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To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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TODD ANDAYA,

Plaintiff,

Index No. 58877/2012

-against-

Decision & Order

ATLAS AIR, INC.,

Defendants.

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The following papers numbered 1 to 9 were read on defendant's motion for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion/Affirmation/Exhibits/Memo of Law	1-4
Plaintiff's Affirmation in Opposition/Exhibits/Memo of Law	5-7
Reply Affirmation/Memo of Law	8-9

Factual and Procedural History

Plaintiff, a gay man, worked as a full time independent contractor for defendant's predecessor corporation, Polar Air Cargo, from 2000 to 2009. In January 2009, plaintiff was hired by Jason Grant the Chief Financial Officer and Richard Barnes the Vice President of Information Technology as director of defendant's Program Management Office ("PMO"). At the time of his hiring, defendant's information technology department underwent a major reorganization.

During his tenure as PMO, there was continuous conflict between plaintiff and his direct reports as well as between plaintiff and his co-directors. Numerous complaints were filed with HR regarding plaintiff's and another director Jim Barrecchia's conduct and management style. It appears that defendant's organization was suffering from management style problems as well as "turf wars" among the directors.

In the Spring of 2009, plaintiff complained to Mr. Barnes that director Jim Barrecchia was interfering with his staff employee by having an inappropriate consensual relationship with her.

In April 2009, the HR director Joseph Kelley held a meeting with the Vice President of Information Technology Richard Barnes and his directors including plaintiff and Barrecchia to address these issues.

In June of 2009, HR director Kelley suggested to Barnes that the IT department be re-organized to correct communication and management issues. He also suggested that plaintiff be sent for management and assessment and coaching sessions because his workplace behavior "appears to be immature and unprofessional."

Defendant hired an outside coach for these sessions, the goal of which was to improve the "ways [plaintiff] relates to his subordinates and peers." Half day sessions were held on August 25, 26, and 27, 2009.

Nevertheless, the conflicts continued. On or about November 12, 2009, plaintiff's direct reports as well as his co-directors each submitted a written statement to Mr. Barnes detailing the difficulties they were having with plaintiff. None of these statements refer to plaintiff's sexual orientation or any complaints he may have filed with HR.

Upon receiving these statements Barnes contacted HR Director Kelley and CFO Grant. CFO Grant than personally met 4 out of the 5 employees who submitted a statement. According to his deposition, CFO Grant stated that he was convinced that plaintiff's "bullying behavior" could not be tolerated. CFO Grant decided to terminate plaintiff and directed Barnes to terminate plaintiff effective November 16, 2009.

On June 1, 2012, plaintiff commenced this action seeking damages for wrongful termination based upon his sexual orientation. Issue was joined on August 30, 2012.

Defendant now moves for summary judgment dismissing the complaint on the ground that defendant was terminated for poor work performance. Defendant argues plaintiff was not terminated due to his sexual orientation or in retaliation for reporting certain behaviors to Human Resources.

In opposition, plaintiff argues that there are questions of fact precluding summary judgment dismissing the complaint. Plaintiff claims that from May 2009 to November 2009 co-director Jim Barrecchia made derogatory comments about him and other co-workers. Plaintiff alleges that in May 2009, Barrecchia referred to him as a "panty waste." He also told plaintiff "don't get your panties in an uproar" and "don't get your panties in a bunch" and "you're light in your loafers today." Plaintiff claims that Barrecchia repeated the comment "light in your loafers" at a meeting the next day.[1] Plaintiff claims that Barrecchia also once stated that he, meaning Barrecchia, was not a "butt pirate" and once said he did not "ride the Hershey highway like you, Todd." Plaintiff also claims that after a heated meeting in November 2009, Barrecchia ended a meeting by saying "get the fuck out of my office you fucking fag." Plaintiff claims that he informed Barnes of this last statement prior to being terminated on November 16, 2009. Based on the foregoing, plaintiff argues that the reason offered for his termination was pretextual and that he was fired due to his sexual orientation. Plaintiff also claims that he was terminated in retaliation for complaining about Barrecchia conduct towards him and toward female employees.

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[1]Defendant claims Barrecchia was not in attendance at this second meeting establishing that he was on a business trip in Las Vegas on that day.

