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

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

Mariotti, Gabriella

- v -

Alitalia - Linee Aeree Italiane

INDEX NO. 102648/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	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

FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/08

Mat
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

GABRIELLE MARIOTTI,

Plaintiff,

-against-

ALITALIA - LINEE AEREE ITALANE - SOCIETA PER AZIONI, THIERRY AUCOC, PIERANDREA GALLI and GIULIO LIBUTTI,

Defendants

Index No. 102648/07

DECISION and ORDER

Motion sequence numbers 001, 002, 004 and 005 are consolidated for disposition.

This action arises out of defendants' alleged discrimination against plaintiff Gabrielle Mariotti (Mariotti) based upon his age and sexual orientation. The nine-count amended complaint asserts three causes of action under § 296 of New York's Executive Law (NYHRL), five causes of action under § 8-107 of the New York City Administrative Code (NYCHRL), and one cause of action for negligent and intentional infliction of emotional distress.

In motion sequence number 004, defendants Alitalia - Linee Aeree Italiane, S.p.A. (Alitalia), Pierandrea Galli (Galli) and Giulio Libutti (Libutti) move to dismiss the amended complaint for failure to state a cause of action. In motion sequence number 005, defendant Thierry Aucoc (Aucoc) separately moves to dismiss the amended complaint for failure to state a cause of action. Mariotti cross-moves for summary judgment on liability against Alitalia and Aucoc.[1]

[1] The court notes that, on March 26, 2007, defendants moved to dismiss the original complaint and plaintiff cross-moved for summary judgment on liability. Plaintiff also served a second cross-motion for a default judgment, additional time to complete service against Galli and Libutti, or leave to serve these defendants by alternative means. Defendants concede that Galli and Libutti were eventually served. By stipulation date June 20, 2007, Galli and Libutti withdrew their original motion to dismiss and plaintiff withdrew his second cross-motion. In July 2007, plaintiff filed an amended complaint. By stipulation dated August 10, 2007, defendants Alitalia and Aucoc withdrew their original motion to dismiss. Therefore, the only motions presently before the Court are defendants' motions to dismiss (motion sequence numbers 004 and 005) and plaintiff's cross-motion for summary judgment.

Facts

According to the amended complaint, from 1990 to 2006, Mariotti was an employee of Alitalia, an Italian corporation doing business in New York. Mariotti allegedly held various positions, including Senior Management in Sales. Libutti was allegedly Mariotti's direct supervisor and Galli was allegedly Libutti's supervisor.

Mariotti is a homosexual male over the age of 40. He claims that, beginning in 2003, he was subject to defendants' repeated inappropriate comments concerning his sexual orientation. In September 2004, Libutti allegedly asked Mariotti to fire an employee because of her age, in connection with Alitalia's alleged policy of not hiring "older workers." Amended Complaint, ¶27. Mariotti claims that in response, he told Libutti that firing an employee "because of her age was unacceptable." *Id.*, ¶25.

Mariotti claims that he applied for a promotion in August 2004, but that the promotion was given to an employee with inferior sales experience. According to Mariotti, an Alitalia senior vice president told Galli and Libutti that Mariotti was not promoted because of his age and sexual orientation, and because Mariotti "refused to abide by Libutti and Alitalia's policy of not hiring older workers." *Id.*, ¶26.

Mariotti maintains that he complained to Alitalia about its failure to promote him, but as a result, he was "brushed off" and retaliated against. *Id.*, ¶29. Specifically, Mariotti claims that he was promoted to a marketing position, where he was "set up" to fail. *Id.*, ¶34. Defendants allegedly failed to provide Mariotti with necessary staff and transferred marketing functions from him, making it impossible for Mariotti to perform his job properly. Due to defendant's alleged misconduct, Mariotti claims that he left his job in October 2006.

Libutti was allegedly fired for his discriminatory conduct and on July 11, 2006, was replaced by Aucoc, who allegedly continued Libutti's pattern of abuse and harassment. Mariotti claims that he was retaliated against and constructively discharged from a hostile work environment. He seeks lost wages and benefits, compensatory and punitive damages, and attorney's fees.

Discussion

Single-Motion Rule

As a preliminary matter, Mariotti argues that defendants' motion to dismiss is prohibited by the so-called "Single-Motion Rule." Smith Aff., ¶8. In essence, Mariotti argues that defendants already used their single motion to dismiss the original complaint under CPLR 3211(a)(7). Under CPLR 3211(e), "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." However, where the plaintiff serves an amended complaint, a "second motion should lie. The amended complaint supersedes the earlier one, in effect starting things over." Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211.55.

Here, as discussed above, Mariotti served an amended complaint, defendants withdrew their original motion to dismiss, and defendants never moved to dismiss the new pleading. Thus, defendants' current motions to dismiss are properly directed at the amended complaint. Therefore, Mariotti's argument as it pertains to prohibiting the motion to dismiss under the "Single-Motion Rule" is without merit.

Defendants' Motions to Dismiss

Defendants seek dismissal of the first and fourth causes of action for discrimination based upon sexual orientation and dismissal of the first and fourth causes of action for age discrimination. Defendants next seek dismissal of Mariotti's first and fourth causes of action to the extent that these claims are based upon a hostile work environment. Defendants next seek dismissal of the first, second, fourth and fifth causes of action to the extent that these claims are based upon constructive discharge, dismissal of the second and fifth causes of action for retaliation, and dismissal of the third and sixth causes of action for aiding and abetting. Further, defendants seek dismissal of the seventh cause of action for interference with protected rights and dismissal of the eighth cause of action for employer liability. Finally, defendants seek dismissal of Mariotti's ninth cause of action for negligent and intentional infliction of emotional distress (IIED) as partially time-barred and for failure to state a cause of action.

Discrimination Based on Sexual Orientation and Age; Hostile Work Environment; Constructive Discharge

Defendants move to dismiss the first and fourth causes of action for sexual orientation, age discrimination and hostile work environment, arguing that there was no adverse employment action against Mariotti and no allegations of severe and pervasive abuse relating to Mariotti's age. Defendants also seek dismissal of the first, second, fourth and fifth causes of action to the extent that these claims are based upon constructive discharge.

On a motion to dismiss, the allegations in the complaint are accepted as true. In deciding a motion to dismiss, all reasonable inferences are drawn in the plaintiff's favour. The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but

merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985).

The first cause of action is based upon § 296(1) of the NYHRL, which makes it "unlawful discriminatory practice" for an employer "to refuse to hire or employ or to bar or to discharge from employment...or to discriminate against [an] individual in compensation or in terms, conditions or privileges of employment," based upon "age [or] sexual orientation... ." The fourth cause of action is based upon § 8-107(1)(a) of the NYCHRL, which makes it "an unlawful discriminatory practice...[f]or an employer or an employee...to refuse to hire or employ or to bar or to discharge from employment...or to discriminate against [a] person in compensation or in terms, conditions or privileges of employment," based upon "actual or perceived age [or] sexual orientation... ."

Analysis of employment discrimination matters in New York mirrors the burden-shifting rubric established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and claims brought under the NYHRL and NYCHRL "are subject to the same analysis" (*Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 [2d Cir.], *cert denied*, 534 U.S. 993 [2001]).[2] Thus, Mariotti has the initial burden to establish a prima facie case of age discrimination. *Stephenson v. Hotel Empls. And Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 270 (2006). "[T]he burden then shifts to the defendant to rebut [Mariotti's] prima facie case of discrimination with a legitimate reason for firing." *Id.* Then, "the plaintiffs must show by a preponderance of the evidence that defendant's reasons are pretextual." *Id.* at 271.

To make a prima facie showing under the NYHRL,

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[2] The Court notes the New York City Council policy that the NYCHRL is to be liberally and independently construed with the aim of making it more protective than its federal (Title VII of the Civil Rights Act of 1964) or state counterparts. Hence, case law suggests that the other human rights laws "should merely serve as a base for the [NYCHRL], not its ceiling." *Farrugia v. North Shore Univ. Hosp.*, 13 Misc. 3d 740, 747 (Sup. Ct., NY County 2006); *Jordan v. Bates Adv. Holdings*, 11 Misc. 3d 764, 771 (Sup. Ct., NY County 2006).

> plaintiff must demonstrate 1) that he is a member of the class protected by the statute; 2) that he was actively or constructively discharged; 3) that he was qualified to hold the position from which he was terminated; and 4) that the discharge occurred under circumstances giving rise to an inference of discrimination.

