STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. Alfred Parker Mayo,
Complainant
v.
Bauer, Inc.,
Respondent

CHRO No. 0830166

March 25, 2013

03-25-13P12:10 RCVD

Ruling on Respondent's Motion to Dismiss and Judgment for the Respondent

The Complainant, Alfred P. Mayo, filed his affidavit of illegal discrimination on October 31, 2007. Subsequently, he filed 5 amended complaints. The last amended complaint was filed on May 11, 2010. These complaints, collectively, allege violations of Conn. Gen. Stat. Sections 46a-60(a)(1), 46a-60(a)(4), and 46a-58(a), as based upon a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991, and/or a violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (See footnote 5 infra.)

After conducting an investigation, a Human Rights Representative ("Investigator") of the Commission on Human Rights and Opportunities ("Commission" or "CHRO") found that "there was reasonable cause for believing an unfair practice was committed as alleged in this Complaint." See Investigator's Certification, dated March 28, 2011. After mandatory efforts to resolve the dispute by mediation failed, the complaints were certified by the investigator, on March 28, 2011. The Commission sent the case to the Office of Public Hearings ("OPH") for a de novo hearing, pursuant to Conn. Gen. Stat. Section 46a-84.

The public hearing for was held on November 13 and 14, 2012.[1] The Complainant appeared as a self-represented litigant. After, deferring prosecution of this matter to the Complainant, Counsel for the Commission did not participated in the public hearing.[2] Attorney Lisa Zaccardelli ("Respondent's Counsel") appeared for the Bauer, Inc.

[1] The Notice of Contested Case Proceeding and Hearing Conference, dated April 6, 2011, assigned Jon. P. Fitzgerald as the presiding Human Rights Referee. The case was reassigned to Alvin R. Wilson, Jr., on January 13, 2012.

[2] Pursuant to section 8 of Public Act 11-237, which amended Gen. Stat. § 46a-84(d), Commission Counsel determined that the interests of the state would not be adversely affected by having the Complainant, or his attorney if he elected to retain one, present all of the case at public hearing. Commission Counsel notified the parties and the Office of Public Hearings (OPH) of CHRO's deferral of prosecution, by letter dated February 17, 2012.

On November 14, 2012, near the close of the two-day hearing, the Respondent's Counsel made an oral motion for judgment for the Respondent, and subsequently filed Respondent's Motion to Dismiss and Judgment for the Respondent, dated November 21, 2012 ("Motion to Dismiss"). The Complainant filed his reply to said motion on or about December 28, 2012.

The Motion to Dismiss stated, in relevant part,"[t]he Respondent ... hereby requests the Hearing Officer ... to dismiss the complaints filed by the Complainant, Alfred P. Mayo ... as the Complainant has failed to establish a prima facie case of discriminatory treatment based on his race, age, disability or retaliation ...." Motion to Dismiss, p.1.

For the following reasons, I conclude that insufficient evidence has been produced to satisfy the complainant's burden of establishing a prima facie case for the alleged violation of 46a-60(a)(1); 46a-60(a)(4); and 46a-58(a). The Respondent's Motion to Dismiss is granted.

Standard of Review

Contested Cases within the jurisdiction of the Office of Public Hearings ("OPH") are governed by the Connecticut Uniform Administrative Procedures Act ("UAPA") and the Regulations of Conn. State Agencies ("Regulations") Section 46a-54-78a, et seq. Subdivision (4) of subsection (d) of Regulations section 46a-54-88a states, "[t]he presiding officer may, on his or her own or upon motion by a party, dismiss a complaint or portion thereof if the complainant or the commission: ... (4) Fails to sustain his or her burden after presentation of the evidence."

Although the Connecticut Practice Book does not govern administrative hearings, such as contested case proceedings within the jurisdiction of the OPH, it can provide guidance in such matters. Practice Book sec. 15-8 sets forth the procedure for a defendant's counsel to request a case be dismissed for failure to make out a prima facie case. Practice Book sec. 15-8 states,

> If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made.

This is an appropriate guidepost in considering Respondent's Motion.

The standard for determining whether the plaintiff has made out a prima facie case, under Practice Book sec. 15-8, is whether the plaintiff put forth sufficient evidence that, if believed, would establish a prima facie case, not whether the trier of fact believes it. See W. Horton & K. Knox, 1 Connecticut Practice Series: Connecticut Superior Court Rules (2004 Ed.) § 15-8, comments, p. 650; see also Thomas v West Haven, 249 Conn. 385, 392 (1999), cert. denied, 528 U.S. 1187 (2000). "For the court to grant the motion [for judgment of dismissal pursuant to Practice Book sec. 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint." (Emphasis added. Internal quotation marks omitted.) 2 E. Stephenson, Connecticut Civil Procedure (3d Ed. 2002) § 162(f), p. 264.

