STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities, ex rel.
Arline Stephenson
Complainant

CHRO No. 1110235

08-22-13P01:53

v.

Webster Bank,
Respondent

August 22, 2013

Ruling on Motion for Summary Judgment

Procedural Background

On January 6, 2011, Arline Stephenson ("Complainant") filed charges of discrimination and retaliation with the Commission on Human Rights and Opportunities ("the Commission" or "CHRO") against Webster Bank, N.A. ("Respondent") claiming violations of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA) and Connecticut General Statutes §§ 46a-58(a), 46a-60(a)(1) and 46a-60(a)(4) (the Connecticut Fair Employment Practices Act or CFEPA).

Complainant had begun working for Webster Bank ("Respondent") in 2000 as an Administrative Assistant. She was promoted to the position of Staff Accountant II in 2005. She claims that after her promotion Respondent denied her training, gave her a poor performance evaluation in 2009, and terminated her employment in 2010 based on her race, color (black), national origin (Jamaican), age (born 07/14/1962) and because she had complained about the 2009 performance evaluation.

Complainant contends that a non-black, non-Jamaican Staff Accountant II in her early 20's as well as a non-black, non-Jamaican supervisor were permitted to attend trainings. The same non-black, non-Jamaican, younger Staff Accountant II was retained while Complainant and another black employee, age 50 Staff Accountant II were terminated during Respondent's termination program. The other black employee had also made a complaint regarding his performance evaluation.

Further, she claims that one of her supervisors, Greg Rosetti, had commented that she had no "skin" in the game – referencing the 2008 presidential election – and that younger people and those able to vote should decide the election, and she attributes this comment to her age and national origin.

Lastly, Complainant claims that in 2007 or 2008 another supervisor, Lois Sweeny, posted a Halloween cartoon outside of Complainant's work area that depicted a masked person holding a noose. Neither Mr. Rosetti nor another supervisor, Greg Madar, took any action to stop or remove the cartoon.

CHRO's efforts to eliminate the alleged discriminatory practices and resolve the parties' dispute by conciliation failed and, on April 23, 2012, the matter was referred to the Office of Public Hearings ("OPH").

On May 15, 2013, Respondent filed a motion for summary judgment, accompanied by a supporting memorandum of law in which it claimed, among other things: that denial of training is not an adverse employment action for purposes of establishing a prima facie discrimination case; that some of Complainant's allegations are time-barred; that Complainant cannot prevail in her ADEA claim because she cannot show that age was the "but-for" cause on an adverse employment action; that she cannot make out a prima facie case of retaliation under Title VII, the ADEA, or CFEPA; and that there is no legal theory pursuant to which she can rebut its legitimate, non-discriminatory reason for eliminating her position.

On June 21, 2013, the Commission filed an objection to the motion and a reply memorandum in which it argued, in the alternative, that summary judgment is not allowable under the statutes and regulations that govern OPH proceedings because it "denies Complainant's due process rights by failing to allow her a public hearing on the merits, including the examination of witnesses, presentation of exhibits, cross-examination and legal briefing," and that, even if summary judgment motions are permissible, Respondent's should be denied because Complainant has established a prima facie case of discrimination and under either a disparate impact or disparate treatment theory, there are material facts in dispute that preclude judgment as a matter of law. Compl't's Br. at 2.

Respondent replied on July 12, 2013 arguing that the regulations grant human rights referees full authority and broad discretion to rule on any kind of motion presented to them and citing rulings in which human rights referees had acknowledged this. See *Barnes v. Alan S. Goodman, Inc.*, CHRO No. 0710395 (Ruling on Motion for Summary Judgment, June 5, 2009); *Carretero v. Hartford Public Schools* CHRO No. 0310481 (Ruling on Motion for Summary Disposition, November 28, 2005).

For the reasons set forth below, I hereby deny Respondent's motion.[1]

<u>Summary Judgment in OPH Proceedings</u>

Under Connecticut law, once a matter is referred to OPH it becomes a contested case proceeding within the meaning of, and governed by the Uniform Administrative Procedure Act ("the UAPA") (Conn. Gen. Stat. § 4-166 et seq.), Conn. Gen. Stat. § 46a-84, and the Regulations of Connecticut State Agencies §§ 46a-54-78a through 46a-54-98a (the Regulations).

Pursuant to the UAPA parties to contested case proceedings are afforded the opportunity to call and cross-examine witnesses, introduce evidence and present argument on the issues at an administrative hearing held for that purpose. Conn. Gen. Stat. § 4-177(a); Conn. Gen. Stat. § 4-177c (a) (2). Under the Regulations human rights referees preside over administrative hearings, including the process leading up to them. They are charged with ensuring that contested cases are disposed of on their merits. Regulations § 46a-54-78a (b) (4).

The Regulations specifically permit, and set forth circumstances and standards pursuant to which presiding referees are to consider motions for default[2] and dismissal.[3] Other pre-trial dispositive

[1] This ruling does not apply to complainant's ADEA claim which I have dismissed on jurisdictional grounds.

[2] The presiding referee may, on his or her own or upon motion by a party, enter an order of default against a Respondent who fails to file a written answer to the complaint or fails to appear at a lawfully noticed conference or hearing. Subsequent to entering the default order, the referee may hold a hearing in damages to determine the relief necessary to eliminate the discriminatory practice and make the complainant whole. Regulations § 46a-54-88a (a), (b).

motions, including summary judgment are neither prohibited nor expressly allowed, but the Regulations do not provide a procedural infrastructure supportive of pre-trial summary judgment within the conventional context of administrative proceedings in the OPH. To wit: discovery in contested case proceedings is ordinarily limited to document production and an adjudicative hearing is the prescribed venue[4] for presenting evidence[5] and calling witnesses.[6] Notwithstanding the fact that parties to contested case proceedings are explicitly permitted to stipulate to permit depositions and/or interrogatories (*Regulations § 46a-54-89a (3)*), and that doing so would help enable the summary judgment process, there is no context within which parties to contested case proceedings are required to engage in discovery beyond document production.

The Regulations confer the full authority to control contested case proceedings, including the authority to rule upon "all motions and objections," upon presiding referees,[7] including the authority, as has previously been recognized, to rule on summary judgment motions; see, e.g., *Commission on Human Rights and Opportunities ex rel. Blake v. Beverly Enterprises*, CHRO No. 9530630 (July 8, 1999); *Commission on Human Rights ex rel. Nobili v. David E. Purdy & Company*, CHRO No. 0120389 (January 17, 2003).

Prima Facie Case – Discrimination

Under Connecticut law it is a discriminatory practice "(f)or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, 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 . . .[or] national origin . . ." (Conn. Gen. Stat. § 46a-60 (a) (1)).

Similarly, under Title VII it is an "unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;" (42 U.S.C. § 2000E-2(a)). Pursuant to Conn. Gen. Stat. § 46a-58 (a) a violation of Title VII is also a violation of state law.[8]

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[3] The presiding referee may, on his or her own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant or the commission: (1) Fails to establish jurisdiction; (2) Fails to state a claim for which relief can be granted; (3) Fails to appear at a lawfully noticed conference or hearing without good cause; or (4) Fails to sustain his or her burden after presentation of the evidence. Regulations § 46a-54-88a (d).

[4] Under the UAPA and the Regulations, parties to contested case proceedings are afforded both the opportunity to inspect and copy relevant and material records, papers and documents not in the possession of the party . . . **and at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved."** (emphasis added) Conn. Gen. Stat. § 4-177c (a)(1) and (2)). Regulations §§ 46a-54-78a and 46a-54-89a.

[5] Parties to contested case proceedings may call, examine and cross-examine witnesses and introduce evidence into the record of the proceedings. Regulations § 46a-54-90a (b).

[6] Witnesses at all hearings shall be examined orally, under oath or affirmation. The presiding officer may question witnesses to ensure a full inquiry into all contested facts and to ensure a fair determination of the issues. Regulations § 46a-54-92a.

[7] Regulations § 46a-54-83.

