

Miller v News Am. Inc.
2016 NY Slip Op 30015(U)
January 5, 2016
Supreme Court, New York County
Docket Number: 156110/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
NEIL MILLER,

Plaintiff,

Index No. 156110/12

-against-

DECISION/ORDER

NEWS AMERICAN INC. a/k/a THE NEW YORK
POST,

Defendant.
-----x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Neil Miller (hereinafter referred to as “Miller” or “plaintiff”) commenced the instant action against defendant News American Inc. a/k/a The New York Post (the “Post”) seeking to recover damages arising out of defendant’s alleged employment discrimination of plaintiff based on his age. Defendant now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the amended complaint. For the reasons set forth below, defendant’s motion is granted.

The relevant facts are as follows. Plaintiff, who was born in 1949, began working as a freelance sports photographer for various Long Island publications in the early to mid-1990s although he had no formal training in photography. In or around late 2001, David Boyle (“Boyle”), who was at that time the Post’s Photo Editor, met with plaintiff for the first time and began offering him freelance photography work for the Post.

Defendant asserts that during plaintiff’s course of freelance employment with the Post, he

was a below-average photographer and that he committed two serious errors. The first occurred in or around April 2009 when plaintiff failed to take a picture of a cat walking across Citi Field during a Mets baseball game. Indeed, defendant asserts that Miller was on assignment at Citi Field that day and that while the Daily News published a picture of said cat, which became a news sensation, the Post was unable to do so because Miller failed to submit any such pictures. Thereafter, Boyle, who was at that point the Post's Managing Photo Editor, warned Miller about this significant failure and reinforced that it was Miller's responsibility to make sure that the Post received photos like that one.

The second significant error occurred in or around July 2010 when Miller accepted an assignment to travel to Ohio to try to capture pictures of National Basketball Association ("NBA") player LeBron James. Specifically, Miller's assignment was to stake out James' house to try to get pictures of him outside of his home because James was in the process of deciding which NBA team he would join as a free agent, one of the most anticipated sports stories of the year. On or about July 2, 2010, the Friday of the weekend in question, while in Ohio, Miller asked Joseph Amari, the Post's weekend assignment editor, if he could leave the assignment because of an "ankle injury." Miller was then asked to remain in Ohio until the Post found a replacement photographer to relieve him. However, Miller refused to remain in Ohio and defendant alleges that he abandoned his assignment and returned to New York without waiting for a replacement photographer and without capturing any pictures of James.

Thereafter, on or about July 4, 2010, Miller sent Boyle and others an e-mail which stated: "sorry for leaving the lebron job early, I have a family problem that required my immediate return home and my personal attention. I will not be available for assignemnt (sic) for a few day (sic), tbd, and will not be taking nor returning messages, your understanding is appreciated, neil miller."

After the incident, Boyle informed Miller that he was unhappy with Miller, that he had lost trust in Miller, that he found Miller to be generally unreliable and that Miller's pictures were just not good enough. Further, Boyle informed Miller that as a result of leaving the James assignment, he would be receiving fewer assignment offers in the future.

On or about August 20, 2010, counsel for Miller sent a letter to the Post's Head of Human Resources stating that Miller had retained the firm to represent him "with respect to [Miller's] claims of employment discrimination" and requested that the Post engage in settlement discussions. Approximately eight months later, on or about April 21, 2011, Miller filed an Equal Employment Opportunity Commission ("EEOC") complaint, which was dismissed on November 4, 2011 on the ground that there was "no employee/employer relationship" between Miller and the Post. Thereafter, in or around September 2012, Miller commenced the instant action and subsequently served an amended complaint in or around November 2013. The amended complaint asserts a total of five causes of action for (1) employment discrimination based on age in violation of the New York City Human Rights Law ("NYCHRL"); (2) unlawful retaliation in violation of the NYCHRL; (3) employment discrimination based on age by an agent, employee or supervisor of the Post in violation of the NYCHRL; (4) employment discrimination based on age in violation of the New York State Human Rights Law ("NYSHRL"); and (5) unlawful retaliation in violation of the NYSHRL. Defendant now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the amended complaint.

On a motion for summary judgment to dismiss a complaint alleging employment discrimination, the court is required to conduct a specific burden shifting analysis. This standard requires plaintiff to demonstrate (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action and (4) circumstances that give rise to an inference

of discrimination. *See McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 (1973). If the plaintiff establishes his *prima facie* case using this analysis, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.* at 802-04. Once the defendant satisfies its burden, it becomes the plaintiff's burden to show that defendant's stated reason was merely a pretext for discrimination. *See id.* Specifically,

[W]here a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence...or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination.

Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29, 35-36, 37 (1st Dept 2011). “[C]ourts have repeatedly found relevant evidence indicating discriminatory treatment by the employer of employees, other than the plaintiff, since such evidence is highly probative of the employer’s actual state of mind.” *Murphy v. American Home Prods. Corp.*, 159 A.D.2d 46, 49-50 (1st Dept 1990).

In the instant action, defendant’s motion for summary judgment dismissing the complaint’s first, third and fourth causes of action alleging discrimination based on age is granted. As an initial matter, plaintiff has met his initial burden of establishing a *prima facie* case of discrimination. He has demonstrated the following: (1) membership in a protected class, specifically that he is over forty years old; (2) qualification for the employment as freelance photographer for the Post in that he had been employed as a freelance photographer for at least fifteen years with at least nine of those years being at the Post; (3) adverse employment action taken against him in that starting in or around July 2010, he received fewer freelance photography assignments from the Post; and (4) he has alleged in the amended complaint that he received fewer assignments because of his age based on a comment made to him about his age by a Post employee.

Pursuant to the *McDonnell Douglas* analysis, the burden now shifts to the defendant to articulate a legitimate, non-discriminatory reason for its decision to reduce the number of assignments given to plaintiff. In response, defendant has put forth evidence that plaintiff was given fewer photography assignments beginning in July 2010 for the nondiscriminatory reasons that his photography work was average and inconsistent, that he abandoned the James assignment, that the Post lost trust in Miller and considered him unreliable and that there were other better freelance photographers available to the Post. To support such nondiscriminatory reasons, defendant has provided the affidavit of Boyle in which he affirmed that “[a]t various times between 2003 and late 2007, I informed Miller that I was not satisfied with the quality and selection of his work,” specifying certain sports events such as New York Knicks games and New York Yankees games during which Miller failed to photograph certain people and events, that Miller missed deadlines, that Boyle had to make suggestions to Miller about how to improve his photography, which Miller did not heed, that Boyle “announced a limit on the number of assignments to be offered to [Miller]” because he “was tired of being let down by him and his continuing lack of professionalism” and that Boyle offered more assignments to other freelance photographers “because they are superior photographers” to Miller. Further, defendant has provided the affidavit of Charles Wenzelberg, the Post’s Chief Photographer, who has affirmed that “Miller’s skill and reliability is on the low end of passable. While he is generally capable of taking usable pictures, the other freelance photographers I offer assignments to are simply better and more consistent photographers.” Wenzelberg further affirmed that “[w]hen photographers capture an exceptional photograph that is published in the Post, I occasionally get a note from management about the quality work they have done. I have never received such a note about a picture [plaintiff] took.” Additionally, defendant has provided the affidavits of Paul Bereswill, William Kostroun and Raymond Stubblebine,

freelance sports photographers who often complete assignments for the Post, in which they all affirm that they are either the same age as plaintiff or older and that they never experienced any age discrimination by anyone at the Post. Specifically, Bereswill affirms that he was born in 1949, Kostroun affirms that he was born in 1946 and Stubblebine affirms that he was born in 1946 and they all affirm that they continue to receive regular photography assignments from the Post.

As defendant has demonstrated nondiscriminatory reasons for giving plaintiff fewer freelance assignments, the burden shifts back to plaintiff to show that defendant's reasons are merely a pretext for discrimination. In response, plaintiff has failed to meet his burden of establishing that the reasons provided by defendant for giving plaintiff fewer freelance assignments are a pretext for discrimination. Plaintiff attempts to demonstrate that he was given fewer freelance assignments because of his age and in support of such a theory, plaintiff alleges the following: (1) that he was sixty-one years old when he noticed that "the number of assignments [the Post] gave to Miller plummeted from an average of twenty-four and a half assignments per month in the preceding six months to thirteen assignments in July 2010 and fourteen assignments in August 2010"; (2) that he spoke with David Rentas, the Post's Deputy Photo Editor, who allegedly opined that the number of assignments Miller received was reduced because he "was getting too old for his job"; and (3) that the incidents relied upon by defendant number only a few out of the many assignments completed by plaintiff for the Post and that the quality of his photography was in fact above average and consistent. However, such allegations fail to support the assertion that the reasons offered by defendant as to why there was a reduction in assignments given to Miller are merely pretextual.

