominguez (“Dominguez”) commenced this employment discrimination action against defendants the Department of Education of the City of New York (“DOE”) and the City of New York (the “City”) (collectively “defendants”).

The defendants now move for summary judgment dismissing the complaint pursuant to CPLR § 3212.

Dominguez worked for the Department of Education as an untenured assistant principal at Boys and Girls High School (“BGHS”) in Brooklyn, New York from 2004 to

2009. Dominguez was subject to a five-year probation before he was eligible for tenure, which was scheduled to end in September 2009. In August 2009, Bernard Gassaway (“Gassaway”) became the new principal at BGHS. After arriving at the school, Gassaway instituted a number of personnel changes to the assistant principal staff. In particular, Gassaway changed Dominguez’s personnel rating from the prior 2008-2009 school year from a satisfactory rating (“S rating”) to an unsatisfactory rating (“U rating”); recommended discontinuance of Dominguez’s employment as an assistant principal; and recommended denying Dominguez’s certification of completion of probationary service.

In his complaint, Dominguez originally claimed that Gassaway’s decision to discontinue his employment was based on age and national origin discrimination. Dominguez is an American citizen, born in the Dominican Republic. Gassaway is an African-American. Dominguez alleges that Gassaway discontinued his employment because Dominguez is Hispanic/Latino and Gassaway wanted to replace Dominguez with a younger, African-American person.

Dominguez originally asserted two causes of action against DOE and the City: (1) age and national origin discrimination under the New York City Human Rights Law (N.Y.C. Administrative Code § 8-502) and (2) age and national origin discrimination under the New York State Human Rights Law (N.Y. Executive Law § 296). Dominguez seeks monetary damages, injunctive relief to reinstate him to an assistant principal position, and attorney’s fees.

The defendants move for summary judgment dismissing the complaint pursuant to CPLR § 3212, arguing that: (1) the City of New York is not a proper party to the action; (2) Dominguez cannot establish a *prima facie* case for his age and national origin discrimination claims; (3) Gassaway had legitimate, non-discriminatory reasons for recommending discontinuance of Dominguez's employment; and (4) Dominguez cannot demonstrate that Gassaway's proffered reasons for discontinuing his employment were a pretext for age or national origin discrimination.

On July 18, 2012, I heard oral argument on the motion for summary judgment, and issued an interim order on the record dismissing the entire action against the City and the age discrimination claims against DOE. The remaining issue is whether DOE is entitled to summary judgment dismissing Dominguez's national origin discrimination claims.

In support of the motion, the DOE argues that Gassaway's decision to discontinue Dominguez's employment was based on his poor job performance as Assistant Principal of Security ("A.P. Security"). At his deposition, Gassaway testified "one of the reasons I returned to Boys and Girls High School is because the school had, based on the number of incidents reported, the school was being targeted to be what's called an impact school where police officers were coming to the school and more and less take over the security of the school." Gassaway explained that "when I came on board, I evaluated the data, and that's including incidents, several reports that I read, and I made a decision that I wanted to bring my assistant principal candidate on to that position."

Gassaway testified that he reviewed the On-Line Occurrence Reporting System (“OORS”) data, which revealed a “lack of structure” and “lack of systems in place.” Gassaway then met with Dominguez to discuss his job responsibilities as A.P. Security. In Gassaway’s affidavit he states, “I came to the conclusion that Mr. Dominguez was wholly ineffective as A.P. Security. The role of the A.P. Security is to supervise the deans, but Mr. Dominguez was not supervising the deans, nor was he observing them, meeting with them, or providing them with any meaningful training.” Gassaway also testified that he had conversations with several deans who indicated that there was a “lack of effective communication among the deans.” Gassaway explained in his testimony that the “deans were divided among themselves . . . on the fourth floor you had one set of deans who may have reported to the principal, and then on the third floor you had another set of deans who reported to, or should I say responded to Victor Dominguez.” Gassaway also claimed that Dominguez supervised his brother and cousin in violation of conflict of interest rules.

