[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Kornreich, Shirley Werner, J.** PART 54
Justice

Joseph Bologna,

Plaintiff

-against-

R.A.I. Corporation Italian Radio-System, Guido Corso and Mario Bona,

Defendants.

INDEX NO. 600093/05

MOTION DATE 8/18/05

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for Motion to Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED
JAN 31 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 24, 2006

SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

JOSEPH BOLOGNA,

Plaintiff,

Index No.: 600093/05

DECISION and ORDER

-against-

R.A.I. CORPORATION ITALIAN RADIO-SYSTEM, GUIDO CORSO and MARIO BONA,

Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for workplace conduct allegedly violating Human Rights Law § 296 *et seq.* and corresponding provisions of the Administrative Code of the City of New York, and for breach of an employment contract. Plaintiff commenced this action against his ex-employer R.A.I. Corporation Italian Radio-System ("RAI"), Guido Corsa, RAI's President, and Mario Bona, RAI's Chairman and CEO, alleging that he was wrongfully discharged for opposing workplace conduct discriminating against women and minorities. Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(7).

I. Plaintiff's Complaint

Plaintiff's complaint alleges as follows. In July 1987, defendant RAI offered to employ plaintiff as a personnel office manager, at a starting salary of $34,560.00 per year. Cmplt., ¶ 10. The complaint continues:

> As part of RAI's employment offer, RAI provided Plaintiff with its 'Employee Information Manual' ['Employment Manual'] and represented to Plaintiff that the Employment Manual would govern the terms of his employment with RAI, if Plaintiff accepted

> RAI's offer.
>
> Defendant RAI further represented to Plaintiff that the Employment Manual was modeled after the employment agreements used by RAI's parent corporation in Italy. As Plaintiff was aware, employees of RAI in Italy are contractually guaranteed employment until they reach 65 years old, unless terminated for just cause. The Employment Manual was consistent with this practice, as it only provided for termination due to 'just cause.'
>
> [Plaintiff] accepted RAI's offer of employment and the terms of the Employment Manual.

Cmplt, paras 10-12.

The complaint further alleges that in late 1999 or early 2000, plaintiff began to discover that "RAI and its officers were unlawfully engaging in sexual and racial discrimination, engaging in sexual harassment and had created a hostile work environment." *Id.* at 15. Plaintiff, who had by then been promoted to Vice President of Human Resources, "sought to correct such unlawful employment practices at RAI by reporting them to Defendant Corso and Defendant Bona, RAI's senior officers, and by strenuously opposing them." *Id.* "Each time, however, that Plaintiff reported his discovery of an unlawful employment practice to Bona and Corso, objected to it and sought to correct it, they laughed at him, insulted him and/or told him to resign if he did not approve of such unlawful conduct." *Id.* at 16.

The complaint cites several examples of improper conduct by the defendants. In late 1999 or early 2000, a "Female VP" of the company allegedly complained to plaintiff that she had been sexually harassed by Mr. Bona during a business trip to Italy. *Id.* at 17. After Bona returned from Italy, Plaintiff informed Bona [who was the Female VP's superior] of the Female VP's complaint and allegations, that he opposed such improper conduct and that such conduct was not appropriate. *Id.* at 18. "Bona was unresponsive, and indicated to Plaintiff that Plaintiff

was making 'too big a deal over it.' Although he did not deny the Female VP's allegations, Bona refused to take any actions to correct such behavior and, over Plaintiff's strenuous objection, would not assure Plaintiff that such conduct would not be repeated in the future." *Id.* at 18. Subsequently, "Bona began repeatedly mistreating the Female VP by verbally abusing her, screaming at her and unjustifiably criticizing her, all in such an unprofessional manner that the Female VP often was reduced to tears. Plaintiff demanded on numerous occasions that Bona behave appropriately towards the Female VP, but it was ignored." *Id.* at 19.

In or about 1999 or 2000, a "Female Administrator" at RAI "informed Plaintiff that she had been sexually harassed by Mario Bona... ." *Id.* at 20. Plaintiff complained to Bona, who "angrily told Plaintiff to leave his office and to 'mind his own business.'" *Id.* at 21. Soon thereafter, the Female Administrator was "transferred to Italy." *Id.*

During 2000 and/or 2001, a "Female Producer" complained to plaintiff that a journalist, who was her superior at RAI, "had made unwanted sexual advances towards her on several occasions." *Id.* at 22. At a meeting to address these allegations, Mr. Corso and Mr. Bona "laughed at Plaintiff's opposition and objection to the journalists's harassing conduct, and Bona stated that the only thing [the Female Producer] is good for is a good f**k." *Id.* at 23. Plaintiff subsequently complained that the journalist was allowed to continue the inappropriate conduct toward the Female Producer, and was told by Bona and Corso that "if he did not like it, he could quit." *Id.* at 24.

On "numerous occasions, a female African-American sound editor at RAI [the 'Sound Editor'] expressed interest in becoming a camera operator. Every time Plaintiff mentioned this to Bona and Corso, they informed Plaintiff that they would not consider the Sound Editor for the

position because she is 'black, lazy and female.'" *Id.* at 25. Again, plaintiff was told by Corso and Bona that he "could leave the company if he did not like it." *Id.* at 26.

"In addition to the above discussed [1999-2001] examples of harassment and discrimination, Plaintiff repeatedly objected to and opposed other examples of unlawful conduct, demanded that such prohibited conduct cease and sought to cure the hostile work environment at RAI. ...Defendants became irritated with Plaintiff due to his continued opposition to such unlawful conduct." *Id.* at 27. Because plaintiff opposed the defendants' conduct, he was "wrongfully terminated" on or about January 17, 2002, by letter signed by Mr. Bona. *Id.* at 28. Prior to his termination, plaintiff had "consistently received excellent employment reviews, including his last review." *Id.* at 29.

The complaint asserts three causes of action: (1) violation of Section 296 of the Executive Law; (2) violation of Section 8-107 of the New York City Administrative Code; and (3) breach of contract.

II. Documentary Evidence

In support of their motion, defendants submit copies of *inter alia,* correspondence with, and regarding plaintiff, a copy of an internal audit performed in 2001, and a copy of the company's "Employee Information Manual."

According to defendants, RAI retained an independent auditor in October 2001, to "review its operations and identify areas of opportunity for improvement in management controls, organizational arrangement, and cost containment throughout RAI, including the personnel, administration and accounting departments." Defendants' Memorandum of Law, p. 5; Affidavit of M. Bona. The auditor's report criticized "middle managers" in general, and with

respect to the personnel department, stated that "the personnel management practices that have progressively emerged over time ... cause great difficulties in operational management and high cost levels." Bona Aff., Ex. B., p. 18. The report recommended that the Personnel Manager (plaintiff) "radically ... change his image and operating practices." *Id.*

By letter dated January 17, 2002, Mr. Bona wrote to plaintiff: "RAI Corporation is under the process of restructuring toward a more efficient business model: we regret to inform you that, after much consideration, we do not see an appropriate role for you in the future organization. Therefore the Board of Directors has decided that it is in our mutual interest that you leave the company." *Id.*, Ex. F. Mr. Bona avers that plaintiff's replacement, Ms. Remy Nicholas, wrote a memo dated January 30, 2002, stating that she found the Human Resources office and its contents "in total chaos." *Id.*, Ex I.

Defendants submit a copy of the Employee Information Manual ("1987 Manual"), which Mr. Bona avers was extant as of 1987, when plaintiff was hired. Bona Aff., Ex. K. The 1987 Manual provides: "If you are terminated or resign, you are obligated to return all RAI property in your possession... . The normal retirement age for all employees is 65." *Id.* Defendants also submit a copy of the "RAI Corporation Employee Manual," dated August, 1998 ("1998 Manual"). The 1998 Manual provides: "Since employment at RAI Corporation is based on mutual consent, both the employee and the company have the right to terminate employment at will, with or without notice, and with or without cause." *Id.*, Ex. L.

III. New York State and New York City Anti-Discrimination Laws

Human Rights Law § 296 provides, in pertinent part, that

> it shall be an unlawful discriminatory practice for an employer or

> licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Executive Law § 296(1).

Section 8-107 of the Administrative Code of the City of New York provides, in pertinent part, that:

> it shall be an unlawful discriminatory practice for an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

NYC Administrative Code § 8-107

IV. Conclusions of Law

A. Motion to Dismiss Standard

On a motion to dismiss a cause of action under the Human Rights Law, the Court must determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509 (1979). Moreover, the Court must "accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994).

B. State and City Anti-Discrimination Laws Standard

"The procedure for demonstrating both age and race discrimination under the [New York]

State and City anti-discrimination laws [Executive Law § 296 *et seq.* and Administrative Code § 8-101 *et seq.*] follows the familiar *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), order of proof for claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994 & Supp. 1999). *Norville v. Staten Island Univ. Hosp.,* 196 F.3d 89, 95 (2d Cir. 1999) citing *McDonnell Douglas, supra; Leopold v. Baccarat, Inc.,* 174 F.3d 261, 264 n.1 (2d Cir. 1999) (state law); *Landwehr v. Grey Adver., Inc.,* 211 A.D.2d 583, 622 N.Y.S.2d 17, 18 (1st Dept. 1995) (city law). *Accord Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305 (2004) (standards for recovery under Executive Law § 296[1] and human rights provisions of the New York City Administrative Code are the same as the federal standards under title VII of the Civil Rights Act of 1964) citing *Mittl v. New York State Div. of Human Rights,* 100 N.Y.2d 326, 330 (2003) (citation omitted).

To establish a prima facie case of unlawful retaliation[1] "for opposing discriminatory practices" under Executive Law § 296 (7) and Administrative Code § 8-107 (7), plaintiff must show that: (1) he has engaged in protected activity; (2) his employer was aware that he

---

[1]The complaint's two retaliation causes of action also allege that "there existed a general hostile work environment towards female employees at RAI." It is unclear from the face of the complaint whether plaintiff intends to assert, in addition to the wrongful termination causes of action, a hostile work environment claim on his own behalf. *See Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305 (2004) (hostile work environment is alternate theory of relief under State and Federal employment discrimination laws). To avoid confusion, the Court finds that plaintiff has not alleged sufficient facts to support a hostile work environment claim. "The standard for a hostile work environment claim is a demanding one. The plaintiff must prove that the conduct was offensive, pervasive, and continuous enough to amount to a constructive discharge." *Scott v. Mem'l Sloan-Kettering Cancer Ctr.,* 190 F. Supp. 2d 590, 599 (S.D.N.Y. 2002) (citation omitted). Plaintiff does not argue that defendants' discriminatory conduct amounted to his "constructive discharge." To the contrary, plaintiff was directly terminated, allegedly for opposing defendants' treatment of other employees. Thus, the Court concludes that no hostile work environment claim is stated.

participated in such activity; (3) he suffered an adverse employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action. Defendants argue that the complaint's retaliation claims must be dismissed because the complaint: (1) fails to establish a causal connection between the protected activity and the adverse action; (2) makes only conclusory allegations of retaliation; and (3) because documentary evidence establishes that Defendants had a legitimate, non-retaliatory business reason for terminating plaintiff. The Court disagrees.

Assuming, as the Court must, the truth of plaintiff's factual allegations, the Court concludes that plaintiff was engaged in a protected activity when he voiced his opposition to conduct by the defendants which he believed to be discriminatory and unlawful. *See Sorrentino v. Bohbot Entertainment & Media, Inc.*, 265 A.D.2d 245, 245-246 (1st Dept. 1999) ("Plaintiff's actions of encouraging the co-employee to bring her sexual harassment claim to the company, and his subsequent statements relaying what he knew of the claims, constituted 'opposition' to practices forbidden by both the State and City Human Rights Laws, and therefore were actions protected against retaliatory employment practices) (citations omitted). Nor is there any dispute that defendants were aware of plaintiff's protected activity, and that plaintiff suffered an "adverse employment action" when he was terminated. *See Forest* 3 N.Y.3d 295.

Defendants contend, however, that plaintiff has failed to allege facts demonstrating a causal nexus between his opposition of defendants' conduct toward several female employees, and his firing. Defendants argue that plaintiff's termination was too remote in time from when plaintiff complained about defendants' conduct because the incidents described in the complaint occurred in 1999, 2000 and 2001, and the termination occurred in 2002.

