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

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

ALAN DUBROW,

Plaintiff,

-v-

BETH ISRAEL MEDICAL CENTER, CONTINUUM HEALTH PARTNERS, INC., HARRIS M. NAGLER and HENRY C. BODENHEIMER, JR.,

Defendants.

Index No.: 151877/2013
Motion Date: 12/10/2015
Motion Seq. No.: 001
Motion Cal. No.: _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2, 3, 4
Answering Affidavits - Exhibits	5, 6
Replying Affidavits - Exhibits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that the motion shall be granted.

Plaintiff Alan Dubrow asserts that defendants violated his rights under the New York City Human Rights Law and the New York State Human Rights Law. In particular, he claims that his resignation as an attending physician, at the age of 63 (just eleven days before his 64th birthday) from the Department of Nephrology at defendant Beth Israel Medical Center (Medical Center) was involuntary and manufactured by the Medical Center and its employees, the individual defendant physicians, and that such constructive termination was unlawfully

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

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

motivated by age discrimination. In the third cause of action, plaintiff states that he was wrongfully discharged in breach of an oral agreement in which the Medical Center promised that he would only be terminated for cause. As his fourth cause of action, plaintiff alleges intentional infliction of emotional distress. By the fifth cause of action, plaintiff seeks a declaratory judgment that no resignation exists.

Defendants now move for summary judgment dismissing the complaint contending that the claims for breach of implied contract, intentional infliction of emotional distress and declaratory judgment are fatally flawed, and that their defense that there is no evidence of any adverse employment action or animus based upon plaintiff's age has been established prima facie and not refuted by plaintiff.

The third cause of action shall be dismissed as an oral contract for employment in excess of one year is void and unenforceable under the statue of frauds. See General Obligations Law § 5-701(a)[1]; Cunnison v Richardson Greenshields Securities, Inc, 107 AD2d 50, 51-52 (1st Dept 1950).

The fourth cause of action is likewise without merit, as no claim in tort for wrongful discharge of an employee is recognized. Murphy v American Home Products, 58 NY2d 293, 297 (1983).

Nor does the fifth cause of action state a cognizable declaratory judgment claim as it is unnecessary in that the first and second causes of action under NYSHRL and NYCHRL provide an appropriate and available conventional recourse. See Elkort v 490 West End Ave Co, 38 AD2d 1 (1st Dept 1971).

As for plaintiff's second cause of action, the standards for recovery under the New York State Human Rights Law (Executive Law § 296) (NYSHRL) are the same as the federal standards under Title VII of the Civil Rights Act of 1964, as interpreted in McDonnell Douglas Corp v Green, 411 US 792 (1973) (the federal framework) (42 USC § 2000e et seq; see Rainer N. Mittl, Opthalmologist, P.C. v New York State Division of Human Rights, 100 NY2d 326, 330 [2003]). Thus, "[b]ecause both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal". Forrest v Jewish Guild for the Blind, 3 NY3d 295, 391 (2004).

On a claim of employment discrimination under the federal, and therefore, under New York state law, a plaintiff has the initial burden of showing, prima facie, that "(1) he is a member of a protected class; (2) he was qualified to hold the position, (3) he was terminated from employment or suffered other adverse employment action, and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination". Bailey v New York Westchester Square Medical Center, 38 AD3d 199, 122 (1st Dept 2007). "This initial burden has been referred to as 'de minimus'". Schwaller v Squire Sanders & Demsey, 249 AD2d 195 (1st Dept 1998).

> 'The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and nondiscriminatory reasons to support its employment decision. In order to nevertheless success on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason' (Melman v Montefiore Medical Center, 98 AD3d 107, 113- 114 [1st Dept 2012] [citation omitted]).

With respect to plaintiff's first cause of action, the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of New York § 7) (LCRRA) that amended the New York City Human Rights Law (Administrative Code of the City of New York § 8-107) (NYCHRL), mandates that the NYCHRL be construed

> 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible'. However, neither the LCRRA nor the City Council report thereon sets forth a new framework for consideration of the sufficiency of proof of claims under the NYCHRL or indicates that the [federal] framework is to be discarded....[on a motion for summary judgment], ...an action brought under the NYCHRL must...be analyzed both under the [federal] framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases (Melman, supra, 112-113 (1st Dept 2012) [citations omitted]).

In contrast to the "but-for cause" analysis applicable to NYSHRL claims, with respect to NYCHRL claims once the burden shifts to plaintiff to demonstrate pretext, the court must independently evaluate whether age was one of the motivating factors, though not necessarily the sole motivating factor, for his discharge. In other words, under NYCHRL, the fact that the employer had mixed motives, one of which was age, as to the discharge, will meet the threshold . Melman, supra.

Defendants contend that plaintiff has not met even his initial burden with respect to his NYCHRL and NYSHRL claims, since, with respect to the third element, there is no evidence that plaintiff was terminated or suffered any other adverse employment action, as a matter of law. They contend that plaintiff's allegations that his resignation was manufactured by the Medical Center is entirely refuted by plaintiff's own letter dated July 4, 2012 and addressed to defendant Bodenheimer, in which plaintiff wrote that he "was resigning effective August 31, 2012".

However, as pointed out by plaintiff, in response to plaintiff's July 4, 2012 letter of resignation, by letter dated July 11, 2012, defendant Bodenheimer, the defendant Medical Center's Chief of Medicine who was responsible for disciplining, hiring and firing of physicians at the Medical Center, wrote plaintiff, in pertinent part, "I advised you to discuss your plans with Dr. Winchester. You stated if your resignation proceeds, you would not retain a medical staff appointment at Beth Israel. I ask you to review your plans with Dr. Winchester and confirm your resignation to me in writing."

