Clementi v Highbridge Community Dev. Corp.
2020 NY Slip Op 34419(U)
December 18, 2020
Supreme Court, Bronx County
Docket Number: 25371/18E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
ANDREW CLEMENTI,

Plaintiff,

Index No. 25371/18E

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

HIGHBRIDGE COMMUNITY DEVELOPMENT CORPORATION,

Defendant.

The following papers numbered 1 to ___ read on this motion, ______________

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1-2
Answering Affidavit and Exhibits	3-4
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint, is granted as to the claim alleging a hostile work environment under New York State Human Rights Law, and is otherwise denied.

Plaintiff commenced this personal injury action, alleging, *inter alia*, wrongful termination. Plaintiff, a Caucasian man, claims that he was discriminated against on the basis of his race and age when, after having worked for defendant for more than 18 years, he was terminated at the age of 66. Plaintiff alleges that defendant treated him less favorably than younger, Hispanic employees, and then terminated him and ended negotiations on a separation and severance agreement when he complained. Plaintiff asserts causes of action under the New York State Human Rights Law (State HRL) and

the New York City Human Rights Law for discrimination on the basis of both age and race, and for retaliation.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])" (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

In support of its motion, movant submits, *inter alia*, the deposition transcripts of: 1) plaintiff; 2) Jorge Batista; 3) Monsignor Sakano; 4) Sister Ellenrita Purcaro; 5) Father Joseph Franco; and 6) Father Mark Cregan. Based on the evidence and witness testimony, it is undisputed that at all relevant times, Monsignor Donald Sakano was defendant's president and chairman of its board of directors ("the board"), and Jorge L. Batista served as chief executive officer, overseeing day-to-day operations. In July of 1999, defendant hired plaintiff to be its Director of Physical and Economic Development, and in 2009, he became Administrator of Leasing, reporting directly to Mark Mazzella, defendant's former Chief Operating Officer (COO). Mazzella was terminated in February of 2016, after which plaintiff reported directly to Batista. It appears that plaintiff and Batista were defendant's only employees with real estate licenses. In a February 13, 2016 e-mail, Batista proposed a series of organizational

restructuring moves. Plaintiff was to remain Administrator of Leasing, and Vanessa Fernandez, a younger Hispanic employee, would be promoted to Associate Administrator. By July of 2016, plaintiff was to transition to a consultant role, and Fernandez would become Administrator of the rebranded Tenant Services division.

On June 30, 2017, Batista notified plaintiff that as of September 4, 2017, his weekly work hours would be reduced from 35 to 30, along with a proportionate reduction in salary. Batista allegedly told plaintiff that this was due to budgetary reasons, and he was not part of defendant's "10-year plan." In a July 7, 2017 memorandum to the file, Batista explained that he was reducing plaintiff's work hours and salary "because it does not appear that his prior manager took appropriate steps to document [plaintiff's] long-standing performance deficiencies," and Batista "was personally unaware of many of these issues before last year." The memorandum notes that Batista told plaintiff about his deficiencies in October or November of 2016, but plaintiff did not take the news well and did not improve. It also indicated that defendant would revisit the issue at the end of the year with the goal of transitioning plaintiff to a part-time consultant position. Shortly thereafter, Kobina Arhin, defendant's chief financial officer (CFO), met with plaintiff to reiterate the reduction, which was officially conveyed by letter dated July 20, 2017 from Rodolfo Palacios, defendant's officer manager and personnel coordinator, and countersigned by plaintiff on August 25, 2017.

According to plaintiff, he never had a negative performance review, and Batista never met with him during 2016 or 2017 to express the concerns relayed in the July 7,

2017 memorandum. Rather, during the latter part of 2015, Batista told plaintiff that he had just learned plaintiff's age and was surprised that plaintiff was "that old." Plaintiff noted in his calendar several instances during 2016 and 2017 in which staff members allegedly commented inappropriately about his age. Plaintiff also alleges that sometime before the June 30, 2017 meeting, defendant's vice president, Bruno Casolari, approached him in a public area, asked when he planned to retire, noted that plaintiff had a significant amount of money in his retirement account, and stated, "wouldn't it be nice to be retired." Plaintiff, who would turn 66 that August, told Casolari that he planned on working for at least the next few years. Defendant allegedly started treating plaintiff less favorably by excluding him from meetings to which Fernandez, who was under his supervision, was invited; failing to complete renovations in his office; and denying him updated computer equipment and software training, as well as training sessions with the various agencies with which defendant worked. In addition, Batista denied plaintiff's request to take vacation in October of 2017, but permitted other employees who were younger and/or Hispanic to take vacation during that period.

On December 1, 2017, Ahrin and Palacios notified plaintiff that as of January 2, 2018, his weekly hours would be reduced from 30 to 21, along with a proportionate reduction in pay, rendering him ineligible for coverage under defendant's employee healthcare plan, but he could enroll in Medicare Part B by December 7th, and this would be revisited again within four months. According to plaintiff, Ahrin and Palacios told him in this meeting, as they had in prior conversations during the second half of

2017, that he had never received a negative evaluation, no one had ever complained about the quality of his work, and neither of the reductions, nor any of the other changes in treatment he was experiencing, had anything to do with his performance; they instead told plaintiff that this was because Batista "wants you out" and "you're not part of his 10-year plan." Palacios confirmed the proposed new terms of employment in a December 8, 2017 letter, specifying that plaintiff's healthcare coverage would terminate on April 30, 2018, but defendant would pay for any Medicare Part B plan that plaintiff chose. Plaintiff was instructed to sign and return it by December 19, 2017.

In August of 2017, plaintiff complained to Father Joseph Franco, a member of defendant's board, about the impending reduction in hours and salary and allegedly recounted what he felt were examples of the harassment suffered due to his age and race/ethnicity. After the second proposed reduction, plaintiff spoke with Father Mark Cregan (the treasurer on defendant's board) and Sister Ellenrita Purcaro (the board's secretary). At Sister Purcaro's instruction, plaintiff e-mailed Sakano on December 19, 2017, articulating his value in remaining with defendant, and complaining that he was being forced out without cause or any explanation, besides not being in the 10-year plan. Purcaro also allegedly told plaintiff that he could seek help from government agencies that address discrimination, so he prepared a complaint for the State Division on Human Rights (SDHR), detailing his experiences at HCDC during the prior two years. He did not officially file the complaint, but submitted it to the SDHR, which date-stamped it on December 20, 2017. Plaintiff did not sign the December 8, 2017 letter,

allegedly upon the advice of Father Cregan, who indicated that he would speak to Monsignor Sakano about the matter. When plaintiff returned from a 1-week vacation on January 16, 2018, Batista notified him that he was being placed "on call" until March 31, 2018, on which date he would be officially terminated, and told him to retain an attorney to negotiate a separation and severance agreement. According to plaintiff, Batista asked whether he had spoken to board members since the 21-hour work week had been proposed, and plaintiff responded in the affirmative.

On February 21, 2018, during negotiations for a severance package and separation agreement, plaintiff's counsel wrote to defendant alleging that plaintiff had suffered discrimination on the basis of age and ethnicity, based on the events recounted in the unfiled SDHR complaint. Six weeks later, defendant requested that plaintiff provide written answers to questions about potential improprieties concerning the execution of leases for a unit rented by another staffer's relative in 2014 and 2015. When plaintiff refused, defendant ended negotiations, and plaintiff never received a severance package. It is apparently undisputed that defendant subsequently completed its investigation, and did not find that plaintiff had engaged in wrongdoing.

Plaintiff believes that his age and ethnicity were the primary reasons for the disparate treatment because, in addition to being told that he did not fit the 10-year plan, Batista gave inconsistent explanations for his decisions. For example, the budgetary reason allegedly cited by Batista at the June 30, 2017 meeting is undercut because defendant hired 10 new employees and created eight new positions, and also

distributed bonuses to all employees for the 2017 calendar year. In addition, Batista cited a project called Arts Bridge as a reason to deny plaintiff's October 2017 vacation request, but approved vacation during that time for Fernandez, to whom Batista had assigned most of the responsibility for the project, and then did not assign any Arts Bridge related tasks to plaintiff during that month. Plaintiff also alleges that all of the 10 new hires were far younger than him, and eight of them were Hispanic.

Father Franco did not recall that plaintiff specifically cited his ethnicity or age as reasons for the alleged mistreatment, although he did complain that he was not part of Batista's 10-year plan. Franco told plaintiff that it appeared as though defendant was pushing him to resign, rather than terminate him. Franco confirmed that Batista had mentioned a 10-year plan or future vision, that it was largely due to budgetary concerns for the "head office," and in connection with this plan, Batista had presented the board with an organizational chart reflecting the executive operation and employees, including plaintiff's unit. Franco then spoke to Monsignor Sakano about plaintiff's situation.

Sister Purcaro confirmed that during their December 2017 conversations, she told plaintiff to e-mail Sakano, but could not recall whether she had also told him to contact the SDHR or any other external agency or organization.

Father Cregan, who is also an attorney, confirmed that plaintiff complained about the second proposed reduction, and being marginalized by being excluded from meetings that would have kept him up to date on matters; Cregan did not recall that plaintiff specifically cited his age or ethnicity as reasons. Cregan told plaintiff that the

retirement inquiry would be inappropriate if Casolari was plaintiff's supervisor, and also might have told plaintiff that defendant could not discriminate against him or tell him when to retire. Cregan explained that the government agencies with whom defendant interacted had modernized their business practices, thus requiring new skill sets from the staff at affordable housing organizations like defendant. He posited that younger employees could better adapt to this: "I think some of the younger hires that we have are certainly -- and again, I don't know [plaintiff's] level of computer skills, but he and I are around the same age and I know that younger people coming in have better computer skills, and the systems just need those kind of skills." After hearing from plaintiff, Cregan spoke to Sakano and Batista. With respect to plaintiff's job functions, Batista "mentioned some of the things that he didn't think [plaintiff] would be able to do going forward," which is, as Cregan had "described earlier, the computers, and the changing nature of the way the business worked." Batista did not say that he had changed his mind and would terminate plaintiff instead of reducing his hours further, and Cregan left their meeting thinking that the issue to be resolved was still the number of hours that plaintiff would work. However, Cregan was not surprised when he later learned of the termination, based on the tenor of the discussions.

Monsignor Sakano testified that he did not recall whether plaintiff had specifically complained to him about being subjected to discrimination, but he was aware that plaintiff had reported this to Father Cregan. After receiving plaintiff's December 19, 2017 e-mail, Sakano and Father Cregan spoke with Batista about plaintiff's situation.

Sakano did not recall if he sent the e-mail to Batista, but he notified Batista about it. Sakano was not sure of when he was personally informed of the allegations of discrimination, but did "not think it was worth a discussion" because "the idea" of age or ethnic discrimination within defendant's organization "to [him] has no validity." Although only Sakano and the board had any power over Batista, Sakano testified that he and Father Cregan would not intervene, since HCDC's policy was that Batista, as CEO, should make all decisions regarding employees.

Batista, alone, decided to reduce plaintiff's salary and hours, and then to terminate him, although he would have run those decisions by Sakano, who had veto power. Batista denied citing budgetary reasons, and having any 10-year plan. Rather, defendant needed to "implement more vigorous computer applications" and "have more systems that were diligently implemented," but plaintiff "just doesn't have the management skills that we need to build a foundation that would support what we were trying to do." He also explained that Casolari's job entailed inquiring about employees' retirement plans on occasion because he oversaw defendant's retirement accounts. Batista did not recall whether the 10 new employees were all far younger than plaintiff, or that eight of them were Hispanic, but acknowledged that defendant's organizational charts seemed to indicate that between 50% and 75% of its employees were Hispanic. Batista acknowledged that he never formally presented a consultant offer to plaintiff, and that a younger Hispanic employee who had provided full-time information technology services had been transitioned into a 2-day per week consultant role paying

an approximate salary of $86,000. Batista also acknowledged that plaintiff was told that the reductions were not based on his performance or complaints that he was difficult. After Palacios reported in December of 2017 that plaintiff would not agree to the second reduction, Batista expected further discussions. He subsequently learned from Sakano and Cregan that plaintiff complained of discrimination. Shortly thereafter, Batista decided to terminate plaintiff's employment, having concluded from his conversations with Cregan that plaintiff would not have accepted a consultant role.

The State HRL and City HRL each prohibit employers from discharging or otherwise discriminating against an individual in compensation or in terms, conditions, or privileges of employment on the basis of said individual's age, race, or national origin (*see* Exec Law 296 [1][a]; NYC Administrative Code 8-107 [1][a][3]). An employment discrimination claim brought under the State HRL is evaluated under the burden-shifting framework set forth in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for claims arising under federal anti-discrimination statutes: (1) a plaintiff must establish a *prima facie* case of discrimination; (2) after which the defendant must proffer legitimate, independent, nondiscriminatory reasons for the adverse employment action; (3) and the plaintiff must then respond with evidence showing that those reasons are pretexts for discrimination (*see Sandiford v City of NY Dept. of Educ.*, 22 NY3d 914, 916, n 2 [2013]). "A plaintiff's evidence at the third step of the *McDonnell Douglas* analysis must be viewed as a whole rather than in a piecemeal fashion" (*Walsh v NY City Hous. Auth.*, 828 F3d 70, 76 [2d Cir 2016]). Hence, a "court may not properly . . . trust[] innocent

explanations for individual strands of evidence," and "piecemeal review is especially inappropriate in considering claims of hostile work environment" (*Davis-Garett v Urban Outfitters, Inc.*, 921 F3d 30, 45-46 [2d Cir 2019]).

The City HRL is 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, 477-78 [2011]), and thus "affords protections broader than the State HRL" (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]; *see also Phillips v City of NY*, 66 AD3d 170, 176 [1st Dept 2009]). Therefore,

> [s]ummary judgment dismissing a claim under the [City] HRL should be granted only if no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof (*Hamburg v NY Univ. Sch. of Medicine*, 155 AD3d 66, 72-73 [1st Dept 2017] [quotations and citations omitted]).

If a defendant proffers legitimate nondiscriminatory reasons for the adverse actions complained of, the plaintiff may defeat summary judgment

> by offering some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete. This is because once a plaintiff introduces pretext evidence, a host of determinations properly made only by a jury come into play, such as whether a false, misleading, or incomplete explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons (*Watson v Emblem Health Servs.*, 158 AD3d 179, 183 [1st Dept 2018] [cleaned up] [citations and quotations omitted]).

"A plaintiff's response to a defendant's showing of nondiscriminatory reasons for its actions can take a variety of forms" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29,

40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), and "evidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial -- as with proof of any other fact" (*id* at 40-41). For these reasons, "evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" (*id* at 44). In addition, since the "mixed motive" framework "imposes a lesser burden on a plaintiff opposing such a motion" (*Hamburg*, 155 AD3d at 73), in that context "the question on summary judgment [] is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct" (*Williams v NY City Hous. Auth.*, 61 AD3d 62, 78, n 27 [1st Dept], *lv denied* 13 NY3d 702 [2009]).

Although plaintiff will bear the burden at trial of proving the there was a hostile work environment and that defendant discriminated and terminated him based on his age, race and retaliation, on this motion, defendant bears the burden of establishing that it did not.

Plaintiff alleges that shortly before he turned 66 years old, defendant reduced his hours and compensation, excluded him from meetings, denied him valuable training and upgraded equipment, transferred his responsibilities to a much younger and less qualified employee of a different ethnicity, whom plaintiff had trained, and then terminated plaintiff and promoted that employee into his position. It is also alleged that this occurred after defendant's CEO realized plaintiff's advanced age, and its vice president inquired about plaintiff's retirement plans, to which plaintiff reported that he

planned to work for at least the next few years. Plaintiff also argues that defendant offered inconsistent explanations for its actions. Defendant argues that plaintiff exhibited deficiencies as an administrator and could not meet the evolving demands of the position, and he was terminated only when he would not accept the second such reduction. Based upon the record before this court and the application of the governing standards, the court finds that triable issues of fact as to pretext preclude the award of summary judgment as to plaintiff's age and race discrimination claims.

Defendant also seeks summary judgment dismissing plaintiff's claims for retaliation. The State HRL provides, in pertinent part, that it is unlawful to retaliate "against any person because he or she has opposed any practices forbidden under this article" (Executive Law 296 [7]). The City HRL goes further, providing, in pertinent part, that it is unlawful to retaliate "***in any manner***," and that "[t]he retaliation or discrimination complained of [] ***need not result in an ultimate action with respect to employment . . . or in a materially adverse change*** . . . [but] must be reasonably likely to deter a person from engaging in protected activity" (NYC Administrative Code 8-107 [7] [emphasis added]). The First Department has thus holds that under the City HRL,

> no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.' (*Williams*, 61 AD3d at 71, *quoting* NYC Administrative Code 8-107 [7]).