[8] In *Trimachi v. Connecticut Workers Compensation Committee* (sic), 2000 WL 872451, *7 (Conn. Super), the Connecticut Superior Court reiterated the legal tenet long espoused in commission administrative decisions that General Statutes § 46a-58 (a) expressly converts a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws. See, e.g., *Commission on Human Rights & Opportunities ex rel. Adam Szydlo v. EDAC Technologies Corporation*, 2007 WL 4623072 (CHRO No. 0510368, November 19, 2007); *Commission on Human Rights & Opportunities ex rel. Dexter v. Connecticut Dept. of Correction*, 2005 WL 4828672 (CHRO No. 0320165, August 31, 2005). Thus, for example, this tribunal has jurisdiction to adjudicate a Title VII claim provided it is raised under the aegis of (and thus converted to a claim under) § 46a-58 (a).

To establish a prima facie case of discrimination in violation of Conn. Gen. Stat. § 46a-60 (a)(1), a complainant must show: (1) that he belongs to a protected class; (2) that he was qualified for the position; (3) that he suffered adverse employment action; and (4) that the adverse employment action occurred under circumstances permitting an inference of discrimination. See *Jacobs v. General Electric Co.*, 275 Conn. 395, 400-01 (2005). The same analysis is used to evaluate a claim under Title VII. *Terry v. Ashcroft*, 226 F.3d 128, 138 (2d Cir. 2003). "The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." *Craine v. Trinity College,* 259 Conn. 625, 638 (2002).

Prima Facie Case – Retaliation

Under Connecticut law an employer may not "discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or . . . filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84[9] (Conn. Gen. Stat. § 46a (a)(4)).

To establish a prima facie case of retaliation, a plaintiff must show: (1) that he participated in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action against him; and (4) a causal connection between the protected activity and the adverse employment action." *Ayantola v. Board of Trustees of Technical Colleges,* 116 Conn. App. 531, 536, 976 A.2d 784 (2009).

Discussion

Complainant's discrimination and retaliation claims are based on a theory of disparate treatment. "When a plaintiff claims disparate treatment under a facially neutral employment policy, this court employs the burden-shifting analysis set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this analysis, the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." *Craine v. Trinity College at 636-37.* That test is a flexible one. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 n. 6, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

In this case Complainant, who claims discrimination based upon her race, color, national origin, and age, is black, Jamaican, and 48. Despite the fact that her performance evaluation (Resp't's Br., *see* HR Post-review report) reflects that her overall job performance "met expectations," Respondent terminated her employment.

Under the relevant statutes, Complainant has stated a prima facie case of discrimination. Respondent has rebutted that case by articulating a legitimate business reason – a company-wide, cost-cutting reduction in force (RIF) and a reorganization of its accounting department in which eight positions were eliminated – for terminating Complainant's employment. To prevail on her claim, Complainant must

prove that Respondent's stated reason for terminating her employment was actually a pretext for discrimination and/or retaliatory.

Respondent contends that the evidence it provided in support of its motion proves, and that there is no legal theory pursuant to which Complainant can rebut, its legitimate, non-discriminatory reason for eliminating her position.

Complainant does not dispute that Respondent had a legitimate business reason for reducing its workforce, but rather that its decision to include her in the RIF was the result of discrimination. She alleges that her supervisors, Greg Rosetti and Jennifer Adams, treated her differently and less favorably than they treated non-black, non-Jamaican, younger employees. She also alleges that her supervisors, Mr. Rosetti and Mr. Madar, did not intervene when Supervisor Lois Sweeney displayed a Halloween depicting a picture of a masked person with a noose outside of Complainant's workspace in 2007 or 2008. Compl. ¶ 18. Moreover, Complainant claims that Mr. Rosetti made a remark while referencing the 2008 presidential election that Complainant had no "skin" in the game and the decision of the election should be left to younger people and those able to vote. Comp. ¶ 17. She also claims that she was denied training opportunities as far back as 2006.[10]

Respondent does not claim that Complainant lacks evidence to support these allegations, nor has it offered evidence to refute them. It claims that the incidents of offensive conduct were isolated and that Complainant's claims are time-barred. Resp't's Br. at 11-12. The Commission disagrees, claiming that the allegations describe a discriminatory "policy or practice" by the employer that should be considered a continuing violation rather than isolated incidents of discrimination that are subject to the applicable statutes of limitations. CHRO Br. at 18-19.

