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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

ROBERT LACAP,

Plaintiff,

-v-

INNOVATIVE COMMERCIAL SYSTEMS,

Defendant.

Index No.: 113680/08

Motion Date: 07/12/11

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this case, plaintiff Roberto Lacap (Lacap) alleges that he was discriminated against, based on his age, ethnicity and national origin, when his employment with defendant Innovative Commercial Systems (ICS) was terminated. ICS moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint.

Lacap is Filipino and states that he was 52 when he lost his job. ICS is in the business of sales, service and installation of electronic security and communications systems. Lacap was employed by ICS from October 1998 until September 2008, and spent his time with ICS as an installer/technician, working for the last four years in ICS's service department. Plaintiff contends

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

that his termination from ICS was without cause or justification, as he had never received performance warnings or discipline, and had always been praised for his work ethic, efficiency and job knowledge. Plaintiff filed this action on October 9, 2008.

Plaintiff claims defendant violated Title 8 of the New York City Administrative Code (City Law) and Article 15 of the New York State Executive Law (State Law) by terminating his employment on account of his age, national origin, ethnicity, or some combination thereof.

The City Law and State Law both provide that it is unlawful for an employer "to . . . discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" based on, among other things, national origin, ethnicity and age (Executive Law § 296 [1] [a]; Administrative Code § 8-107 [1] [a]). Absent direct evidence of discrimination, claims of discrimination pursuant to the State Law and City Law are reviewed under the burden-shifting framework established by the United States Supreme Court in McDonnell Douglas Corp. v Green (411 US 792 [1973]) (see McGrath v Toys "R" Us, Inc., 3 NY3d 421, 429 [2004] [federal burden-shifting standards apply to state and local human rights laws claims]).

This framework requires that a plaintiff initially establish that he or she is a member of a protected class, qualified for

the employment position, and has suffered an adverse employment action that occurred under circumstances giving rise to an inference of discrimination (Bailey v New York Westchester Sq. Med. Ctr., 38 AD3d 119, 122-123 [1st Dept 2007]). Upon the making of such a showing, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the adverse employment action taken (Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO, 6 NY3d 265, 270 [2006] [internal quotation marks and citation omitted]). In response, a plaintiff must raise a triable issue of fact as to whether the defendant's explanation for its action was pretextual; that is, a plaintiff must raise a genuine "question of fact concerning either the falsity of [the] defendant's proffered basis for the termination or that discrimination was more likely the real reason" (Hemingway v Pelham Country Club, 14 AD3d 536, 537 [2d Dept 2005], quoting Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

ICS argues that it is entitled to summary judgment because plaintiff cannot demonstrate that his job termination occurred under circumstances giving rise to an inference of discrimination or that ICS's reason for firing plaintiff was pretextual.[1] ICS

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[1] In reply, ICS argues that plaintiff has not demonstrated any of the prima facie elements of his claim, but ICS did not challenge any element other than "inference," and may not raise new arguments on reply (see Sanford v 27-29 W 181st St Assn Inc., 300 AD2d 250 [1st Dept 2002] [reply is for the limited purpose of

submits the deposition testimony of its president, Robert Horowitz, and of plaintiff's supervisor, James More, in support of its motion. The parties do not dispute that More joined ICS's service department in or around May 2008, and supervised plaintiff for three to four months before plaintiff's job termination,[2] but that plaintiff had been supervised by others at ICS before More became his supervisor. The parties also do not dispute that More is at least ten years younger than plaintiff, Caucasian and American-born.

Addressing plaintiff's age discrimination claim first, More's testimony reflects that every person hired or transferred into the service department for a period of time before and after plaintiff's departure was 10 to 20 years younger than plaintiff. In addition, plaintiff testified that More told him that plaintiff was getting slow and that the other staff members, all of whom, according to More's testimony, were younger than plaintiff, could do the job. As the non-moving party on this

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responding to the opposition, not for raising new arguments to which the opposing party has had no opportunity to respond]). In any event, defendant does not dispute that plaintiff was 52 years old, fired and that he worked for ICS for about ten years. From these facts, the inference that plaintiff was qualified for the job and suffered an adverse employment event is reasonable.

[2] From the testimony submitted, it appears that after More joined the service department there may have been a transition period during which both More and plaintiff's former supervisor, Mr. Uligan, were both in the service department.

motion, for purposes of this motion, plaintiff's testimony must be presumed true.

