

New York Appellate Division Rejects Age Discrimination Claim and Raises the Bar for Plaintiffs Bringing Discrimination Claims under the New York City Human Rights Law

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A divided Panel of New York's Appellate Division, First Department, issued a recent decision affirming the trial court's grant of summary judgment against a doctor suing his former employer, Montefiore Medical Center. *Melman v. Montefiore Medical Center*, 2012 NY Slip Op. 04111 (May 29, 2012). The opinion, which addresses causes of action brought under the New York City Human Rights Law ("NYCHRL"), makes clear that plaintiffs must do more than assert arguments and theories based on weak and unestablished evidence if they want their claims to reach a jury, even when bringing claims under this uniquely broad statute.

Factual Background

Plaintiff Arnold Melman was chairman of Montefiore's urology department, a position he held for nearly twenty years, when he brought suit in 2007 against the hospital under the NYCHRL. He alleged age discrimination and retaliation. Melman, who was 66 years old at the time, asserted that his pay was unreasonably low given his experience and accomplishments, and further argued that younger doctors in the department, noting one of his subordinates in particular, earned higher salaries. Also, Melman alleged that other departmental chairs were involuntarily forced out of their positions at Montefiore, suggesting age-based animus on the part of the employer. Finally, he asserted that Montefiore generally treated him with "perceived disrespect."

Case History and Legal Analysis

Montefiore moved for summary judgment, arguing that Melman could not establish a triable issue of fact as to whether he was underpaid because of his age. Bronx Supreme Court Justice Mark Friedlander granted the motion and Melman appealed, arguing that under the *McDonnell Douglas* framework, Montefiore did not adequately rebut his allegations of discrimination.

The decision was affirmed on appeal, with Justice David Friedman writing for the majority. Relying on the 2011 First Department case, *Bennett v. Health Management Systems*, 92 AD3d 29 (2011), which the lone dissenting justice, the Honorable Rolando Acosta, authored, the majority in *Melman* held that summary judgment motions in context of claims brought under the NYCHRL must be evaluated using two separate analyses: (1) the "*McDonnell Douglas*" test set forth in the Supreme Court case *McDonnell Douglas Corp v. Green*, and (2) the more lenient "mixed motives" analysis. 411 U.S. 792 (1973).

Under the well-known *McDonnell Douglas* test, as applied by the New York Court of Appeals in *Forrest v. Jewish Guild for the Blind*, a plaintiff must establish a *prima facie* case of discrimination. The employer then has the burden of setting forth legitimate reasons for its employment action. The burden then shifts back to the plaintiff, who must in turn show those reasons are a "pretext" for the alleged discrimination by showing both that the stated reasons given by the employer are false and that discrimination was the real reason for the adverse action. Analyzing Melman's claims under this framework, the court held that Melman had established a *prima facie* case of discrimination. He had, for example, illustrated that a younger subordinate in his department (referred to in the opinion as "RG") did indeed earn more than he earned, and he presented evidence that his requests for raises and bonuses were not fully met. However, the majority also found that Melman could not rebut the host of legitimate business reasons Montefiore provided to explain the alleged disparity.

Regarding RG, the younger physician with higher pay, the hospital showed that this doctor had unique skills in robotic prostate surgery that no one else in the department shared. Also, other surgeons with this special expertise in that locale were paid considerably more than RG, and Montefiore feared he would leave for a job at a competing hospital if he did not receive a considerable raise. The hospital also explained that younger physicians were generally not paid more than Melman, and presented records showing that for the vast majority of time that Melman and RG worked together, Melman was paid significantly more.

In addressing Melman's raises, which the plaintiff alleged were too small for his level of experience and expertise, the hospital presented evidence of Melman's performance problems, which included a complaint filed against him with the State Division of Human Rights, allegations of improper billing and instances of double billing, and professional misconduct complaints filed with the State Office of Professional Medical Conduct. Most significantly, Montefiore showed that the urology department's residency program, which was Melman's responsibility, had been put on probation during the relevant time period by the Residency Review Committee of Accreditation Counsel for Graduate Medical Education. Montefiore also explained that the value of Melman's practice had declined over the past several years and he simply was not contributing as much to the revenue of the hospital as he had in the past. According to Montefiore, these factors, and not Melman's age, determined the amount of his raises.

Under the *McDonnell Douglas* test, the burden then fell on Melman to show that these proffered reasons for the alleged discriminatory conduct were pretextual. He first argued that any problems in the urology department that Montefiore attempted to attribute to his failings as chairman were in fact the hospital's fault and the result of poor business decisions. The court summarily rejected this argument, noting that a plaintiff "must do more than challenge the employer's decision as contrary to sound business or economic policy, since such an argument does not give rise to the inference that the adverse action was due to age discrimination." Slip op. at 6. Melman then reiterated that a number of older department chairs had involuntarily left their positions and were replaced by younger physicians, which he argued showed the hospital generally preferred younger doctors. The court responded that Melman had not established any evidentiary record to support this allegation because none of those physicians testified or submitted an affidavit in the proceeding. With no evidence in the record to substantiate this claim, the majority refused to "impose on Montefiore the additional burden of justifying its conduct in collateral matters involving nonparty former employees when plaintiff has established only that those employees may have been able to satisfy the minimal requirements of a prima facie case in lawsuits of their own." Slip op. at 7.

After determining that Melman's case failed under the *McDonnell Douglas* test, the court moved on to the more lenient, "mixed motive" test. Slip op. at 9. Under this test, a plaintiff only has to raise an issue as to whether the employer was at least partially motivated by discrimination, even if the employer also had legitimate reasons to take action. This means that a plaintiff need not prove the reasons proffered by the employer for the adverse decision were false or pretextual. Instead, the plaintiff need only raise an issue of fact as to whether the action was motivated, at least in part, by discrimination. Applying that lesser burden, the court still found that Melman failed to set forth an age discrimination claim, holding that "[t]he combined evidence on which plaintiff relies does not amount to even circumstantial evidence that age discrimination played any role in Montefiore's adverse decisions concerning his employment." Slip op. at 9. As such, the court affirmed the trial court's grant of summary judgment, explaining that even in light of the NYCHRL's expansive goal of protecting victims from invidious discrimination, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury." Slip op. at 11.

One member of the Panel, Justice Acosta, who, as noted above, authored the court's opinion in *Bennett*, dissented. He criticized the majority for what he considered substituting its judgment for a jury's, arguing that many of Melman's contentions, particularly his assertion that other older departmental chairs involuntarily left the hospital, should not have been summarily rejected. In Justice Acosta's opinion, the possible existence of this pattern was more than a mere "collateral matter," as it reasonably could have shown that Montefiore abused older physicians it could not force out by paying them a lower than average salary. This, according to Justice Acosta, is something a jury, and not a judge hearing a summary judgment motion, should have decided. Justice Acosta also noted that Melman claimed his supervisors exaggerated and distorted his performances problems, which also resulted in a triable factual issue. Most importantly, the dissenting justice expressed concern that "[b]y ruling as a matter of law for the defendant in this case, I believe that the majority is unjustifiably raising the evidentiary requirements to bring a claim for retaliation under the City HRL higher than this Court and the Court of Appeals have found necessary." Slip op. at 19.

Implications for Employers

This decision likely will have positive repercussions for employers faced with discrimination claims under the New York City Human Rights Law. The statute, which is uniquely broad and is construed liberally, is often relied on by plaintiffs and plaintiffs' attorneys when bringing discrimination or retaliation claims in New York City. However, the majority's treatment of Melman's allegations sends the message that, despite the statute's remedial purpose and broad reach, a plaintiff must still be able to present more than vague and conclusory evidence if he/she wants to survive a summary judgment motion. As the majority explained, "bare collateral circumstances," without more, are simply not enough to rebut an employer's nondiscriminatory reasons for an employment action. Also, the court's rejection of the plaintiff's argument that his alleged performance problems were really the fault of the hospital's poor management likewise shows that a plaintiff cannot easily distort seemingly legitimate business decisions to serve the purposes of his/her discrimination claim. In sum, plaintiffs who choose to bring suit under the NYCHRL must be able to present some evidence that the adverse action was motivated, at least in part, by discrimination before they will be permitted to present their case to a jury, even when the more lenient "mixed motive" test is applied in conjunction with the *McDonnell Douglas* analysis.

If you have any questions about this subject or implementing policies and procedures to address or avoid discrimination claims, please contact any of the lawyers listed on this client alert, or your Proskauer relationship lawyer.

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