Arvin Creef v. Cognex Corporation

No. 0500182.

Superior Court of Massachusetts, Norfolk County.

Feb. 5, 2007.

Opinion By: John P. Connor, Jr., Justice.

INTRODUCTION

The present case involves a claim for age discrimination. The plaintiff at age 56 was terminated from his employment by the defendant, Cognex. He alleges that the termination was based on age discrimination. He is seeking relief under General Laws, Chapter 151B, § 4 and the Age Discrimination Employment Act ("ADEA"), 29 USC § 623(A)(1) and Title VII. Cognex has moved for summary judgment.

BACKGROUND

The procedure for summary judgment is detailed in Mass.R.Civ.P. 56 and Sup.Ct.R. 9A(b)(5). The court, in making its decision, reviews pleadings, deposition, answers to interrogatories, responses to requests for admission, and affidavits. It begins with a consideration the moving party's Statement of Undisputed Facts, the nonmoving party's response, and any supplements.

These materials are reviewed according to prescribed guidelines. Facts in a Statement of Undisputed Facts will be deemed admitted if there is either no response, an irrelevant response or a bald, unsupported conclusion. *Deziamba v. Warner Stackpole,* 56 Mass.App.Ct. 397, 398-401 (2002).

In this case, the plaintiff's responses to the defendant's Statement of Undisputed Facts consisted of pages upon pages of detailed, rambling and often irrelevant statements. They also consisted of statements by the plaintiff which were contradictory to the testimony in his earlier deposition. The plaintiff showed no appreciation for Sup.Ct.R. 9A(b)(5), which is an "anti-ferreting rule designed to assist a trial judge in the all too difficult situation in which the parties throw a foot high mess of undifferentiated material at the judge." *Id.* at 399.

There are several critical issues in every employment discrimination case. One that was not contested in this case was the fact that the plaintiff performed satisfactorily prior to his termination, yet the plaintiff spent seven pages describing his satisfactory work history in response to the defendant's second undisputed fact which merely asked for an acknowledgment that the defendant had a policy prohibiting discrimination. Statement No. 5 asked for an acknowledgment that in 2002 sales began to decline for one of the defendant's products. Rather than respond directly, the plaintiff spent the better part of a page, once again, describing his satisfactory work history. He then repeated that in response to the defendant's next four statements. Statement No. 20 asserted that when the product sales did not improve, the defendant determined more decisive leadership was needed in the plaintiff's position but that at the same time, defendant hoped to provide the plaintiff with another position. Again, plaintiff's response was to reassert over two pages that he had performed effectively. He then continued to repeat that response to subsequent statements. This same pattern continued throughout the plaintiff's responses.

It is understandable that the plaintiff felt aggrieved by being terminated after performing satisfactorily but he did not need to focus on that issue. By doing so he imposed a difficult burden on the court to sift through pages of repetitive responses that were largely irrelevant to find some relevant facts imbedded therein.

A second deficiency in the plaintiff's response was his affidavit which contained statements of facts that

were inconsistent and contradictory in critical places with his prior deposition. This approach is prohibited and when it occurred, I disregarded the affidavit statements. “A party cannot create a disputed fact (simply) by contradicting by affidavit statements previously made under oath in a deposition.” *O'Brien v. Analog Devices, Inc.*, 34 Mass.App.Ct. 905, 906 (1993). While there are exceptions to this rule for such things as newly discovered evidence, none exists in this case. See *Perma Research and Dev. Co. v. Singer Company*, 401 F.2d 572, 578 (2d Cir.1969).

Finally, and most disturbing are misleading statements relating to the plaintiff's performance. Repeatedly, when it is irrelevant, there is reference to his satisfactory performance. In so doing Counsel overstates his case. For instance, he asserts that the plaintiff's “overall evaluation prior to discharge was given a 2.875 ... above expectations” but nowhere does he state in what year that evaluation was earned. He then compares that evaluation to that of the woman hired to assume part of his responsibilities. The evaluation is not helpful and is an attempt to compare apples to oranges.

Reviewing the facts which I may consider in a light most favorable to the plaintiff, I find as follows. The defendant designs, manufactures, and markets machine vision machines. The plaintiff was hired by Vice President of Sales, Kris Nelson, age 51 in August of 1999 just prior to his 52nd birthday. He was given the position of Director of End User Sales. In July 2002, at age 54, he was promoted to Vice President of End User Sales. In this position he was responsible for creating and implementing a sales strategy and of hiring a staff with the goal of getting the defendant into industrial markets.

The sales for one of the defendant's major products began to decline in late 2002 and continued into 2003. It was determined by the plaintiff's supervisors, Nelson, age 54 and Hoffmaster, age 50, that the plaintiff had not found a remedy for the problem. They had also received negative feedback from a key customer concerning the plaintiff's performance. They decided a change was necessary and removed the plaintiff from his position in April of 2003. At the same time, they offered the plaintiff the position of Vice President of Distribution. The plaintiff accepted at the same pay and with the same benefits as his former position.

In his new position, the plaintiff had responsibility for creating a distribution strategy and implementing that strategy to achieve sales. In October 2003, the defendant hired Kevin O'Connor to succeed the plaintiff as the Vice President of End User Sales. He brought with him to that job an extensive work history in management and product distribution.

By the end of 2003, O'Connor, who supervised the plaintiff, realized that the existing distribution channel development and management functions at the defendant were not meeting the distribution needs. O'Connor determined that with his own skills in strategy, the defendant did not need a second vice president level position in the area of sales and distribution. Rather, Cognex needed a lower level manager to focus on implementing functions including attracting new distributors.

In January 2004, the plaintiff was told by O'Connor that his job was being eliminated and that a person would be hired to assume some of his duties (Creef Dep. 293, line 22-294, line 14 and 196, line 22-197, line 2). O'Connor admitted the termination decision was no reflection on the plaintiff's performance. The plaintiff acknowledged that O'Connor had the experience to perform some of the functions of the plaintiff's job.

After the plaintiff was terminated, Lisa Eichler, age 34, was hired as manager of channel development to assume the “implementation of strategy” functions formerly part of the plaintiff's job. She had a bachelor's degree in engineering and had gained a substantial background in product distribution over the prior decade at General Electric. Where the plaintiff had been earning $143,900.00 with a potential of $35,000.00 in bonuses, Fischler was paid $115,000.00 with a $20,000.00 bonus potential. She was assigned to the plaintiff's desk and became the contact person for distributors. With the new system in place, the defendant signed up twenty-four additional distributors before the end of 2004, compared with the six distributors added by the plaintiff.

The plaintiff claims that Cognex discriminated against him by terminating his employment solely because of his age. He brings this action under both General Laws Chapter 151B, § 4B, and the ADEA, 29 USC § 623(A)(1) and Title VII, 42 USC § 2000e-16(c). The defendant has responded that the sole reason for the termination was corporate restructuring which eliminated his position.

DISCUSSION

Summary judgment is appropriate when the moving party shows that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Cassesso v. Comm'r of Correction,* 390 Mass. 419, 422 (1983). When evaluating a summary judgment motion, the court looks at the evidence in the light most favorable to the non-moving party. See Mass.R.Civ.P. 56(c); *O'Sullivan v. Shaw,* 431 Mass. 201, 203 (2000). The moving party bears the burden of establishing the absence of a triable issue. *Pedersen v.. Time, Inc.*, 404 Mass. 14, 17 (1989). Once the moving party meets this burden, the burden shifts to the non-moving party to allege specific facts establishing the existence of a general issue or issues of material facts; he may not rest merely on the pleadings. *Correllas v. Viveiros,* 410 Mass. 314, 317 (1991); *Godbout v. Cousens,* 396 Mass. 254, 261 (1985). Bare assertions and conclusions regarding one's understanding, beliefs, and assumptions are not enough to withstand a well-pleaded motion for summary judgment. *Polaroid Corp. v. Rollins Environmental Serv. (N.J.), Inc.*, 416 Mass. 684, 696 (1993).

"Summary judgment is generally disfavored in the context of discrimination cases based on disparate treatment." *Brunner v. Stone & Webster Eng'g Corp.*, 413 Mass. 698, 705 (1992) (where motive, intent or state of mind questions are at issue, summary judgment is often inappropriate because they are factual questions) (quoting *Flesner v. Technical Communication Corp.*, 410 Mass. 805, 809 (1991); *Anderson v. Bessemer City,* 470 U.S. 564, 572-73 (1985)). A defendant's motion for summary judgment has been upheld when the plaintiff's evidence of intent, motive, or state of mind has been found insufficient to support a judgment in the plaintiff's favor. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 440 (1995).

In an age discrimination case brought under G.L.c. 151B in order to prevail the plaintiff must prove: 1, that he was a member of a protected class; 2, that he suffered harm; 3, that the defendant acted with a discriminatory animus; and 4, that the harm was caused by the discriminatory animus. *Lipchitz v. Raytheon Corp.*, 434 Mass. 493, 502 (1991). This discriminatory animus is often not provable with direct evidence and to cope with this problem the court employs a three-stage, burden shifting paradigm. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973); *Sullivan v. Liberty Ins. Co.*, 444 Mass. 34, 40 (2004). Simply stated the three stages first require the plaintiff to establish prima facie case. The burden shifts to the defendant to establish a lawful reason for the termination and then the burden reverts to the plaintiff to establish that the reason was a pretext for discrimination. *Abramian v. Fellows of Harvard College,* 432 Mass. 107, 117 (2000)

In most discrimination actions, to establish a prima facie case of termination based on unlawful discrimination under G.L.c. 151B the plaintiff must make a showing: 1, that he was a member of a protective class; 2, that he performed his job satisfactorily; 3, that he was terminated; and 4, that the employer sought to hire a person outside the protective class with similar qualifications. *Id.* at 116. In a reduction in force case such as this, the fourth element is not workable and is replaced by requirement that the plaintiff must "produce some evidence that (his) layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination." *Sullivan* at 45.

As with most reduction in force cases, in the present case there is no dispute with regard to the first three elements. The plaintiff at age 54 was within the "over forty" protected age class. G.L.c. 151B, s.1(8). After satisfactory performance of his job, he was terminated. The sole element of dispute is whether there was a reasonable inference of unlawful discrimination in his termination.

The plaintiff's job disappeared at the time of the plaintiff's termination. The more cerebral functions

included developing a distribution strategy. This function was assumed by the plaintiff's supervisor, O'Connor. The second part of his job involved the hands-on work of implementing the strategy by developing and maintaining a stable of distributors. This fell to the new employee, Eichler. She was substantially younger than the plaintiff and obviously outside of the protected age group (over 40). There is no question but that the plaintiff was far more qualified to oversee the responsibilities of product distribution than Eichler. However, those qualifications were no longer going to be necessary with O'Connor utilizing his experience to handle the strategy issues. A lower level person was sufficient to handle the details of working with the distributors and Eichler had ten years of doing that type of work for General Electric. She was hired not as a Vice President but as a "Director" of distribution at a salary $25,000.00 less than that of the plaintiff.

Other than the plaintiff's bald conclusion ("almost comical" that Eichler did not replace him) [FN1] and blatant hearsay (plaintiff in his affidavit stating that his former administrative assistant said that Eichler had the plaintiff's old job) there is no factual support for his allegation that Eichler assumed all of the plaintiff's responsibilities.

Perhaps the plaintiff's case is best summed up by his own words at his deposition. When asked what he considered to be the basis for discrimination, he responded that he was terminated and replaced by a younger woman and that he was aware of no other reason. The age difference itself was not enough to raise an inference of discrimination. When viewed as part of the totality of the facts and circumstances, the inescapable, unrebutted evidence is that Eichler was hired to perform only a part of the plaintiff's job. The balance of it was assumed by the current Vice President and when that happened the plaintiff's job disappeared.

Assuming arguendo, that the plaintiff had established a prima facie case the burden then turned to the defendant to articulate a legitimate, non-discriminatory reason for the termination. See *Blaire v. Hurley Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 441-42 (1995); *Knight v. Avon Products, Inc.*, 438 Mass. 413, 420, n. 4 (2003). The defendant has satisfied that burden with the evidence that O'Connor made a staffing decision which was unfortunate for the plaintiff but was a legitimate business decision. Because of his extensive background in product distribution, O'Connor had the expertise to assume the strategic aspects of development and the day-to-day implementation of that strategy could be adequately handled by a lower level management employee. In dividing the job function the plaintiff's job was eliminated. In the face of the evidence, the plaintiff was required to produce evidence that would enable a jury to find that the proffered reason was a pretext for discrimination. Mass.R.Civ.P. 56(e). Other than his own opinion, plaintiff offered no evidence except the age of the new hire to bolster his allegations of discrimination.

The ADEA and G.L.c. 151B are parallel in almost every respect with regards to the elements and methods of proof of age discrimination. See *Cruz-Ramos v. Puerto Rico Sun Oil Company,* 202 F.3d 381, 384 (1st Cir.2000). The only difference is in the formulation of the fourth element of a prima facie case in an employment reduction situation. Under federal law the plaintiff has the burden of making a showing that the defendant retained younger persons in the same position or otherwise failed to treat age neutrally in implementing the reduction in force. Compare to G.L.c. 151B which requires a production of some evidence that the layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination. *Cruz-Ramos* at 384.Other than the fact that a person under forty was hired to handle the more mundane aspect of the plaintiff's responsibility, there has been no showing by the plaintiff based upon personal knowledge to support the proposition that Eichler or some other person outside of the protected age group was retained in the plaintiff's position.

A claim has also been made under Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000e et seq. However, this action must fail since Title VII limits private actions for discrimination to those "based on race, color, religion, sex or national origin."42 U.S.C. § 2000-16(a); *Lennon v. Rubin,* 166 F.3d 6 (1st Cir.1999).

The defendant's motion for summary judgment is allowed on the plaintiff's claims under G.L.c. 151B, the ADEA, 29 U.S.C., § 623 et seq. and Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000 et seq.

FN1. Plaintiff's response to material fact p. 27.