NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JEFFREY SMITH,	Index No. 21251/11
Plaintiff,	Motion Date May 10, 2013
- against-	
HAVAS NORTH AMERICA, INC., et al.,	Motion Cal. No. 94
Defendants.	Motion Seq. No. 4

The following papers numbered 1 to 52 read on this motion by defendants, Havas North America, Inc., Euro RSCG Worldwide, Inc., Euro RSCG Worldwide, LLC (herein collectively referred to as "Euro"), and Louis-Philippe Cavallo, to dismiss the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-48
Affirmation in Opposition - Exhibits.....	49-50
Reply Affirmation.....	51-52

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff in this, *inter alia*, age discrimination case alleges that he was wrongfully terminated from his employment by Havas North America, Euro RSCG Worldwide, Inc., and Euro RSCG Worldwide, LLC (collectively "Euro"). Defendant, Louis-Phillipe Cavallo, is the Chief Financial Officer for defendant, Euro, and one of plaintiff's supervisors. The complaint asserts claims for age discrimination pursuant to New York State Human Rights Law (NYSHRL), §§296 *et seq* and New York City Human Rights Law (NYCHRL), §§8-101 *et seq*; retaliation pursuant to New York State Human Rights Law, §§296 *et seq* and New York City Human Rights Law §§8-101 *et seq*; and aider and abettor liability pursuant to New York State Human Rights Law, §§296 *et seq* and New York City Human Rights Law §§8-101 *et seq*. Defendants move to dismiss the complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

Facts

In or about May, 2010, Euro began the process of migrating from their existing financial platform and reporting software to a system called "PeopleSoft." It planned to upgrade its own already operative PeopleSoft system (the "Project"), to a newer version. In May 2010, Euro hired David Kennedy to manage the Project and he was Director of PeopleSoft Project Management. In October 2010, upon Kennedy's promotion, Cavallo, Kennedy and others interviewed plaintiff, who was then 50 years old, and recommended him for the position. In November 2010, Euro offered plaintiff the position of project manager for the Project as an employee-at-will.

Defendant submits that prior to accepting the position, plaintiff understood that he was expected to (i) ensure the timely completion of the Project within the set budget by, among other tasks, gathering the specifications ("specs") for the Project from the analysts who drafted them, reviewing and then presenting them to Kennedy and others for approval; (ii) facilitate meetings; (iii) information gathering; and (iv) have an in-depth understanding of Euro's then-current financial methodology (i.e. the way the company kept its computerized financial records), as well as of the PeopleSoft system. Plaintiff was responsible for reporting the overall Project status, and taking ownership of all aspects of implementation, including assisting and managing the Project deliverables and completion dates. Further, defendant submits that plaintiff understood that Euro had "very limited" resources to complete the Project within the targeted time line.

On or about November 15, 2010, plaintiff began working at Euro. Kennedy was plaintiff's direct supervisor. Cavallo was Kennedy's supervisor and, as CFO and Director of Group Shared Services for Havas, was ultimately responsible for the Project. Defendant submits that, as with all new Euro employees, plaintiff was placed on a 90-day new employee probation. Approximately 10 employees (including plaintiff) were assigned to participate as members of the Project team and to report to Kennedy ("PeopleSoft Team"). Eight of the ten employees on the PeopleSoft team were 40 or more years old; one employee was older than plaintiff.

One month after plaintiff's start date, he requested a work schedule which, between days working from home, vacation days and Euro's holiday schedule, resulted in plaintiff being out of the office for an entire month. While Kennedy "reluctantly" granted plaintiff's request, he cautioned plaintiff that next time he needed to give more notice when seeking such an extended time off.

Defendants submit that soon after plaintiff returned from the time off, Kennedy, Cavallo and others began to notice "serious deficiencies" in plaintiff's work performance. Among the issues, plaintiff failed to follow-up with Cavallo regarding specs that he and Cavallo had been working on. Plaintiff also failed to deliver specs by the date he agreed to provide them and, to the extent that plaintiff submitted any finalized specs for approval, such documents were

submitted late and found to be unacceptable. Plaintiff admitted, during his examination before trial, that Gary Liddell, the Chief Financial Officer of Euro, who was essentially plaintiff's client on the Project, was not satisfied. By February of 2011, allegedly plaintiff's performance was so lacking that Kennedy and Cavallo, in consultation with Euro's human resources department, decided to extend plaintiff's new employee probationary period by 60 days, advise the recruiting agency which placed plaintiff in the project manager position that plaintiff's resume and his actual performance were "inconsistent," and seek replacement applicants for the position.

