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

PRESENT: BARBARA JAFFE J.S.C. PART 5
Justice

Pierson, Hanny M.

-v-

N.Y.C. Dept. of Education

INDEX NO. 105088/06

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12-8-11
DEC 08 2011

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

HARRY M. PIERSON,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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Index No. 105088/06

Motion Subm.: 9/13/11
Motion Seq. No.: 006

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Theresa B. Wade, Esq.
Law Office of Michael G. O'Neill
30 Vesey St., Third Fl.
New York, NY 10007
212-581-0990

For City:
Daniel Chiu, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., Rm. 2-115
New York, NY 10007
212-788-1158

By notice of motion dated August 13, 2010, defendant moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

I. BACKGROUND

In March 2005, plaintiff, a 55-year-old Caucasian Jewish male, applied for defendant's Teaching Fellows Program (Program), and was interviewed on April 3, 2005 by defendant's employee Michelle Lum to whom he provided samples of a teaching lesson and his writing. According to plaintiff, when he discussed his prior work experience, Lum said, "that was a very long time ago, wasn't it?" and asked him to consider "societal changes across the years." He also alleges that Lum was hostile to him throughout the interview and cut him off while he was speaking, but acknowledges having said that, "Asian parents are more often able to communicate

the importance of education to their children." (Affirmation of Daniel Chiu, ACC, dated Aug. 13, 2010 [Chiu Aff.], Exh. B).

According to Lum, plaintiff's sample teaching lesson does not account for students' interactive needs, his demeanor was not engaging, and when asked to evaluate his performance after the lesson, plaintiff perceived no weakness with it. She also noted that throughout the day, plaintiff was slightly argumentative with her and another Program candidate, that his writing sample was "sparse and lacked personal responsibility," and that during the interview he was argumentative and off-topic and made stereotypical comments (*eg* "African-American parents care less about education than Asians."). (*Id.*, Exh. D).

By letter dated April 15, 2005 and addressed to the "Director" of the Program, and before being notified that he was not be accepted into the Program, plaintiff withdrew his application, accusing Lum of discriminating against him based on his age. (Chiu Aff., Exh. G). A few days later, he received notice that he had not been accepted into the Program. (Affidavit of Harry Pierson, dated Nov. 8, 2010).

In the summer of 2005, defendant invited plaintiff to apply for its Science Math Alternative Route to Teaching (SMART) teaching fellows program, and he applied on August 8, 2005. (Chiu Aff., Exhs. H, I). On August 20, 2005, plaintiff was interviewed by Farahnaz Khan, who recommended him for SMART. (*Id.*).

Plaintiff's application was then reviewed by Vicki Bernstein, the Executive Director of both SMART and the Program. She disagreed with Khan's recommendation given her view of plaintiff's writing sample and interpersonal skills based on Khan's interview notes. She denied having received plaintiff's April 2005 letter (*id.*, Exh. C), and on August 25, 2005, she notified

plaintiff that he was not accepted into SMART. (*Id.*, Exh. L).

According to an analysis performed by plaintiff's counsel, there were 4,557 applicants for the Program in 2004-2005, of which 866 were over 40 years old and only 22 of them were accepted into the Program, approximately 2.5 percent, whereas the other 3,691 applicants were under 40 years old and 162 of them were accepted, approximately 4.4 percent. (Affirmation of Theresa B. Wade, Esq., dated Nov. 9, 2010, Exh. F).

II. CONTENTIONS

Defendant argues that plaintiff cannot establish a *prima facie* case of age discrimination as he was not qualified for the Program based on his writing sample, teaching lesson, and interview with Lum, as he withdrew his application before he was rejected, and even if he was rejected, it did not occur under circumstances giving rise to an inference of discrimination as Lum's comments were neither age-related nor derogatory. (Mem. of Law, dated Aug. 13, 2010). Defendant also contends that Lum's rejection of plaintiff's application was based on a legitimate, non-discriminatory reason and that absent evidence that Bernstein was aware of his complaint about Lum and as defendant invited plaintiff to apply for SMART, an inference of animus cannot be drawn. In any event, defendant argues that it had a legitimate, non-discriminatory reason for denying plaintiff's SMART application. (*Id.*).

Plaintiff maintains that he was qualified for the Program as he was invited to interview for it, that defendant denied him a position because it had no apparent knowledge that he withdrew his application, and that Lum's comments were discriminatory, observing that the statistics show that applicants under 40 years old were almost twice as likely to be accepted into the Program as those older than 40. Plaintiff contends that defendant's reasons for denying his

application are pretextual and that there exist triable issues as to what plaintiff said to Lum and what occurred during the selection process. He argues that it is reasonable to conclude that Bernstein received his April 2005 letter as she was the director of the Program, and that there is a connection between plaintiff's discrimination complaint and Bernstein's denial of his SMART application, especially as the initial interviewer recommended plaintiff for acceptance into SMART. He also asserts that Bernstein's rejection was pretextual, characterizing her reasons as irrational criticisms. (Mem. of Law, dated Nov. 9, 2010).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie,* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut this showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]); "unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d 557, 562), as are self-serving affidavits clearly created to contradict previous testimony and create issues of fact (*Harty v Lenci,* 294 AD2d 296 [1st Dept 2002]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1st Dept 2000]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

In employment discrimination cases, the "the employer's intent is often at issue, and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination." (*Belfi v Prendergast*, 191 F3d 129, 135 [2d Cir 1999]). Nonetheless, "a plaintiff must provide

more than conclusory allegations to resist a motion for summary judgment." (*Holcomb v Iona College*, 521 F3d 130, 137 [2d Cir 2008]).

A. Plaintiff's age discrimination claims

Pursuant to Executive Law § 296(1)(a), it is unlawful "[f]or an employer . . . , because of an individual's age . . . , to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment."

A three-step burden-shifting analysis is applied to determine whether a plaintiff has established a claim under Executive Law § 296(1)(a). (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 271 [2006]). First, the plaintiff must establish a *prima facie* claim, requiring that he demonstrate: (1) that he is a member of a protected class; (2) that he was qualified for the position he sought; (3) that he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of age discrimination. (*Stephenson*, 6 NY3d at 271; *Ferrante v Am. Lung Assn.*, 90 NY2d 623 [1997]; *Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288 [1st Dept 2005]).

If the plaintiff establishes a *prima facie* claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its challenged action. (*Stephenson*, 6 NY3d at 270-71). Then, if the defendant does so, the burden shifts back to the plaintiff to demonstrate that the reason is pretextual, which requires that he show both that the defendant's reason is false and that discrimination was the real reason for its action. (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 14 AD3d 325, 329 [1st Dept 2005], *affd* 6 NY3d 265

[2006]).

As age discrimination claims under this section are analyzed in the same manner as claims brought pursuant to the Age Discrimination in Employment Act of 1967, 29 USC §§ 621-634, federal case law is instructive. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 [2004]). To prevail on a motion to dismiss an age discrimination claim, a defendant must demonstrate either that, as a matter of law, the plaintiff cannot establish the elements of intentional discrimination or that plaintiff is unable to raise a triable issue as to whether the facially legitimate, non-discriminatory reasons advanced by the defendant are pretextual. (*Balsamo v Savin Corp.*, 61 AD3d 622 [2d Dept 2009]).

1. Was plaintiff qualified for the Program?

As defendant chose to interview plaintiff for the Program, apparently based on its belief that he may be qualified for a position, and absent any evidence that plaintiff did not possess the objective qualifications necessary for a position, defendant has not established that plaintiff was not qualified. Rather, defendant's arguments about plaintiff's qualifications relate to the reasons for denying his application.

2. Did plaintiff suffer an adverse action?

While plaintiff may have withdrawn his application, there is no indication that defendant ever received or acknowledged it. Rather, it sent him a rejection letter and its records reflect that plaintiff's application was rejected, not withdrawn. Defendant has thus failed to establish that plaintiff did not suffer an adverse action.

3. Did the adverse action take place under circumstances giving rise to inference of age discrimination?

Nothing about Lum's statements reference plaintiff's age or anything derogatory. Rather,

she referenced his pertinent teaching experience which was relevant to her evaluation of his qualifications for the Program. Consequently, her statements are age-neutral. (*See eg Norville v Staten Is. Univ. Hosp.*, 196 F3d 89 [2d Cir 1999] [while interviewer asked what year candidates graduated from nursing school, no evidence that purpose of question was to ascertain candidates' ages]; *Bobo v Wachovia Sec., LLC*, 2010 WL 1186455 [ND NY 2010] [use of terms "old guard" and "new guard" not evidence of age discrimination as on their face terms did not pertain to age]; *Gordon v Health & Hosps. Corp.*, 2008 WL 924756 [ED NY 2008], *affd* 350 Fed Appx 547 [2d Cir 2009] [comment inquiring as to plaintiff's age was innocuous on its face]; *Moon v Clear Channel Communications, Inc.*, 307 AD2d 628 [3d Dept 2003] [statements referring to plaintiffs as old were made in context of plaintiffs' flexibility in terms of perceived need to change and thus insufficient to raise issue as to whether defendant's explanation was pre-textual]; *Charles v Highland Care Ctr., Inc.*, 5 Misc 3d 1017[A], 2004 NY Slip Op 51413[U] [Sup Ct, Queens County 2004] [comment that plaintiff was "old" nurse's assistant was ambiguous and may have referred to fact that she had worked at facility as assistant for past 25 years]).

Even if the comments constitute a veiled reference to plaintiff's age, they do not amount to age discrimination. (*See eg DiGirolamo v MetLife Group, Inc.*, 2011 WL 2421292 [SD NY 2011] [comments referring to others as old and tired insufficient to show age discrimination]; *O'Connor v Smith & Laquercia, LLP*, 2010 WL 3614898 [ED NY 2010] [comment that plaintiff was too old to work did not reflect age-based animus]; *Fadia v New Horizon Hospitality*, 743 F Supp 2d 158 [WD NY 2010] [comment that plaintiff was too old insufficient]; *Ospina v Susquehanna Anesthesia Affiliates, P.C.*, 23 AD3d 797 [3d Dept 2005], *lv denied* 6 NY3d 705 [2006] [statements that plaintiff was old or implied that he was old did not raise triable issue as

whether age was motivating factor in termination or that defendant's reason for termination was false]; *Hardy v Gen. Elec. Co.*, 270 AD2d 700 [3d Dept 2000], *lv denied* 95 NY2d 765 [statements allegedly showing that manager had problem with age raised no factual issue]; *Almanzar v Coll. Church Corp.*, 255 AD2d 230 [1st Dept 1998] [supervisor's statement that he would try to get someone younger than plaintiff to perform his job was isolated and ambiguous and thus insufficient to support finding of age discrimination]).

And even if plaintiff met his *prima facie* burden, defendant has demonstrated a legitimate, non-discriminatory reason for rejecting his application, namely, that plaintiff's teaching lesson and writing sample were sub-standard, that he argued with Lum and another applicant, and that he made comments during the interview based on stereotypes. (*See Tucker v New York City*, 376 Fed Appx 100 [2d Cir 2010]] [defendant established non-discriminatory reason for not hiring plaintiff based on his poor interview]; *Stone v Bd. of Educ. of Saranac Cent. School Dist.*, 153 Fed Appx 44 [2d Cir 2005] [defendant proffered valid age-neutral explanation as plaintiff interviewed poorly and was not sufficiently familiar with recent teaching methods]; *Oluyomi v Napolitano*, 2011 WL 4348053 [SD NY 2011] [caselaw recognizes that applicant's poor interview can support nondiscriminatory reason for adverse employment action]; *Hurd v New York Health & Hosps. Corp.*, 2007 WL 678403 [SD NY 2007], *affd* 2008 WL 5120624 [2d Cir 2008] ["subjective impressions from an interview alone have been upheld as a valid justification absent a showing of discriminatory motive"]; *Gavigan v Clarkstown Cent. School Dist.*, 84 F Supp 2d 540 [SD NY 2000] [defendant's claim that plaintiff lacked certain interpersonal skills at interview enough to rebut plaintiff's *prima facie* showing]).