More also testified that another 13-year employee, transferred into the service department in 2009, whom More described as in his late 40s, and Filipino or of Filipino heritage, was transferred because either the project manager he worked for, or the employee himself, got a little slow, and ICS's president moved him over because he wanted to keep everybody employed.[3]

This evidence is sufficient to establish a prima facie case of age discrimination, as it demonstrates plaintiff's replacement by younger workers, before and after his termination (Bemis v New York State Div. of Human Rights, 26 AD3d 609, 611 [3d Dept 2006] ["Petitioner met this burden by showing that there was engineering work for which he was qualified and several younger engineers were assigned to his unit to perform such work just before and after his layoff notice"]), and raises the factual issue of whether or not ICS engaged in age-related stereotyping.

To demonstrate that More's "slow" comment was not age-related, ICS points to More's deposition transcript, which

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[3] At oral argument, defendant's counsel read More's testimony, regarding the employee in his late 40s, as "[h]e worked for another project manager, and it got a little slow", however, More's deposition transcript reflects that More testified that "he worked for another project manager and he got a little slow". That testimony is ambiguous as to whether More was describing the manager or the worker as slow.

reflects that More testified that plaintiff was slow, and then describes what he meant by that. More does not, however, discuss what he meant when he allegedly made this statement to plaintiff. Moreover, while ICS argues that no one was hired to take plaintiff's place at ICS after he was terminated, More's testimony reflects that three employees were eventually hired into the service department to do the same type of work that plaintiff did, none of whom were in their fifties at the time, but were approximately 10 to 20 years younger than plaintiff. More did not testify unequivocally that these employees, or another he hired, were not hired to replace plaintiff. From More's testimony it appears that he hired another worker who was in his early 30s at the time.

As plaintiff has met his prima facie burden, the inquiry shifts to whether ICS has demonstrated a legitimate, nondiscriminatory reason for terminating plaintiff's job must be addressed. To meet this burden, ICS submits More's testimony that he observed plaintiff's work performance and that it was inadequate in that plaintiff was slow, requiring More to follow up with another technician, who would be sent back to the work site to repair what plaintiff was incapable of repairing, which would then get repaired. More testified that this occurred more than 10 times. More also testified that issues were not being resolved, that plaintiff would disappear and he was unable to

reach plaintiff by phone, and that he did not hear from plaintiff throughout the day, although plaintiff was supposed to report to him from work sites. More testified that by slow, he meant that plaintiff took the long way to get things done, such as by waiting 30 minutes for a bus to come instead of walking a few blocks and "just dragging the day so a minimum could be done in the eight hours he was being paid for, a minimum amount of work."

More testified that he spoke with plaintiff on several occasions about his work and the quality of his work during the time plaintiff worked under his supervision. More also testified about an issue with service tickets, as did Horowitz, and the time it took plaintiff to do work. With this testimony, ICS has met its burden to articulate a nondiscriminatory reason for terminating plaintiff from his job.

ICS also contends that, since 2004, prior to being supervised by More, plaintiff had job performance problems that were consistently the same and that continued through September 2008 despite repeated warnings. In support, ICS points to the testimony of Horowitz, that it was his understanding that plaintiff was transferred from department to department due to performance issues, that ICS granted plaintiff's requests for extended vacations, which caused hardship to the company, and that there were two instances when plaintiff's then-supervisor (Uligan) was on vacation and Horowitz was informed that plaintiff

could not be located. Defendant also submits two interoffice e-mail messages concerning plaintiff's vacation time, an unsigned warning letter from 2004, and a few other interoffice e-mail messages from 2003-2005 and 2008.

In opposition, plaintiff challenges defendant's contention that plaintiff's job performance had been in question for some time as misleading and inaccurate. Plaintiff points to the undisputed fact that he was with the company for approximately ten years, and to Horowitz's testimony that plaintiff regularly received bonuses and pay increases. Plaintiff argues that this indicates that he met his employer's expectations over the years.

In addition, it is undisputed that the record contains no evidence that plaintiff received warning letters, discipline, or documents reflecting performance issues during the period when plaintiff was supervised by More. More testified that he had discussions with plaintiff about his work and performance on several occasions during the three to four month period that he supervised him, but that he could not recall a specific instance when he did so, or give an example of specific customer complaints about plaintiff's work. Contradicting More's testimony, plaintiff testified that the first time that More spoke with him indicating any problem was the very day that plaintiff was fired, that More had not previously said anything about the quality of plaintiff's work, the number of hours he

worked, or his attitude, and that plaintiff had been unaware of any performance issues. Regarding time concerns with service tickets, giving plaintiff's testimony the benefit of all reasonable favorable inferences, he testified that he finished projects in less days than the given time-frame. No documentary evidence addressing the service tickets for projects/jobs has been submitted on this record. Thus, plaintiff raises a fact issue about the credibility of More's testimony as to plaintiff's performance (Communications & Entertainment Corp. v Hibbard Brown & Co., 202 AD2d 191, 192 [1st Dept 1994] [summary judgment was also properly denied in view of the parties' sharply conflicting affidavits since it is well settled that it is not the court's role to pass upon issues of credibility on a summary judgment motion]). While More's inability to recall any matters in detail may simply reflect the passing of time, this is a determination that must be made by the trier of fact.

