STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – JANUARY 18, 2012)

WALTER MOORE	:	
	:	
VS.	:	**C.A. No.: PC/08-4904**
	:	
RHODE ISLAND BOARD OF GOVERNORS	:	
FOR HIGHER EDUCATION, and	:	
THE UNIVERSITY OF RHODE ISLAND,	:	
By and Through Its President,	:	
Robert Carothers, and any and all defendants	:	

DECISION

K. RODGERS, J. This matter came before this Court on remand from the Rhode Island Supreme Court directing this Court to conduct an evidentiary hearing on the applicability of the discovery rule to Plaintiff, Walter Moore's (Moore), cause of action. See generally, Moore v. Rhode Island Bd. of Governors, 18 A.3d 541 (R.I. 2011). The Supreme Court instructed this Court to make "further factual findings on the applicability of the discovery rule; specifically, whether Moore's claim was time-barred, including a finding about what efforts, if any, Moore made to discover the violation before the deposition and whether he knew, or should have known, of the purported violation." Moore, 18 A.3d at 545.

After considering the testimony presented and the issues raised in Defendants' previously-filed Motion for Summary Judgment and Plaintiff's Objection thereto, and for the reasons set forth herein, this Court finds that Plaintiff's cause of action is time-barred and that Defendants are entitled to summary judgment.

I
Facts and Travel

Moore is an African-American male employed as an internal auditor in the Board of Governor's Office of Higher Education (OHE). Maria DiSano (DiSano), a Caucasian female, was also employed as an internal auditor in OHE. In August 2001, DiSano accused Moore of sexual harassment. That accusation led to an investigation by the Board of Governors, which investigation in turn sparked Moore to file an employment discrimination suit against the Board of Governors in the United States District Court for the District of Rhode Island in 2003 (Moore I). DiSano's deposition in Moore I was conducted on April 27, 2005, at which time Moore was present.[1]

Even while Moore I was pending in federal court, Moore and DiSano continued to work together as internal auditors in OHE until February 2004. During that time, they were supervised by Carl Toft (Toft), Director of Internal Auditing. In the instant case, Moore alleges that DiSano was hired for an internal auditor position at the University of Rhode Island (URI) in February 2004, that the position was not posted by URI, and that DiSano received higher compensation than Moore did in the same position with OHE. Moore further alleges that URI's failure to post the position was intentional and was done for the purpose of precluding Moore from applying for the position and reserving it for a Caucasian woman. DiSano's transfer to URI was effective on February 23, 2004. Moore alleges in the instant case, which was filed on July 25, 2008, that he was discriminated against based upon gender, ancestral origin, race and color, in violation of the Rhode Island Fair Employment Practices Act (FEPA), codified at G.L. 1956 § 28-5-1, et seq.

[1] Moore I was ultimately settled on June 13, 2005. Issues relating to that settlement, specifically its impact on the instant case, are not relevant to the factual findings the Supreme Court has instructed this Court to address.

Moore testified that he was aware in February 2004 that DiSano was being transferred to URI as an internal auditor but believed that it was simply a lateral transfer with no additional compensation or benefits. He contends that he did not become aware until DiSano's April 27, 2005 deposition in Moore I that DiSano was receiving a monetary stipend in addition to the base pay as an internal auditor at URI, and thus made more money than Moore did in the same position at OHE.

Moore relied upon the following events as evidence of the knowledge he possessed in February 2004 concerning DiSano's transfer. First, after an hour-long meeting with his supervisor, Toft, in February 2004, he understood DiSano's transfer to URI would have all the same duties and responsibilities of an internal auditor at OHE, and therefore he assumed the position had the same salary as his. He also understood from speaking with DiSano that her transfer allowed her a shorter commute and less traffic congestion. Moore testified that Jack Warner (Warner), the then-Commissioner of OHE, stated at a social gathering in the office at or about the same time as his meeting with Toft that DiSano's transfer was "lateral." Finally, Moore received a memorandum in June 2004, from Stephen McAllister (McAllister), Associate Commissioner of OHE, stating that DiSano had transferred to URI as an internal auditor effective February 23, 2004. (Pl.'s Ex. 1.)[2]

Furthermore, Moore testified that in February 2004, he believed the URI position would have the same salary as the OHE positions because all three full-time internal auditors, two at OHE and one at URI, had been receiving the same compensation.