Defendants further submit that during the period that plaintiff's performance issues surfaced, on or about February 2, 2011, plaintiff attended a meeting with Cavallo, Kennedy and several other employees who were also involved in the Project. Plaintiff testified during his examination before trial, that Cavallo told him that plaintiff's probationary period was coming to a close and that Cavallo was "not happy." Plaintiff further testified that during the meeting Cavallo acted in a "threatening manner," telling plaintiff to have all specifications approved in one day or else he would be fired. Plaintiff also testified that Cavallo "mocked and belittled [plaintiff] by gesturing that [plaintiff] was taking and giving only bullshit answers and, that he told [plaintiff] that his humming was annoying." While plaintiff had alleged that Cavallo had commented on plaintiff's age during the meeting, during the examination before trial, however, plaintiff admitted that Cavallo had made no comments about plaintiff's age. Plaintiff testified that he was upset about Cavallo's statements because he perceived them to be an "inappropriate" public reprimand; that an employee's probationary period is "something that you normally do not discuss with somebody in public."

The day after the meeting, plaintiff called Corinne Romano, Director of Human Resources for Euro to report Cavallo's "inappropriate" comments made during the meeting. Plaintiff admits that during his deposition he did not report to Romano that Cavallo said anything about plaintiff's age during the meeting, nor did he claim that Cavallo was discriminating against him on the basis of age or retaliating against him on account of his engagement in any protected activity. Defendants submitted Romano's notes, tracking the events, and these notes do not contain any reference to Cavallo comments about plaintiff's age or age discrimination.

On March 3, 2011, plaintiff made another similar complaint again against expressing that he was upset with Cavallo publicly criticizing his work performance. Plaintiff reported Cavallo's comments to Romano by e-mail and telephoned her. Plaintiff told Romano that Cavallo created a hostile work environment by insulting plaintiff in front of plaintiff's superiors. Again, plaintiff failed to state that Cavallo made any comments about his age, nor that he was being discriminated against because of his age. Plaintiff testified that he believed Cavallo's second set of comments in March were motivated by retaliation due to plaintiff's February 3, 2011 complaint.

On the evening of March 3, 2011, plaintiff then followed up with another e-mail. In this

e-mail, plaintiff characterized Cavallo's unprofessional conduct as age discrimination. Specifically, plaintiff's e-mail stated that "having had time to reflect on [Cavallo's] unprofessional behavior, I feel strongly that I am being discriminated against because of my age. I came to this conclusion after speaking with my counselor." Plaintiff averred that the "counselor" he consulted was his wife who thought Cavallo had issues with older people.

As he stated in his e-mail, plaintiff's evidence of Cavallo's age discrimination includes that (i) Cavallo would "snap his fingers at me, ask me a question, then as I try to answer, interrupts and tells me that I'm too slow with my response; (ii) he will say I am too slow to be a good secretary ([Plaintiff] was not writing fast enough); and (iii) Cavallo said he should "shove a clock up [plaintiff's] ass so he would stay focused on times and dates." Plaintiff did not indicate that Cavallo made any explicit reference to plaintiff's age in the email. Plaintiff also testified that these comments were not related to his age but to the speed with which he wrote and answered questions; and his ability to adhere to a timeline.

In support of the instant motion, Romano avers that she responded to plaintiff's accusation of age discrimination with an email indicating that Euro did not believe that plaintiff's age had anything to do with Cavallo's behavior and that she would investigate the claim. Upon investigation, Romano discovered that Cavallo had also criticized and berated others involved in the Project. She stated that she found the criticism was warranted based on plaintiff's significant professional deficiencies.

Further, Romano avers that during plaintiff's extended probation from March 4, 2011 through May 3, 2011, plaintiff's performance and relatedly, the progress of the Project under plaintiff's management, continued to deteriorate. First, on March 8, 2011, plaintiff revised the timeline for full implementation of the PeopleSoft system and extended the "go-live" time from November, 2011 until February or March of 2012. Kennedy found plaintiff's time line unacceptable and told plaintiff it had to get done sooner. Second, plaintiff allegedly continued to disappoint Liddell by, *inter alia*, failing to provide Liddell with a coherent plan for the Project. Third, various aspects of plaintiff's work product and performance were found to be unacceptable. Fourth, plaintiff's methodology for completing the Project was at odds with Kennedy's, yet plaintiff failed to yield to Kennedy's direction. For example, Kennedy and Cavallo wanted plaintiff to use a methodology which required specifications that were sufficiently detailed so that the computer programmers could understand how to code the required functionalities. On the other hand, plaintiff thought it was "more appropriate" to write "very, very slight specifications" or "drawings called swim lanes where you literally use flow charts to specify" a business process and how it is mapped. Kennedy kept Cavallo apprised of his exchanges with plaintiff on the topic and reached out to Cavallo to advise him that he was "dealing with an issue surrounding [plaintiff's] performance regarding their differing methodological approaches." In addition to plaintiff's refusal to use the methodology demanded by Kennedy, defendants submit that plaintiff failed to ensure that sufficient detail and function design information were written into the specs.

Based upon plaintiff's alleged failures and insubordination, plaintiff's probationary period was again extended when it expired on May 3, 2011. The latter extension was for 30 days until June 3, 2011. Based upon an incident at a May 2, 2011 meeting where Cavallo laughed at plaintiff and was "abusive" and "demeaning," plaintiff again complained to Human Resources about Cavallo's behavior. However, once again, he did not claim that Cavallo mentioned anything about plaintiff's age or about plaintiff's prior complaints.

Finally, when plaintiff's performance did not improve after the second probation extension, and the Project went into the "red zone" (meaning disaster was imminent and there was a critical failure), plaintiff was terminated on June 6, 2011 (at the close of the final probationary period). Defendant submits that the entire Project was abandoned as no one was hired to replace plaintiff. On September 9, 2011, plaintiff filed the complaint in this action.

Discussion

Under the New York State Human Rights Law, to support a *prima facie* case of age discrimination, 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 age discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Once a *prima facie* case is made, the burden shifts to the employer to rebut the presumption with evidence that the plaintiff was discharged for a legitimate, nondiscriminatory reason. If such evidence is produced, the presumption is rebutted and the fact-finder must determine whether the proffered reasons are merely a pretext for discrimination. A fact-finder who concludes that the proffered reasons are pretextual is permitted to infer the ultimate fact of discrimination but is not required to do so (*id.* at 630).

A defendant "seeking summary judgment dismissing a cause of action alleging age discrimination must demonstrate either that, as a matter of law, the plaintiff cannot establish the elements of intentional discrimination, or that the plaintiff cannot raise a triable issue of fact as to whether the facially legitimate, nondiscriminatory reasons proffered by the [defendant for its] challenged actions were pretextual" (*Considine v Southampton Hosp.*, 83 AD3d 883, 884 [2d Dept 2011] [internal quotation marks and citations omitted]; *see Sayegh v Fiore*, 88 AD3d 981 [2d Dept 2011]). In the case at bar, defendants established their entitlement to judgment as a matter of law by demonstrating that plaintiff cannot establish the elements of intentional discrimination: that he was qualified to hold the position from which he was terminated or that his discharge occurred under circumstances giving rise to an inference of age discrimination.

Where, as here, a plaintiff cannot demonstrate that he was "satisfactorily performing the job at the time of discharge," plaintiff failed to show that he was qualified for the position (*see Cole v Millard Fillmore Hosp.*, 116 F.3d 465 (2d Cir. June 13, 1997). In cases of alleged discriminatory termination, a discharged employee must show that he was satisfactorily

performing the job at the time of the discharge in order to show that he was qualified for the position (*Thornley v Penton Pub.,* 104 F.3d 26, 29 (2d Cir.1997). Satisfactory performance is defined as performing the job at a level that meets the legitimate expectations of the employer. In considering this issue, courts may rely on evaluations prepared by the employee's supervisors (*Meiri v Dacon*, 759 F.2d 989, 995 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985). In the instant case, defendants presented sufficient uncontroverted documentation to demonstrate that, according to its employment standards, plaintiff was not performing his job satisfactorily. According to plaintiff's superior, plaintiff was deficient in his performance during his entire tenure as project manager; and that his deficiencies were communicated to him repeatedly, including in each of his two probationary memos.

It is well-settled that any inference of discrimination is undermined when the plaintiff is within the protected class when first hired (*Vinokur v Sovereign Bank*, 701 F. Supp. 2d 276 (E.D.N.Y. 2010). Here, it is undisputed that plaintiff's age at the time he was interviewed and hired for the position fell squarely within the protected age group - he was 50 years old when he was hired. Plaintiff was then terminated seven months later. Interestingly, eight of the ten employees hired on the project along with plaintiff were over 40 years old and one employee was older than plaintiff.