"The continuing-violation theory extends the statute of limitations where there is proof of specific ongoing discriminatory policies, or where specific and related instances of discrimination are permitted by the employer to continue for so long as to amount to a discriminatory policy or practice." *City of Hartford v. Comm'n on Human Rights & Opportunities*, 2004 Conn. Super. LEXIS 366, citing *Cruz v. Coach Stores*, 202 F.3d 560, 569 n.4 (2d. Cir. 2000).

Complainant has adequately plead facts which, if proven, would show both that her supervisors directly engaged in discriminatory conduct, and that they tolerated discrimination against her in ways that are related to her race, color, age, and national origin. Such proof would justify equitable tolling of the

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[10] Respondent contends that denial of training is not "materially adverse." Resp't's Br. at 10. Respondent points to the Second Circuit's examples of materially adverse employment action, which include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation." Resp't's Br. at 10, citing *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004). Respondent concludes that Complainant is unable to satisfy the "rigorous standard" set forth by the Second Circuit. Resp't's Br. at 11. Complainant, however, is not claiming that the denial of training is the only adverse employment action that she suffered. In her complaint, Complainant alleges that she was denied training and later terminated on the basis of her race, national origin, and age. The *Sanders* court offered broad discretion in assessing when a negative employment action rises to the level of "materially adverse," as it concluded that adverse employment action can include "other indices ... unique to a particular situation." Presently, Complainant was terminated, a decision which Respondent informed her was based upon comparing 2009 performance evaluations between employees in like positions. Compl. ¶ 13. If Complainant was denied training that employees in similar positions were given, and Complainant's performance was compared to those who received training, then the denial of training constitutes an adverse employment action in this instance, as the denial of training may have influenced Complainant's job performance, which bore on whether she survived Respondent's termination program.

relevant filing deadlines under the exception for continuing acts of discrimination that constitute a policy or practice.

Summary Judgment Standard

The presiding tribunal shall render summary judgment when the moving party has demonstrated, with pleadings, affidavits, and any other evidence, that no genuine issue of material fact exists and that, therefore, the moving party is entitled to judgment as a matter of law. In deciding the motion for summary judgment, the tribunal must view the evidence in a light most favorable to the non-moving party and draw all reasonable inferences against the moving party. *Orkney v. Hanover Ins.* Co., 248 Conn. 195, 201 (1999); *Ferucci v. Southern New England Telephone Company*, 2005 Conn. Super. LEXIS 2206, 3; *Langner v. The Stop & Shop Supermarket Company*, 2000 Conn. Super. LEXIS 216, 5; cf. Conn.

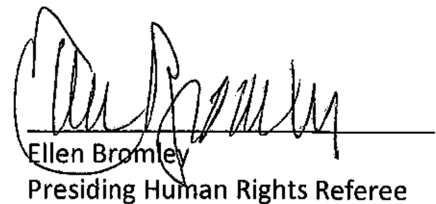
Ultimately, this tribunal's role is not to resolve issues of fact, but to determine if any issue of material fact exists. *Nolan v. Borkowski*, 206 Conn. 495, 500 (1988). A material fact has been defined simply as "a fact which will make a difference in the result of the case." *Hammer v. Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 578 (1990). If a genuine issue of material fact exists, the motion should be denied. See *Nolan v. Borkowski*, supra, 500.

Conclusion

Complainant has shown that there is a genuine issue of material fact as to the role discrimination played in establishing her priority in the RIF and, accordingly, whether her termination was the result of her protected class status. Given that our ordinary rules do not allow extensive discovery, at this point in the proceedings, the record is not sufficiently developed to grant Respondent's motion. Due process requires that Complainant be given the opportunity to call witnesses, present evidence and conduct cross examination that could establish that Respondent's stated reason for her termination as pretextual.

For the reasons stated above, Respondent's Motion for Summary Judgment is DENIED.

Dated this 22nd day of August 2013,



Ellen Bromley
Presiding Human Rights Referee

cc.

Arline Stephenson
Michelle Dumas-Keuler, Esq.
Sarah S. Healey, Esq.
Domenico Zaino, Esq.