Though defendants agree that plaintiff denied he had tendered his resignation by letter dated November 26, 2012 from his attorney, the Medical Center insists that it had every right to refuse such retraction but extend plaintiff's employment until December 31, 2012, at the request of plaintiff. Defendants reference the letter dated October 9, 2012, from the Medical Center's general counsel, addressed to plaintiff's attorney, which stated that the extension of the effective date of his resignation to December 31, 2012 was conditioned upon plaintiff's resigning his privileges as of that date. On the other hand, plaintiff contends that the Medical Center implicitly rejected his resignation as he never sent written confirmation in accord with the written instructions of defendant Bodenheimer and non-party Winchester requested that he continue working and fill in for him beyond the December 31, 2012 deadline. Plaintiff cites the foregoing as evidence of the Medical Center's having undertaken to effectuate its promise that he would not be separated from employment by the Medical Center unless terminated for cause. Defendants point out that the resignation letter dated July 4, 2012 was the second letter within a year in which plaintiff had tendered his resignation. They cite his letter dated

October 27, 2011, which was addressed to non-party Dr. James Winchester, Chief of the Medical Center's Division of Nephrology, in which plaintiff wrote "I am resigning my position effective January 31, 2012." Plaintiff rescinded such letter of resignation by e-mail dated November 29, 2011, to non-party Winchester, in which he wrote "Dear Jim: I have decided to remain in my position. I appreciate your support. Alan."

Defendants argue further, that even assuming arguendo that plaintiff was constructively terminated when the Medical Center refused to accept the retraction of his resignation and failed to await further written confirmation from him as indicated in defendant Bodenheimer's correspondence, as to the fourth element, plaintiff has made no factual allegations that tend to prove that the discharge occurred under circumstances giving rise to an inference of discrimination on the basis of his age. Defendants cite plaintiff's deposition testimony in which he stated that the only evidence of his assertion that the Medical Center discriminated against him based on his age was that "They gave me no other reason to request my resignation." Defendants also reference plaintiff's further deposition testimony wherein he admitted that no one at the Medical Center made any comments about his age in connection with his termination, that he was not aware of any other physicians in his age group who were forced to retire or be terminated, and that he never complained to anyone at the Medical Center about age discrimination until he filed the lawsuit at bar. They point out, for example, that plaintiff never raised age discrimination during his interview in the course of an investigation of hostile work environment claims, which interview was conducted by a member of the personnel department on July 18, 2012, or in any of the discussions he had with Dr.

Winchester that followed his letter of resignation.

Plaintiff alleges by affidavit in opposition to the motion, that he was replaced by a much younger physician. Plaintiff refers extensively to allegations of gender based sexual harassment in the department, some of which claims were against him, and the subsequent investigation of such claims in the summer of 2012, which he alleged arose out of the hiring and ultimate separation from employment of a female physician in the Nephrology Department. He argues that none of the complaints against him were substantiated, but that the stress and physical toll such investigation took caused him to tender his resignation, notwithstanding that, as he stated in the personnel interview, "he loves his job and doesn't want to quit" but wants to see "how this plays out". He also describes Dr. Winchester's consistent assessment of his service performance as "exemplary" and professional at all times, Dr. Winchester's lack of knowledge of any complaints about comments of a sexual nature made by plaintiff or complaints about plaintiff's professionalism from any co-workers, or any conduct on plaintiff's part that would create a hostile work environment. He also cites Dr. Winchester's opinion that the Nephrology Department is not stronger since plaintiff's resignation.

This court finds that upon the record at bar, even the extremely low threshold of establishing a prima facie employment discrimination case based on age under either NYCHRL or NYSHRL, which is admittedly "de minimus", has not been met. The court concurs with defendants that there is no evidence that age played any role whatsoever in defendants' decision to terminate plaintiff.

First there is no evidence that the Medical Center constructively terminated plaintiff. Plaintiff does not contend that the Medical Center orchestrated his resignation letter of July 4, 2012, or that he wrote and sent such letter other than as a matter of his own volition. Nor does plaintiff's apparent "change of heart" transform his resignation into an involuntary one.

Second, assuming that plaintiff was discharged by the Medical Center in light of the Medical Center's refusal to accept his retraction or to wait for plaintiff's written confirmation, nothing in the record shows any age motivation on its part. There is no evidence of disparate treatment of plaintiff because of his age. As argued by defendants, under these circumstances, plaintiff's 'mere allegation, without more, that he was replaced by a younger employee, even if true, is insufficient to defeat a motion for summary judgment" (DeMay v Miller & Wrubel PC, 262 AD2d 183, 185 [1st Dept 1999]).

Defendant Medical Center contends that its legitimate reason for discharging plaintiff was its unwillingness to abide plaintiff's second resignation letter in a year coupled with the recurrent, even if unsubstantiated, complaints that he engaged in inappropriate conduct tending to create a hostile workplace. Even were this court to assume arguendo that the evidence at bar can be interpreted as establishing a prima facie case of age discrimination, plaintiff has failed to demonstrate by a fair preponderance of the credible evidence that either the impetus for the hostile workplace claim investigation or the reasons for pressing plaintiff's discharge proffered by the Medical Center were a pretext for age discrimination. As stated in Kelderhouse v St. Cabrini Home, 259 AD2d 938, 939 (3d Dept 1999), "Notably, a challenge by a discharged employee to the correctness of any employer's decision does not, without more,

give rise to the inference that the employee's discharge was due to age discrimination."

Accordingly, it is

ORDERED that the motion of defendants for summary judgment pursuant to CPLR 3212 is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 14, 2015

ENTER:

J.S.C.
DEBRA A. JAMES