As an initial matter, the comment made by Rentas does not establish that defendant's reasons are merely a pretext for discrimination. At his deposition, plaintiff could not recall the

contents of the conversation he had with Rentas in order to establish that any such discriminatory remark by him was actually made. Moreover, even if Rentas did opine to Miller that the reduction in assignments that he was experiencing was due to his age, that statement alone is insufficient to raise an issue of fact in order to defeat defendant's motion for summary judgment. Such remark, if it was made at all, was made by a person who was not responsible for making personnel and delegation decisions and merely shows the opinion of Rentas himself, not a pattern or practice of the Post. Indeed, it is well-settled that discriminatory remarks made by employees other than decision-makers are insufficient to raise an issue of fact as to whether the employer's adverse employment action was done with the intent to discriminate. *See Mete v. New York State Off. of Mental Retardation & Dev. Disabilities*, 21 A.D.3d 288, 294 (1st Dept 2005)(holding that "most of these remarks are not probative of an intent to discriminate. Even accepting that the remarks could be considered discriminatory, they were not made by decision makers and they were not made...in relation to the process of making the decision [to fire the plaintiff]"). Here, plaintiff has failed to offer any evidence whatsoever that Rentas played any role in the decision to reduce the number of assignments being offered to plaintiff or that Rentas was the person responsible for making such a decision. Indeed, it is undisputed that during the time period at issue, Boyle and later, Wenzelberg, were the individuals responsible for doling out assignments to the freelance photographers and would have been the individuals responsible for reducing the assignments offered to Miller.

Further, plaintiff's belief that the quality of his photography was in fact above average and consistent also does not establish that defendant's reasons are merely a pretext for discrimination. Specifically, plaintiff asserts that defendant only focuses on certain instances where the Post took issue with plaintiff's work but that much of plaintiff's work was well-done and that he was justified in "abandoning" the James assignment because he had family issues to deal with. However, the

First Department has held that

In determining whether the reason for an adverse action was pretextual, 'it is not for the Court to decide whether the [] complaints...were truthful or fair, as long as they were made in good faith.' 'The mere fact that [plaintiff] may disagree with [the] employer's actions or think that [plaintiff's] behavior was justified does not raise an inference of pretext.'

Melman v. Montefiore Medical Center, 98 A.D.3d 107, 120-21 (1st Dept 2012). The fact that plaintiff merely disagrees with defendant's interpretation of the James assignment situation or of the quality of his photography work is irrelevant.

Finally, the fact that plaintiff was sixty-one at the time the Post reduced the number of assignments given to plaintiff is not evidence that defendant's reasons for doing so are merely a pretext for discrimination. Indeed, defendant has provided the affidavits of three other freelance photographers who perform work for the Post and are the same age or older than plaintiff, thereby dispelling plaintiff's assertion that he received fewer assignments solely based on his age. Thus, defendant's motion for summary judgment dismissing the complaint's first, third and fourth causes of action for age discrimination is granted.

Additionally, defendant's motion for summary judgment dismissing plaintiff's hostile work environment claim, to the extent the amended complaint asserts such a claim, is granted. Although the amended complaint does not explicitly assert a cause of action alleging a hostile work environment, the first, fourth and fifth causes of action contain boilerplate references to a "hostile work environment." Thus, although it is not clear to the court whether plaintiff seeks to assert a hostile work environment claim, the court will analyze defendant's motion for summary judgment as though plaintiff has alleged such a claim and finds that any hostile work environment claim should be dismissed without opposition.

Defendant is also entitled to summary judgment dismissing the amended complaint's second and fifth causes of action for unlawful retaliation. To make out a *prima facie* case of retaliation under both the Executive Law and the Administrative Code, plaintiff must show that (1) he engaged in a "protected activity" known to defendant; (2) defendant took an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). If plaintiff makes out a *prima facie* case for retaliation, the burden then shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. *See Williams v. The City of New York*, 38 A.D.3d 238 (1st Dept 2007). The burden then shifts back to the plaintiff to show that the non-retaliatory reasons were pretextual. *See id.* Under the NYCHRL, the plaintiff is required to show that the "adverse employment action" complained of was reasonably likely to deter a person from engaging in protected activity. *See New York Administrative Code § 8-107(7)*.

