Haber v J. Press, Inc.

2013 NY Slip Op 31201(U)

May 30, 2013

Supreme Court, New York County

Docket Number: 104281/2010

Judge: Kathryn E. Freed

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SCANNED ON 6/4/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 10

Index Number : 104281/2010
HABER, JEROME
vs.
J. PRESS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT CAL # 44

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUN 03 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5-30-13
MAY 30 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 10

----------X

JEROME HABER,

Plaintiff,

-against-

J. PRESS, INC.,

Defendant

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DECISION/ORDER
Index No. 104281/2010
Seq. No. 003

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1-4
ORDER TO SHOW CAUSE AND AFFIDAVITS ATTACHED	
ANSWERING AFFIDAVITS	5
REPLYING AFFIDAVITS	6
EXHIBITS	7-13
OTHER	

FILED
JUN 03 2013
COUNTY CLERK'S OFFICE
NEW YORK

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION AS FOLLOWS:

Defendant moves for an Order granting summary judgment. Plaintiff cross-moves pursuant to CPLR§ 3025(b) for leave to amend his complaint so as to add a claim under the New York City Human Rights Law (Admin Code § 8-107).

Factual and procedural background:

Plaintiff, a 77-year-old man described in the complaint as "the most successful salesman in J. Press's long history" (¶ 6), brought this action against his employer, defendant J. Press, Inc. (the "company" or "defendant"), complaining of age discrimination. The company, a well known retailer of men's clothing and accessories, is a privately owned subsidiary of Onward Kashiyama, a Japanese

concern. The company has a flagship store in Manhattan, and various other stores in Massachusetts, Connecticut and Washington, D.C. In 2007, the Manhattan flagship store moved from 7 East 44th Street to 380 Madison Avenue. The company's employees, including plaintiff, are represented by Local 34, New York Joint Bard, UNITE-HERE (hereinafter, the "union").

According to the complaint, plaintiff has worked as a salesman for the company for over 50 years, consistently bringing in about $1.5 million in sales per year. As all salesmen in the company, plaintiff's compensation consists solely of commissions, at a rate of eight to ten percent of his sales.

As alleged in the complaint, since November 2006, when the company brought in Jonathan Sadler ("Sadler") as the manager of the New York store, plaintiff has been subjected to age discrimination both through a hostile environment and the implementation of various policies which curtailed plaintiff's ability to earn commissions. Specifically, plaintiff contends that Sadler, who was terminated in August 2011, repeatedly referred to him as "the old man," told plaintiff he should retire because he was "too old to work," threatened that he would "find a way to get rid of" plaintiff, told him neither Sadler nor his boss wanted to see plaintiff's "old face" in the new store, intentionally destroyed mail addressed to plaintiff, and falsely told other employees that plaintiff urinated on the bathroom floor because he was so old he could "hardly see where he [wa]s aiming." Plaintiff also alleges that in order to diminish his income and force him to retire, Sadler: forced plaintiff to leave the sales floor for a full lunch hour and at 6 pm every evening, thereby depriving plaintiff of the opportunity to sell to the lunch crowd and after-work shoppers; reduced salesmen's schedules from six days a week to five; detrimentally changed the system of assigning customers to salespersons; barred plaintiff from going out the front door, where he could greet customers going up to the store; and, forced salesmen to do all the paperwork during store hours instead of at home. As a result of

these policies, plaintiff's income was greatly reduced. On a more personal note, plaintiff alleges that Sadler did not allow plaintiff to sit and rest his feet when he was not engaged in sales activity, and enforced store rules much more strictly against plaintiff than against other employees. Plaintiff also alleges that the company failed to pay commissions due to him from the sale of Alden Shoes.

Plaintiff filed a note of issue on March 2, 2012.[1] Now, on the brink of trial, the company moves for summary judgment dismissing plaintiff's complaint with prejudice.

The parties positions:

Defendant's summary judgment motion is based on the following arguments: the action is time-barred because the bulk of the allegedly discriminatory conduct occurred more than three years before plaintiff filed his complaint on April 1, 2010, and the remaining acts alleged are too sporadic to constitute discriminatory conduct; plaintiff, who is still employed by the company, cannot make out a *prima facie* case of discrimination because he has not suffered an adverse employment action; the conduct by Sadler complained of by plaintiff evidences a personality conflict, not unlawful discrimination; the allegedly discriminatory acts complained of were too infrequent to create a hostile workplace, since they did not "permeate" the environment and did not interfere with plaintiff's performance of his job; and, plaintiff cannot complain about the policies enacted by Sadler because they were approved by plaintiff's union.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material

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[1] Plaintiff initially filed a note of issue on October 24, 2011. However, that note of issue was stricken to allow defendant to conduct additional discovery (mot seq. no. 002, decided January 19, 2012 [Gische, J]).

issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a *prima facie* showing, the burden then shifts to the opposing part to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1989]; *People ex rel Spitzer v Grasso*, 50 AD3d 535 [1st Dept 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v New York Telephone*, 220 AD2d 728, 729 [2d Dept 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 [1st Dept. 2002]).