"In order to establish a prima facie case, the proponent must submit evidence which if credited, is sufficient to establish the fact or facts which it is adduced to prove.... [T]he evidence offered by the plaintiff is to be taken as true and interpreted in a light most favorable to [the plaintiff], and every reasonable inference is to be drawn in the [plaintiff's] favor." (Internal quotation marks omitted.) Cadle Co. v. Errato, 71 Conn. App. 447, 455-56, cert. denied, 262 Conn. 918 (2002). Not only, is the Referee precluded from making fact findings, he may not weigh the credibility of the witnesses or draw inferences against the Complainant. Gambardella v. Apple Health Care Inc., 86 Conn.App. 842, 846-47 (2005). All reasonable inferences must be drawn in favor of the plaintiff. Id at 852.

Based on this standard, the presiding referee must review the record – the pleadings, and the testimony provided and exhibits enter at the hearing – to determine whether the Complainant, at the close of his case, adduced evidence that, if credited, would satisfy the burden of establishing a prima facie case of a violation of any of the following claims alleged in his complaints -- (a) Section 46a-60(a)(1) based on race, color, national origin, ancestry or age; (b) Section 46a-60(a)(4); or (c) a violation of Section 46a-58(a) based upon either a violation of (i) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991, or (ii) the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.[3] If the Complainant

[3] 46a-60(a)(1) -- It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, ... to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, ... age, ... national origin, ancestry, present or past history of ... physical disability ....; 46a-60(a)(4) – "It shall be a discriminatory practice in violation of this section: ... (4) For any person [or] employer ... to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84." ; and Section 46a-58(a) -- "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected,

has failed to present sufficient evidence to establish a prima facie case, the Motion to Dismiss must be granted.

To be clear, this is not the de minimus burden to make out a prima facie case of discrimination under the burden shifting framework set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1983), and its extensive progeny.[4] It is the more rigorous burden necessary to prove that the employer discriminated against the employee in violation of the pertinent sections of the Connecticut Fair Employment Act ("CFEPA") at issue in this case.

"The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dept. of Community Affairs v. Burdine, 450 U.S.248, 253 (1981). "In a disparate treatment case, liability depends on whether the protected trait ... actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604,610 (1993) citing, United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256, 101 S.Ct. 1089, 1093-1095, 67 L.Ed.2d 207 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-578, 98 S.Ct. 2943, 2949-2950, 57 L.Ed.2d 957 (1978). The Complainant must meet this burden to defeat the instant Motion to Dismiss.

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any other person to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability."

[4] The applicable test for a disparate treatment case is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1983) and Ann Howard's Apricot's Restaurant v. CHRO, 237 Conn. 209 (1996). The complainant must show that: (1) he/she belongs to a protected class; (2) he/she was qualified for the position held; (3) he/she was discharged; and (4) the discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his/her membership in that class. "When a plaintiff alleges disparate treatment, 'liability depends on whether the protected trait ... actually motivated the employer's decision." ... That is, the [alleged protected trait] must have 'actually played a role in [the employer's decision making] process and had a determinative influence on the outcome.' ... Recognizing that 'the question facing triers of fact in discrimination cases is both sensitive and difficult,' and that '[t]here will seldom be 'eyewitness' testimony as to the employer's mental process,' ..., the Courts of Appeals ... have employed some variant of the framework articulated in McDonnell Douglas to analyze [discrimination] claims that are based primarily on circumstantial evidence." Reeves at 141. "McDonnell Douglas and subsequent decisions have 'established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory-treatment cases.' St. Mary's Honor Center v. Hicks, 509 US 502, 506 (1993)." Reeves at 142.

Decision

This tribunal has carefully reviewed the pleadings, the public hearing transcripts, and the exhibits entered for evidence which, when viewed in the light most favorable to the Complainant, would satisfy his burden to make out a prima facie case of any one of his claims. [5] For the following reasons, I have determined that insufficient evidence has been produced to satisfy the Complainant's burden of establishing a prima facie case for the alleged violation of Conn. Gen. Stat. Sections 46a-60(a)(1); 46a-60(a)(4); and/or 46a-58(a).

At the conclusion of the presentation of Complainant's case, the Complainant had offered evidence to establish that he belongs to a number of protected classes by virtue of his race, color, and age. (There was, however, no evidence presented that the Complainant had a disability.) The record also contains evidence of an adverse employment action -- he was terminated by the Respondent. To survive this Motion to Dismiss, the Complainant must also have introduced evidence that he was qualified and leads to the conclusion that the circumstances of the adverse employment action infer discrimination.