In the instant action, plaintiff has made out his *prima facie* case of retaliation as he has established that he engaged in a "protected activity" when he complained to defendant about the alleged age discrimination, filed his EEOC complaint and served defendant with the summons and complaint in this action; that defendant took an adverse employment action against him when they reduced the number of freelance assignments he was given; and that defendant reduced the number of assignments given to plaintiff because of his EEOC complaint, the complaint made to defendant and the commencement of this action. Specifically, it is undisputed that in or around August 2010, plaintiff, via his counsel, complained to the Post about the alleged age discrimination, that in April 2011, plaintiff filed his EEOC complaint and that in September 2012, he commenced the instant action against defendant, conduct that constitutes "protected activity" under the law. Further, plaintiff asserts that in the months following said protected activity, the Post reduced the

assignments they gave to plaintiff in retaliation for engaging in said protected activity.

The burden then shifts to defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. In response, defendant has put forth evidence that plaintiff received fewer assignments from the Post based solely on his just adequate performance and the availability of more talented freelance photographers. Indeed, defendant has provided evidence in the form of e-mails and affidavits demonstrating that even up until 2014, defendant was complaining to Miller about the quality of his work, that defendant still considered plaintiff to be unreliable and inconsistent and that Miller's age or the fact that he complained about the alleged discrimination was irrelevant to the determination to reduce the number of assignments he received. Indeed, Wenzelberg, the Post's Chief Photographer and the person responsible for delegating assignments to freelance photographers after July 2010, affirmed that "[t]he fact that [plaintiff] complained about age discrimination and is suing the Post plays no role in my decision to offer or not offer a freelance assignment for the Post. Rather, I am solely concerned if his skills and reliability merit the offer of an assignment." Further, Boyle, the Post's Managing Photo Editor, affirmed that Miller's assignments were reduced after July 2010 because he abandoned the James assignment and that they continued to be reduced because the Post lost trust in him. Further, Boyle affirmed there were several problems with Miller's work in the years following the James assignment which played a major role in the Post's decision to continually reduce the number of assignments given to Miller following his protected activity. The problems as set forth by defendant are, *inter alia*, as follows:

- July 4, 2011: Miller photographed Derek Jeter of the New York Yankees gazing onto the field from the dugout steps and of a three-paneled fan sign behind him but his photograph was poorly composed as his picture cut out one third of the sign;
- June 27, 2012: Miller was covering another New York Yankees

game but failed to capture a photograph of Yankees pitcher Andy Pettitte being hit with a ground ball, a photograph which another Post photographer was able to capture, and instead submitted photographs of Pettitte walking around after he was hit;

- June 8, 2013: Miller completely missed a 5:30 p.m. deadline to submit photographs from a Mets baseball game allegedly due to a problem with Miller's WiFi and failed to notify the Post about the issue until it was too late;
- January 31, 2014: Miller covered a Brooklyn Nets basketball game for the Post but incorrectly calibrated his equipment such that his photographs would be set to the wrong date, December 18, 2012, which created a big problem because the Post was unable to find his photographs for publication and caused the Post to acquire photographs from an alternate source;
- April 1, 2014: Miller attempted to take photographs of Beyonce and Jay-Z sitting courtside at a Brooklyn Nets basketball game but he cut off Jay-Z's leg and Beyonce's foot, errors which caused the Post to acquire a photograph from the Associated Press that was superior to Miller's.

The Post has also provided e-mails sent to Miller throughout the years following the James assignment detailing that Miller was notified and warned that the quality of his photography was not up to par.

As defendant has demonstrated nondiscriminatory reasons for giving plaintiff fewer freelance assignments after plaintiff engaged in protected activity, the burden shifts back to plaintiff to show that defendant's reasons are merely a pretext for retaliation. However, in response, plaintiff has failed to put forth any evidence that defendant's reasons are merely a pretext for retaliation. Plaintiff merely asserts that "[t]he timing of the adverse actions to which [he] was subjected leads to an inference of retaliation." However, as defendant has provided evidence that the adverse actions alleged by plaintiff were the result of problems with plaintiff's performance, such an assertion fails to raise an issue of fact sufficient to defeat defendant's motion.

Finally, as this court has granted defendant's motion for summary judgment dismissing the amended complaint on the ground that plaintiff cannot prove employment discrimination and

unlawful retaliation as a matter of law, the court need not address defendant's final argument that plaintiff may not recover against defendant because plaintiff was an independent contractor and not an employee.

Accordingly, defendant's motion for summary judgment dismissing the amended complaint is granted. The amended complaint is hereby dismissed in its entirety. This constitutes the decision, judgment and order of the court.

Date: 1/5/16

Enter: _____
CYNTHIA S. KERN
J.S.C.