Defendant's threshold argument that the bulk of the action is time-barred is not persuasive. The statute of limitations for an age discrimination claim under the New York State's Human Rights Law is three years (see CPLR§ 214[2]; *Murphy v American Home Products Corp.*, 58 NY2d 293, 307 [1983]). However, as a case cited by defendant, *Baez v State of New York* (n.o.r., 2010 WL 4682809 [Sup Ct, NY Co, Gische, J, 2010]), makes clear, the statute of limitations is subject to a continuing violation doctrine. "The continuing violation doctrine provides a narrow exception to the NYSHRL limitations period where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" as in a hostile environment claim (*id.*). Here, in addition to his own testimony, plaintiff has proffered the testimony of his co-worker, David Wilder ("Wilder"). Looking at the facts in the light most favorable to

plaintiff, as the court must, the continuing violation theory applies in this case. Hence, the statute of limitations period would not start running until the last discriminatory act alleged by plaintiff. Finally, defendant has not asserted the statute of limitations as an affirmative defense in its Answer, nor sought leave to amend its Answer to add that defense.

To make out a *prima facie* case of employment discrimination, plaintiff must show that he is a member of a protected class qualified to hold his position who was fired or suffered an adverse employment action which "occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305-306 [2004]). Defendant concedes that plaintiff meets the first two elements, but argues that there was no discrimination and, relying on *Ehmann v Good Samaritan Hospital Medical Center*,90 AD3d 985 [2d Dept. 2011]), contends that plaintiff cannot show he suffered an adverse employment action because he was not fired or demoted.

The court finds defendant's reliance on the Second Department to be misplaced. Plaintiff need not show he was "actively or constructively discharged" to establish a *prima facie* case; only an "adverse employment action" is required (see *Strassberg v Long*, 300 AD2d 141 [1st Dept 2002]; Executive Law § 296(3-a)[1](a) [it is unlawful for an employer to discriminate "in promotion, compensation or in terms, conditions, or privileges of employment" due to age]). A "decrease in wage or salary ... or other indices that might be unique to a particular situation" may constitute a materially adverse change (see *Burlington Industries, Inc. v Ellerth*, 524 US742, 761 [1998]). Plaintiff has submitted evidence that his average annual income from 2000 to 2006 was $101,296, and that income dropped to an average of $64,625 per year from 2007 to 2011 (see exhibit 1 to Roth supplemental affirmation; exhibit B to Haber affidavit).

Defendant argues that any loss of income suffered by plaintiff is attributable to the poor economy rather than the rule changes imposed by Sadler, which plaintiff cannot challenge as discriminatory since he has admitted they were age-neutral. The cause of plaintiff's loss of income is a factual question to be decided by the jury. Plaintiff's admission that the rules were not age-related does not vitiate his claim. It is undisputed that those rules had no real impact on anyone but plaintiff, who was the only salesperson to work six days a week, and regularly work through the lunch hour and do paperwork after working hours or at home (see Sadler EBT pp 115-116 [when he made the 5-day rule, Sadler was aware plaintiff would be the only one affected]; Wilder affidavit ¶ 5 ["the only person affected" by the 5-day rule was plaintiff, "who had always worked six-day weeks"], ¶ 6 ["Other rules imposed by ... Sadler affected (plaintiff) more than other employees"]). Neutral rules that negatively affect only members of the protected class may be deemed discriminatory (*cf. Matter of Manhattan Pizza Hut, Inc. [NYS Human Rights Appeal Board)*, 51 NY2d 506, 511 [1980] ["the company's policy, though facially neutral, results in discrimination because of a disparate impact on a particular group of persons"]). This is sufficient to withstand defendant's summary judgment motion.

