

| |
|--|
| Marcell v New York City Dept. of Educ. "DOE" |
| 2014 NY Slip Op 32364(U) |
| June 11, 2014 |
| Supreme Court, New York County |
| Docket Number: 115029/2007 |
| Judge: Kathryn E. Freed |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ET A
6/13/14
E

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT:

Justice

PART 5

Index Number : 115029/2007
MARCELL, CHRISTINE
vs.
NEW YORK CITY DEPARTMENT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

cal # 32

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

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


FILED

RECEIVED
JUN 13 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

JUN 13 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/11/14
JUN 11 2014


_____, 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 5

-----X
CHRISTINE MARCELL,

Plaintiff,

-against-

DECISION/ORDER
Index No. 115029/07
Seq. No. 001

THE NEW YORK CITY DEPARTMENT OF
EDUCATION "DOE",

Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

| PAPERS | NUMBERED |
|---|--------------|
| NOTICE OF MOTION AND AFFIDAVIT ANNEXED..... | 1,2(Exs.A-K) |
| ANSWERING AFFIDAVIT..... |3..... |
| REPLYING AFFIDAVIT..... |4..... |
| EXHIBITS..... | |
| OTHER...(Memorandum of Law)..... |5..... |

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

Defendant The New York City Department of Education ("DOE") moves for an order, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint. Plaintiff Christine Marcell opposes the motion. After oral argument, and after consideration of the parties' papers and the relevant case law and statutes, the DOE's motion is **granted**.

FILED

JUN 13 2014

Factual and Procedural Background:

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff seeks monetary damages as a result of an alleged violation of the New York State

Human Rights Law (Executive Law § 290 et seq.). Specifically, plaintiff, who had been a Regional Director of Early Childhood until a 2007 reorganization of the DOE, alleges that the DOE discriminated against her on the basis of her age, then 53, by replacing her with a younger individual.

Plaintiff commenced this action by filing a summons and verified complaint on or about November 9, 2007. Ex. A.¹ In her complaint, plaintiff alleged that she began her employment with the DOE in 1986 and rose from a per diem substitute teacher to an appointed teacher by 1997, when she was promoted to Pre-Kindergarten Coordinator until March, 2000. She was then promoted to Supervisor of Early Childhood until June 30, 2003, at which time she was promoted to Director of Early Childhood at a salary of approximately \$101,000. Ex. A, at par. 4. Plaintiff further claimed that, on July 1, 2007, she was “demoted” without any fault of her own to a line-attendance teacher in reserve, a substitute teaching position with “no continuity or set job description”, at a salary decrease exceeding \$30,000. Ex. A, at par. 5.

As a first cause of action, plaintiff alleged that the DOE discriminated against her based on her age in violation of Executive Law § 296 by “engaging in a course of conduct which included demotion to a substitute teacher status (1) without permanent assignment (2) loss of salary and potential salary [and] loss of pension and potential pension.” Ex. A, at par. 7. She further asserted that, in her place, the DOE hired a “less qualified 38 year old individual who [then began to perform] the same or similar duties [as plaintiff has] without the experience or training of plaintiff.” Ex. A, at par. 8. Plaintiff demanded that the DOE “hire or restore [her] to her former position with full seniority, status, salary increments, bonuses and benefits, to the same extent that she would have

¹Unless otherwise noted, all references are to the affirmation of Assistant Corporation Counsel Adam E. Collyer, Esq. in support of the DOE’s application.

received but for [the DOE's] unlawful conduct in [replacing her with a 38 year old]." Ex. A. She demanded compensation in an amount not less than \$25,000 for loss of wages, benefits, and promotional opportunities, as well as the costs of this action. Ex. A.

On or about March 7, 2008, the DOE joined issue by service of its verified answer, in which it denied all substantive allegations of wrongdoing. Ex. B.

On January 20, 2011, plaintiff appeared for a deposition in this matter.² Ex. C. At her deposition, she testified that, from 1984 to 1988, she worked as a per diem teacher performing early childhood screenings. Ex. C, at 13. In 1988, plaintiff was hired by the DOE as a full-time kindergarten teacher at P.S. 156 and she became tenured three years later. Ex. C, at 14. She remained at P.S. 156 as a full-time classroom kindergarten teacher until 1997. Ex. C, at 14.