To the extent that defendant has provided a proper foundation for the admission of e-mail messages from 2003-2005 that were not written by plaintiff, these documents do not address issues contemporaneous with plaintiff's job termination. Horowitz's testimony about performance problems plaintiff experienced with his former supervisor appears to concern these same matters, which occurred years prior to plaintiff's termination. ICS has not provided testimony or an affidavit from

any of plaintiff's former supervisors about these issues, and Horowitz testified that he did not have personal knowledge of plaintiff's work performance. While the record does contain two e-mail messages from 2008, to the extent that these email messages, submitted through attorney affidavit, are admissible, it is not clear what they prove or support.[4] Regarding vacation requests, ICS does not here assert or offer evidence that plaintiff was actually terminated for anything having to do with his approved requests for, or taking of, vacation in years past.[5]

On summary judgment, the role of the court is issue-finding (Rose v Da Ecib USA, 259 AD2d 258, 259 [1st Dept 1999]), and not to draw inferences and characterizations in a movant's favor from evidence that does not either speak for itself or necessarily support the inference. Defendant's contention that plaintiff's performance was inadequate prior to his time supervised by More is clearly an interpretation or conclusion from evidence that does not speak for itself. To defeat summary judgment, a plaintiff must present sufficient evidence to infer that the employer was motivated in whole or in part by discrimination (see Grady v Affiliated Cent., Inc., 130 F3d 553, 560 [2d Cir 1997],

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[4] While the attorney affidavit submitted on the motion states that the emails were from More to Horowitz and Horowitz to More, More's deposition testimony reveals that he had poor recollection about the content of the emails. In addition, ICS does not indicate that these messages were business records.

[5] Horowitz testified that he approved the vacation requests.

cert denied 525 US 936 [1998]; Ferrante, 90 NY2d at 631 [to defeat summary judgment, a plaintiff may point to evidence establishing a reasonable inference that the employer's reason is not worthy of credence]). "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination" (Reeves v Sanderson Plumbing Prods., Inc., 530 US 133, 147 [2000] [internal quotation marks and citation omitted]). While a plaintiff may not meet his burden to demonstrate pretext simply by showing disagreement with his employer's reasons, More's testimony concerns certain alleged but unspecified incidents, and plaintiff has raised a fact issue about the veracity or credibility of More's testimony, thereby raising a fact question concerning the falsity of the defendant's proffered basis for the termination, which precludes summary judgment (Ferrante, 90 NY2d at 631; Hemingway, 14 AD3d 536, supra). The prima facie case here, including that plaintiff was the oldest person in the service department and the only one in his 50s, More's alleged comment to plaintiff and his deposition statement about another relatively older worker, and that every other person brought into the service department to do the same job plaintiff did was considerable younger than plaintiff, raises a fact issue as to pretext (see Owens v New York City Hous. Auth.,

934 F2d 405, 410 [2d Cir], cert denied 502 US 964 [1991] [statements made by individuals with "substantial influence" over plaintiff's employment raise genuine issue of fact on issue of pretext]; Ryduchowski v Port Auth. of N.Y. & N.J., 1998 WL 812633, *10, 1998 US Dist LEXIS 18558, *30 [ED NY 1998] [genuine issue of fact as to whether employer's proffered reason was pretextual where inference could be drawn that someone with a discriminatory motive influenced the decisionmaker]). Consequently, summary judgment must be denied as to plaintiff's age discrimination claim.

The same is not true concerning plaintiff's claim of discrimination based on national origin or ethnicity. Plaintiff testified that no one ever said anything to him that led him to believe that he was being discriminated against because he was Filipino, that nothing happened during the years that he was at the company to lead him to believe that the company discriminated against Asians or Filipinos, that there were other Filipino workers at ICS, including in the service department. Plaintiff's testimony is that his heart led him to believe that his termination may have been due to the color of his skin, as well as his belief that a white person would not have been summarily dismissed in the manner in which plaintiff was. This is insufficient to raise a fact question. That an American-born employee may have been hired at or around the time of plaintiff's

termination alone does not meet plaintiff's burden of pretext under the McDonnell Douglas framework. Plaintiff provides no other evidence sufficient to raise a fact issue as to discrimination based on ethnicity or national origin, and summary judgment is granted to ICS dismissing those claims.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent that plaintiff's claims that he was discriminated against based on national origin and ethnicity are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are to attend the previously scheduled mediation conference in Part Mediation-1 on November 15, 2011 at 10:30.

This is the decision and order of the court.

FILED

OCT 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 13, 2011

ENTER:

DEBRA A. JAMES J.S.C.