Before Gassaway became principal in August 2009, Dominguez had received a satisfactory rating on his personnel report for the 2008-2009 school year from principal Spencer Holder (“Holder”). On October 14, 2009, Gassaway changed Dominguez’s prior satisfactory rating for the 2008-2009 school year to an unsatisfactory rating, and recommended that Dominguez’s certification of completion of probation be denied. The DOE attaches a copy of Dominguez’s 2008-2009 personnel report as modified by

Gassaway, and a letter from Gassaway to Dominguez dated October 14, 2009. The personnel report and the October 14, 2009 letter cite four reasons for Dominguez's unsatisfactory rating: (1) supervising his brother Pablo Dominguez and cousin Julio Acevedo in violation of Chancellor's Regulations C-110 sections IV(B) and IV(D); (2) supervising his brother Pablo Dominguez in violation of the New York City Conflicts Interest Law; (3) failing to properly supervise the deans which resulted in failure to fulfill his professional duties as A.P. Security; and (4) failing to follow proper protocol by not reporting all school related incidents in the OORS system.

On October 16, 2009, Dominguez appealed his unsatisfactory rating and his discontinuance to the DOE Office of Appeals. The DOE attaches a copy of the Chancellor's Committee Report from March 3, 2010, in which the Chancellor affirmed Gassaway's recommendation to change Dominguez's satisfactory rating into an unsatisfactory rating and to deny his certification of completion of probation.

Gassaway chose Dr. James Barnes, an African-American, to replace Dominguez. Gassaway states that he selected Dr. Barnes for "his extensive and relevant experience" which included positions as former A.P. Security at Canarsie High School and Graphic Arts High School, District 79's security administrator, and former principal. Gassaway testified that nine assistant principals were removed in total, including five African-American assistant principals. The DOE argues that "given that so many African-

American assistant principals were removed, plaintiff's allegation that he was removed because he was not African-American is without factual or logical support."

In opposing the motion, Dominguez asserts that Gassaway's first and second proffered reasons are pretextual because he did not supervise his brother or his cousin. At his deposition, Dominguez testified that his brother Pablo Dominguez and Julio Acevedo ("Acevedo") were deans. However, Dominguez explains that he was not responsible for supervising the deans and therefore he did not supervise his brother Pablo Dominguez or Julio Acevedo. Dominguez also testified that Acevedo was not his cousin. Dominguez also submits Holder's affidavit which states, "Mr. Dominguez (Plaintiff) disclosed to me prior to my hiring Pablo Dominguez that I was about to hire his brother. I did not believe it would be an issue at all since Mr. Dominguez (Plaintiff) had no supervisory role over his brother."

Dominguez further argues that Gassaway's third and fourth proffered reasons are similarly pretextual. Dominguez claims that he did not fail in supervising the deans because he was not responsible for supervising the deans as A.P. Security. Dominguez also claims that he fulfilled his duty to report security incidents as instructed by Holder, and he testified that "ten other deans" were also responsible for reporting security incidents. In his affidavit, Dominguez states that "the increase in reported incidents reflects a change in the reporting policies as required by the Department of Education, and thus does not reflect an increased security problem at the High School."

Dominguez also argues that he was an exemplary employee who performed all of his assistant principal duties under Holder from 2004-2009. Dominguez testified that he began working at BGHS as a teacher in 1991, and that he received satisfactory ratings throughout his time at the school, except for the unsatisfactory rating from Gassaway. In addition, Holder states in his affidavit that Dominguez “met all goals and expectations that I set for the AP Security position. I was responsible for and performed all evaluations of Plaintiff’s performance from his hire as AP in 2004, through the 2008-2009 school year. Plaintiff received ‘S’ ratings on all evaluations for this time period because his work [was] exceptional.” Dominguez also argues that it was inappropriate for Gassaway to change his rating for the 2008-2009 school year because Gassaway did not observe his work during that period.

Finally, in his affidavit, Dominguez notes that before Gassaway became principal “there were eleven assistant principals, four of which were non-African American (36%).” Dominguez claims that Gassaway removed all non-African American assistant principals, while retaining and hiring only African-American assistant principals. At his deposition, Dominguez testified that “three latinos, one West Indian and one Caucasian assistant principal were all let go and replaced by African-American assistant principals.” Dominguez states that “the African American AP’s were all retained (Williams and Rivers) or replaced by other African-Americans” such that “the AP’s at Boys and Girls High School were now 100% African-American.”

