SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Samuel D. Massol,

Plaintiff,

- v -

Congregation Rodeph Sholem, Pete Thompson and Joseph Elbaum,

Defendant.

Index No.: 107743/07
Motion Date: 05/07/13
Motion Seq. No.: 02

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1
Answering Affidavits - Exhibits	No(s). 2
Replying Affidavits - Exhibits	No(s). 3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint. Plaintiff alleges that he was fired by Congregation Rodeph Sholem (the Congregation) based upon his age and race and that the Congregation retaliated against him when he complained about such discrimination in violation of New York State's Human Rights Law (Executive Law § 296) and New York City's Human Rights Law (NYCHRL) (Administrative Code of the City of New York, § 8-107).

Plaintiff was the maintenance superintendent for the

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

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

Congregation, responsible for the maintenance of its three buildings. Peter Thompson (Thompson) was the Congregation's facilities supervisor and plaintiff's supervisor. Joseph Elbaum (Elbaum) was the Congregation's executive director.

Plaintiff alleges that, on June 18, 2004, he was terminated by Elbaum and Thompson and that, while he was informed that the dismissal was due to poor management and his conduct in tampering with employee time cards, he believes it was really due to his age of 58 at the time of the termination. He states that, between 2000 and 2004, there were three or four incidents in which Thompson mentioned that they were both getting old and two incidents in the same time period where Thompson's assistant also alluded to his age and an incident in 2000 or 2001 in which the husband of the school director made a disparaging remark about Puerto Ricans. He further states that there were no other statements regarding race and that the last comments about his age occurred in 2003.

Plaintiff asserts that, when an anonymous letter dated May 25, 2004 (the Letter) asserting that he had a sexual relationship with one of his co-workers on the maintenance staff Claire Rosario (Rosario) was received by the Congregation, the Congregation interviewed Rosario and him on or about June 6, 2004. He alleges that the Congregation used the relationship as an excuse to terminate him and replace him with Wilton Piniata

(Piniata), a younger co-worker, who was in his thirties. Plaintiff acknowledges that he did have a sexual relationship with Rosario, but he claims that, since there was no physical contact on the Congregation's premises, it was not a valid basis for his dismissal. He further states that until the day of his dismissal there was never any discussion of his arranging timecards to reflect a full day's work when the employees in fact worked a lesser time, and that such actions were within his authority.

Defendants contend that when the Letter was received, Elbaum and Thompson began an investigation and interviewed members of the maintenance staff and that they then learned that plaintiff was arranging for employees to have their timecards punched reflecting more work hours than they actually worked. Since employees were paid based upon the hours worked as reflected on their timecards, Elbaum and Thompson viewed this conduct as stealing from the Congregation. They further stated that this conduct was not authorized and that it was the sole reason for Thompson's recommendation, and Elbaum's decision, to terminate plaintiff. They also state that Thompson was older than plaintiff and that neither he nor Elbaum knew plaintiff's age. Finally, they state that Piniata replaced plaintiff since he was a shift supervisor and thus familiar with the work.

Plaintiff contends that there was a "reward" system under

which hard working employees were paid for a full day's work when they worked only a half day and that Thompson knew and approved of this system.

The action was commenced by filing a summons and complaint on June 1, 2007.

Executive Law § 296 (1) provides that:

> "It shall be an unlawful discriminatory practice: (a) For an employer ... because of an individual's age, [or] race ... to discharge from employment such individual or to discriminate against such individual ... in terms, conditions or privileges of employment."

NYCHRL § 8-107 (1) provides that:

> "It shall be an unlawful discriminatory practice: (a) [f]or an employer ... because of the ... age, [or] race ... of any person ... to discharge from employment such person or to discriminate against such person ... in terms, conditions or privileges of employment."

A plaintiff claiming discrimination in employment has the initial burden of establishing a prima facie case by showing that he was a member of a protected class, that he was qualified for the position, that he was terminated or suffered another adverse employment action and that the adverse employment action "occurred under circumstance giving rise to an inference of discrimination" (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004]).

"In order to make a prima facie showing of retaliation, [a

plaintiff] must show: (1) participation in a protected activity known to defendant; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action" (*id.* at 327).

The courts have applied "the three-step burden-shifting approach set forth in McDonnell Douglas Corp. v Green (411 US 792 [1973])" in which the plaintiff makes the "minimal showing [that he is in a protected class and that an adverse employment action has been taken against him, then] the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons [for its action and] ... then plaintiff must show those reasons to be false or pretextual" (Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 34, 35-36 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

When a defendant moves for summary judgment, it must "demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual" (Forrest, 3 NY3d at 305). If the plaintiff responds with some evidence that at least one of the defendant's reasons was "false, misleading or incomplete", he has adequately raised a factual issue of pretext, which is generally a question for a jury (Bennett, 92 AD3d at 44-45).

