

NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT: NOT EVERY PLAINTIFF ASSERTING A DISCRIMINATION CLAIM UNDER THE NEW YORK CITY HUMAN RIGHTS LAW WILL BE ENTITLED TO REACH A JURY

By Scott J. Wenner and Alizah Z. Diamond

On May 29, 2012, a divided panel of New York's Appellate Division, First Department, announced a decision that should help employers facing claims under the exceptionally broad New York City Human Rights Law ("NYCHRL") to obtain summary judgment and curb the number of unfounded claims that reach a jury. In *Melman v. Montefiore Medical Center*, 2012 NY Slip Op. 04111 (May 29, 2012), the appellate panel affirmed an award of summary judgment dismissing the complaint. It found that plaintiff Arnold Melman ("Melman"), head of the urology department at Montefiore Medical Center ("Montefiore"), had failed, under both the federal *McDonnell Douglas* test and the "mixed motive" test, to establish a triable issue of fact over whether he was treated differently by the hospital because of his age. The court found that, notwithstanding the intended broad reading of the NYCHRL in favor of employment discrimination claims, Melman's contentions were based on weak, defective, or nonexistent evidence. Therefore, they were insufficient to rebut the legitimate and non-discriminatory reasons set forth by Montefiore or to show that age was a motivating factor for the hospital's treatment of Melman.

Background

Melman brought suit against Montefiore in 2007 in the Bronx County Supreme Court, asserting causes of action for age discrimination and retaliation under the NYCHRL. Melman, at the time 66-years-old, alleged that because of his age, and despite his distinguished record, Montefiore undercompensated him compared to physicians in comparable positions in other hos-

pitals and younger physicians in his department. Melman also claimed that Montefiore denied his requests for raises or gave him inadequate increases and awarded him insufficient bonuses. He further alleged that Montefiore had been limiting his control over the department and generally treated him with "perceived disrespect" because of his age.

The trial court (Friedlander, J.), finding no triable issue of fact as to whether Melman was treated adversely because of his age, granted Montefiore's motion for summary judgment and dismissed the case. Melman appealed the dismissal, arguing that Montefiore had failed to meet its burden of establishing that it had legitimate and non-discriminatory reasons for its employment decisions and that he had presented sufficient evidence to go to trial on his claim.

The Court's Ruling

Following the First Department's December 2011 decision in *Bennett v. Health Management Systems*, Justice David Friedman, writing for the majority, observed that the court was required to apply two analyses when considering a summary judgment motion in discrimination cases based on circumstantial evidence brought under the NYCHRL: (i) the three-step burden-shifting test set forth by the U.S. Supreme Court in the seminal civil rights case *McDonnell Douglas Corp v. Green*; and (ii) a less stringent "mixed motive" test.

Under the familiar *McDonnell Douglas* framework, a plaintiff has the initial burden of establishing a prima

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facie case of discrimination. If the plaintiff is successful, the burden shifts to the employer to provide, using admissible evidence, legitimate, independent, and nondiscriminatory reasons that supported its employment decisions. If the employer satisfies its burden, the burden shifts back to the plaintiff who must show that the proffered reasons were a “pretext” for discrimination.

Melman argued on appeal that he had established a prima facie claim of discrimination under the *McDonnell Douglas* framework and that Montefiore had failed to satisfy its burden of demonstrating that it had non-discriminatory reasons for its actions. The court rejected Melman’s argument, finding that Montefiore had successfully proffered a number of legitimate and non-discriminatory reasons for its actions towards Melman. Among the reasons the hospital cited were complaints filed against Melman with state authorities for improper billing and deficient record-keeping, and a gradual decline in Melman’s performance and contribution to Montefiore’s revenue. This satisfied Montefiore’s burden.

Turning back to Melman’s showing, the court found that he had failed to produce admissible evidence to show that Montefiore’s reasons were a pretext for age discrimination. The majority rejected Melman’s claim that age bias could be inferred from poor business decisions by Montefiore that ostensibly harmed Melman’s practice, observing that questioning an employer’s decision-making “as contrary to sound business or economic policy” does not support an inference that the decision was discriminatory. This long-established rule rests on the maxim that courts “should not sit as a super-personnel department that reexamines an entity’s business decisions.” Consequently, it is irrelevant if the employer supplies “a good reason, a bad reason, or a petty one,” for its acts, provided the “stated reason . . . was nondiscriminatory.”

The court also rejected Melman’s argument that a general discriminatory animus against older physicians — and thus against him — could be inferred from his unsubstantiated charge that older depart-

ment chairs had been forced to leave their positions at Montefiore and were replaced by younger physicians. The court 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.” Thus, Melman was not permitted to paint the hospital’s treatment of others as discriminatory and use it to satisfy his burden of proving pretext. The court concluded that Melman had failed to satisfy his evidentiary burden under the *McDonnell Douglas* test in order to avoid summary judgment.

The court also analyzed Melman’s case under the “mixed motive” test as recent First Department precedent directed. Under that test, Melman only had to raise an issue of fact as to whether Montefiore was at least partially motivated by considerations of age in its treatment of him, even if Montefiore also had legitimate reasons to take action. Applying that test, the court found that Melman had failed to offer even circumstantial evidence that discrimination played any role in Montefiore’s decisions. Accordingly, the court affirmed the trial court’s grant of summary judgment. The court observed that despite 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.”

The Significance of This Decision

In *Melman*, the majority makes clear that while the NYCHRL must be given the broad remedial reading the City Council intended it to have when it enacted the 2005 amendments, a claim will not survive summary judgment if the plaintiff does not present concrete evidence that the adverse action was motivated, at least in part, by discriminatory or retaliatory animus. Vague and conclusory statements concerning circumstantial facts are insufficient to satisfy this burden. This is a step towards alleviating employers’

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concerns that arose after the court's 2009 *Williams* and *Phillips* decisions.¹ There the court held, without much guidance, that the NYCHRL was subject to "enhanced liberal constructions requirements" and was to be "construed independently from its state and federal counterparts in order to accomplish the statute's 'uniquely broad and remedial' purposes." Since *Williams* and *Phillips*, many plaintiffs employed in New York City have utilized the NYCHRL to bring discrimination claims. Those opinions, which directed that the NYCHRL was to be far more liberally construed than similar federal and state laws but which remained silent on where that liberalization ended, led many employers to share a perception that this law has few, if any, recognized limitations to restrain frivolous or near frivolous claims from reaching a jury. Through its holdings in *Bennett* and this case, the court has defined at least some limits to NYCHRL claims and may have moved the evidentiary standards for those claims slightly closer to the more familiar standards governing federal and state civil rights claims. However, employers still must be prepared for more judicial resistance to summa-

1. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009) and *Phillips v. City of New York*, 66 A.D.3d 170 (1st Dep't 2009).

ry judgment and similar deference to the "uniquely broad and remedial purposes" of the NYCHRL when defending against claims brought under the law. ♦

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For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the Firm at a particular Schnader office location, please contact:

Scott J. Wenner, Chair
212-973-8115; 415-364-6705
swenner@schnader.com

Michael J. Wietrzychowski, Vice Chair
856-482-5723; 215-751-2823
mwietrzychowski@schnader.com

Alizah Z. Diamond
212-973-8110
adiamond@schnader.com

www.schnader.com

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