DOCKET NO.: NNH CV-11-6025382-S : SUPERIOR COURT

BRUCE BONNER, ET AL. : JUDICIAL DISTRICT OF NEW HAVEN

v. AT NEW HAVEN

CITY OF NEW HAVEN FEBRUARY 21, 2014

MEMORANDUM OF DECISION

The issue before the court is whether the defendant's motion for summary judgment should be granted on the ground that there is no issue of material fact that the defendant did not intentionally discriminate against the plaintiffs. For the reasons set forth in this memorandum, the defendant's motion for summary judgment is denied.

FACTS

This action was commenced by service of writ, summons, and complaint on November 29, 2011. The plaintiffs filed a brief one count complaint with this court on December 2, 2011. In their complaint, the plaintiffs allege the following facts. The plaintiffs are African-American police officers in the city of New Haven. The plaintiffs all took the civil service exam administered for promotion to the rank of sergeant in April 2009. Consequently, at a meeting which took place on July 14, 2009 (the board meeting), the New Haven Civil Service Commission (the commission) certified an eligibility list (the eligibility list) for promotions containing the names of the plaintiffs. Prior to 2009, the eligibility lists certified by the commission were always made effective for a total of two years, measured in one year increments.

The plaintiffs further allege the following. Although the commission certified the eligibility list, certain members of the commission expressed concern during the board meeting that the majority of applicants who passed the exam were African-American, and that none of the applicants who passed were Latino. As a result, the commission only certified the eligibility list for one year. One year later, in July 2010, the commission did not renew the eligibility list for a second year. This was the first time the commission ever failed to renew a police eligibility list. The commission failed to renew the eligibility list for the sole purpose of excluding the African-American plaintiffs from obtaining promotions to the rank of sergeant. Consequently, the commission has discriminated

against the plaintiffs on the basis of race in violation of their rights under the Connecticut Fair Employment Practices Act (CFEPA).

The defendant filed the present motion for summary judgment on October 22, 2013, together with a supporting memorandum of law and exhibits. The plaintiffs filed an opposition on November 18, 2013, together with a supporting memorandum of law and exhibits, to which the defendant replied on December 2, 2013. The matter was heard at the short calendar on December 16, 2013.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008). "The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Zielinski* v. *Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

As stated above, this action arises from alleged violations of CFEPA. CFEPA is codified in General Statutes § 46a-51 et seq. Section 46a-60 (a) (1) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or

privileges of employment because of the individual's race . . . ." Connecticut has a strong public policy favoring the prevention, elimination, and amelioration of employment discrimination of all types. See *Leone* v. *New England Communications*, Superior Court, judicial district of New Britain, Docket No. CV 01-0509752-S (April 10, 2002, *Quinn, J.*) (32 Conn. L. Rptr. 72, 73) ("there is a strong public policy expressed by statute in our state prohibiting discrimination on the basis of race, sex or national origin"). "In order to establish a prima facie case [of discrimination under CFEPA], the complainant must prove that: (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination." *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 505, 832 A.2d 660 (2003).

The defendant's motion hinges on the fourth element of the prima facie case. The defendant argues that summary judgment should enter in its favor because the commission's actions did not occur under circumstances giving rise to an inference of discrimination. The defendant produced the following evidence: discovery responses from a number of the plaintiffs; the minutes of the board meeting; affidavits of a number of members of the commission; copies of both the current and prior versions of the civil service rules; a copy of the eligibility list; and excerpts of the deposition transcript of Anne Massaro, together with an errata sheet (the errata sheet). On the basis of this evidence, the defendant argues that there is no indication whatsoever that the eligibility list was certified for only one year because of race, or that the eligibility list was not extended for a second year because of race. The defendant also argues that the record establishes that there were and are legitimate nondiscriminatory reasons why the commission did not extend the eligibility list.

The plaintiffs respond that there are issues of material fact in the present case. The plaintiffs point to the deposition testimony of one of the commissioners, Anne Massaro. During the board meeting, Massaro verbally expressed her concerns regarding the absence of Latino candidates on the eligibility list. During her deposition, the plaintiffs state that Massaro testified that the commission voted affirmatively not to extend the eligibility list. The plaintiffs argument is essentially that this evidence gives rise to a reasonable inference of discrimination and that this is sufficient to defeat the defendant's motion. The plaintiffs also argue that every prior police promotional list in the city's

history was certified for two years, and that the commission's failure to extend the eligibility list gives rise to an inference of discrimination.

The plaintiffs correctly point out that Massaro voiced concerns regarding the lack of Latinos appearing on the eligibility list. As stated above, the defendant submitted the minutes of the board meeting. In the minutes, Massaro stated that "regarding the Hispanics, like, I feel uncomfortable that none of them passed this test." See Def.'s Ex. B, 9. She added "I'm just uncomfortable with that, that's all." Def.'s Ex. B, 10. Just before raising these concerns, she asked to go off the record. "Can we go into Executive Session? I have a question." Def.'s Ex. B, 8. She explained that "the question I have I don't think that the public should hear what (inaudible) say." Def.'s Ex. B, 9. Massaro was deposed on August 8, 2013. Subsequently, Massaro executed the errata sheet. The errata sheet amended over fifty of Massaro's deposition responses.

An errata sheet is defined by Black's as follows: "An attachment to a deposition transcript containing the deponent's corrections upon reading the transcript and the reasons for those corrections." Black's Law Dictionary 621 (9th ed. 2009). In Connecticut, errata sheets are governed by Practice Book § 13-30 (d), which provides in relevant part: "If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them." In *Podell* v. *Citicorp Diners Club, Inc.*, 112 F.3 98 (2d Cir. 1997), a case from the Second Circuit interpreting the federal rule concerning errata sheets,[1] the court held that "Rule 30 (e) allows deponents to make changes in form or substance to their testimony and to append any changes [that are] made to the filed transcript . . . A deponent invoking this privilege must sign a statement reciting such changes and the reasons given . . . for

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[1] "Our Supreme Court has stated that it is appropriate to look to the judicial interpretation of an analogous federal rule for guidance." *Galeski* v. *Sansabrino*, Superior Court, judicial district of New Britain, Docket No. CV-0504004059-S (November 22, 2005, *Shapiro, J.*) (40 Conn. L. Rptr. 496, 497). Fed. R. Civ. P. 30 (e), which is substantially similar to Practice Book § 13-30 (d), provides in relevant part: "On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them."

making them . . . ." (Citation omitted; internal quotation marks omitted.) *Podell* v. *Citicorp Diners Club, Inc.*, supra, 112 F.3 103.

In the present case, the errata sheet did not comply with Practice Book § 13-30 (d). No where on the errata sheet does Massaro include a "statement of the reasons" for the changes made. There is no indication as to whether the changes on the errata sheet are changes in form (i.e. changes due to errors in transcription) or changes in substance (i.e. changes to the substantive content of her answers).[2] Because Massaro failed to comply with the Practice Book, the court is without the benefit of an explanation for her changes.

The errata sheet raises a number of other issues as well. As stated above, Massaro made over fifty corrections. One such correction was made to a response Massaro gave to a question from the plaintiffs' attorney about eligibility list's expiration. The plaintiffs' attorney asked: "tell me about the process of expiring the list. Did you take a vote?" Massaro Dep. (page 15; lines 19-20). Originally, Massaro responded "yes," but changed her answer to "no" in the errata sheet. When the plaintiffs' attorney asked Massaro if she voted in favor of letting the eligibility list expire, Massaro initially replied "yes," but subsequently changed her answer to "[t]here was no vote." See Massaro Dep. (page 16; lines 20-25). On cross examination, the defendant's attorney asked Massaro "[s]o you just testified that there was a vote to actively expire the list, is that your testimony? That there was a vote taken 'yes' or 'no' to expire the list?" Massaro Dep. (page 25; lines 9-13). Massaro initially responded "yes," but changed her response to "no" in the errata sheet. The errata sheet is full of similar instances of Massaro correcting affirmative responses to questions regarding a vote to expire the eligibility list.

"[D]eposition testimony is not conclusive as a judicial admission . . . ." *Collum* v. *Chapin*, 40 Conn. App. 449, 450 n.2, 671 A.2d 1329 (1996). "A response to a question propounded in a

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[2] As stated above, deponents are allowed to make "changes in form or substance"; Practice Book § 13-30 (d); to their deposition testimony via an errata sheet. See also *Podell* v. *Citicorp Diners Club, Inc.*, supra, 112 F.3d 103 ("Rule 30 [e] allows deponents to make changes in form or substance to their testimony and to append any changes [that are] made to the filed transcript" [internal quotation marks omitted]). Although the court is without the benefit of a statement of reasons for Massaro's changes, it is incredible that all of the changes could be due to transcription errors.

deposition is not a judicial admission." *Esposito* v. *Wethered*, 4 Conn. App. 641, 645, 496 A.2d 222 (1985). "At trial, in open court, the testimony of [a deponent] may contradict her earlier statement and a question for the jury to decide may then emerge." Id. Although deposition testimony and, by extension, revised testimony in an errata sheet, do not constitute a judicial admission, when a party amends deposition testimony, the court may consider both the revised responses in the errata sheet and the original responses for evidentiary purposes. "[W]hen a party amends his testimony under Rule 30 (e), [t]he original answer to the deposition questions will remain part of the record . . . ." (Internal quotation marks omitted.) *Podell* v. *Citicorp Diners Club, Inc.*, supra, 112 F.3d 103. Thus, the court in the present case may consider the original deposition responses and the amended errata responses given by Massaro in considering whether there is an issue of material fact.

As the plaintiffs correctly note, in cases sounding in racial discrimination, "[t]he nature of the plaintiff's burden of proof is *de minimus*." (Emphasis in original.) *Harper* v. *Metropolitan District Commission*, 134 F. Supp. 2d 470, 483 (D. Conn. 2001). The court is also guided by the fact that "employment discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence." *Rosen* v. *Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991). "[E]mployers rarely leave a paper trail—or "smoking gun"—attesting to a discriminatory intent . . . ." *Hollander* v. *American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990). This means that "plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most competently and appropriately made by the trier of fact." Id. In the present case, the jury will have the opportunity to make such a determination, as there is a general issue of material fact to be decided.

Massaro initially testified numerous times during her deposition that she and the commission affirmatively voted to expire the eligibility list. She subsequently changed her answer, stating that there was not vote at all. While this inconsistent testimony is far less than a "smoking gun" indicating Massaro actually discriminated against the plaintiffs, it could create an inference of discrimination in the mind of a reasonable juror. A juror could view Massaro's changes in the errata sheet, coupled with both her desire to go into executive session to discuss a question she "[doesn't] think the public should hear"; See Def.'s Ex. B, 9; and her subsequent comments on the race of the

applicants on the eligible list, as "circumstantial evidence which cumulatively undercut[s] the credibility of [her] various explanations . . . ." *Hollander* v. *American Cyanamid Co.*, supra, 895 F.2d 85. Massaro did not explain her motivation for changing her testimony, but, in any event, "[s]ummary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994). The substance of Massaro's inconsistent testimony, coupled with the plaintiffs' minimal burden and the need for inferential reasoning in discrimination cases, creates a genuine issue of material fact.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is denied.

Frechette

Frechette, J. 2-21-14