Id. at 270 (quotation marks and citation omitted).

As to the first element, Mariotti is a homosexual male over the age of 40 and therefore is a member of a protected class. As to the third element, there is no dispute as to Mariotti's qualifications for the position he held. As to the second and fourth elements, Mariotti claims that he was constructively discharged due to defendants' discrimination and a hostile work environment, and that, in August 2004, he was not promoted because of his sexual orientation, his age, and because he "refused to abide by Libutti and Alitalia's policy of not hiring and firing older workers." (Amended Complaint ¶26).

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 (2004) (citation and internal quotation marks omitted). A hostile work environment is one that "a reasonable person would find hostile or abusive" and one where the plaintiff "subjectively perceive[s] the environment to be abusive." *Harris v. Forklift Sys., Inc*, 510 U.S. 17, 21-22 (1993) (internal citation and quotation marks omitted). "Whether a work environment is sufficiently abusive to be actionable...depends on all of the circumstances of a given situation" including the following considerations: 1) frequency of the conduct; 2) severity of the conduct; 3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and 4) whether the conduct unreasonably interferes with the employee's work performance. *Brennan v. Metropolitan Opera Assn., Inc.*, 192 F.3d

310, 319 (2d Cir. 1999), citing *Harris* 510 U.S. at 23. The conduct must have "created a pervasive atmosphere of 'intimidation, ridicule and insult' adequate to alter the terms of the plaintiff's employment." *Id.* (citation omitted).

Here, while no physically threatening conduct is alleged, Mariotti claims that he was repeatedly subjected to the defendants' use of the word "faggot" and its Italian version, "Frocio" (Amended Complaint, ¶20), and that he was told by Libutti that "he should better start belonging to the team'" (*Id.*, ¶23). The complaint also provides additional examples of abusive conduct by Libutti and Galli, including one instance in which Libutti and Galli allegedly referred to another employee as "Frocio" and asked Mariotti if he knew whether this employee "was a 'top' or a 'bottom.'" *Id.*, ¶24. These inappropriate comments were in specific reference to Mariotti's sexual orientation. Moreover, Mariotti submitted the affidavit of Francesco Gallo (Gallo), a former senior vice president of Alitalia, in which Gallo alleges that he witnessed Libutti and Galli refer to Mariotti as a "fag" and a "little lady." Gallo Aff., ¶¶4, 5. Gallo further states that he was directed to fire Mariotti because of his sexual orientation, but refused to do so. Gallo Aff., ¶7.

Constructive discharge occurs when "an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 203 (1st Dep't. 1996) (citations and internal quotation marks omitted). In order to meet this threshold, the working conditions must have been "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Morris v. Schroder Capital Mgt. Intl.*, 7 N.Y.3d 616, 622 (2006).

Here, Libutti was replaced by Aucoc in July 2006; however, Mariotti did not resign until October 2006. Thus, Mariotti's allegations are severely undermined by the fact that Libutti was replaced approximately three months prior to Mariotti's resignation. *Ternullo v. Reno*, 8 F. Supp. 2d 186, 193 (N.D. N.Y. 1998) ("[p]laintiff's case is significantly undercut by the fact that the source of her problems, [her supervisor], was removed nearly two months prior to submitting her resignation"). However, in the three months preceding his resignation, from July to October 2006, Mariotti claims that Aucoc "continued the pattern of abuse and harassment towards Plaintiff" allegedly begun by Libutti and Galli. (Amended Complaint, ¶35). Mariotti claims that in August 2004, he applied for a promotion to the position of Senior Director of sales. Not only was Mariotti passed over for the promotion, Mariotti claims that the person who was promoted instead was not only far less qualified than he, but the promoted employee lacked any significant previous experience at all in the area of sales. Additionally, Mariotti claims that he was "set up" to fail at his job, when, after he was finally promoted in 2006, he was simultaneously placed on probation within Alitalia. Further, Mariotti was understaffed and "important marketing functions were transferred away from him." (Amended Complaint ¶34). Gallo states that he was directed to fire Mariotti because of his sexual orientation, but refused to do so. Gallo Aff., ¶7. Moreover, Gallo supports Mariotti's claim by stating in his affidavit that Libutti set Mariotti up for failure by intentionally withholding the resources necessary for Mariotti to complete his new position. Gallo Aff., ¶10. Gallo specifically attests that "Libutti told [Gallo] he was not going to give Mr. Mariotti the resources Mr. Mariotti needed to perform his job in order to have Mr. Mariotti fail which would form the basis to terminate him." Gallo Aff., ¶10. Gallo states that defendants "were incredibly discriminatory and looking to fire Mr. Mariotti because he is a homosexual." Gallo Aff., ¶10. After Mariotti left Alitalia, the person promoted to the position after him was

given a complete staff and the "important marketing function" which had been transferred away from Mariotti were restored.[3]

In considering the foregoing, the amended complaint sufficiently alleges constructive discharge and that such discharge occurred under circumstances which gives rise to an inference of discrimination, thus satisfying the second and fourth elements required to establish a prima facie case. Therefore, Mariotti has established a prima facie case with regards to the first and fourth causes of action for sexual orientation and hostile work environment, and the first, second, fourth and fifth causes of action to the extent that these claims are based upon constructive discharge.

However, with regard to the first and fourth causes of action based upon age discrimination, Mariotti has not properly established a prima facie case. Assuming that Alitalia had an "open policy of age discrimination" as is alleged in paragraph 32 of the amended complaint, nothing contained in the pleading specifically alleges that adverse action was taken against Mariotti based to his age. The comments that Mariotti puts forth as creating a hostile work environment dealt with his sexual orientation, not his age. Additionally, Mariotti's claim that he was discriminated against for refusing to "abide by Libutti and Alitalia's policy of not hiring and firing older workers" constitutes retaliatory discrimination, not age discrimination. Thus Mariotti's claim that he was discriminated against due to his age is conclusory, because he fails to explain how this discrimination occurred or cite a personal example of age-related discrimination.

Accordingly, defendants' motions to dismiss the first and fourth causes of action are granted solely with respect to Mariotti's claims of age discrimination, whereas defendants'

[3] The Court notes that the person who replaced Mariotti is a female. Amended Complaint ¶34. Neither side makes representations as to her sexual orientation and neither side avers that she leads an alternative sexual lifestyle

motion to dismiss the first and fourth causes of action for sexual orientation and hostile work environment, and the first, second, fourth and fifth causes of action for constructive discharge are denied.

Retaliation

Defendants next move to dismiss the second and fifth causes of action for retaliation.

In order to establish a prima facie case of retaliation, an employee must show: 1) that he was engaged in protected activity; 2) that "the employer was aware of plaintiff's participation in the protected activity; 3) the employer took adverse action against plaintiff; and 4) a causal connection existed between the plaintiff's protected activity and the adverse action taken by the employer." *Gordon v. New York City Bd. Of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) (citation and internal quotation marks omitted). In addition, "[r]etaliation claims under the HRL and the NYCHRL, like sexual harassment claims, are analytically identical to those under Title VII... ." *Sowemimo v. D.A.O.R. Sec., Inc.*, 43 F.Supp. 2d 477, 487 (SD NY 1999).

On a motion to dismiss, the allegations in the complaint are accepted as true. In deciding a motion to dismiss, all reasonable inferences are drawn in the plaintiff's favour. The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985).

Mariotti claims that he was discriminated against for his refusal to "abide by Libutti and Alitalia's policy of not hiring and firing older workers" (Amended Complaint ¶26). Mariotti alleges that he was passed over for a promotion in 2004 and then "set up to fail" when he was finally promoted in 2006, (*supra*). If these things occurred as a result of Mariotti's refusal to fire the employee in question due to her age, then Mariotti was engaged in protected activity of

which the employer was aware and they constitute retaliatory discrimination. However, it must be left up to a jury to decide whether the facts alleged by Mariotti constitute retaliation and therefore these claims cannot be dismissed outright. For the foregoing reasons, defendants' motion to dismiss Mariotti's claim of retaliatory discrimination as alleged in the second and fifth causes of action is denied.