In the fall of 1997, plaintiff became a Pre-Kindergarten Coordinator for District 7 in The Bronx. Ex. C, at 15. In that position, she helped to facilitate the professional development of pre-kindergarten teachers within her district, handled administrative paperwork associated with filing reports for pre-kindergarten programs, worked with principals to institute such programs in the schools, and handled pre-kindergarten budgets for schools in the district. Ex. C, at 15-16. In that position, she worked under her teacher's license. Ex. C, at 16.

In or about 1999, plaintiff became a Supervisor of Early Childhood for District 7. Ex. C, at 16-17. In that capacity, she supervised District 7's pre-kindergarten program and worked under a school district administrator license. Ex. C, at 17. She remained in that position until 2003, when the DOE restructured its early childhood and pre-kindergarten programs. Ex. C, at 19. As a result

²Although the plaintiff was identified at her deposition as Christine Marcell Assuma s/h/a Christine Marcell, the caption of this action names her as Christine Marcell.

of the 2003 restructuring, 32 districts were consolidated into 10 regions. Ex. C, at 22. In July of 2003, when the restructuring became effective, plaintiff applied and successfully interviewed for the position of Regional Director of Region 10. Ex. C, at 23-24. Her title was technically Regional Instructional Specialist. Ex. C, at 23. In September of 2003, her title was changed to Regional Director of Early Childhood. Ex. C, at 23, 31.³ Plaintiff held that position until a subsequent restructuring occurred in 2007. Ex. C, at 31.

In July of 2007, another restructuring of the pre-kindergarten and early childhood programs occurred. Ex. C, at 35. This time, the DOE downsized the program from ten regional offices, with two in each borough, to five borough offices. Ex. C, at 37-38. Pursuant to the restructuring, each borough was to have a Pre-Kindergarten Borough Director. Ex. C, at 60; Ex. F. Plaintiff was interviewed for the Borough Director position but did not obtain it. Ex. C, at 40, 60. She did not interview for Borough Director of a specific borough, but only for one of the positions available. Ex. C, at 60. At the time she applied for the position she was 53. Ex. C, at 77. The ages of the five applicants selected for the Borough Director position in 2007 were, according to a DOE Office of Early Childhood Education informational sheet, annexed to the DOE's motion as Exhibit G, and a DOE "Human Resource System" printout, annexed to the DOE's motion as Ex. H, 51, 60, 38, 54, and 55. The individual named Borough Director for Manhattan was Laura Colavecchio, 38. Ex. G.

³The posting for the Regional Early Childhood Director position stated that the applicant "will oversee the provision of services to all students in the early childhood grades (pre-kindergarten to grade three) and the Universal Pre-kindergarten Programs located within community-based organizations throughout the Region" and also was to ensure "continuity of content throughout the Region as well as congruence with all [DOE] policies and procedures and compliance with all legislative and funding source mandates for all programmatic elements and relative to all segments of the eligible student population, including English Language Learners (ELL) and special education students." Ex. D. The salary was listed as \$101,664. Ex. D.

At her deposition, plaintiff was asked why she believed she had been discriminated against based on her age, to which she replied that she was 53 and the person selected as Borough Director was under 40. Ex. C, at 77. Plaintiff was also asked:

Q: Is there anything other than the fact that Laura Colavecchio was under 40 and, to you, was less qualified, is there any other basis for which you've developed a belief that this was on the basis of your age that you did not get this position?

A: She was younger, she was less qualified, she was - - had considerably less experience. Her career did not focus on pre-K, as mine did for 21 years, and she certainly did not hold supervisory titles that I had held.

Ex. C, at 77-78.

However, when plaintiff was asked why Colavecchio was less qualified than she, plaintiff replied that:

I don't know what's on her resume. I don't know what all her qualifications could or may be. I just know that she certainly has a lot less experience than I have in pre-K and supervisory experience.

Ex. C, at 57.

Ann Wolf, a former Deputy at the DOE's Office of Early Childhood Education, testified at a deposition on September 28, 2011. Ex. E, at 10. Wolf testified that, during the 2007 restructuring, the district offices of early childhood education were disbanded and the employees in those offices had to apply for positions under the newly reorganized system. Ex. E, at 23. Many supervisors were affected by the reorganization. Ex. E, at 23. The restructuring entailed the creation of a new position of Borough Director. Ex. E, at 31-32. Applicants for this position were interviewed by Wolf and

Evelyn Castro, Director of the DOE's Office of Early Childhood Education. Ex. E, at 31-32. Each candidate was asked the same set of questions. Ex. E, at 32.⁴

According to Wolf, the position of Borough Director differed from the Regional Director position because it oversaw a larger geographic area, had virtually no contact with the public schools, and worked almost exclusively with community-based organizations and vendors providing kindergarten programs, and would be working with the DOE's central office administration. Ex. E, at 41-42. In deciding who to hire as a Borough Director, Wolf and Castro considered knowledge of early childhood education, experience as a leader, and the ability to function in the new organizational structure. Ex. E, at 38. Wolf said that preference in the selection process was not given to Regional Directors because she and Castro were concentrating on "the nature of the experience." Ex. E, at 40. Candidates were interviewed for all five Borough Director positions and, although a candidate could have expressed a preference for placement in a certain borough, one could have been hired to work in any of the five boroughs. Ex. E, at 34-35.