The requirement that plaintiff show a causal connection between his complaints and his termination may be satisfied by demonstrating "the temporal proximity between the two." *See Feingold v. New York,* 366 F.3d 138, 156 (2d Cir. 2004) citing *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.,* 263 F.3d 208, 224 (2d Cir. 2001). But even where "the elapsed time between plaintiff's complaint of harassment and [his] dismissal does not of itself support an inference of retaliation," the Court may consider other factors to determine whether the plaintiff stated a prima facie case of retaliation. *See Pace v. Ogden Servs. Corp.,* 257 A.D.2d 101, 104-105 (N.Y. App. Div. 1999) (fact that plaintiff's subordinate, "a male who was less qualified and paid a larger salary, was kept to fill her position" supported inference of unlawful discrimination) (citations omitted).

Here, the complaint alleges that defendants consistently rejected his complaints of improper treatment of female employees and advised plaintiff (the company's personnel officer) that if he did not like their practices, he could leave. The complaint further alleges that plaintiff continued to complain after the specific incidents in 1999, 2000 and 2001, and that he was terminated after defendants became "irritated" with his opposition. In an affidavit submitted in opposition to defendants' motion, plaintiff avers that he continued to complain about defendants' conduct up until his termination. Affidavit of J. Bologna, para. 8. Defendants do not dispute that plaintiff had an excellent employment record and had not received any negative performance reviews during his 15-year employment. His termination letter does not mention any specific reason, other than a "process of restructuring." The Court concludes that plaintiff has alleged sufficient facts to support a finding that a causal nexus existed between plaintiff's opposition of defendants' conduct toward female employees, and his termination. The Court

notes that plaintiff cannot be expected to establish that defendants "actually expressed their discriminatory intent, and the record must therefore be examined as a whole in order to ascertain whether, in light of all the circumstances, the evidence supports a finding of such intent." *Sogg v. American Airlines*, 193 A.D.2d 153, 160-161 (1st Dept. 1993) (citations omitted).

Defendants further contend that plaintiff's complaint should be dismissed because they have presented documents which demonstrate a legitimate non-retaliatory reason for his termination. Defendants misapprehend the law. The present record may provide a basis upon which a fact-finder could conclude that defendants fired plaintiff because the internal audit determined that his performance was poor. However, on a motion to dismiss, such evidence does not destroy plaintiff's prima facie case. *See Mohammad v. Board of Managers,* 262 A.D.2d 76, 77 (1st Dept. 1999) ("Although defendants have arguably articulated a legitimate, nondiscriminatory reason for some of the allegedly retaliatory conduct, discovery has yet to be conducted and plaintiffs, having adequately stated a claim for employment discrimination, should be afforded a full and fair opportunity to support their allegations").

C. Breach of Contract Claim

Finally, the Court concludes that plaintiff has failed to allege facts sufficient to support a cause of action for breach of contract. New York law presumes that where the term of employment is for an indefinite period of time, it is a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason. *See Lobosco v. N.Y. Tele. Co./NYNEX,* 96 N.Y.2d 312 (2001). "New York does, however, recognize an action for breach of contract when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy

in accepting employment." *Id.* at 316 citing *Weiner v. McGraw-Hill Inc.*, 57 N.Y.2d 458, 443 (1982).

Here, plaintiff was employed for an indefinite term and thus, was presumed to be an at-will employee. *Lobosco,* 96 N.Y.2d 312. The 1987 Manual, which was extant at the time of plaintiff's hiring, does not require RAI to provide cause for an employee's termination. Plaintiff alleges that RAI represented to him at the time of his hiring that the 1987 Manual was "modeled after" certain unidentified employment agreements then used by RAI's Italian parent corporation, which allegedly prohibited termination by the employer, except with cause. Plaintiff argues that RAI, therefore, was prohibited from terminating plaintiff without cause. Plaintiff cites no document supporting this strained extrapolation of the 1987 Manual's plain text. Thus, the Court concludes that plaintiff has pled no breach of contract claim. *R/S Assocs. v. N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32 (2002)(where "language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language") (citations omitted) . Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint is denied, except as to third cause of action, for breach of contract; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: January 24, 2006
New York, New York

SHIRLEY WERNER KORNREICH