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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. CRAWFORD PART 47

0115683/2000

METE, JOHN L.
VS
STATE OF MENTAL RETARDATION

INDEX NO. _____

MOTION DATE 4/18/03

MOTION SEQ. NO. _____

MOTION CAL. NO. 6

SEQ 2

REARGUMENT/RECONSIDERATION

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

SCANNED MAY 12 2003

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/14/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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JOHN L. METE and MERRILL J. GOTTLIEB, individually and on behalf of all other persons similarly situated

Index No. 115683/2000

Plaintiffs,

DECISION AND ORDER

-against-

NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

Defendants.

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PAULA J. OMANSKY, J.:

Motion sequence nos. 002 and 003 are consolidated for disposition. In this action for age discrimination under the Human Rights Law (Executive Law, Article 15, §296, et seq.), plaintiffs John L. Mete and Merrill J. Gottlieg, individually and on behalf of all other persons similarly situated, move (motion sequence no.002), pursuant to CPLR 2221, for leave to renew and/or reargue and/or to reconsider a decision and order of this court dated September 18, 2002 and entered on October 3, 2002 (the "September 2002 order"), and upon reargument/renewal/reconsideration move to vacate that portion of the September 2002 order which dismissed plaintiffs' fourth cause of action, on grounds that there are triable issues of fact as determined by the decision of Judge Neal P. McCurn, United States District Court, Northern District of New York (the "Federal Court") dated November 5, 1997 (the "McCurn 1997 order").

Defendants Developmental Disabilities ("OMRDD") and the New York State Department of Civil Service ("DSC") move (motion sequence no.003), for leave to reargue this court's September 2002 order and upon reargument to vacate the September 2002 order and grant defendants' motion for summary judgment and dismissing plaintiffs' complaint in its entirety on the ground that the court overlooked certain facts and arguments contained in the prior application and supporting memoranda.

FACTS

In mid 1989, defendant OMRDD undertook a staff reduction which involved complete elimination of the Chief of Service job title, followed by a demotion or retirement of all incumbents holding that job title. As a result, all 46 incumbents, including plaintiffs, each of whom was over the age of 40, were demoted, or allegedly forced to retire from State service.

The facts of the alleged discrimination are fully outlined in this court's September 2002 order and shall not be restated here.

On October 4, 1991, plaintiffs filed a complaint in the U.S. District Court, Eastern District of New York. On February 5, 1992, the complaint was removed to the U.S. District Court, Northern District of New York. On June 24, 1993, the Hon. Neal P. McCurn, granted plaintiffs' motion to proceed as a class action under 29 USC § 216(b).

Defendants moved in Federal Court to dismiss plaintiff's

entire complaint. On November 5, 1997, the Federal Court issued the McCurn 1997 order which denied defendant's motion to dismiss plaintiffs Federal age discrimination claims and found that

> [p]laintiffs have identified the RIF[1] as the specific employment practice that had a disparate impact upon them. Through its statistical evidence plaintiffs demonstrated that this practice had an adverse impact on defendants' older employees. As more fully discussed ..., plaintiffs have shown that the disparity found is statistically significant in that their expert Dr. Greenberg attested that the chance of the disparate impact occurring on the protected class by chance is less than one in 100,000 ... . While this statistical disparity alone could possible establish plaintiff's prima facie case, when coupled with other evidence of discrimination contained in the record, plaintiffs have established their prima facie case ...

(McCurn 1997 order at 39-40 [citations omitted]).

The Federal Court held that an issue of fact existed. In addition, the Federal court dismissed the plaintiffs' cause of action under the New York State Human Rights Law for lack of subject matter jurisdiction. The McCurn 1997 order was not submitted on the prior applications.

On January 20, 1998, the litigants obtained a stay of all proceedings in the Federal court action pending a determination by the U.S. Supreme Court in a separate matter concerning whether the Eleventh Amendment to the US. Constitution prohibited imposing employer liability on States and State Agencies under the Federal Age Discrimination in Employment Act of 1967 (the "ADEA") (29 USC

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[1] Staff reduction-in-force ("RIF").

§ 621).

On January 11, 2000, the United States Supreme Court in Kimel v Florida Board of Regents (528 US 62, 79 [2000]) held that Congress' extension in 1974 of the prohibitions of the ADEA to the States and their agencies was an invalid exercise of Congress' power under section 5 of the Fourteenth Amendment

Based on the Supreme Court's Holding in Kimel, Judge McCurn dismissed plaintiffs' Federal court action. Plaintiff commenced the present State action pursuant to section 205(c) of the CPLR.

The remaining facts have been more fully outlined in this court's September 2002 order and shall not be restated here.

DISCUSSION

This court grants the parties leave to reargue/renew the prior September 2002 order to determine the issues raised herein.

Disparate Impact

This court denies that branch of defendants' argument which seeks to dismiss the disparate impact claim based on the Third Department's holding in (Bohlke v General Electric Co., 293 AD2d 198, 200 [3d Dept], lv dismissed 98 NY2d 693 [2002]), which adopted the Second Circuit's analysis in Criley v Delta Air Lines, Inc., (119 F3d 103, 105 [2d Cir], cert denied 522 US 1028 [1997]).

Defendants have failed to show that the court overlooked or misapprehended the facts or the law, or, for some other reason, mistakenly arrived at its earlier decision (William P. Pahl Equip.

Corp. v Kassis, 182 AD2d 22, 27 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992], rearg denied 81 NY2d 782 [1993]). Reargument is not designed to afford the unsuccessful party a second opportunity to argue issues previously decided, or to present arguments different from those originally asserted **(id.).**

This court based its prior determination on the fact that the New York Court of Appeals has not eliminated the application of the disparate impact theory in age discrimination suits (Levin v Yeshiva University, 96 NY2d 484, 492 [2001]). As this court held in the September 2002 order, the First Department has continued to recognize both disparate treatment and disparate impact claims (Abbott v Memorial Sloan-Kettering Cancer Center, 276 AD2d 432 [2000]) and has not specifically ruled on the question of the availability of disparate impact theory on State age discrimination claims (Becker v City of New York, 249 AD2d 96, 97 [lst Dept 19981).

Accordingly, this court correctly sustained plaintiffs' theory of age discrimination under the theory of disparate impact by holding that the application of the Second Circuit's ruling in Criley v Delta Air Lines (supra) to State law contradicts the Court of Appeals' clear and unequivocal holding in People of the State of New York v New York City Transit Authority (59 NY2d 343, 348-349 [1983]) which

> interprets the Human Rights Law to prohibit discrimination based on policies or activities which disparately impact on the classes protected under the statute. Morever, the difficulties of applying the pleading requirements of the ADEA which has a more limited age range[2] as its protected class, to New York's broad statutory scheme is self-evident. Given the Court of Appeals' directive and the First Department's recognition of disparate impact as a viable theory under the State discriminatory scheme this court declines to issue a holding which eliminates all disparate impact claims for age-based discrimination claims by older workers who, in a youth-obsessed culture, are more often the targets of both disparate treatment and disparate impact forms of discrimination. A weakening of New York's anti-discrimination protections is not in keeping with the intent of the New York Legislature as indicated by the plain wording of the Executive Law. Except for certain mandated retirement provisions[3] and job positions "where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business" (Executive Law § 296 [3-a][d]), New York State Law dictates that age cannot be a factor in employment decisions once a person has reached 18, the age of majority (Executive Law §§ 296[1] and 296[3-a][a]).

(September 2002 order, at 9-10).

Accordingly, plaintiff need not plead nor prove that defendants discriminated against all persons age 18 and over as this would render the age discrimination portion of Human Rights Law meaningless and would contradict the clear legislative purpose of the State statute which is to bar discriminatory employment decisions based on age after a person has reached his or her majority. In this instance, "plaintiffs have stated a prima facie

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[2]The ADEA prohibits discrimination against persons who are between the ages of 40 and 65 (29 USC § 631[a] and [b]).

[3]Executive Law § 296 (3-a)(e) and (f).

case by presenting statistical evidence which purports to show that workers over forty years of age were disproportionally impacted by the OMRDD's decision to reorganize its work force" (September 2002 order, at 11).

That branch of defendants' motion (motion sequence no 003) to reargue is denied.

Standard of Review

This court declines to vacates its findings in the September 2002 order and substitute the findings of the Federal Court in the McCurn 1997 order on the ground of res judicata/collateral estoppel. It is well settled that "[a] motion for summary judgment does not direct the court's attention to the sufficiency of the pleading, but rather to the factual basis for the action or defense" (Buckley & Company, Inc. v City of New York, 121 AD2d 933, 934 [1st Dept 1986], appeal dismissed 69 NY2d 742 [1987]). Once the court has granted or denied a summary judgment motion based on the facts adduced before it, the matter is res judicata (id. at 935). Hence, the determination becomes law of the case barring a subsequent summary judgment claim on the same proof (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21, at 327).

However, the doctrine of law of the case does not apply in this instance since the New York Supreme Court is not a coordinate jurisdiction to the Federal District Court (Mosher-Simons v County

of Allegany, 99 NY2d 214, 218 [2002]). In addition, the McCurn 1997 order was not a decision on the merits (cf. Bardi v Warren County Sheriff's Dept., 260 AD2d 763, 765 [3d Dept 19991 and State Bank of Albany v McAuliffe, 108 AD2d 979 [3d Dept], appeal denied 65 NY2d 741, appeal denied 65 NY2d 603 [1985]). Instead, the underlying McCurn 1997 order differs from the aforementioned cases in that the Federal Court did not grant any party summary judgment (Whitfield v JWP Forest Electric Corp., 223 AD2d 423 [1st Dept 19961) and the age discrimination claim was not fully litigated (see, Twumasi v TJMT Transportation Servs., Inc., 292 AD2d 193, 294 [1st Dept], lv denied 98 NY2d 616 [2002]). Unlike the situation where dismissal of a claim by Federal Court precludes all causes of action mirroring the Federal claim (Mosher-Simons v County of Allegany, supra]), the Judge McCurn's denial of summary judgment has no preclusive effect (see, Di Cocco v Capital Area Community Health Plan, Inc., 159 AD2d 119, 123 [3d Dept 19901, appeal denied 77 NY2d 802 [1991]) since a denial of a motion for summary judgment is not necessarily res judicata or law of the case that there is an issue of fact which will be established at trial (Tong v Hang Seng Vank, Ltd., 210 AD2d 99, 100 [lst Dept 19941, citing Sackmann-Gillard Corp. v Senator Holding Corp., 43 AD2d 948, 949 [2d Dept], lv denied 34 NY2d 515 [1974]; see, Wyoming County Bank v Ackerman, 286 AD2d 884 [4th Dept 20011). Moreover, "proof offered to defeat a motion for summary judgment does not meet the standard of proof

required to resolve an issue of fact at trial" (Cushman & Wakefield, Inc. v 214 East 49th Street Corp., 214 AD2d 464, 468 [lst Dept] appeal dismissed 88 NY2d 951, appeal denied 88 NY2d 816 [1996]).

Even if this court were to hold that McCurn 1997 order had preclusive effect at the time it was issued, the plaintiffs' Federal age discrimination claim was later dismissed based on the U.S. Supreme Court's holding in Kimel v Florida Board of Regents (supra), which held that Federal age discrimination laws do not apply to state workers. The Federal Court, a court of limited jurisdiction, was not empowered to review the evidence before it under the ADEA since that law cannot be applied to the State in reviewing its policy towards its own government workers. Given the ultimate result, defendants can not be said to be on notice that the findings in McCurn 1997 order would be binding on them in State court on a State claim.

Since the Federal Court declined to review the State discrimination claims, there is no res judicata as to State claims (cf., Lane v Birnbaum, 258 AD2d 389 [lst Dept 1999]).

This court is also not persuaded by plaintiffs' arguments that it should have stopped in its analysis and not reached the issue of whether defendants had rebutted the presumption of discrimination. Summary judgment motions in discrimination cases involve a three prong analysis (see, McCurn 1997 order, at 23-40). As this court

noted in the September 2002 order, "[o]nce the plaintiff employees have satisfied their initial burden, the burden then shifts to defendants to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support their employment decision'' (September 2002 order, at 11, citing Laverack & Haines, Inc. v New York State Division of Human Rights, 88 NY2d 734, 738 [1996]; Soqq v American Airlines, Inc., 193 AD2d 153, 156 [lst Dept 19931, lv dismissed 83 NY2d 846, lv denied 83 NY2d 754, rearq denied 83 NY2d 954 [1994]). If defendants meet their burden, plaintiffs must then "establish a genuine issue of material fact either through direct, statistical, or circumstantial evidence as to whether defendants' reasons for their employment decision are false and that defendants were motivated by a discriminatory reason" (September 2002 order, at 13, citing Gallo v Prudential Residential Servs., Ltd. Partnership, 22 F3d 1219, 1225 [2d Cir 19941).

This court is not obligated to reach the same conclusion as the Federal Court in the McCurn 1997 order. In analyzing the arguments raised on the prior application, this court had the benefit of the U.S. Supreme Court decision in Kimel which outlined the scope of justification available to States defending themselves against age discrimination claims holding that

> States may discriminate on the basis of age without offending the Fourteenth Amendment if the age

> classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interest they serve with razorlike precision. As we have explained, when conducting rational basis review "we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational"

(September 2002 order, at 12 citing Kimel v Florida Board of Regents, supra, 528 US, at 83-84, quoting Vance v Bradley, 440 US 93, 97 [1979]).

This court properly applied the standards in Kimel to the present State claim and found that the plaintiff's evidence did not create an issue of fact which, if proven could rebut the defendants' documentation in support of their claim that their actions were rationally based. Defendants presented sufficient documentary evidence that a reduction in force was a budgetary necessity and that the Chief of Service title was outmoded under the planned reorganization. Contrary to plaintiffs' arguments, this court correctly held that

> A reduction in work force due to economic conditions is a legitimate, independent and non-discriminatory reason for an employment decision (Laverick & Hines, Inc. v New York State Division of Human Rights, 88 NY2d 734, 738 [1996]). If the law permits an employer the right to reduce the number of employees in a job title (ibid.), there is no legal basis for this court to find that defendants are prohibited from eliminating an entire job title as the result of reorganization of the supervisory structure of the OMRDD.

(September 2002 order, at 12).

This court has reconsidered plaintiffs' submitted evidence and adheres to its holding in the September 2002 order that plaintiffs failed to establish a genuine issue of material fact either through direct, statistical, or circumstantial evidence as to whether defendants' reasons for their employment decision are false and that defendants were motivated by a discriminatory reason (see, September 2002 order, at 13). Accordingly, plaintiffs' motion (motion sequence no 002) for leave to reargue is denied.

Plaintiffs have also failed to draw the court's attention to new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking renewal, and therefore not brought to the Court's attention (William P. Pahl Equip. Corp. v Kassis, supra, 182 AD2d, at 27; CPLR 2221[e][2]). Since there is no new or additional evidence, there is no basis for this court to reverse its prior dismissal of the fourth cause of action. Accordingly, that branch of plaintiff's motion (motion sequence no.00 2) which seeks renewal is also denied.

Disparate Treatment

The court adheres to its earlier finding that defendants' prior application did not directly attack the disparate treatment claims. The ongoing dispute between the litigants concerning the scope of the prior motion raises the question as to whether defendants properly noticed that portion of their summary judgement motion as required by CPLR 3212.

However, the court rejects plaintiff's claim that defendants are now barred from filing a new motion. Given the confusion, defendants are entitled to an opportunity to re-notice their application seeking to dismiss the disparate treatment cause of action. Accordingly, that branch of defendants's motion (motion sequence no. 003) to reargue the motion to dismiss the disparate treatment claim, as well as any remaining causes of action, is denied with leave to renew as a motion for summary judgment.

Accordingly, it is

ORDERED that motions of plaintiffs (motion sequence. 002) and defendant (motion sequence no. 003) for leaver to reargue and/or renew is granted; and upon reargument and renewal the court adheres to its prior September 2002 order for the reasons stated herein; and it is further

ORDERED that the branch of defendants' motion (motion sequence no 003) to reargue the motion to dismiss the disparate treatment cause of action, and any remaining claims, is denied with leave to renew as a motion for summary judgment; and it is further

ORDERED that the parties are directed to appear for a conference on June 20, 2002, at //!&?a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: May 6, 2003

ENTER:

PAULA J. OMANSKY
J.S.C.