Plaintiff has also succeeded in making out a *prima facie* case of a hostile work environment. Contrary to defendant's position, verbal comments are not all indicative of a personality conflict. They "may provide sufficient evidence to support a claim for employment discrimination" when, as here, they were made by a decision-maker or supervisor threatening an adverse employment action (see *Gonzalez v New York State Office of Mental Health*, 26 Misc3d 1227(A), *14-*16 [Sup Ct, Kings Co, Battaglia, J, 2010]). Plaintiff avers that in addition to humiliating remarks such as telling his co-workers that he had urinated on the bathroom floor, the store manager constantly made

derogatory comments about plaintiff's age, told him he was "too old to work" and he should retire, that the company's CEO "does not want to see your old smiling face [at the new store] and neither do I" and that he would find a way to get rid of plaintiff (see Haber affidavit; see also Wilder affidavit). These statements, which threatened plaintiff's continued employment, are sufficient for a jury to conclude that plaintiff was subjected to age discrimination, even if in actuality plaintiff is still employed and Sadler was the one fired. "Viewing the evidence in the light most favorable to [plaintiff] ..., a reasonable person could find both that [plaintiff] subjectively perceived [Sadler]'s conduct as abusive and that [Sadler]'s conduct created an objectively hostile or abusive environment, and thus that the State HRL was violated" (*McRedmond v Sutton Place Restaurant and Bar*, 95 AD3d 671 [1st Dept 2012]).

On the other hand, with respect to commissions allegedly due to him for the sale of Alden shoes in the store, the court finds that plaintiff cannot bundle what is really a claim for breach of an oral contract into the complaint's single cause of action for discrimination and harassment.

Plaintiff alleges that the company made a handshake deal with him for commissions on all sales of Alden shoes in the store because he brokered the deal with the owner of Alden shoes,'and its failure to pay him those commissions constitutes another way the company is trying to reduce plaintiff's income to force him to retire. The company denies the existence of any such agreement. Aside from his own deposition testimony and affidavit, plaintiff has offered no proof that there such a contract ever existed, particularly an affidavit from the owner of Alden shoes.

Furthermore, in September 2007, the union reached an agreement with the company whereby the union consented to Alden shoes taking over the store's shoe department provided it was staffed by union employees in accordance with the terms of the union's August 2006 agreement with Alden

shoes (see exhibit B to Smith affidavit). The agreement also barred Alden shoes from making special agreements with individual employees (Article 22). According to Glenn Smith, the company's outside labor counsel, plaintiff never complained to the union about the company's breach of an agreement to compensate him for Alden shoes sold in the store, and such an agreement would be barred unless the union consented to it, which it had not (Smith affidavit, ¶ 2; *see also* exhibit A, 2008 collective bargaining agreement, § 18.1).

Finally, plaintiff has cross-moved to amend the complaint so as to add a claim for age discrimination under the City's Human Rights Law. In support of his cross-motion, plaintiff argues that defendant would not be prejudiced by his adding this claim because it is premised on the same facts as his claim under the state law, so no new discovery would be necessary. Defendant opposes the cross-motion, arguing that it would suffer prejudice because the City law provides remedies which the state law does not, such as punitive damages and attorney's fees, and its trial strategy and discovery demands would have been different.

Plaintiff commenced this action three years ago. Counsel was surely aware at that time that the facts of this case support a claim under the City law as well as, if not better than, the state statute. However, no explanation is proffered for waiting three years until after the note of issue has been filed to first seek to assert that claim, and then only in response to defendant's motion for summary judgment. "Although CPLR 3025(b) provides that leave to amend should be freely given, this does not mean that the court must permit a substantial amendment of the pleadings in the absence of any semblance of an excuse for the delay involved" (*Prince v O'Brien*, 257 AD2d 208, 211 [1st Dept 1998], (citations omitted). Plaintiff cannot "merely sit back and await the eve of trial before moving to ... amend the complaint so substantially" (*Bert G. Gross & Co. v Damor Realty Corp.*, 60 AD2d

541 [1st Dept1977]).

"In light of this extended period of delay by plaintiff[]while in full possession of the facts necessary to support the amendment, and the absence of any excuse for waiting until the eve of trial before seeking to amend..., those facts alone warrant[] the denial of [the cross-]motion" (*Holliday v Hudson Armored Car & Courier Service, Inc.,* 301 AD2d 391 [1st Dept 2003]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted only to the extent that plaintiff's claim for commissions stemming from sales of Alden shoes is hereby dismissed. Defendant's motion is denied in all other respects; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar; and it is further

ORDERED that this constitutes the order of the court.

FILED

JUN 03 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED: May 30, 2013

MAY 30 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT