

Memorandum of Decision on Motion

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THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Samaradasa Weerahandi

v.

Time/Warner Retail Sales & Marketing, Inc. and Richard Jacobsen

Docket No. HNT-L-636-09

Motion for Summary Judgment

Opposed

Submitted and Decided: August 19, 2011

Oral Argument Waived

The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

This matter is a failure-to-promote action brought under the New Jersey Law Against Discrimination ("LAD"). Plaintiff claims that his former employer, Time/Warner Retail Sales & Marketing, Inc. ("Time/Warner"), and its President and CEO, Richard Jacobsen, failed to promote him to the position of vice president out of discrimination and retaliation.

The plaintiff was hired by Time Warner on February 2, 2002, as Director of Statistical Analysis in the Information management Department. (See Time Employee History Card., Nancy Kunz Cert., Exh. B.) He was hired by Executive Vice President of Information Management, Martin Koschat, and his starting salary was \$125,000. (Plf.'s Dep., Nardone Exh. B, 2-4, Plf.'s Statement of Material Facts, ¶4.) Information Management's role is

Among other things, market analytics and centralized order regulation. We create and uses analytics to assist other TWR functions, such as Sales, Marketing and Finance, in carrying out their responsibilities. Ultimately, we try to provide useful, analytical information so that sound business decision can be made

about a variety of subjects, including the number of magazines that are distributed to retail stores for sale to the general public. The goal is to reduce the number of unsold magazines that are returned to the publishers, since unsold magazines represent a significant cost.

(Kunz Cert. ¶3.)

Plaintiff described his initial position at the company as follows:

Q. Just generally, if you could tell me what your responsibilities were as the director of statistical analysis.

A. Data analysis, analysis development, analytics development, serving as the - oversee web analytics.

Q. Oversee?

A. Oversee web analytics.

Q. Web analytics. Okay.

A. Data quality assurance. Basically that is it.

(Plf.'s Dep., 122:10-20.)

On May of 2006, Koschat left Time/Warner, and plaintiff was promoted to the position of Director of Data Analysis. The position description states that the Director of Data Analysis "[m]anages data management, analysis, research and system development activities that support TWR marketing projects and initiatives and/or requests from Time Inc.'s Marketing Division." (Nardone Cert., Exh. C.) The responsibilities are enumerated as follows:

- Establishes and implements data flow guidelines and processes for the Data Warehouse supporting business research and analysis.
- Designs and develops systems that support data and analytical reports for internal and external clients.
- Designs and implements needed interface (data Portal) to permit users to publish reports.

- Leads, guides and supervises Data Managers in systems & analytical reporting design and development.
- Develops strategies to detect data irregularity and enforce data quality control on data provided by third party vendors.
- Conducts research on new market analytical techniques and systems that can impact company earnings, visibility, and reputation.
- Collaborates with IT department to address data processes and application development issues. Assists IT department in detecting and troubleshooting Data Portal and Data Warehouse problems.
- Consults with end users on use of data sources for their analytical and research projects
- Conducts selected data related research projects.
- Develops and implements statistical models.
- Provides management for direct reports.
 - Assigns and reviews work
 - Assesses performance; coaches and counsels on needed improvements.
 - Identifies development needs, and generates development plans. Sponsors/provides needed training and development.

(Id.)

It is undisputed that, over the course of his employment at Time/Warner, the plaintiff was very involved with the company's Asian American Association ("A3"). (Weerahandi Cert. ¶6.) The plaintiff states that over this time, he communicated frequently with Time/Warner's human resources division about the lack of Asian Americans in the company's upper ranks, and Time/Warner's failure to promote Asian Americans. (Id. ¶7.) The plaintiff states that he met with Jacobsen on October 11, 2007 to address these concerns. (Id. ¶8.) Plaintiff asserts that, during that meeting, Jacobsen made disparaging remarks about Asian-American employees. He certifies as to that interchange as follows:

11. Mr. Jacobsen responded by making a racist remark about Asian Americans. Specifically, Mr. Jacobsen had told me that he has Indian American friend, and he tells them the reason why Asians do not climb up the corporate ladder is because they lack sales and communication skills, or words to this effect.

12. I responded by stating this was not correct. I cited my colleagues who are Indian American and Chinese American who go back to their native countries and become high level executives with large corporations, and return to the United States and are engaged with high level corporate executive in the United States in large sales and high level business deals, or words to this effect.

13. Mr. Jacobsen had no response and appeared annoyed.

However, plaintiff testified at his deposition somewhat differently:

Q. What did he say?

A. He said something like which implied that Asian Americans don't get promoted because they don

Q. I have the communication skills to do sales, this and that. Then I responded. My response was -

A. He - exactly I don't remember, along with anybody else. Which imply that, oh, I have a lot of Indian American friends. I told them that you need to do more communication to get promoted, you need to have sales skills. Then I responded.