In response to defendant's legitimate, non-discriminatory reason for rejecting plaintiff's

application, plaintiff has failed to establish that defendant's explanation was both false and that the real reason was discriminatory as he does not dispute having made a comment about Asian parents or having argued with Lum and the other applicant, and merely disagrees with Lum's assessment of his teaching lesson and writing sample. (*See Stone*, 153 Fed Appx at 46 [even if plaintiff showed that defendant inaccurately assessed her public speaking or teaching skills, such allegations insufficient to show age discrimination]; *Orisek v Am. Inst. of Aeronautics and Astronautics*, 938 F Supp 185 [SD NY 1996], *affd* 162 F3d 1148 [2d Cir 1998], *cert denied* 526 US 1065 [1999] [although plaintiff disagreed with defendant's choice in hiring another employee and believed she was most qualified applicant, court not permitted to second-guess selection absent proof of discrimination]; *Richane v Fairport Cent. School Dist.*, 179 F Supp 2d 81 [WD NY 2001] [plaintiff merely disagreed with reasons given for rejection and did not establish that reasons were false]; *Brink v Union Carbide Corp.*, 41 F Supp 2d 406 n 7 [SD NY 1999], *affd* 210 F3d 354 [2d Cir 2000] [plaintiff's self-serving views of his own merits do not establish pretext]; *Ospina*, 23 AD3d at 799 [challenge by employee to correctness of employer's decision does not give rise to inference that termination was due to age discrimination]).

Moreover, plaintiff's statistical analysis is not probative absent any evidence of the applicants' backgrounds, qualifications, and performance during the evaluation process; that more people who were hired were less than 40 years old is meaningless in and of itself. (*See Martin v Citibank, N.A.*, 762 F2d 212 [2d Cir 1985] ["statistical proof alone cannot ordinarily establish a *prima facie* case of disparate treatment"]; *Hardy*, 270 AD2d at 704 [contention that out of 66 terminated employees, 48 were over the age of 40 did not by itself reveal age bias]; *Weit v Flaum*, 258 AD2d 286 [1st Dept 1999] [chart allegedly showing salary discrepancies

between male and female employees did not indicate whether employees were similarly situated and, absent expert testimony, was insufficient to show discriminatory motive]).

B. Nationality and ethnicity discrimination

Plaintiff has also failed to offer any evidence that defendant's employees made any comments related to him as a Caucasian and/or Jewish, or that they otherwise discriminated against or retaliated against him on that basis, or that they discriminated against other Caucasian or Jewish applicants. (*See eg Rosario v Hilton Worldwide, Inc.*, 2011 WL 336394 [ED NY 2011] [plaintiff did not allege that he heard discriminatory remarks or witnessed overt acts of discrimination or that statistical or other evidence supports his claim]; *DeMay v Miller & Wrubel P.C.*, 262 AD2d 184 [1st Dept 1999] [plaintiff offered no proof of age discrimination absent any age-related comments or that defendant wanted younger employee or replacement was hired because he was younger]).

C. Retaliation

Pursuant to Executive Law § 296(7), an employer may not "retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article." A three-step burden-shifting analysis is applied to determine whether a plaintiff has established a claim under Executive Law § 296(7). First, the plaintiff must establish a *prima facie* claim, which requires that she demonstrate: (1) that she engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) that the employer took an adverse employment action against her; and (4) that her protected activity and the adverse employment action were causally related. (*Forrest*, 3 NY3d at 312-13). Second, if the plaintiff establishes a

prima facie claim, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its action. (*Cosgrove v Sears, Roebuck & Co.*, 9 F3d 1033, 1039 [2d Cir 1993]). Third, if the defendant does so, the burden shifts back to the plaintiff to demonstrate that the reason is pretextual. (*Id.*).

Here, plaintiff offers no evidence that Bernstein received or was aware of his April 2005 letter before she rejected his SMART application, and even if he had established, *prima facie*, that Bernstein retaliated against him, defendant demonstrated that Bernstein had legitimate, non-discriminatory reasons for her decision based on her analysis of his interview and application, which plaintiff does not show to have been pretextual, having merely disagreed with her assessment of his qualifications.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is granted and the complaint is hereby dismissed as against defendant, and the Clerk is directed to enter judgment in favor of said defendant.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 8, 2011
New York, New York

DEC 0 8 2011

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE