State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings

Commission on Human Rights and Opportunities
ex rel. Barry Weinz, Complainant

CHRO Case No. 1110081
Federal No. 16A 2010 0149

v.

Bill Selig Jewelers, Inc., Respondent

July 25, 2016

Decision on Reconsideration Request and Petition

The complainant on June 29, 2016, filed a request for reconsideration of the undersigned's final decision dismissing the complaint. The commission on June 30, 2016, filed a petition, dated June 29, 2016, joining with the complainant in complainant's request for reconsideration. The complainant and commission argue, in essence, that this is a case of overt discrimination; the mixed-motive *Price Waterhouse* analysis applies; complainant presented direct evidence consisting of an isolated remark by Bill Selig, the decision maker and respondent's owner, alluding to complainant's diabetes at the time of his termination; and the remark was sufficient as a matter of law to establish by a preponderance of the evidence that a protected characteristic played a motivating role in the employer's decision to discharge the complainant.

In an attempt to prove intentional disability-based employment discrimination, complainant predicates his claim on one isolated remark made by Selig, the ultimate decision-maker, mentioning complainant's diabetes when respondent terminated him. The thrust of the request for reconsideration is that the remark satisfies two factors of a four-factor test [1] used to aid in determining the admissibility or sufficiency of a statement as evidence of discrimination; e.g. *Henry v. Wyeth Pharmaceuticals, Inc.* 616 F. 3d 134, 149-150 (2d Cir.2010); *Hasemann v. United Parcel* Services *of America, Inc.*, 2013 WL 696424 * (D. Conn. 2013); *Koestner v. Derby Cellular Products,* 518 F. Supp.2d 397, 401-02 (D. Conn. 2007); *Jackson v. Post University,* 836 F. Supp.2d 65, 96 (D. Conn. 2001); and therefore the undersigned was compelled to conclude that respondent was motivated by discriminatory assumptions or attitudes relating to persons with diabetic illness when the decision to terminate the complainant was made.

Upon review of the aforementioned request and petition, and upon reconsideration of the June 14, 2016 final decision, said decision is affirmed in every respect as initially stated. In addition thereto, the following clarification of that which was initially stated is issued herewith, which shall constitute a clarifying amendment to the June 14, 2016 final decision.

[1] In determining whether a remark is probative of discriminatory motive the suggested four factors are: "(1) who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker); (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made (i.e., whether it was related to the decision-making process)." *Henry v. Wyeth Pharmaceuticals, Inc.* 616 F. 3d 134, 149 (2d Cir.2010).

Clarification

In reaching my conclusion dismissing the complainant's claims of disability- and age- based discrimination, the testimony of the parties with regard to Selig's allegedly biased diabetes remark was given careful consideration. The statement was characterized as falling within the category of stray remarks and rejected as direct evidence that, standing alone, could reasonably be viewed as establishing discriminatory intent sufficient to shift the burden of persuasion to the respondent even though the comment was made by the decision maker at the time of complainant's discharge. In assessing the content of the remark and the context in which it was made, emerging as it did against the backdrop of a long employment history, I could not conclude that the remark, by itself, indicates improper discriminatory motive or negative views by respondent about complainant's diabetic condition or spurred the decision to sever the employment relationship. An employee who is a member of a protected class, but is unable to properly perform his job duties, does not enjoy a blanket shield from adverse employment action that is based on legitimate, nondiscriminatory reasons. See, *Danzer v. Norden Systems, Inc.*, 151 F. 3d 50, 56 (2d Cir.1998).

"As a general rule, stray remarks, even if made by a decisionmaker, do not constitute sufficient evidence to make out a case of employment discrimination, unless there is other evidence of discrimination in the record." *Hayes v. Compass Group U.S.A, Inc.*, 343 F. Supp. 112, 120 (D.Conn. 2004), citing *Danzer v. Norden Systems, Inc.*, supra. Accord *Abdu Brisson v. Delta Airlines*, 239 F.3d 456, 468 (2d Cir. 2001) ("Stray remarks of decision maker, without more, cannot prove a claim of employment discrimination.") But when "other indicia of discrimination are properly presented, the remarks can no longer be deemed 'stray,' and the jury has a right to conclude that they have a more ominous significance." (Internal quotation marks omitted) Id., quoting *Danzer v. Norden Systems, Inc.*, supra.