Aiding and Abetting

Defendants next seek dismissal of the third and sixth causes of action for aiding and abetting, under §296 (6) of the NYHRL and §8-107 (6) of the NYCHRL, respectively. Both provisions provide that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." NYHRL §296 (6) and NYCHRL §8-107 (6). "It is the employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting." *Murphy v. ERA United Realty*, 251 A.D.2d 469, 472 (2d Dep't. 1998); *see also Priore v. New York Yankees*, 307 A.D.2d 67, 74 (1st Dep't. 2003).

As discussed above, defendants' motions to dismiss all discrimination-based claims (first, second, fourth and fifth causes of action, with the exception of discrimination based on age) and claims of retaliatory discrimination have been denied. Further, the court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). Therefore, whether or not any or all of the defendants aided, abetted, incited, compelled or coerced any such conduct will be determined through due course of judicial proceedings. For the foregoing reasons, defendants' motion to dismiss the third and sixth causes of action is denied.

Interference with Protected Rights

Defendants seek dismissal of the seventh cause of action for interference with protected rights, which seeks to invoke §8-107 (19) of the NYCHRL. Under the section,

> [i]t shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

As previously discussed, this Court has found that Mariotti's discriminatory and retaliatory claims, as well as his claims that one or more defendants aided and abetted the discriminatory behavior, should not be dismissed outright without the benefit of further judicial proceedings. As a further extension of these claims, the assertion that one or more defendants attempted to or succeeded in coercing, intimidating, threatening or interfering with any of Mariotti's protected rights must be determined through discovery and further court procedures. Therefore, defendants' motion to dismiss the seventh cause of action is denied.

Employer Liability

Defendants seek dismissal of the eighth cause of action, which asserts a claim under §8-107 (13) of the NYCHRL. This section makes an employer "liable for unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section." This cause of action is a further assertion of Mariotti's discrimination claims in the first, second, fourth and fifth causes of action. Therefore, for the reasons discussed above addressing each of those causes of action, defendants' motion to dismiss the eighth cause of action is denied.

Negligent and Intentional Infliction of Emotional Distress (IIED)

Defendants seek dismissal of Mariotti's ninth cause of action for IIED as partially time-barred and for failure to state a cause of action.

The statute of limitations for a claim for IIED is one year. CPLR 215; *Gallagher v. Directors Guild of Am., Inc.*, 144 A.D.2d 261, 262 (1st Dep't. 1988) ("claim for damages for an intentional tort is subject to the one-year limitations period," including a claim for IIED). Plaintiff made no specific opposition with respect to the time-limitations issue. Here, the action was commenced on February 26, 2007. Therefore, Mariotti's claim for IIED is time-barred with respect to events that occurred prior to February 26, 2006.

On the merits, in order to establish a claim for IIED, a plaintiff must show 1) defendant's conduct was extreme and outrageous; 2) defendant acted with intent to cause severe emotional distress or with reckless disregard that such conduct would cause severe emotional distress; 3) plaintiff's injury was caused by defendant's conduct; and 4) plaintiff suffered severe emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). A claim of harassment based on a pattern of abusive conduct has been held to give rise to a claim of IIED where the alleged conduct goes far beyond the bounds of decency. *See Polley v. FRB of New York*, 1994 U.S. LEXIS 11813 (S.D.N.Y.), citing *Collins v. Wilcox, Inc.*, 158 Misc.2d 54 (Sup. Ct. 1992). While the burden on the plaintiff is not an easy one because it must be shown that the conduct was "so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v. American Home Products Corp.*, 58 N.Y.2d 293 [1983]), it would be premature for the Court to decide at this time whether that burden has been met. Plaintiff must have the benefit of further discovery and other judicial proceedings in order to establish his case and prove his burden. As

such, defendants' motion to dismiss the ninth cause of action with respect to events occurring on or after February 26, 2006 is denied.

Conclusion

In summation, defendants' motions to dismiss the first and fourth causes of action are granted solely with respect to Mariotti's claims of age discrimination, as Mariotti failed to state a claim on this count. Defendants' motions to dismiss the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action with respect to Mariotti's claims of discrimination based on sexual orientation, hostile work environment, constructive discharge, retaliation, aiding and abetting, interference with protected rights, employer liability, and negligent and intentional infliction of emotional distress are hereby denied in whole.

All parties are directed to appear for a conference on September 16, 2008.

Date: 7-31-08

J.S.C.

HON. MILTON A. TINGLING
J.S.C.

FILED
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