When plaintiff's position as Regional Director of Early Childhood was eliminated in the 2007 restructuring, she was given the option of "reversion to [her] prior appointed license" and, if she did not exercise her right to reversion, she was to be deemed "irrevocably resigned from the [DOE] as of October 1, 2007. Ex. I. Plaintiff was reverted to her "last appointed license" and was to be assigned as an "Absence Teacher Reserve" until she secured a permanent position as a teacher in another title. Ex. C, at 55; Ex. J.

⁴The posting for the position of Pre-Kindergarten Borough Director stated that one who was awarded this position would, inter alia, "oversee the provision of all services in the Universal PreK (UPK) programs located within community-based organizations (CBOs) throughout an assigned borough." Ex. F.

Positions of the Parties:

In support of its motion, the DOE asserts that its motion for summary judgment should be granted because plaintiff failed to establish a prima facie case of age discrimination. The DOE maintains that, since three of the five candidates it selected for the position of Borough Director were older than plaintiff, she cannot credibly allege that an inference of age discrimination exists. Further, maintains the DOE, plaintiff admits that she did not know what Colavecchio's qualifications were. The DOE maintains that Colavecchio's qualifications were excellent and annexes to its motion as Exhibit K the latter's DOE service record.

In the alternative, the DOE asserts that, even assuming that plaintiff has established a prima facie case of age discrimination, she is still unable to prove that the DOE's legitimate non-discriminatory reasons for its restructuring were a pretext for age discrimination.

In an affidavit she submits in opposition to the motion, plaintiff primarily recites her credentials. She further asserts that it was a "slap in the face" and "humiliat[ion]" for her to revert back to a teaching position. Plaintiff's Aff In Opp., at pars. 10, 12. She claims as "clear evidence that [she] was discriminated against based on [her] age" the fact that Colavecchio had less supervisory experience than she and did not have a career focused on pre-Kindergarten. Plaintiff's Aff. In Opp., at par. 12.

In a reply affirmation in further support of its motion, the DOE argues that its motion must be granted because three of the five candidates names as Borough Directors were older than plaintiff. Additionally, the DOE asserts that Colavecchio was "overwhelmingly qualified for the position of Borough Director." Reply Aff., at par. 10.

Conclusions of Law:

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Kosson v Algaze*, 84 NY2d 1019 (1995). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

To establish a prima facie case of age discrimination under the New York State Human Rights Law (Executive Law § 296), a plaintiff must demonstrate the following elements: (1) that he or she is a member of a class protected by the statute; (2) that he or she was actively or constructively discharged; (3) that he or she was qualified to hold the position from which he or she was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination. *Stephenson v Hotel Employees and Restaurant Union Local 100 of the AFL-CIO*, 6 NY23d 265, 270 (2006) quoting *Ferrante v American Lung Ass'n.*, 90 NY2d 623, 629 (1997). To establish an inference of age discrimination, plaintiff must demonstrate either that he or she was

replaced by a younger person, that there is direct evidence of discriminatory intent, or that there is statistical evidence of discriminatory conduct. *See Bockino v Metropolitan Transp. Auth.*, 224 AD2d 471, 472 (2d Dept 1996). The protected class for age discrimination cases consists of individuals at least 40 years of age. 29 USC 631; *O'Connor v Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). Failure to establish every element of the cause of action entitles the employer to summary judgment dismissing the cause of action. *See Johnson v NYU Hospitals Center*, 39 AD3d 817 (2d Dept 2007), *lv denied* 9 NY3d 805 (2007).

Should plaintiff make the prima facie showing required, the burden shifts to the defendant to rebut that showing with a legitimate and nondiscriminatory reason for the discharge. *Stephenson, supra* at 270; *Ferrante, supra* at 629. Thereafter, plaintiff must show that the reason given by the defendant was merely a pretext for discrimination. *Stephenson, supra* at 271; *Ferrante, supra* at 630. The issue in an action for age discrimination “is not whether the defendants acted with good cause, but whether their business decision would not have been made but for a discriminatory motive.” *Stephenson v Hotel Employees and Restaurant Union Local 100 of the AFL-CIO*, 14 AD3d 325, 329 (1st Dept 2005), *affd* 6 NY3d 265 (2006).

Here, since plaintiff failed to establish that her alleged discharge occurred under circumstances giving rise to an inference of age discrimination (*see, McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 [1973]; *Ferrante v American Lung Ass'n, supra*), she has failed to establish a prima facie claim of such bias.

Initially, plaintiff was not replaced by a person younger than herself. Although plaintiff claims that Colavecchio replaced her, this is belied by the record, which indicates that, after a restructuring in 2007, the DOE consolidated administration of its early education program from ten

regional offices, with two in each borough, to five borough offices. Ex. C, at 37-38. Pursuant to the restructuring, each borough was to have a Pre-Kindergarten Borough Director. Ex. C, at 60. Wolf testified that, during the 2007 restructuring, the district offices of early childhood education were disbanded and the employees in those offices had to apply for positions under the newly reorganized system, which change affected many supervisors. Ex. E, at 23. Since candidates interviewed for Borough Director could have been assigned to any borough (Ex. E, at 34-35), the hiring of a person to work in a given borough did not mean that he or she was replacing someone else, especially since this was a newly-created position.

Plaintiff, who had worked in The Bronx (Ex. C, at 15), was interviewed for a Borough Director position but was not chosen for one. Ex. C, at 40, 60. Colavecchio, one of five people to earn the position, was named Borough Director in Manhattan, a fact reflected by the Office of Early Childhood Education information sheet submitted by the DOE. Ex. G. Although this information sheet is not in admissible form, the fact that Colavecchio was named to the position in Manhattan is conspicuously absent from plaintiff's papers, further undermining her argument that her position in The Bronx was somehow replaced by Colavecchio.

In addition, plaintiff has failed to provide any direct evidence of discriminatory intent. The papers submitted are devoid of any indication, other than plaintiff's own conclusory statements, that she was not hired for the Borough Director position due to her age. Although plaintiff testified that Colavecchio had "considerably less [supervisory] experience" than she (Ex. C, at 77-78), she also conceded that she did not "know what's on [Colavecchio's] resume" or "what all [Colavecchio's] qualifications could or may be." Ex. C, at 57.

Nor has plaintiff provided any statistical evidence of discriminatory conduct. Despite her

contention that she was replaced by Colavecchio, who was 38 at the time of the 2007 restructuring, plaintiff completely ignores that fact that three of the five individuals hired as Borough Directors were older than she was. Ex. H. Indeed, other than Colavecchio, plaintiff, who, as noted above, has the burden of establishing a prima facie case (*see Stephenson, supra*, at 270), does not mention the age of any individual hired as a Borough Director. Although the documents submitted by the DOE establishing the ages of the other Borough Directors were not in admissible form, plaintiff does not dispute the DOE's representation that three of the individuals who attained the position exceeded her age. It is this Court's opinion that plaintiff's glaring, and seemingly intentional, omission of information regarding the ages of the other individuals hired as Borough Directors so severely undermines her claim of age discrimination as to bring it within the realm of frivolity.

Even assuming that the plaintiff made out a prima facie case, the DOE has presented a legitimate nondiscriminatory reason for her discharge, i.e., the restructuring of the administration of its early education program. Ex. C, at 37-38, 60; Ex. E, at 19-21, 23. Plaintiff has failed to raise a triable issue of fact that her discharge was pretextual and that age discrimination was the reason for the discharge. *Stephenson, supra* at 271; *Bockino, supra*, at 472-473. Thus, the DOE is entitled to summary judgment dismissing plaintiff's age discrimination claim.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant The New York City Department of Education is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

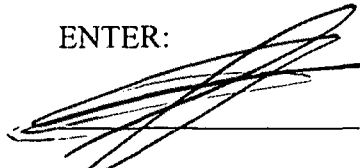
ORDERED that defendant The New York City Department of Education is directed to serve this order, with notice of entry, on counsel for the plaintiff and on the Trial Support Office, 60 Centre Street, Room 158; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: June 11, 2014

ENTER:



Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

JUN 18 2014

**COUNTY CLERK'S OFFICE
NEW YORK**



OFFICE OF THE CLERK
U.S. SUPREME COURT

Very truly yours,
Clerk of the Court