Plaintiff further argues that defendant did not follow it's normal complaint procedures when terminating him. Plaintiff also claims that another employee, Mr. Ramirez, who is also a gay man, had also been the subject of anti-gay slurs by defendant.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *(See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Under NYS Executive Law "[a] plaintiff alleging [discrimination based on sexual orientation] in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 [2004]; *citing Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). If plaintiff meets this burden, the employer must produce evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason *(see St. Mary's Honor Center v Hicks*, 509 US 502 [1993]). If the employer produces such evidence, plaintiff must then show that the proffered reason was merely a pretext for discrimination by demonstrating "both that the reason was false, and that discrimination was the real reason" (*id.* at 515; *see also Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 71 [2001]).

To prevail on a summary judgment motion, an employer "must demonstrate either the employee's failure to establish every element of intentional discrimination, or—having offered legitimate, nondiscriminatory reasons for the challenged action—the absence of a material issue of fact as to whether its explanations were pretextual" (*Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314 [2005]; *see also Forrest*, 3 NY3d at 305).

Here, defendant established entitlement to summary judgment dismissing the complaint by submitting evidence that from the beginning of his employment with defendant, there were conflicts and tension between plaintiff and his direct reporting employee as well as his co-directors. Notably, plaintiff's poor management style required defendant to send plaintiff for management assessment and coaching 8 months after he was hired. Thus, defendant established that the reason for plaintiff's termination was legitimate.

In opposition, plaintiff fails to raise a material issue of fact. While plaintiff notes that Barrecchia may have made several anti-gay comments between May and November 2009 those stray discriminatory comments without any basis for inferring a connection to the termination is insufficient to defeat defendants' motion (*see Sandiford v City of N.Y. Dept. of Educ.*,
22 N.Y.3d 914, 977 N.Y.S.2d 699 [2013] citing *Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 301 [2004]). Notably, there is no evidence that Barrecchia had any involvement in CFO Grant's

decision to terminate plaintiff. Moreover, the Court notes that plaintiff had worked successfully with defendant and it's predecessor in interest for 8 years prior to being hired as a director. During that time, he worked with Barnes who knew that plaintiff was gay. There is no allegation that during those 8 years plaintiff suffered any anti-gay discrimination. Notably, the trouble among plaintiff, his direct reports and his co-directors started when he was placed in a management position. Moreover, the troubles started almost immediately upon plaintiff's hiring and continued until he was terminated in November 2009. Although, plaintiff claims that his termination was a pretext for discrimination based upon his sexual orientation he does not address the fact that as early as April 2009 the tensions in defendant's IT department warranted a meeting with Vice President Barnes and the HR director. Further, plaintiff does not claim that his referral for management assessment and coaching was pretextual. Nor does he challenge the HR Director's statement that plaintiff's management style was "immature and unprofessional."

Based on the foregoing, the Court finds that plaintiff has not raised material issues of fact to preclude summary judgment in favor of defendant.

Notably, "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer" (*Proud v Stone*, 945 F2d 796, 797 [4th Cir 1991]; see also Brennan, 284 AD2d at 71). This "same actor inference" is more compelling where the termination occurs within a relatively short time after the hiring (*see Campbell v Alliance Natl. Inc.* 107 F Supp 2d 234, 248 [SD NY 2000]).

Here, plaintiff was hired by CFO Grant and Vice President Barnes in January 2009. CFO Grant made the determination to terminate him 11 months later. Accordingly, there is strong inference that discrimination was not a factor in plaintiff's termination (*see Dickerson v Health Mgt. Corp. of Am.*, 21 A.D.3d 326, 800 N.Y.S.2d 391 [1st Dept 2005] ["the same individuals who hired plaintiff (Gemma and Rodrigo) made the decision to terminate him, all within a time span of nine months, which 'strongly suggest[s] that invidious discrimination was unlikely' "]).

To the extent plaintiff argues that he was fired in retaliation for complaining about defendant's treatment of women in the organization, "[i]n order to make out the claim for retaliation pursuant to the Executive Law plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 [2004]).

Plaintiff does not offer an argument in opposition to defendant's claim that he was not engaged in "a protected activity." Moreover, plaintiff does argue that there is a causal relationship between his complaints about the treatment of women and his termination. Rather, he argues that he was terminated because of his sexual orientation.

Based on the foregoing, defendant's motion for summary judgment dismissing the complaint is GRANTED.

Dated: White Plains, New York
September 25, 2014

HON. WILLIAM J. GIACOMO, J.S.C.

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