[2] That memorandum, captioned "OHE Internal Audit Department Activity Report for the Quarter Ended 3/32/04", provides as follows: "Internal Audit Personnel" Ms. Maria DiSano transferred to the URI internal audit staff on February 23, 2004. The position will be advertised and a replacement hired." (Pl.'s Ex.1 at 3.)

Specifically, Moore testified that he and DiSano had previously complained in or about 2000 that a third internal auditor at URI, Soledade Surette (Surette), was paid more than they were. As a result of their actions, Moore, DiSano and Surette were given the same gross rate of pay as of March 26, 2000. Moore assumed that was still the case upon DiSano's transfer to URI in February 2004.

On cross-examination, Moore testified that he did not inquire of anyone nor file an Access to Public Records Act (APRA) request to determine if DiSano did receive higher compensation at URI because he was not suspicious at the time of her transfer that the internal auditor position to which DiSano transferred provided any additional compensation beyond that which he received as an internal auditor with OHE. On re-direct examination, Moore further stated that because he already had a lawsuit pending at the time DiSano was transferred to URI, he did not want to create "any more hard feelings in the office" by filing another complaint unless he was sure he had a "solid complaint."

On April 24, 2006, almost one year after DiSano's April 27, 2005 deposition in Moore I wherein he learned that DiSano was receiving a stipend, Moore filed a complaint of discrimination with the Rhode Island Commission for Human Rights (commission). On April 28, 2008, the commission granted Moore the right to sue, and this lawsuit followed. Moore does not allege in either the complaint filed with the commission (Def.'s Ex. B), nor in the instant Complaint that he was told by anyone in February 2004 that DiSano's transfer was "lateral" or that he was expressly told that the position was at the same salary as the internal auditor position at OHE. In both his complaint to the commission and in the instant Complaint, Moore challenges URI's failure to post the

position, and specifically alleges that the failure to post the position was to preclude Moore from applying based upon his membership in a protected class. (Def.'s Ex. B at 3; Complaint ¶¶ 16, 20, 22.)

II
Presentation of Witnesses

Moore relied upon his own testimony in support of his assertion that the discovery rule would allow his Complaint for employment discrimination to be filed out of time. Moore appeared to be well-versed in the elements of the discovery rule in explaining why he failed to take any action to determine what DiSano's actual compensation was upon her February 2004 transfer. However, as discussed infra, ensuring that he had a "solid complaint" before he acted on the compensation differential is not the standard by which this Court applies the discovery rule. Moreover, there was no evidence introduced which would demonstrate that he did not know in February 2004 that URI failed to post the internal auditor position of which he now complains.

The substance of Moore's testimony also gives this Court pause. It is questionable at best why Moore needed almost one year to review DiSano's deposition testimony before filing a complaint with the commission when he was in attendance at the deposition and testified that he learned on April 27, 2005 that DiSano was paid more than him upon her transfer to URI. Given that this was the same woman with whom, at the time of the transfer, Moore was in the throes of federal litigation alleging employment discrimination, it is difficult to conceive how Moore was not suspicious that she was receiving favorable treatment, how he understood the transfer to be a "lateral" move, and why he did not want to create any further hard feelings at work, all of which he claims as reasons why he failed to investigate the salary DiSano received upon her transfer.

Notwithstanding what this Court perceives as self-serving explanations and overstatements, it is undisputed that Moore made no efforts whatsoever to discover the salary differential between February 2004 and the April 27, 2005 deposition.

Further, this Court cannot give credence to Moore's testimony that Warner had specifically spoken of the transfer as a "lateral" move, or that the memorandum from McAllister did or could in any way lead him to believe that the transfer provided the same compensation package. Indeed, Plaintiff's Exhibit 1 is clear cut and straightforward, and in no way asserts or suggests that the transfer was "lateral" and/or at the same salary as the OHE position.

Defendants presented the testimony of Toft. Toft was both DiSano's and Moore's supervisor from 1999 through February 2004, and remains Moore's supervisor at this time. Toft demonstrated no animus toward Moore, nor revealed any favoritism toward DiSano. His testimony was neutral, credible and convincing, albeit limited in its scope. He testified that he could not recall specifically speaking with Moore about DiSano's salary in February 2004, but he himself did not make any assumptions about DiSano's salary upon her transfer to URI. It was clear from Toft's testimony that he never referred or suggested that DiSano's transfer was "lateral." Toft stated that URI makes its own hiring and firing decisions in-house, with the exception of the highest levels of the administration in the ranks of vice-president and above, and he had no involvement in nor knowledge of the terms of DiSano's transfer to URI. Thus, he did not have such information to share with Moore. He further testified that the State non-classified pay system within which the internal auditor positions fall have fairly wide pay ranges within each grade, including fluctuations in salary based on longevity.

III
Standard of Review

On remand from the Supreme Court, this Court was tasked with determining whether Defendants are entitled to summary judgment based upon the applicable statute of limitations, or put another way, whether the discovery rule serves to save Plaintiff's Complaint from being dismissed as untimely. It is well-settled that the discovery rule's purpose is to protect individuals from suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim. Canavan v. Lovett, Schefrin and Harnett, 826 A.2d 778, 783 (R.I. 2004) (citing Ashey v. Kupchan, 618 A.2d 1268, 1269-70 (R.I. 1993) (citing Wilkerson v. Harrington, 104 R.I. 224, 237, 243 A.2d 745, 752 (1968))). The discovery rule does not require that the plaintiff fully appreciate the potential liability or even be convinced that an injury exists; rather, "'the objective standard requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists.'" Id. at 783-84 (quoting Riemers v. Omdahl, 687 N.W.2d 445, 449 (N.D. 2004)) (emphasis added). "In keeping with the remedial spirit of the rule, this Court draws 'all reasonable inferences' in [P]laintiff's favor to determine whether, in the exercise of reasonable diligence, [P]laintiff should have discovered the alleged act" for which Plaintiff seeks to find Defendants liable. Id. at 784 (quoting Richmond Square Capital Corp. v. Mittleman, 689 A.2d 1067, 1069 (R.I. 1997)).

Whether the discovery rule applies is a question of law. Hanson v. Singsen, 898 A.2d 1244, 1248 (R.I. 2006). In certain circumstances, preliminary questions of fact will be resolved by the trial justice preceding the determination of whether the statute of limitations bars Plaintiff's complaint. See Hall v. Insurance Co. of North America, 727

A.2d 667, 668 (R.I. 1999) (holding that question of whether due diligence was exercised "should be determined by a justice of the Superior Court as a preliminary issue preceding the determination of whether the statute of limitations had run"). While summary judgment is a drastic remedy, it is appropriate where Plaintiff's complaint is time-barred by the applicable statute of limitations. See, e.g., Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174 (R.I. 2008) (affirming summary judgment for defendant based on statute of limitations); Croce v. State, Office of Adjutant General, 881 A.2d 75 (R.I. 2005) (affirming summary judgment for State based on statute of limitations on FEPA and RICRA claims); Chorney v. Cullen, 692 A.2d 694 (R.I. 1997) (affirming summary judgment for defendant based on statute of limitations where plaintiff failed to present competent evidence to support existence of disputed fact on applicability of discovery rule).

Summary judgment will be appropriate when "'viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" Montiero v. Silver Lake I, L.P., 813 A.2d 978, 980 (R.I. 2003) (quoting Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001)). In opposing a motion for summary judgment, the nonmoving party "'has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in their pleadings, mere conclusions or mere legal opinions.'" Liberty Mut. Inc. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). "'Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing

that there is a genuine issue of material fact.'" Montiero, 813 A.2d at 980 (quoting Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)).

If, after a preliminary evidentiary hearing, the trial court finds that the statute of limitations has run as a matter of law, then that finding, in itself, can serve as a sufficient basis upon which to grant summary judgment as a matter of law in favor of the defendant. See Hall, 727 A.2d at 669-70 (whether relation back applies to amended complaint served upon newly-added party after statute of limitations had run).

IV
Analysis

The Rhode Island Fair Employment Practices Act, under which Plaintiff bases his claim of discrimination in the workplace, contains a one-year statute of limitations. Section 28-5-17(a). While not yet addressed by Rhode Island courts, the Third Circuit Court of Appeals has held that the discovery rule may apply to cases involving alleged employment discrimination. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385-86 & n.5 (3rd Cir. 1994) (applying discovery rule to Title VII claims). In light of Moore I, it appears that the Rhode Island Supreme Court is prepared to adopt the application of the discovery rule to employment discrimination claims as well. Moore I, 18 A.3d at 544-45.

Moore complains in both his complaint filed with the commission and Complaint herein that he was denied the opportunity to apply for the position with a richer compensation package based upon his race, color and origin. (Def.'s Ex. B at 3; Complaint ¶¶ 16, 20, 22). Here, the alleged unfair employment practice occurred when URI failed to post the internal auditor position that allowed a richer compensation package than what Moore received in the same position at OHE. It is undisputed that

Moore filed his complaint with the commission on April 24, 2006, well beyond the one-year period mandated in § 28-5-17(a). The question before this Court is whether the discovery rule saves Plaintiff's untimely filing based upon the efforts, if any, Moore made to discover the violation and whether he knew, or should have known, of the purported unfair employment practice prior to April 24, 2005, one year prior to filing his complaint filed with the commission.

A
Moore's Lack of Effort to Discover Discriminatory Conduct

Moore admitted that he made no efforts to discover DiSano's compensation package and/or other benefits associated with her transfer to URI. He did not inquire of DiSano or anyone else what the benefits of her new position would include, nor did he initiate an APRA request.[3] He simply assumed from conversations with his supervisor, and with DiSano, that it was a lateral move that provided the same compensation as he was receiving at OHE. Moreover, having discounted Moore's testimony that Warner specifically called the transfer a "lateral" move and that McAllister's memorandum did or could lead anyone to believe that the URI position provided the same compensation package as an OHE internal auditor, see Section II, supra, Moore's reasons for not being "suspicious" are themselves suspect. In any event, the undisputed fact remains that Moore made no efforts whatsoever to discover the alleged unlawful conduct by Defendants prior to hearing at the April 27, 2005 deposition that DiSano's transfer to URI allowed her a richer compensation package than Moore received at OHE.

[3] Defendants make much of this argument, but failed to present evidence as to exactly what information would be revealed through an APRA request. Nonetheless, Plaintiff also failed to present any evidence whatsoever that such an APRA request would not have disclosed the existence of the monetary stipend. The resolution of what an APRA request would disclose is not a material fact which would preclude summary judgment.

B
Moore's Knowledge Prior to April 27, 2005 Deposition

Moore did credibly testify that he did not know of the compensation differential until April 27, 2004. He did not testify – nor was he asked – on what date he became aware that the URI position had not been posted in accordance with URI's policies. Having no evidence otherwise, it stands to reason that because DiSano's transfer was effective on February 23, 2004, as established by uncontroverted evidence in the record, the failure to post the position would necessarily occur prior to the transfer itself. Plaintiff has presented no evidence that would allow this Court to find otherwise.

C
A Reasonable Person Should Have Known that a Cause of Action Existed in February, 2004

The next question set forth in the Supreme Court's inquiry turns on whether Moore should have known of the alleged discriminatory conduct prior to April 24, 2005. "A potential plaintiff is under an affirmative duty to investigate diligently a claim and is not allowed to use the discovery rule to postpone indefinitely the running of the statute of limitations." Benner v. J.H. Lynch & Sons, Inc., 641 A.2d 332, 338 (R.I. 1994) (citing Pari v. Corwin, 620 A.2d 86, 87 (R.I. 1993); Dionne v. Baute, 589 A.2d 833, 835 (R.I. 1991)). The application of the discovery rule is based on an "objective standard [which] requires only that the [P]laintiff be aware of facts that would place a reasonable person on notice that a potential claim exists." Canavan, 826 A.2d at 783-84 (emphasis added).

First, Moore's testimony that he wanted to be sure that he had a "solid complaint" and did not want to create any harder feelings in the office certainly do not comport with his obligation as a potential plaintiff to investigate diligently. Benner, 641 A.2d at 338. Moreover, Moore's testimony and the evidence of record demonstrate that a reasonable

person would have been on notice that a potential claims exists. Canavan, 826 A.2d at 783-84. Moore was aware in February 2004 of the transfer itself. Moore was also aware that the transfer would allow a less-experienced, less-educated internal auditor than he (Complaint ¶ 11) to be autonomous, essentially working on her own, which a reasonable person could perceive as a benefit to working with a supervisor and another internal auditor. There is no evidence that Moore was unaware in February 2004 that URI had failed to comply with its posting requirements. Finally, a reasonable person currently involved in federal litigation concerning work place discrimination would be on notice that a potential claim exists when an unposted position is filled by the very person he alleges in the federal litigation as having been favored by the employer.

A reasonable person under these circumstances would not turn a blind eye in order not to create any more hard feelings in the workplace, nor would a reasonable person wait to ensure he had a "solid complaint." Rather, a reasonable person would protect his rights to pursue any claims of further workplace discrimination that may support the existing litigation or give rise to any future litigation.

For all of these reasons, the Court finds that a reasonable person would have been on notice that a potential claim existed when DiSano's transfer to the unposted position was announced in February 2004 and, at the latest, at the time her transfer was effective on February 23, 2004. Thus, Moore should have known of the alleged discriminatory conduct of which he now complain as of February 2004, approximately twenty-six months before he filed his complaint with the commission.

D
Defendants Are Not Equitably Estopped from Asserting A Statute of Limitations Defense

To the extent that Plaintiff relies upon an equitable tolling of the stature of limitations based upon alleged misrepresentations by Defendants or agents thereof, the credible evidence before this Court reveals that that claim also fails as a matter of law. See McAdam v. Grzelczyk, 911 A.2d 255, 259-60 (R.I. 2006) (holding that a party can be estopped from invoking statute of limitations in exceptional circumstances such as settlement where the party's statements or conduct are calculated to lull the claimant into a reasonable belief that suit need not be brought). In McAdam, the Court "emphasized that '[t]here must be a showing of an express representation or other affirmative conduct which amounts to a representation that could reasonably deceive another and induce a reliance that would work to the disadvantage of the individual relying upon the representation.'" Id. at 260 (quoting Gross v. Glazier, 495 A.2d 672, 674 (R.I. 1985)).

Plaintiff generally alleges in his Objection to Defendants' Motion for Summary Judgment that Defendants misrepresented the lateral nature of DiSano's transfer. After hearing the testimony and reviewing the evidence presented, this Court finds that no such misrepresentations or other affirmative conduct by Defendants or their agents occurred. Toft had no specific knowledge concerning the terms of DiSano's employment at URI and therefore would not have been able to categorize the transfer as lateral or at the same compensation level. Contrary to Moore's reliance thereon, the memorandum from McAllister on its face does not indicate in any way that the transfer was lateral or at the same compensation level. Warner's purported statement that it was a "lateral" move is also questionable in light of Moore's entire self-serving testimony and overstatements.

Finally, Moore's reliance on the 2000 salaries of Moore, DiSano and Surrette as a basis for believing the URI position afforded the same compensation package that Moore received at OHE was successfully challenged by Toft's credible testimony that there are fairly wide pay ranges within each grade, including fluctuations in salary based on longevity.

This evidence fails to establish that Defendants or their agents expressly represented to Plaintiff or engaged in any other affirmative conduct which reasonably deceived Moore. McAdam, 911 A.2d at 260; Gross, 495 A.2d at 674. Accordingly, Defendants are not estopped from invoking the statute of limitations defense.

V
Conclusion

For the reasons set forth herein, and after conducting an evidentiary hearing on the preliminary issue of whether the one-year statute of limitations pursuant to § 28-5-17(a) bars Plaintiff's cause of action, this Court finds that the discovery rule does not apply to save Plaintiff's cause of action and that Defendants are not estopped from invoking the statute of limitations defense. Accordingly, Defendants are entitled to judgment as a matter of law as Plaintiff's Complaint was filed more than fourteen months after the one-year statute of limitation had run.

Counsel for Defendants shall prepare an Order consistent with this Decision.