A review of a number of cases indicates that when the allegedly biased remark by itself is the only evidence of discrimination unsupported by other indicia of discriminatory animus, it will rarely be seen as sufficient either to raise an inference of discrimination under the pretext *McDonnell Douglas* model (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)), or to show by a preponderance of the evidence that an impermissible factor played a motivating role in the employment decision under the mixed-motive *Price Waterhouse* model (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). For otherwise stray remarks to have probative value the law appears to require the presence of other evidence, such as statics, a pattern of derogatory statements, a facially discriminatory corporate policy, or a history of discrimination. See, e.g., *Henry v. Wyeth Pharmaceuticals, Inc.*, 616 F. 3d 134 (allegedly biased remark made years before and not in decision making context nevertheless had probative value, although other offensive remarks lacked tendency to show discriminatory attitudes or assumptions related to protected class); *Slattery v. Swiss Reinsurance America Corp*, 248 F. 3d 87 (2d Cir. 2001 (statements of corporate executives, not personally involved in employment decision, concerning age-based corporate policy favoring younger workforce relevant in age discrimination claim); *Abdu-Brisson* v. *Delta Airlines*, 239 F.3d 456, 468 (2d Cir. 2001) (alleged stray remark combined with pattern of derogatory statements and consuming interest of employer in the ages and protected retirement benefits of pilots); *Carlton v. Mystic Transportation, Inc.*, 202 F. 3d 129 (2d Cir. 2000) (otherwise stray comment by employer that plaintiff should retire took on ominous significance when buttressed by plaintiff's replacement with employee twenty-five years younger); *Kirsch v. Fleet Street, Ltd.*, 148 F. 3d 149, 162 (2d Cir. 1998) (alleged stray remark combined with other evidence including similar discriminatory statements and direct threat that employees position was vulnerable due to age); *Danzer v. Norden Systems, Inc.*, supra, 154 F.3d 50 (series of ageist, derogatory remarks by non-decision maker no longer deemed "stray" when combined with other indicia of discrimination such as lower job performance rating and plaintiff's removal from projects); *Hasemann v. United Parcel Services of America, Inc.*, 2013 WL 696424 (D. Conn. 2013) (comments by two superiors in

months before termination deemed unrelated to employment decision, even when coupled with plaintiff's replacement by much younger worker); *Tremalio v. Demand Shoes, LLC.,* 2013 WL 5445258 (D. Conn. 2013) (allegedly stray remark combined with fact that plaintiff was passed over in favor of substantially younger person); *Weichman v. Chubb,* 552, F. Supp. 2d 271, (D. Conn. 2008) (single age-based remark by decision maker, without other indicia that employer acted with discriminatory intent, not probative of discrimination); *Koestner v. Derby Cellular Products,* 518 F. Supp. 2d. 397, 401 (D. Conn. 2007) (remarks by corporate executives not involved in employment decision that to reduce insurance premiums company "had to get younger" sufficient to raise inference of discrimination, but comment by decision maker that "someone more energetic would be better for the job" not probative of age-based animus); *Tomassi v. Insignia Financial Group,* 478 F.3d 111 (2d Cir.2006) (evidence of ageist remarks by decision maker made monthly and at the time of firing, when combined with plaintiff's replacement by worker thirty-eight years younger, in the aggregate sufficient to raise a triable question of fact); *Hayes v. Compass Group U.S.S., Inc.*, supra, 343 F. Supp. 112 (age-related remarks of two decision makers coupled with weak statistical evidence of pattern and practice of age discrimination and evidence of possible inconsistent policy of terminating managers over forty years of age but demoting those under forty sufficient to send case to jury); *Jackson v. Post University,* supra, 836 F. Supp. 65 (isolated derogatory remark of low-level supervisor, not the decision maker, regarding marijuana insufficient evidence to establish racial discrimination).