Discussion

The New York State Human Rights Law and the New York City Human Rights Law prohibit employment discrimination based on an individual's national origin. N.Y. Executive Law § 296; N.Y.C. Admin. Code §§ 8-107, 8-502.

A discrimination claim brought under the New York State Human Rights Law ("State HRL") is analyzed according to the federal Title VII standard, the *McDonnell Douglas* shifting-burdens test. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 316 (2004). Under *McDonnell Douglas*, the plaintiff must establish a *prima facie* discrimination case by a preponderance of the evidence that: (1) he or she is a member of a protected class; (2) he or she is qualified for the position; (3) he or she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Forrest*, 3 N.Y.3d at 305. The burden then shifts to the defendant to rebut the plaintiff's *prima facie* case by setting forth admissible evidence that shows legitimate, non-discriminatory reasons for its employment decision. *Matter of Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 938 (1985).

To prevail on a motion for summary judgment, the defendant must demonstrate that either: (1) the plaintiff failed to establish a *prima facie* case of discrimination; or (2) there is an absence of a material issue of fact as to whether the defendant's proffered reasons for the adverse employment action are pretext to discrimination. *Forrest*, 3

N.Y.3d at 305. If the defendant sets forth legitimate, non-discriminatory reasons, the burden shifts to the plaintiff “to raise a triable issue as to whether these reasons were pretextual by producing evidence tending to show ‘both that the stated reasons were false and discrimination was the real reason.’” *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 120 (1st Dep’t 2012) (citing *Forrest*, 3 N.Y.3d at 305). A plaintiff can meet this burden by demonstrating falsity because “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000); *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 34 (1st Dep’t 2011).

A discrimination claim brought under the New York City Human Rights Law (“City HRL”) must be interpreted “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.” *Albunio v. City of New York*, 16 N.Y.3d 472, 477 (2011). Under the 2005 Local Civil Rights Restoration Act, “it is beyond dispute that the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the City HRL’s uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights issues.” *Bennett*, 92 A.D.3d at 34 (internal quotations omitted). The City HRL provides that “discrimination shall play no role in decisions relating to employment.” N.Y.C. Admin. Code § 8-101. Accordingly, a discrimination claim brought under the

City HRL is analyzed under both the *McDonnell Douglas* test, as well as the broader “mixed motive” test which inquires into whether discrimination was a motivating factor in the adverse employment decision. *Melman*, 98 A.D.3d at 127.

On a motion for summary judgment dismissing a City HRL discrimination claim, the “defendant bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff’s favor, no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of the number of mixed motives, by direct or circumstantial evidence.” *Bennett*, 92 A.D.3d at 41. If the defendant sets forth non-discriminatory reasons, the plaintiff must demonstrate a triable issue of fact as to whether discrimination was one of the motivating factors for the adverse employment action. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 n. 27 (1st Dep’t 2009); *Melman*, 98 A.D.3d at 127. In cases where “the plaintiff responds with some evidence that at least one of the reasons proffered by the defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.” *Bennett*, 92 A.D.3d at 45.

Based on the record before me, I find that Dominguez demonstrated a *prima facie* discrimination case. Dominguez is a member of a protected class (Hispanic/Latino; Dominican Republic), he was qualified to hold the assistant principal position, and he

suffered an adverse employment action (discontinuance of his employment). Dominguez also produces evidence of circumstances that give rise to an inference of discrimination: his employment as assistant principal was discontinued, all non-African-American assistant principals were removed, and the African-American assistant principals were either retained or replaced by other African-Americans. Under both the State HRL and the City HRL, a plaintiff's burden of proving a *prima facie* discrimination case is not onerous. *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Melman*, 98 A.D.3d at 124.

The burden now shifts to the DOE to demonstrate legitimate, non-discriminatory reasons to support its employment decision. The DOE met its burden of producing evidence to show that Gassaway's reasons for discontinuing Dominguez's employment were based on poor job performance. Gassaway testified that he reviewed the On-Line Occurrence Reporting system, met with Dominguez about the A.P. Security position, and discussed the security situation with several deans to reach his decision. In his affidavit, Gassaway stated that he came to the conclusion that "Mr. Dominguez was wholly ineffective as A.P. Security." The DOE also submits Dominguez's 2008-2009 personnel report, modified by Gassaway, as evidence of Dominguez's failures as A.P. Security.

Although the DOE produces evidence of non-discriminatory reasons for discontinuing Dominguez's employment, the Court finds that Dominguez produced sufficient evidence to raise triable issues of fact under both the State HRL and the City

HRL standards as to whether the DOE's proffered reasons were pretextual. Gassaway claims that he discontinued Dominguez's employment because Dominguez supervised his brother Pablo Dominguez and cousin Julio Acevedo in violation of Chancellor's Regulations C-110 sections IV(B) and IV(D), and supervised his brother Pablo Dominguez in violation of the New York City Conflicts Interest Law. However, Dominguez submitted evidence that he did not supervise his brother, and that Julio Acevedo was not his cousin. Gassaway also claimed that Dominguez failed to properly supervise the deans and report all school related incidents in the OORS system. At his deposition, Dominguez testified that he was not responsible for supervising the deans. Dominguez also testified that he followed proper protocol by reporting security incidents according to Holder's instructions. Dominguez's testimony raises a triable issue of fact as to these two proffered reasons.

The evidence of Dominguez's satisfactory evaluations also casts doubt on Gassaway's proffered reasons. *See Ferrante v. American Lung Ass'n*, 230 A.D.2d 685, 686 (1st Dep't 1996). Dominguez submits Holder's affidavit, in which Holder states that Dominguez was an exemplary employee who performed his duties as A.P. Security. The record also contains Dominguez's satisfactory evaluations for school years, 2005-2006, 2007-2008, and the parties do not dispute that Dominguez received a satisfactory rating from Holder for the 2008-2009 school year. Dominguez also testified that he received satisfactory ratings throughout his employment at BGHS, which began in 1991.

Second, Dominguez submits empirical evidence to show that national origin discrimination may have been the real reason or a motivating factor in Gassaway's decision to discontinue Dominguez's employment. In his affidavit, Dominguez alleges that Gassaway removed all non-African American assistant principals and "the African American AP's were all retained (Williams and Rivers) or replaced by other African-Americans." Dominguez claims that at the end of the 2008-2009 school year, prior to Gassaway's arrival, "there were eleven assistant principals, four of which were non-African American (36%)." According to Dominguez, "three latinos, one West Indian and one Caucasian assistant principal were all let go and replaced by African-American assistant principals" such that "the AP's at Boys and Girls High School were now 100% African-American." The DOE does not dispute these facts.

In its entirety, the evidence on the record is sufficient to show that the defendant's proffered reasons may be false and that discrimination may have been the real reason or a motivating factor in Gassaway's decision to discontinue Dominguez's employment. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (plaintiff's *prima facie* case and evidence of falsity is sufficient to permit the trier of fact to infer the ultimate fact of intentional discrimination); *Reeves*, 530 U.S. at 147. While Gassaway's removal of several African-American assistant principals is relevant, it is insufficient to preclude an inference of discrimination. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (finding that employment of other minority employees was relevant but did not

“conclusively demonstrate” that employer’s actions were not discriminatorily motivated); *Reeves*, 530 U.S. at 135. Moreover, although the DOE submits evidence of non-discriminatory reasons that tend to negate plaintiff’s proof, it must be remembered that the Court’s role in a summary judgment motion is one of “issue-identification, not issue-determination.” *Ferrante*, 230 A.D.2d at 686.

Based on the foregoing, the Court finds that Dominguez produced sufficient evidence to raise triable issues of fact under both the State HRL and the City HRL standards. Here, the DOE failed to prove the absence of a material issue of fact as a matter of law as to whether Gassaway’s proffered reasons were pretextual and failed to demonstrate that no reasonable jury could find the defendant liable under the *McDonnell Douglas* or mixed motive tests.

In accordance with the foregoing, it is

ORDERED that defendant DOE’s motion for summary judgment dismissing the national origin discrimination claims pursuant to CPLR 3212 is denied.

This constitutes the decision and order of this court.

Dated: New York, New York
September 28, 2012

FILED
OCT 01 2012
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Saliann Scarpulla, J.S.C.