

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

VERONICA BIKOFSKY, D.M.D.,

Plaintiff

v.

SAINT BARNABAS CORPORATION,
NEWARK BETH ISRAEL MEDICAL
CENTER, INC. and JOHN A. BRENNAN,
M.D.,

Defendants

SUPERIOR COURT OF NEW JERSEY

ESSEX COUNTY

DOCKET NO.: ESX-L-3176-10

OPINION

Decided: February 8, 2013

By: Thomas R. Vena, J.S.C.

Oral argument was held before this Court on February 8, 2013. Mark J. Blunda, Esq. of Appruzzese, McDermott, Mastro & Murphy, P.C. appeared on behalf of defendants. Andrew Dwyer of the Dwyer Law Firm, L.L.C. appeared on behalf of the plaintiff Veronica Bikofsky.

DISCUSSION

This is defendants' motion for summary judgment. Plaintiff filed suit against defendants under the New Jersey Law Against Discrimination ("LAD") N.J.S.A. § 10:5-1 et seq. alleging age discrimination and aiding and abetting.

Plaintiff is a licensed dentist. Starting in 1979, defendant Newark Beth Israel Medical Center (“NBIMC”) entered into a License Agreement whereby a group of dentists known as the Beth Dental Group was granted a non-exclusive right to utilize Dental Health Care owned by NBIMC at its Newark Campus. The Beth Dental Group was a private practice that treated paying patients; i.e., those with insurance and/or the ability to pay. Plaintiff began working for the Beth Group in early in 1981, and later in 1981 was responsible for directing the practice. In 2001, plaintiff’s employment arrangement changed somewhat and she was required to apply for employment at NBIMC. Plaintiff applied for, and was hired full-time at NBIMC, but continued to run the Beth Dental Group. She remained employed in this capacity until her employment with NBIMC was terminated in 2009.

At the same time, NBIMC also operated an academic Dental Residency Program in the same location as the Beth Dental Group. Included as part of the Dental Residency Program were the Dental Clinic, for indigent patients, non-insured patients, Medicaid patients, and Charity Care patients. Residents and attending physicians who taught in the Dental Residency program treated patients in the Dental Clinic.

As of 2008, NBIMC was losing tens of millions of dollars each year, and so management was directed to make the necessary cuts to stem the losses. The cuts were-hospital wide and impacted entire programs, individual doctors, and support personnel. Initially, NBIMC planned to eliminate all three components of its dental program: the Dental Residency program, the Dental Clinic, and the Beth Dental Group. On October 30, 2008, NBIMC notified Bikofsky that they were terminating the License Agreement with Beth Dental Group pursuant to the terms of the agreement. The Beth Dental Group

was allowed to stay through April 2009 in order to wind down its practice and inform its clients about the impending move.

After plaintiff was terminated, it is undisputed that the Dental Residency Program expanded and began treating insured and paying patients in addition to continuing to treat indigent and Medicaid patients. Plaintiff alleges that at least one new resident was hired and that a new “Beth Dental Practice” was established after her termination, which occupies the exact same space and performs the exact same work previously performed by plaintiff and the Beth Dental Group. Defendants dispute this, and also allege that after 2009, NBIMC implemented a new business model where the income from the fee-paying dental patients now goes to NBIMC rather than a private dental practice, such as the Beth Dental Group.

Motions for summary judgment are governed by Rule 4:46-2, which requires a court to grant summary judgment upon a moving party’s showing “that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law.” In Brill v. Guardian Life Insurance, 142 N.J. 520 (1995), the New Jersey Supreme Court propounded the standard for granting summary judgment under R. 4:46-2, holding that the judge must consider, “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.” The burden is placed on the movant to exclude any reasonable doubt as to the existence of any genuine issue of material facts and all inferences of doubt are drawn

against the moving party in favor of the opponent. Heller v. Hartz Mountain Industries, 270 N.J. Super. 143, 149 (Law Div. 1993).

Count One of plaintiff's complaint alleges age discrimination in violation of the LAD N.J.S.A. § 10:5-12. Claims brought pursuant to this statute are judged according to the burden-shifting analysis prescribed by McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999). This analysis includes three stages. First, a plaintiff must be able to provide a prima facie case of discrimination. Beatty v. Miller, 366 N.J. Super. 69, 74 (App. Div. 2004). Once plaintiff proves a prima facie case, the burden then shifts to the employer who must "come forward with admissible evidence of a legitimate non-discriminatory reason for its rejection of the employee." Bergen, 157 N.J. at 210. If an employer is able to produce such evidence and rebut the presumption of discrimination, the burden shifts back to the plaintiff to show "by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision, but was merely a pretext for discrimination." Id. at 211.

The first step for plaintiff then, in this case, is to establish a prima facie case of discrimination based on her age. To establish a prima facie case of age discrimination, a plaintiff must show that:

(1) [s]he was a member of the protected class; (2) [s]he was performing the job at the level that met the employer's legitimate expectations; (3) [s]he was discharged; and (4) the employer sought another to perform the same work after the complainant had been removed from the position.

Reynolds v. Palnut Co., 330 N.J. Super. 162, 167 (App. Div. 2000).

Here, plaintiff can make out a prima facie claim for age discrimination. It is undisputed that she was a member of a protected class, as she was in her seventies at the time of her discharge. It is also undisputed that plaintiff was a competent dentist whose performance met her employer's expectations. It is further undisputed that plaintiff was discharged in April, 2009, and finally, after plaintiff's termination, it is not disputed that NBIMC sought others to perform the same work after the complainant had been removed from her position. See Defendants' Reply Brief at 2, "The existing Dental Residency Program and associated clinic now treat insured and paying patients, as well as indigents. Dental Residents in training now treat paying and insured patients, as well as indigents."

Having made out a prima facie case for age discrimination, the burden now shifts to defendants to produce evidence of a legitimate, non-discriminatory motive for its actions. Defendants claim that their legitimate, non-discriminatory reason for terminating plaintiff was simply an economic one, and that plaintiff fell victim to hospital-wide budget cuts that affected entire programs, and resulted in the loss of more than one-hundred eighty positions, as NBIMC was able to save \$24 million at a point in time when the hospital was losing tens of millions of dollars each year. Plaintiff does not dispute that the hospital was in the midst of financial hardships at the time of her termination, and must now demonstrate that defendants' economic considerations were merely the pretext for her termination. "An employee successfully meets this burden by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 199-200 (App. Div. 1998) (quotations omitted). Specifically:

[T]he plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons, ..., was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).... [To do so,] the non-moving [party] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," ... and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.' Greenberg, 310 N.J. Super. at 200 (App. Div. 1998) (citations omitted).

To avoid summary judgment, then, "the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons, . . . , was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext). Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 431 (App. Div. 1995) (quoting Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d. Cir. 1994). To prevail on a motion for summary judgment, it is not necessary that plaintiff prove that the only inference to be drawn is that the employer acted in a discriminatory manner. Rather, plaintiff "need only point to sufficient evidence to support an inference that the employer did not act for its proffered non-discriminatory reasons." Kelly v. Bally's, 285 N.J. Super. at 432 (App. Div. 1995) (citing Josey v. John R. Hollingsworth, Corp., 996 F.2d 632 (3d Cir.1993).

Here, plaintiff has produced sufficient evidence that could allow a reasonable fact-finder to draw an inference that defendants did not act for their proffered legitimate, non-discriminatory reason. First, as to defendants' assertion that plaintiff's position was eliminated as a cost-saving measure, a reasonable inference could be drawn that since the dental program was not entirely eliminated, and since the dental residents continued doing the work formerly performed by plaintiff, and since defendants terminated a

program that was profitable at the time of its elimination, that defendants' proffered reason was merely pretextual.

Additionally, plaintiff has produced evidence of statements made by defendants that, if believed, could reasonably allow a fact-finder to infer that defendants acted with a discriminatory animus. In Abrams v. Lightolier Inc., 50 F.3d 1204 (3d Cir. 1995), a Third Circuit case involving LAD claims, the Court held that "discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." Abrams, 50 F.3d at 1214. Additionally, "discriminatory comments by an executive connected with the decisionmaking process will often be the plaintiff's strongest circumstantial evidence of discrimination, [and as such,] they are highly relevant and a trial court's decision to admit such evidence should ordinarily be upheld." Id. at 1215.

In this case then, it is appropriate to admit statements made by Connie Labat, Darnell Terry, David Seldin, John Brennan, and Patrick Donahue. Each statement relates in some way to plaintiff's age, and while more than one inference concerning each statement can be drawn, a rational factfinder could reasonably infer discriminatory animus in each of the statements. Further, it is irrelevant that each of the statements may or may not have been made by the individual who actually terminated plaintiff. Rather, "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." Abramson v. William Paterson College, 260 F.3d 265, 286 (3d Cir. 2001). Since one inference that a reasonable fact-finder could draw is that defendants' proffered reasons for terminating plaintiff were merely pretextual, summary judgment is not appropriate at this time and the motion is denied.

Finally, as to plaintiff's claim against John Brennan for aiding and abetting the alleged discrimination, summary judgment is likewise inappropriate. To hold an individual liable under an aiding and abetting theory under the LAD, a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). Here, the Court has found that a factfinder could reasonably find that defendants performed a wrongful act that caused an injury. Since John Brennan authored the letter terminating plaintiff's employment, if a factfinder were to find illegal discrimination, it could also reasonably find that Mr. Brennan was aware of his role in the illegal or tortious activity and that he knowingly and substantially participated in the violation. Because of these genuine issues of material facts, summary judgment as to the aiding and abetting claim is also denied.