Q. You said he said something like Asian Americans don't get promoted because they don't have good communication skills. Is that actually what he said to you/

A. Like, something like. I don't know the terminology he use. That is what I heard in the language, that means no word by word, the way I got the impression. That is what he's trying to tell me as the response to my

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Q. That was your impression of what he said, but it's not actually what he said. Is that fair to say?

A. No. It is actually what he tried to tell me.

..A. he talked about his friends. He said he has Indian American friends?

Q. And he would tell them what?

A. Basically they need to do sales, to communicate, this and that.

...Q. You said they need to do sales. Did he explain what he meant by that?

A. NO.

Q. And you said and communication?

A. Yeah.

Q. What did he mean by that?

A. I don't know.

(Plf.'S Dep., 216:24-218:23.)

In July of 2007, after Time/Warner relocated from Manhattan to Parsipanny, New Jersey, Time/Warner's Controller, Jim O'Donnell, left the company. (Kent Cert. ¶¶4-6.) Peter Fornabaio, the Senior Director of Client Financial Services, left the company shortly thereafter. (Id. ¶8.) At the time both men left the company, Chris Stanford was the Assistant Controller at the company. (Id. ¶5.) He then began to take on many of O'Donnell's and Fornabaio's former responsibilities. (Id. ¶9.) These duties included "work related to TWR's third-party client business, publisher payables and the client book operation in Tampa, in addition to his existing responsibilities." (Id.) Indeed, the comptroller position was essentially an accountant's role, as the he "was responsible for financial and accounting support for TWR's third-party client business and oversaw the financial functions relating to TWR's book distribution as well as TMD." (Id. ¶4.) Stanford is himself a Certified Public Accountant with a Master of Business Administration in Finance and a Bachelor of Science in Accounting. In September of 2007, Stanford was promoted to Vice President of Finance. (Id. ¶9.) In this role, he "was responsible for, among other things, publisher payables, client financial services in New York, client book operations and TMD support, as well as all of his previous responsibilities." (Id. ¶13.)

In October of 2007, the plaintiff notified Vice President of Information Management Diane Kunz that he had received a more

lucrative offer at Pfizer, but that he was happy at Time/Warner and wanted to remain there. (Kunz Cert. ¶¶12-13.) He then asked her whether Time/Warner could improve his position in the company through "a higher salary, a promotion, or more direct reports." (Id. ¶14.) Kunz met with Kenneth Frawley, Vice President of Information Management, and decided not to advocate for a salary increase since plaintiff's salary was already higher than others in his division. (Id. ¶15.) After meeting with Robert Gursha, Executive Vice President and Chief Marketing Officer of Time/Warner, the decision was made not to offer the plaintiff an extra incentive remain with the company, (Id. ¶16.), such as by creating a new Vice President position for him.

Kunz informed plaintiff that he would not be receiving an incentive. (Id. ¶17.) On November 15, 2007, the plaintiff delivered a resignation letter to Kunz, stating that he was resigning as of January 1, 2008. (Kunz Cert. Exh. E.) He thanked Kunz "for the opportunities for professional and personal development that you have provided me during the last five years," and stated that "I have enjoyed working for the company under your supervision and appreciate the support provided me during my tenure in your organization." (Id.) On December 20, 2007, the plaintiff sent Kunz another email, which stated, in pertinent part:

I want to take this opportunity to thank you for being such a good manager, something I would not take for granted from my own experience with some managers who are nice but don't quite know how to manage people. As you know, especially because of this reason, I tried hard (to a level even loosing the Pfizer job offer) to stay here even with just a symbolic gesture - you tried hard in your capacity to do the best, and thanks for trying despite the negative outcome.

(Id. Exh. F.) Then, on December 27, 2007, plaintiff sent an email to many of the employees in the company, which stated "Thank You to everyone I have worked with during the last 6 years. I learned a lot from you and have had such a wonderful experience at TWR." (Id. Exh. G.)

The plaintiff filed suit under the LAD on or about October 27, 2009. The defendants bring the instant Motion for Summary Judgment requesting that the Court dismiss the action.

Analysis:

"A motion for summary judgment is not unlike the unveiling of a statue. The motion substantially supported requires the opposition to remove the shielding cloak and demonstrate the existence of a controversial issue concerning a material fact." *Templeton v. Scudder*, 16 N.J. Super. 576, 585 (App. Div. 1951).

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

The LAD, N.J.S.A. 10:5-12(a) provides:

For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to

submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment[.]

The plaintiff first alleges discriminatory failure to promote under the LAD. In order to make out a *prima facie* case of discriminatory failure promote, the plaintiff must demonstrate, "(1) that [he] is a member of a class protected by the anti-discrimination law; (2) that [he] was qualified for the position or rank sought; (3) that [he] was denied promotion, reappointment, or tenure; and (4) that others (*i.e.*, males) with similar or lesser qualifications achieved the rank or position." *Dixon v. Rutgers*, 110 N.J. 442, 443 (1988). With regard to the first prong, it is clear that plaintiff's claim of national/ethnic discrimination invokes a protected class under the LAD. As to the second prong, the plaintiff offers no proof that he has any qualifications in the area of accounting which is where the Vice President position existed. Further, the Court also finds that the plaintiff is unable to satisfy the third and fourth prongs.

Regarding the second, third and fourth prongs, the plaintiff effectively concedes that he was not turned down for a promotion because he was never up for the promotion, and that Stanford was substantially more qualified for his own promotion than plaintiff was. The plaintiff admits that Stanford was promoted to his position before the plaintiff notified Kunz of his offer at Pfizer; that plaintiff did not have "any day-to-day responsibilities that included the Finance Department;" and that "Kent never considered Plaintiff for the Vice President position in the Finance Department as she was looking for an experienced accounting professional and it never occurred to her to consider someone within Information Management or any other non-finance department employee for the Vice President of Accounting and Financial Services Position." Plaintiff acknowledges Stanford's academic background in accounting, and does not argue that he has any similar education. Further, it appears from the above description of plaintiff's and Stanford's positions at Time/Warner that there was very minimal, if any overlap, between plaintiff's role as a data analyst and Stanford's role as an accountant in a different department of the company. Plaintiff's

Response to Material Fact 8, Kent Cert. ¶¶17-18. Further, plaintiff concedes that Sanford is an African-American, Kent Cert. ¶15. Thus, the Court does not see any grounds for a discriminatory failure-to-promote claim as to Sanford.

As to his further demand as to promotion in his department, plaintiff does not allege that any such position existed. Plaintiff Cert. at ¶15, Kunz Cert. ¶18. In fact, he admits no one was promoted to Vice President in his department. Response to Material Fact 42. Therefore, there was no position for him to be passed over, or to be filled by another person.

The plaintiff additionally files a claim for retaliatory failure to promote. In order to sustain a claim for retaliatory failure to promote under the LAD, the plaintiff must prove that "1) he was engaged in a protected activity known to the defendant; 2) he was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two." *Romano v. Brown & Williamson Tobacco Corp.*, 284 N.J. Super. 543, 548-49 (App. Div. 1995).

The plaintiff has not offered any evidence that he was subjected to adverse employment action. He concludes in his brief that he did not receive a promotion due to his conversation with Jacobsen on behalf of A3. Response to Statement of Material Fact 27b. However, he merely states that this is true without offering any evidence or citation to the record in support of that proposition.¹ He offers no evidence that there was a promotion available in his department or appropriate for his qualifications, and does not dispute the defendant's evidence that he was never being considered for Stanford's promotion. Response to Material Fact 42, 47, 60-62. This finding is further buttressed by the well-wishing emails he sent to his coworkers prior to his departure. Further, he admits he left to make \$17,000 more, not because of his heritage. Response to Material Facts 28 and 37. Moreover, he does not offer a scintilla of proof that Jacobsen himself or the conversation with him had anything to do with his status in the company but rather admits he resigned voluntarily. *Id.* Thus,

¹ The Court notes that several of plaintiff's denials of material facts do not cite to the record in violation of R. 4:46-2(b). E.g., Responses to 33, 35, 36. He thus offers no evidence as to Kunz's alleged duplicitous conduct, although he does admit she suggested his staying on the payroll to the end of the year to collect his bonus, Response to Nos. 34 and 77, and that Kunz was a very good manager who did not discriminate or retaliate against him. Response to No. 38.

the Court must find that there has been no proof of retaliatory action in this case.

It is true that the standard on a Summary Judgment Motion is not whether the plaintiff would prevail at trial, but merely whether an issue of material fact exists such that the plaintiff may credibly make his case. On the other hand, a Court cannot deny summary judgment simply because the plaintiff puts forth some sort of an argument in opposition. R. 4:46-2(c) provides that "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to a trier of fact." In a case such as this, where the plaintiff has offered no credible proofs to sustain his case, summary judgment is appropriate.

Finally the Court dismisses the plaintiff's claim for punitive damages, as such is tied to his claims under the LAD.

For the reasons discussed above, defendants' Motion for Summary Judgment is **GRANTED**.