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[5] Complainant filed his original affidavit of illegal discrimination dated October 31, 2007. He subsequently filed five amended complaints, respectively dated on or about December 27, 2007; January 13, 2008; January 25, 2008; April 2, 2009; and May 11, 2010. In his fourth amended complaint, dated April 2, 2009, Complainant, for the first time, asserted claims that the Respondent had violated Conn. Gen. Stat. Sections 46a-60(a)(1) and 46a-60(a)(4). He alleged discrimination based on race, color, national origin, ancestry and age, as well as retaliation based on the complainant's previous opposition to discriminatory conduct. Additionally, relevant to this Motion to Dismiss, claims remaining from the original affidavit and the fifth amended complaint, dated May 11, 2010, include violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991, as enforced through Section 46a-58(a); the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., as enforced through Section 46a-58(a) and physical disability discrimination under state law, i.e., Section 46a-60.

In his fourth amended complaint, the Complainant wrote, "I hereby withdraw any and all prior allegations as against this respondent in my original Commission complaint dated October 31, 2007 and amended complaints filed with the Commission on December 27, 2007 and January 28, 2008 citing violations of C.G.S. Sections 46a-60(a)(7), 46a-60(a)(8), 46a-64 and 46a-81 and/or the Equal Pay act of 1964." Two claims checked off on the original Affidavit if Illegal Discriminatory Practice form provided to the Complainant by the CHRO's West Central Region office, and not subsequently withdrawn, include violations of the federal Age Discrimination in Employment Act of 1967 (ADEA) and Conn. Gen. Statute Section 46a-64a. (Note -The ADEA claim in not within the jurisdiction of the Office of Public Hearings because age is not one of the enumerated categories under Section 46a-58. The 46a-64a claim must have been a typographical error on the form because that section of the law – Discrimination against families with children -- was repealed by section 15 of Public Act 90-246.)

The Referee, however, has identified no evidence in the record, either direct or circumstantial, that can lead to the conclusion that the legitimate business reasons offered by Respondent for discharging the Complainant were a pretext for discrimination. The Complainant failed to produce any evidence that the reasons offered by the Respondent for his discharge were not worthy of credence.

There is no evidence that the decision to terminate his employment was based on a discriminatory motive. Nor was any evidence proffered that leads to the conclusion that the Respondent dismissed the Complainant in retaliation for him filing a complaint with the CHRO.

In connection with his claims that his employer discriminated against him on the basis of race, the Complainant testified that one of his coworker, had called him a derogatory and highly offensive racial term at work – "nigger". See Public Hearing Transcript pp. 43-44. This testimony stands in stark contrast to the information contained the numerous complaints filed, and was the first time that the Complainant has made such an explosive claim on the record.

Specifically, the Complainant in his original Affidavit of Illegal Discriminatory Conduct, filed on October 31, 2006, alleged that the same co-worker had called him a "f---ing asshole." The use of the N-word was never mentioned in that initial affidavit. Nor did the Complainant make such a claim in any of the five (5) amended complaints filed on or about December 27, 2007; January 13, 2008; January 25, 2008; April 2, 2009; and May 11, 2010.

Reviewing the evidence in a light most favorable to the Complainant, it reveals that after he reported to his supervisor the profane comment alleged in the original affidavit, the co-worker was reprimanded. Furthermore, there is no evidence that the co-worker was responsible, in any way, for the decision to terminate the Complainant.

This tribunal also concludes that the Complainant failed to provide any evidence that he was qualified when he was terminated. To the contrary, the Complainant introduced substantial evidence that indicated that his employer found his work product deficient and his behavior unprofessional and insubordinate.[6]

Therefore, the presiding referee has determined that insufficient evidence has been produced to satisfy the Complainant's burden to establish a prima facie case for the violation of 46a-60(a)(1); 46a-60(a)(4); or 46a-58(a).

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[6] See the following exhibits entered by the Complainant – Exhibit 5 (October 2007 Performance Review); Exhibit 6 ("Al Mayo Performance Log"); Exhibit 8 (which is actual Respondent's Exhibit BA-13 – Employee disciplinary form, dated 10/11/2007, with attached photographs); and Exhibit 9 (Employee Disciplinary Form, dated 12/10/2007). See also Respondent's Exhibit BA-8 (Attachment to Employee Disciplinary Form, dated 12/10/2007).

Order

In light of the foregoing, in accordance with the provisions of Subdivision (4) of subsection (d) of § 46a-54-88a of the Regulations of Connecticut State Agencies, it is hereby ordered that the complaint be, and hereby is, DISMISSED.

Dated at Hartford, Connecticut this 25th day of March 2013.

Alvin R. Wilson, Jr.
Presiding Human Rights Referee

C:
Alfred P. Mayo – via email and certified mail no. 7008 2810 0002 3670 5186
Bauer, Inc. – via certified mail no. 7008 2810 0002 3670 5193
Lisa Zaccardelli, Esq. – via email
Robin Fox, Esq. – via email