Barra v Quigley
2018 NY Slip Op 33349(U)
December 14, 2018
Supreme Court, New York County
Docket Number: 161466/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

----------X

LAWRENCE BARRA,

Plaintiff,

- v -

JOHN QUIGLEY, individually and as Regional Vice President, and CHARTER COMMUNICATIONS, INC., successor to Time Warner Cable of New York City, LLC.,

Defendants.

----------X

INDEX NO. 161466/2017

MOTION DATE

MOTION SEQ. NO. 001, 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 16, 17

were read on this motion to dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 26, 27, 28, 29, 30, 31

were read on this motion to dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(7) for an order partially dismissing the complaint. Plaintiff opposes.

I. PROCEDURAL BACKGROUD

On or about December 28, 2017, plaintiff filed a summons and complaint (NYSCEF 1); defendants filed a pre-answer motion to dismiss (mot. seq. one) (NYSCEF 3). While the motion pended, plaintiff filed an amended complaint (NYSCEF 9), and thereafter opposed the motion to dismiss the original complaint (NYSCEF 11). Defendants replied as to their motion to dismiss the original complaint (NYSCEF 16), and shortly thereafter filed the instant motion to dismiss

the amended complaint (mot. seq. two) (NYSCEF 18). Consequently, the motion to dismiss the original complaint is academic.

II. AMENDED COMPLAINT (NYSCEF 21)

Plaintiff alleges the following:

Plaintiff, born in 1955, was employed by defendant Charter Communication, Inc., previously Time Warner Cable of New York City, LLC. (Time Warner), as a general superintendent for more than 20 years and received positive performance appraisals and bonuses. On January 14, 2015, he met with defendant Quigley, division president and to whom plaintiff directly reported, and Time Warner's vice-president of human resources. At the meeting, Quigley told plaintiff that "there was no room" for him at the company and asked whether he "would retire and be with his family." Plaintiff replied that he did not plan on retiring soon. Quigley then reminded him that he was "turning 60 in September." In response to plaintiff's request for an explanation as to why there was no room for him, Quigley said that an entity rumored to be planning to buy Time Warner had no need for a general superintendent. Quigley then offered to pay plaintiff until he turned 60 years old if he retired. Plaintiff refused and was immediately demoted to foreman, resulting in a decrease in pay, benefits, and bonuses.

Plaintiff was subjected to numerous comments before and after his demotion, including "you don't have much more time left," references to "gray hair" and "no hair," and calling plaintiff "Mr. Barra" rather than "Larry," as he had always been referred.

Plaintiff's demotion was not an isolated incident of discrimination, but the product of a "broader effort" to replace older employees with younger managerial employees with a concomitant lack of experience and aptitude, an effort that is being litigated in another part of this court in *Bennett v Time Warner Cable, Inc.*, No. 152686/2014. There, older employees claim

to have been demoted from general foreman to foreman as a result of age discrimination, which Charter denies, claiming that the demotions are the product of the elimination of overlapping layers of supervision. Even if defendant did not intend to discriminate based on age, it created a disparate impact on older workers.

Consequently, plaintiff alleges unlawful age discrimination in violation of New York City Human Rights Law (NYCHRL) § 8-107 and the New York State Human Rights Law (NYSHRL) § 296.

III. CONTENTIONS

A. Defendants (NYSCEF 18-21)

Defendants allege that plaintiff fails to state a claim for disparate impact absent an allegation of the existence of a "facially neutral policy" (NYSCEF 19); and that at best, plaintiff only claims intentional discrimination against him individually. They maintain that *Bennett,* the other employment discrimination case presently being litigated, is inapposite because the policy in issue dates back to 2013 and pertains to a different job title.

B. Plaintiff (NYSCEF 27-30)

Plaintiff contends that given the procedural posture and the liberal pleading standards of the anti-discrimination laws, the allegation that his demotion was part of "a broader effort" states a policy, and that the connection between his demotion and the policy at issue in the other case raises a triable fact. He argues that the difference in job title is irrelevant absent any requirement that a discriminatory policy apply to employees with the same job title, and that a sole assertion of intentional conduct is permissible. In any event, he asserts, in the alternative, a claim of disparate impact.

C. Reply (NYSCEF 31)

Defendants reiterate that plaintiff fails to allege a practice or policy distinct from any claim of intentional discrimination. Although they do not refute that disparate impact may be pleaded as an alternative to disparate treatment, they argue that the alternative pleading does not obviate the need for pleading a specific facially neutral policy.

The alleged "broader effort," defendants maintain, reflects an inability to identify a specific policy that yields a disparate impact. They, moreover, assert that the policy at issue in *Bennett* is entirely different from that in issue here given the substantial difference between the job titles of general foreman and general superintendent, and the expressed reasons for demotion in each case.

IV. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.; Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). Thus, the reviewing court must determine whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]).

In determining whether the facts alleged in the complaint and inferences arising therefrom state a cause of action for employment discrimination, plaintiff's allegations must be

construed in his favor, especially where the NYSHRL and NYCHRL are relied on. (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009] [employment discrimination cases require only notice pleading; plaintiff need not plead specific facts establishing *prima facie* case of discrimination]). The provisions of the NYCHRL are to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 478 [2011]), and with due regard for fulfilling the law's remedial goals (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, *66* [1st Dept 2009], *lv denied* 13 NY3d 702). It is "to be more broadly interpreted than similarly-worded federal or State antidiscrimination provisions." (*Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158, 1161 [2d Dept 2015]).

A claim of unlawful discrimination based on disparate impact is established when the plaintiff demonstrates that the defendant had a policy or practice that results in a disparate impact to the detriment of a protected group. (NYCHRL § 8-107; *People v New York City Transit Auth.*, 59 NY2d 343, 348-349 [1983]; *Mete v New York State Office of Mental Retardation & Developmental Disabilities*, 21 AD3d 288, 296 [1st Dept 2005]).

Defendants concede that plaintiff, due to his age, falls within a protected group under both statutes. At issue is only whether he alleges a facially neutral policy resulting in a disparate impact on older employees.

For a policy to be unlawful under a disparate impact theory, it must be neutral on its face and in terms of intent. (*New York City Transit Auth.*, 59 NY2d at 348-349). A policy expressly based on replacing older employees with younger employees is not neutral on its face, but gives

rise to an inference of intentional age discrimination. Thus, the "broader effort" alleged by plaintiff cannot be a basis for a disparate impact claim.

Nonetheless, *Bennett*, wherein defendants argue that their sole intent is to eliminate overlapping layers of supervision, considered in light of the liberal pleading standards afforded under the pertinent statutes, support plaintiff's assertion that his demotion was part of this same facially neutral policy. Having alleged that his former position, general superintendent, was on the same level as the area vice-presidents to whom he reported, plaintiff demonstrates that he was part of the same chain of command, and thus his demotion to foreman, like those in issue in *Bennett*, may be the same. Moreover, the justification for demotion given in *Bennett*, that the role of general foreman was unnecessarily duplicative and cumbersome, is not so dissimilar from that proffered here, that the role of general superintendent was no longer needed. Defendants thus fail to demonstrate a significant difference between a general superintendent being demoted to foreman and a general foreman being demoted to foreman. Likewise, defendants offer no explanation as to how the demotions in *Bennett* are so remote in time as to render it impossible that plaintiff's demotion was the product of the same policy. Whether plaintiff was actually subject to that policy is a matter of fact, not to be resolved at this stage of the litigation.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motions to dismiss are both denied in their entirety; and it is further

ORDERED, that defendants are directed to serve and file an answer to the amended complaint within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on March 6, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

12/14/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE