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Manager fired for 'poor' sales can pursue age bias claims

Federal judge rejects 'same actor' inference in 151B case

by Pat Murphy

The former sales manager for a regional food distributor can proceed with state law age discrimination claims despite undisputed evidence that he was hired when he was 65 and fired by the same person who hired him after his first-year sales failed to match his expenses, a U.S. District Court judge has decided.

In November 2016, defendant Seacoast Sales hired 65-year-old Robert Beaupre, the plaintiff, as the company's director of sales. In January 2018, the defendant terminated Beaupre.

The plaintiff, who resides in Lynn, sued Seacoast and its owner, John Haddad, in state court for age discrimination in violation of G.L.c. 151B, §4; breach of contract; and breach of the implied covenant of good faith and fair dealing.

The defendant, a Maine corporation, removed the case to federal court and moved for summary judgment. According to the defendants, the plaintiff was fired for a legitimate, nondiscriminatory reason in that his 2017 sales were just a fraction of his expenses.

But Judge Nathaniel M. Gorton refused to grant summary judgment on the plaintiff's discrimination claim.

"Beaupre has raised a genuine dispute as to whether defendants' stated reason for terminating his employment was pretextual," Gorton wrote. "Despite defendants' claim that they were disappointed with the sales revenue generated by plaintiff, Beaupre has testified that Haddad expressed satisfaction with his performance at a meeting in November 2017."

In addition, the judge rejected the defendants' contention that they were entitled to the "same actor inference," which creates the inference that discrimination was not a determining factor in an employee's termination when, as with Haddad at Seacoast, the person who hired and fired were the same.

On the other hand, Gorton concluded that the plaintiff had not raised triable issues regarding his allegations of breach of contract and the implied covenant of good faith.

The 21-page decision is Beaupre v. Seacoast Sales, et al., Lawyers Weekly No. 02-459-20.

"We will be in good shape"

Plaintiff's attorney Thomas H. Curran said the decision is important because a federal judge recognized that the same actor inference does not apply to a discrimination case brought under Massachusetts law. The Boston lawyer said that to allow the application of the same actor inference would go against the standard principle that courts must draw reasonable inferences in favor of the non-moving party when ruling on a motion for summary judgment.

Curran added that defense claims that his client was terminated solely because of poor performance were "simply inaccurate."

"There's demonstrable evidence in the record that, just before he was terminated, [the plaintiff] was given glowing reviews of his performance, effort and overall contribution to the company," Curran said. "Contrast that with the fact that there is no evidence whatsoever that he received notice from the employer that he was not performing his job up to their expectations."

Defense counsel Peter Bennett, of Portland, Maine, said his clients' evidence was strong enough to warrant summary judgment on the plaintiff's age discrimination claims.

"We believe that when the jury fully hears the case and applies the law, we will be in good shape," Bennett said.

Boston employment attorney Bryn A.M. Sfetsios said Gorton was correct on the same actor issue.

"The same actor inference argument has basically been rejected in Massachusetts courts," she said. "So even though somebody might hire somebody who's over 40, that's not dispositive that age discrimination can't occur at some point throughout his employment"

Disappointing sales

According to court records, Haddad and the plaintiff became acquainted in 2003 when Beaupre was the retail sales manager for Seacoast's first customer, a deli products manufacturer in Lynn. In 2014, the plaintiff became a consultant for Seacoast, and two years later he accepted Haddad's offer to join the company full time to become its first-ever sales director.

The plaintiff worked without a written employment agreement, although the parties agreed he was entitled to an annual salary of $110,000 plus a commission, should his sales exceed his salary.

According to the defendants, the plaintiff was hired with the express understanding that he was to develop new business with grocery chains Market Basket, BJ's Wholesale Club, Shaw's and Restaurant Depot. The plaintiff disputed that claim, asserting his responsibilities included expanding sales of all existing and future accounts.

During his first year as Seacoast's sales manager, Beaupre's sales were under $15,000 and were all attributable to existing Seacoast accounts. Further, the plaintiff's efforts to secure new business with chain stores failed to bear fruit.

In November 2017, Haddad and Beaupre met for a performance review. Although the fact that the plaintiff's sales had not covered his expenses came up during their meeting, the plaintiff said he received a positive review.

Nonetheless, Haddad terminated the plaintiff a short time later, citing his poor sales performance. According to the plaintiff, most of his duties were immediately assumed by Haddad's brother-in-law, Peter McArdle, who months before had been brought into the company to create a beverage division.

Beaupre was 66 and McArdle was 47 at the time of the plaintiff's termination. While McCardle had extensive experience in the beverage industry, he allegedly had little or no experience in the sale of food products. Meanwhile, Beaupre had been employed in the food industry for more than 40 years.

After filing a complaint with the Massachusetts Commission Against Discrimination, the plaintiff sued the defendants in Essex Superior Court.

In his court case, the plaintiff alleged that the defendants terminated his employment solely because of his advanced age. Further, the plaintiff alleged that, because of his age, he was pressured into forgoing participation in Seacoast's health care plan and signing up for Medicare instead. He further alleged that, due to his age, he was prohibited from participating in the company's 401(k) plan.

The plaintiff added claims for breach of contract and the implied covenant of good faith and fair dealing. The defendants removed the case to federal court on diversity grounds.

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>
> **— Thomas H. Curran, Boston**

Discrimination claims proceed

In moving for summary judgment, the defendants argued that the plaintiff could not establish a prima facie case of age discrimination under the burden-shifting framework established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green and applied by Massachusetts courts to Chapter 151B claims in the absence of direct evidence of age discrimination.

Specifically, the defendants contended that the plaintiff's low sales revenue demonstrated that he did not perform his job at an acceptable level.

But Gorton concluded that the plaintiff's evidence was sufficient to establish that element of a prima facie case. In addition to citing Beaupre's testimony that he was given a positive performance review in November 2017, the judge wrote that the plaintiff "has proffered evidence that he was responsible for a broad range of tasks beyond merely acquiring new business from a small number of specific entities and, other than his low first-year sales figures, there is no evidence that his performance was less than adequate."

Given that the plaintiff had established a prima facie case of age discrimination, Gorton turned to the question of whether the defendants had met their burden to rebut the presumption of discrimination by offering a legitimate, nondiscriminatory reason for the termination.

Once again, the defendants focused on their argument that the plaintiff's termination was justified because he performed poorly as sales director, specifically pointing to the fact that Beaupre generated substantially less in sales revenue than his salary.

But Gorton concluded that the plaintiff's evidence was sufficient to create a genuine issue as to whether the defendants' proffered reason for termination was pretextual. Apart from the positive performance review, the judge cited evidence that Beaupre received supportive texts from Haddad in December 2017, as well as evidence "that at least some of [the plaintiff's] former job responsibilities were assumed by the younger McArdle following his termination."

In rejecting the defendants' contention that they were entitled to a same actor inference, Gorton observed that the Supreme Judicial Court in a 2016 case, Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, stated that it is inappropriate for a court to apply such an inference on summary judgment.

Gorton went on to find sufficient evidence in the record from which a reasonable jury could concluded that Beaupre was denied participation in Seacoast's health care and retirement plans because of his age.

Turning to the remaining claims, Gorton found no basis for the plaintiff's contention that the defendants promised to employ him for a definite term. Accordingly, the judge concluded that the plaintiff could not maintain a breach-of-contract claim since he was an at-will employee who was terminable for any reason.

In addition to granting the defendants' motion for summary judgment on the contract claim, Gorton likewise concluded that the plaintiff could not recover for breach of the implied covenant of good faith and fair dealing. In that regard, the judge found no merit to the plaintiff's claim that the defendants terminated him to avoid paying commissions on two new accounts with BJ's and Market Basket, which he alleged were imminent at the time he lost his job.

"It is undisputed that the oral employment agreement between Beaupre and Seacoast did not contemplate the payment of commissions until Beaupre generated enough sales revenue to exceed his salary," Gorton wrote. "In light of the fact that Beaupre did not come close to that prerequisite during his first year at Seacoast, it appears unlikely that he would have been entitled to a commission even if he had procured the prospective accounts before he was fired."

Beaupre v. Seacoast Sales, et al.

THE ISSUE Could a former sales manager for a regional food distributor proceed with state-law age discrimination claims in light of undisputed evidence he was hired when he was 65 and fired by the same person who hired him after his first-year sales failed to match his expenses?

DECISION Yes (U.S. District Court)

LAWYERS Thomas H. Curran, Peter Antonelli, Zachary J. Gregoricus and Christopher Marks, of Curran Antonelli, Boston (plaintiff)
Peter Bennett, Frederick B. Finberg, Sarah Hall and Joanne I. Simonelli, of The Bennett Law Firm, Portland, Maine (defense)