Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Anthony V. D'Amico,

Plaintiff,

-against-

Arnold Chevrolet, LLC,
Frank Bellavia and Mark Cohen,

Defendants.

Clerk of the Court

Motion Sequence No.: 002; MG
SETTJ

Motion Date: 6/23/11
Submitted: 7/27/11

Index No.: 19618/2010

Attorney for Plaintiff:

Joseph C. Stroble, Esq.
40 Main Street, P.O. Box 596
Sayville, NY 11782

Attorney for Defendants:

Milman Labuda Law Group PLLC
3000 Marcus Avenue, Suite 3W8
Lake Success, NY 11042

Upon the following papers numbered 1 to 26 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 20; Answering Affidavits and supporting papers, 21 - 24; Replying Affidavits and supporting papers, 25 - 26.

This is an action commenced by plaintiff to recover damages he allegedly sustained as a result of defendants' wrongful termination of his employment due to his age. As a result of a previous motion to dismiss by defendants, this Court issued an order dated March 22, 2011 which dismissed plaintiff's second, fourth, fifth, and sixth causes of action in their entirety; dismissed plaintiff's first and third causes of action as against defendants Frank Bellavia and Mark Cohen; dismissed plaintiff's first and third causes of action insofar as they plead state human rights claims of age discrimination and harassment under NYSHRL and federal claims of age discrimination and harassment under 42 USC 1981 and Title VII; and converted the remaining motion concerning portions of plaintiff's first and third causes of action against Arnold Chevrolet, LLC from a dismissal

motion to a summary judgment motion, adjourned it for sixty days and directed that the parties come forward with evidence that could be considered on a summary judgment motion (that is, additional affidavits and other supporting papers).

Defendants now move for an order granting summary judgment dismissing the complaint pursuant to CPLR §3212. In support of the motion defendants submit copies of the pleadings, the March 22, 2001 short form order, the labor agreement in effect at the time, several letters to plaintiff, the arbitrator's decisions and the New York State Division of Human Rights Determination. Plaintiff Anthony V. D'Amico ("D'Amico") was hired by defendant Arnold Chevrolet, LLC, an automobile dealership ("the dealership"), as a service technician in September, 2005. He was over forty years of age at the time he was hired by the defendant dealership. His duties were to perform service work on the automobiles of defendant Arnold's customers. The service work that was assigned to plaintiff D'Amico throughout his workdays was to be performed properly and correctly in the first instance. D'Amico was a member of United Service Workers, Local 355, IUJAT, ("the union") a collective bargaining unit which represented the service technicians at the dealership. A collective bargaining agreement ("CBA") between the union and the dealership governed the terms and conditions of plaintiff's employment with the dealership. In a letter dated December 4, 2006 plaintiff D'Amico was advised by the dealership of his poor work performance in repairs made by him on September 22, 2006 and on October 30, 2006. On September 18, 2008 plaintiff D'Amico was advised by letter that his carelessness in repairing a vehicle on July 17, 2008 resulted in extra costs and customer dissatisfaction, on October 8, 2008 he was advised again, by letter, that he caused paint damage to a vehicle on October 8, 2008 when he was careless in the manner of a repair and, finally, on October 17, 2008 plaintiff D'Amico was advised in writing that his employment was terminated as a result of his carelessness and poor workmanship in the repair of another customer's automobile.

Neither plaintiff D'Amico nor the union filed any grievances for the written notices sent by the dealership to plaintiff D'Amico. His first grievance was filed after his employment was terminated in October of 2008. On December 17, 2008 Eugene T. Coughlin, an arbitrator, determined that the dealership's discharge of plaintiff D'Amico was for just cause and the grievance filed by the union alleging age discrimination in plaintiff D'Amico's discharge was denied and dismissed as being wholly without substance or merit. The arbitrator found that plaintiff D'Amico had submitted no evidence demonstrating a causal connection between his protected status (age) and his discharge and that the dealership had successfully stated a legitimate non-discriminatory reason for his termination. On January 19, 2009 the arbitrator sustained and affirmed the December 17, 2008 decision, in response to the union's exceptions to and request to reconsider his previous determination. In response to the administrative complaint plaintiff filed with the New York State Division of Human Rights ("NYSDHR") in October of 2008, a Determination and Order after Investigation was issued by the NYSDHR on March 31, 2010 which found that there was no probable cause to believe that the dealership had engaged in unlawful discriminatory practices relating to the employment or discharge of plaintiff D'Amico because of age. The determination indicated that the investigation revealed that the dealership provided a legitimate non-discriminatory reason for his termination; that comparative data provided by the dealership showed employees older than plaintiff D'Amico received training and that of forty employees twelve were older than plaintiff

D'Amico; and that another employee who was younger than plaintiff D'Amico was fired for the same reason as he was, which demonstrated a lack of discriminatory animus on the basis of age by the dealership. Thus the NYSDHR dismissed plaintiff D'Amico's complaint. No request to file an appeal as to this determination was made by plaintiff D'Amico, nor did he file an application with the US Equal Employment Opportunity Commission ("EEOC") for a review.