However, "'the burden of persuasion of the ultimate issue of discrimination always remains with the plaintiff' ... and an age discrimination plaintiff 'must do more than challenge the employer's decision as contrary to 'sound business or economic policy' ... [but rather plaintiff must] raise a triable issue as to whether these reasons were pretextual by producing evidence tending to show 'both that the stated reasons were false and that discrimination was the real reason'" (Melman v Montefiore Med. Ctr., 98 AD3d 107, 114, 120 [1st Dept 2012] [internal citations omitted]; Forrest, 3 NY3d at 305; Sandiford v City of New York Dept. of Educ., 94 AD3d 593, 595 [1st Dept 2012]).

The statute of limitations for discrimination claims under Executive Law § 296 and the NYCHRL is three years (Koerner v State of N.Y., Pilgrim Psychiatric Ctr., 62 NY2d 442, 448 [1984]; *Miccio v Fits Sys., Inc.*, 25 AD3d 439, 439 [1st Dept 2006]; Horan v New York Tel. Co., 309 AD2d 642, 642 [1st Dept 2003]).

Applying the above mentioned principles to this case, plaintiff's complaint cannot stand. Initially, the claims regarding conduct more than three years before the commencement of this action on June 1, 2007 are time-barred and consequently, the alleged comments in 2000-2003 cannot support plaintiff's claim (Miccio, 25 AD3d at 439; Horan, 309 AD2d at 642). However, plaintiff's dismissal on June 18, 2004 was within the limitations period and the court therefore turns to this issue.

Plaintiff asserts that he was fired based upon his age, due to the comments of Thompson and his assistant that occurred between 2000 and 2003, and not due to anything he was told at the time of his dismissal. He asserts that since the Congregation never questioned him about the timecards during its investigation, this could not have been the real reason for his termination. Defendants state that plaintiff had no authority to permit employees to have their timecards punched out to reflect work hours that were not accurate, since the Congregation would have to pay the employees based upon the timecards. When asked at his deposition "According to the Employees Manual book, if you recall the policy of the Congregation, was that permitted, if an employee would go home, were you allowed to sign them out", plaintiff answered "I did that." He also answered that it was his decision to sign out employees as working a full day when they left early and went home sick when he determined that they were good employees and earned it.

Plaintiff does not dispute that the Employee Manual states "[a]ltering, falysifying, tampering with records, or recording time on another employee's time record may result in disciplinary action, up to and including termination of employment. Such action may also result in charges of civil or even criminal theft or fraud." However, though asked about the Employee Manual at his deposition, plaintiff never stated that he was given

authority to override the Congregation's Employee Manual explicit prohibition against recording time on another employees time record.

Instead, only for the first time in his opposing affidavit, plaintiff states:

> In or about 1994, with the approval of Ms. Monica Hamburger, Executive Director of the Congregation, a reward system for my employees [sic].
>
> After Defendant PETE THOMPSON was hired by the Congregation, I informed PETE THOMPSON of the reward system for my employees and he consent and approval of the continued use of the reward system.
>
> The reward system consisted of paying hard working employees for a full day's work when they worked a half day.

The version of events in which the Congregation approved the falsification of timecards by plaintiff as a reward system that plaintiff relates in his opposing affidavit is in direct contradiction with the testimony he gave at his deposition that the decision to "punch out" other employees based upon their job performance was his alone. On that basis, this court determines to disregard such affidavit. Branham v Loews Orpheum Cinemas, Inc., 31 AD3d 319, 324 (1st Dept 2006). Thus other than his own subjective belief, plaintiff presents no evidence that tends to show that the real reason for his dismissal was his age or ethnicity.

While generally, pretext is a factual issue, plaintiff must present "some evidence that at least one of the reasons proffered

by defendant is false, misleading or incomplete" (Bennett, 92 AD3d at 45; Carryl v MacKay Shields, LLC, 93 AD3d 589, 590 [1st Dept 2012]). In addition, it is true that it does not matter whether the reasons for the employer's decision are good reasons or bad reasons and that "[w]hat matters is that the [employer's] stated reason for terminating plaintiff was nondiscriminatory" (Forrest, 3 NY3d at 308 n 5).

The court finds that defendants have set forth a legitimate, non discriminatory reason for their decision to terminate plaintiff's employment. As plaintiff has failed to present evidence that such reason was a pretext for discrimination, defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

Nor has plaintiff established prima facie that he suffered any adverse employment action because he complained about an ethnic slur made by the husband of a director of the Congregation nine years before his termination.

It is, therefore,

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: December 6, 2013 ENTER:

DEBRA A. JAMES *J.S.C.*