"To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [a plaintiff] engaged in a protected activity by opposing conduct prohibited thereunder; (2) defendants were aware of that activity; (3) [the plaintiff] was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]). "Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant 'took an action that disadvantaged' him or her" (*Harrington v City of NY*, 157 AD3d 582, 585 [1st Dept 2018], *quoting Fletcher*, 99 AD3d at 51-52).

Plaintiff's retaliation claims are two-fold. The first is premised on being informed of termination the month after he complained to several members of defendant's board about the second proposed reduction in his hours and pay, and how he had been treated over the previous months. The second is based on the fact that during the course of the parties' February 2018 negotiations over a separation and severance agreement, plaintiff's counsel articulated the grounds for the alleged discrimination, to which defendant responded by conditioning further negotiations on his participation in its investigation over leases executed in 2015 and 2016, as an excuse to deny him severance pay. The branch of the motion for summary judgment to dismiss the retaliation claims is denied as there remain issues of fact, including but not limited to whether such discrimination occurred and whether the termination was pretextual.

Defendant also moves for summary judgment dismissing plaintiff's claims of a

hostile work environment (HWE claims). The State HRL analyze these claims under the "severe and pervasive" standard imported from federal case law (*see Hernandez v Kaisman*, 103 AD3d 106, 114 [1st Dept 2012]). Here, such an environment will be found to exist "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004], *citing Harris v Forklift Systems, Inc.*, 510 US 17, 21, 23 [1993]). This requires consideration of all the circumstances, such as the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (*id* at 310-311 [interior quotation marks and citation omitted]). In contrast, the primary consideration for HWE claims arising under the City HRL is whether the claimant has been "treated less well" because of the protected characteristic, and the severity or pervasiveness of the conduct bears only on the scope of damages, and not the underlying liability (*see Hernandez*, 103 AD3d at 113-114, *citing Williams*, 61 AD3d at 76-80). Liability will not lie in those "truly insubstantial cases," where the defendant establishes as an affirmative defense that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (*Williams*, 61 AD3d at 80).

It is noted that rather than assert the HWE claims as separate causes of action,

the complaint includes them within the causes of action for discrimination on the basis of age and race brought under both the State HRL and the City HRL. As best as can be gleaned from the allegations of complaint, to the extent that the HWE claims are distinct from the discrimination causes of action, they are based on all of the alleged conduct complained of except for plaintiff's reduction in hours and pay and eventual termination: the age-related comments such as the "elder male" reference in an e-mail, and being called "grandpa" by colleagues in the office; allowing his office to remain in disarray for several months by failing to complete a renovation; denying him upgraded computer equipment, software, and training; excluding him from staff meetings and agency training sessions; denying plaintiff's vacation request while granting them for the same period to employees who were younger or Hispanic; and Batista's rude treatment.

Although these actions may have left plaintiff feeling isolated and made his work life unpleasant, none of it presents as "intimidation, ridicule, and insult," except for the alleged age-related comments and Batista's rudeness. As to the former, the e-mail was an isolated incident, and the alleged repeated use of "grandpa," while perhaps unprofessional, appears to have been uttered, at most, only sporadically during 2016 and 2017. Similarly, Batista's allegedly rude conduct, as described by plaintiff, was not physically threatening or intimidating. Accordingly, movant has established entitlement to summary judgment with regard to the State HWE claims. However, as the City HRL focuses on unequal treatment rather than any particular type of conduct, a HWE claim need not be premised upon only intimidation, ridicule, or insult. Hence, all of the

conduct described above may potentially be found to have created a hostile working environment, and to the extent that plaintiff is asserting such a claim as distinct from his pleaded causes of action for age and race-based discrimination, there remain issues of fact precluding summary judgment in favor of defendant as to the City HWE claims.

The foregoing shall constitute the decision and order of this court.

Dated: DEC 18 2020

J.S.C.

☒ Motion is granted in part and denied in part
☒ Action is still active