In opposition to the defendants' motion plaintiff alleges that the dealership "engaged in a policy and pattern of practice which included training younger workers under the age of forty . . . while individually failing to provide the training and education to the older workers over [forty] in their [fifties], and beyond." The plaintiff maintains that the dealership did not properly train its workers who were over the age of forty and then made false allegations with respect to the workmanship of the older workers, thus establishing a pretext for discharge. Plaintiff D'Amico avers that he was the target for discharge because of his age, that he was falsely written up with respect to certain of his jobs. He states that he was terminated because of his age, despite the fact that he was qualified for the position at the dealership.

As evidence of the dealership's alleged discriminatory practices, plaintiff D'Amico submits an affidavit from a fellow employee, Jamie Gallagher, who claims "I was over [forty] years of age at all time mentioned herein", that he was employed by the dealership from February 2005 until March of 2008, and that he was written up falsely for three of his repair jobs in an effort to wrongfully discharge him from his employment. Mr. Gallagher claims are totally devoid of merit since he attests to a February 12, 1969 date of birth–rendering him thirty-six to thirty-nine years of age during the cited time period. Additionally, plaintiff D'Amico submits an affidavit from a former employee, Vincent Favaro, who worker for the dealership and was discharged six months prior to plaintiff D'Amico's termination. Mr. Favaro's date of birth is March 21, 1956. He states that he was employed at the dealership for several years prior to his termination, thus, he was hired and fired some time during his late forties or early fifties. Mr. Favaro asserts that he was denied training and opportunities that were given to the younger workers, that plaintiff D'Amico was replaced by a man who was approximately thirty-one years of age, that it was the policy and practice of the dealership to target the forty and fifty year old workers for termination, that he and the plaintiff were the targets of the age discriminatory policy of the dealership, and that the dealership advised him that it was not worth the investment of time for the education and training of older workers.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see, Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 [1978]; Andre v. Pomeroy, 35 NY2d 361 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (see, S.J. Capelin Assocs., Inc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (see, Benincasa v. Garrubbo, 141 AD2d 636, 637 [2nd Dept., 1988]). Once this showing by the movant

has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]).

In order to make out a *prima facie* case of age discrimination, the plaintiff must establish that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment decision, and that the decision occurred under circumstances giving rise to an inference of discrimination (see, Nieves v. Angelo, Gordon & Co., 341 Fed Appx 676 [2nd Cir., 2009]; Norville v. Staten Island Univ. Hosp., 196 F3d 89 [2nd Cir., 1999]). Once the plaintiff alleges a *prima facie* case of discrimination, the burden shifts to the defendant employer to demonstrate a legitimate, non-discriminatory reason for the adverse employment action; and, if the employer meets its burden, it then shifts back to the plaintiff to present evidence that the employer's proffered reason is a pretext for discrimination (*see id*). "A plaintiff cannot defeat a summary judgment motion based on 'purely conclusory allegations of discrimination, absent any concrete particulars'"(Nieves v. Angelo, Gordon & Co., 341 Fed Appx 676 at 678 [2nd Cir., 2009] quoting Meiri v. Dacon, 759 F2d 989 [2nd Cir., 1985]).

When looking at the evidence presented in a light most favorable to plaintiff D'Amico, it cannot be concluded that he was the victim of age discrimination. The evidence establishes that he was reprimanded on many occasions for his unsatisfactory work performance and that he never filed any grievance or complaint that the reprimands were unjustified or inappropriate. Thus his claim that he was qualified for the position is questionable. Plaintiff D'Amico has not shown that there was any inference of discrimination in his termination. In fact, the affidavit of his co-worker, Jamie Gallagher, offers some scintilla of proof that the dealership terminated younger workers (*i.e.* less than forty years of age) for unsatisfactory work. Plaintiff D'Amico has offered no concrete particulars which would show that the summary judgment motion should be denied. Rather, he has offered conclusory allegations insufficient to defeat the motion. Whereas the dealership has shown that its actions were found to be non-discriminatory, both by the independent arbitrator and the NYSDHR.

Accordingly, it is

ORDERED that the motion by defendants for an order granting summary judgment dismissing the remaining portions of the complaint pursuant to CPLR §3212 is granted and the complaint is dismissed in its entirety; settle judgment (see, 22 NYCRR §202.48).

Dated: OCT 24 2019

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION