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

PRESENT: DEBRA A. JAMES Justice — PART 59

LYN ROLLINS,

Plaintiff,

- v -

FENCERS CLUB, INC., and JAMES MELCHER,

Defendants.

Index No.: 106303/09

Motion Date: 08/10/12

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 4
Answering Affidavits - Exhibits	6, 7
Replying Affidavits - Exhibits	8, 9.

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this action, plaintiff alleges that defendants discriminated against her based upon her age by firing her in violation of the New York City Human Rights Law (Administrative Code of City of NY § 8-107 [1] [a]) (HRL). Defendants now move for summary judgment dismissing the complaint.

Plaintiff was hired as General Manager by defendant Club in August 2007 at the suggestion of co-defendant James Melcher at which time she was 58 years old. Plaintiff alleges that the defendant's current Executive Director who first became a board

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

member in 2008 commented on plaintiff's work performance on numerous occasions stating that plaintiff "looked tired" which plaintiff interpreted as referring to plaintiff's age and alleged inability to perform the duties of her job for that reason. The Executive Director testified at deposition that on at least two occasions she used the aforementioned phrase in discussing the plaintiff, but disagreed that she was referencing plaintiff's age.

Plaintiff asserts that she diligently performed her duties and was rewarded with a pay raise in September 2008. Co-defendant Melcher, then Board Chairman of the Club, stated in his deposition that plaintiff's request for a raise was discussed in September 2008 and "was negotiated that it would be in the form of a bonus at the end of the year." Plaintiff also points to a letter from Melcher to the membership of the Club dated September 2, 2008, in which it is stated that "Lyn Rollins came on board as the Club's new Manager one year ago and has done a terrific job of reorganizing and modernizing our procedures across the board, while continuing our tradition of friendly and welcoming interaction with members, parents, and coaches."

However, plaintiff was terminated from her employment with defendant in December 2008.

Plaintiff argues that against these positive portrayals of her performance, the comments and actions of defendant's

Executive Director disparaging her performance and favoring a younger staff member constitute sufficient evidence of discrimination to survive defendants' attempt to dismiss her claims.

In Bennett v Health Management Systems, Inc. (92 AD3d 29, 31 [1st Dept 2011]), the Court took "the opportunity to address the evidentiary showing required at the summary judgment stage in [an age] discrimination case brought pursuant to the New York City Human Rights Law" as is the case here. The Court noted that

> Six years after the passage of the New York City Local Civil Rights Restoration Act (Local Law No. 85 [2005] of City of NY) (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 laws" (Williams v New York City Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009], lv denied 13 NY3d 702 [2009] [emphasis added]).

Id. at 34. The Court then began its analysis by stating that

> The McDonnell Douglas (411 US 792 [1973]) burden-shifting approach initially requires only that the plaintiff make a prima facie showing of membership in a protected class and that an adverse employment action had been taken against him. The adverse action must have occurred under circumstances giving rise to an inference of discrimination. Once that minimal showing is made, the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of its action (id. at 802). If that burden is successfully shouldered then plaintiff must show those reasons to be false or pretextual (id.).

Id. at 35-36.

The Court in Bennett was careful to note that the requirement of plaintiff's initial prima facie showing is "limited" but "can, if its limited function is not understood correctly, transmute that prong into one that requires a plaintiff to prove his entire case." Id. at 36. As applied here, plaintiff, assuming as the court must that plaintiff's evidence is true for purposes of this motion, has made a prima facie showing that she suffered a termination because of perceptions that she would be unable to do her job because she lacked "energy" because of her age.

Therefore pursuant to Bennett, defendant on this "summary judgment motion [must] produce[] evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds. Id. at 39. Defendants attempt to meet their burden here by introducing deposition and affidavit evidence that plaintiff failed to perform the duties of her position in a satisfactory manner. However, even were the court to take as true the evidence submitted by the defendants in support of their motion, defendants still have failed to meet their burden. As stated by the Court

> There remain two factors to consider. First, it is essential to remember that the McDonnell Douglas evidentiary framework is not the only evidentiary framework applicable to discrimination cases. It is not uncommon for covered entities to have multiple or mixed motives for their action, and the City HRL proscribes such partial discrimination since under Administrative Code § 8-101, discrimination shall play no role in

> decisions relating to employment, housing or public accommodations.

Bennett, 92 AD3d at 40 (citations omitted).

While defendants argue that plaintiff's poor performance was the cause of her termination, the previously cited and uncontroverted evidence that defendants negotiated the payment of a bonus to plaintiff and publicly acknowledged to the membership the "terrific job" plaintiff was doing less than four months prior to her termination raises issues of fact as to whether the proffered reason for defendants' action is pretextual. "On a motion for summary judgment, 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 a number of mixed motives, by direct or circumstantial evidence." Bennett, 92 AD3d at 41. The Court further directs that

> Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons. These will be jury questions except in the most extreme and unusual circumstances. Proceeding in this way reaffirms the principle that trial courts must be especially chary in handing out summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue.

Bennett, 92 AD3d at 43-44 (citations and internal quotations omitted).

Though plaintiff relies heavily on the fact defendant's Executive Director made statements that could be interpreted as supporting an inference of ageism, none of the statements relied upon specifically references plaintiff's age nor implies that plaintiff was being treated differentially because of her age. As stated by the Court examining a similar fact pattern

> Plaintiff also relies on a total of three remarks by [defendant's CEO] (to whom plaintiff attributes [defendant]'s adverse actions against him) that are said to manifest bias against older physicians. This reliance is unavailing. Two of the remarks were simply positive references to "young" professionals that, in the absence of other evidence of ageist bias, do not imply any sinister aspersion on older workers. Stray remarks such as these, even if made by a decision maker, do not, without more, constitute evidence of discrimination. The third remark, even further afield from the subject matter of this action, was simply [the CEO's] comment, in a newspaper article profiling him just before his retirement, on his own weakened physical condition as he battled a malignant brain tumor. Being a patient, [the CEO] said, is "not a preferred state," to which he added: "I'm 72 years old and things happen to old men. Nobody knows that better than a doctor." We see no evidence of ageist bias in this rueful observation on what is, after all, an inescapable fact of life. In sum, the tiny number of stray, marginally age-related remarks that plaintiff cites, none of which concerned an employment decision, do not – even when viewed in the light most favorable to plaintiff – form a quantum of proof sufficient to support a finding that the legitimate reasons Montefiore proffered for its challenged actions were pretextual, either in whole or in part.

Melman v Montefiore Medical Center, 98 AD3d 107, 125-126 (1st Dept 2012). In this case plaintiff's allegations that

defendant's Executive Director stated on more than one occassion "Are you sure you're up for this? You know you're at that age where you should - you need more rest. You look tired" are insufficient, standing alone, to support an inference of age discrimination. Contrast Sandiford v City of New York Dept. of Educ., 94 AD3d 593, 595 (1st Dept 2012) (plaintiff's testimony regarding repeated derogatory remarks regarding gays and lesbians was sufficient to raise a question of fact); Asabor v Archdiocese of New York, 102 AD3d 524, 528 (1st Dept 2013) (nature and degree of unaddressed racial animus at defendant precluded summary judgment).

Nonetheless, since unlike in Melman, the defendants at bar have not produced evidence of legitimate, non discriminatory reason for their adverse action against plaintiff, the burden has not shifted back to plaintiff to raise a triable issue as to whether defendants' reason was pretextual and she need not show at this juncture that "the reasons were false and that discrimination was the real reason" (Melman, 98 AD3d at 121). In this case, such questions must be await determination by a fact finder at trial.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is DENIED; and it is further

ORDERED that should this action not settle in Mediation-I, the parties shall appear for a pre-trial conference in IAS Part 59, 71 Thomas Street, New York, New York on October 22, 2013, 2:30 PM.

This is the decision and order of the court.

Dated: August 8, 2013 ENTER:

J.S.C.
DEBRA A. JAMES

FILED
AUG 15 2013
COUNTY CLERK'S OFFICE
NEW YORK