Under the standardized approach in *Henry v. Wyeth Pharmaceuticals, Inc.*, supra, 616 F. 3d 149-150, for evaluating whether and to what degree the remarks being analyzed are relevant to and probative of illegitimate discriminatory intent in the decisional process, the court itself viewed the four-factor framework as a "useful approach to the admission or exclusion of remarks..." and cautioned that "none of the factors should be regarded as dispositive." Id.

Whether the alleged disability was, or was not, a motivating factor in the employer's decision is a factual inquiry. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714 (1983); see *Parker v. Sony Pictures Entertainment, Inc.,* supra, 260 F. 2d 108-110; *Levy v. Commission on Human Rights & Opportunities*, supra, 236 Conn. 105. The ultimate question is whether the employment decision was made with a discriminatory motive and the complainant bears the burden of proving that the respondent had a discriminatory intent or motive; *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981; *Parker v. Sony Pictures Entertainment, Inc.,* 260 F. 2d 100, 107 (2d Cir. 2001). As Justice Rehnquist said in *Aikens*, "in deciding this ultimate question ... [t]he law often obliges finders of fact to inquire into a person's state of mind." *United States Postal Service Board of Governors v. Aikens,* supra, 717. Bearing this in mind and taking into consideration the four-factors in the *Henry* case as a guide, there is no indication in the record that Selig's remark, without more, is probative of illegitimate discriminatory intent or sufficiently related to the decisional process itself to make out a case of employment discrimination.

Complainant's and commission's argument falls far short of demonstrating that the Selig's isolated remark was probative of disability discrimination on his part. The complainant and commission point to no other supporting evidence of discriminatory animus present in the record that would establish that complainant's diabetes actually had a motivating role in the employment decision. Unlike the situation in *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 101, 109 (1996), where the plaintiff was told he was being removed from his position as a truck driver "because of his hearing disability," the remark in the present case merely alludes to complainant's diabetes as affecting, or possibly affecting, complainant's inability to perform the work to respondent's satisfaction.

Not all references to complainant's protected status, diabetes, are necessarily "smoking-gun" evidence of disability discrimination, particularly when, as here, the complainant had been employed with respondent for at least nine years after being diagnosed with diabetes. Complainant freely discussed his condition with Selig and other employees and admitted that the employer did not consider his diabetic illness as job-limiting. Numerous accommodations to complainant's diabetic condition were made and offered. The complainant admitted that as early as two years before his termination, he was aware of Selig's increasing dissatisfaction with the declining quality of complainant's work. Complainant in its request for reconsideration concedes the remark was not offensive. Viewed in context, the content of the isolated comment was innocuous and untainted with discriminatory intent.

However, if the undersigned erred and the subject remark is viewed as sufficiently revealing of a discriminatory factor that more likely than not motivated the employer's decision, under the *Price Waterhouse* order and allocation of proof the respondent met and exceeded its burden of proving by a preponderance of the evidence that a legitimate, nondiscriminatory reason existed at the time of the disputed action, to wit that complainant was no longer able to perform the essential functions of the job, and that reason was the actual motivating cause. *Levy v. Commission on Human Rights & Opportunities*, supra, 236 Conn. 106-107.

Having found no error of fact or law that should be corrected; no new evidence having been discovered and brought to my attention which materially affects the merits of this matter; or other good cause for reconsideration not having been shown, the complainant's request for reconsideration, in which the commission joined, is hereby DENIED.

It is so ordered this 25th of July 2016.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

Cc: Thomas Meiklejohn, Esq. – via email only
Alix Simonetti, Esq. – via email only
Leon M. Rosenblatt, Esq. – via email only