The inference of discriminatory intent is further undermined when the plaintiff is not replaced by anyone, let alone a younger person (*see Weiner v Cataldo, Waters & Griffith Architects*, P.C., 200 AD2d 942 [3d Dept 1994]). In fact, Euro did not hire anyone to fill the project manager position left vacant by plaintiff. Defendant submits that the entire project was abandoned shortly after plaintiff's termination.

Finally where, as here, the same persons participate in plaintiff's hiring and termination decisions, "it is difficult to impute to them an invidious motivation that would be inconsistent with the decision to hire" (*see Moon v Clear Channel Communications, Inc*., 307 AD2d 628, 632 [3d Dept 2003]; see *LeBlanc v Great Am. Ins. Co.,* 6 F.3d 836, 847 [1993], *cert denied* 511 US 1018 [1994]; *cf. Carlton v Mystic Transp.,* 202 F.3d 129, 137-138 [2000], *cert denied* 530 US 1261 [2000]).

In opposition to the defendants' *prima facie* showing, plaintiff has failed to raise a triable issue of fact. Therefore, the branches of the motion which are for summary judgment dismissing the causes of action which allege age discrimination are granted.

That branch of defendant's motion is to dismiss plaintiff's unlawful retaliation claim is also granted. To make out an unlawful retaliation claim under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct (*see* Administrative Code of City of N.Y.

§ 8–107[7]; *cf. Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 312–313 [2004]). Once the plaintiff has met this initial burden, the burden then shifts to the defendant to present legitimate, independent, and nondiscriminatory reasons to support its actions (*see Delrio v City of New York,* 91 AD3d 900 [2d Dept 2012]). Then, if defendant meets this burden, the plaintiff has the obligation to demonstrate that the reasons put forth by defendant were merely a pretext (*see id.; Pace v Ogden Servs. Corp.,* 257 AD2d 101, 104 [3d Dept 1999]; *see also Jute v Hamilton Sundstrand Corp.,* 420 F.3d 166, 173 [2d Cir. 2005]).

"To establish its entitlement to summary judgment in a retaliation case, a defendant must demonstrate that the plaintiff cannot make out a *prima facie* claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" (*Delrio v City of New York,* 91 AD3d at 901; *see Lambert v Macy's E., Inc.,* 84 AD3d 744, 745 [2d Dept 2011]). Although "a plaintiff is not required to prove his [or her] claim to defeat summary judgment" (*Ferrante v American Lung Assn*., 90 NY2d 623, 630 [1997] [emphasis omitted], citing *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century–Fox Film Corp.,* 3 NY2d 395, 404 [1957]), once the defendant has satisfied its initial burden, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's *prima facie* showing, so as to demonstrate the existence of a triable issue of fact" (*Stukas v Streiter,* 83 AD3d 18, 24 [2d Dept 2011] [internal quotation marks omitted]). For instance, where a defendant on a summary judgment motion has produced evidence that justifies its allegedly retaliatory conduct on permissible grounds, "the plaintiff may not stand silent" (*Bennett v Health Mgt. Sys., Inc.,* 92 AD3d 29, 39 [1st Dept 2011]). The plaintiff must either counter the defendant's evidence by producing evidence that the reasons put forth by the defendant were merely a pretext, or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive (*see Cenzon–Decarlo v Mount Sinai Hosp.,* 101 AD3d 924, 926 [2d Dept 2012]; *Bennett v Health Mgt. Sys., Inc.,* 92 AD3d at 39; *Delrio v City of New York,* 91 AD3d at 901; *Lambert v Macy's E., Inc.,* 84 AD3d at 745; *Williams v New York City Hous. Auth.,* 61 AD3d at 70–71). Upon a review of the evidence, the court finds that although the parties agree that the plaintiff engaged in a protected activity, the defendant nevertheless established its *prima facie* entitlement to judgment as a matter of law dismissing the third cause of action by presenting nonretaliatory reasons for the challenged action (*see Delrio v City of New York,* 91 AD3d at 901), and by demonstrating that the challenged action could not be linked to a retaliatory motivation (*see Williams v New York City Hous. Auth.,* 61 AD3d at 71).

In opposition, the plaintiff has failed to raise a triable issue of fact. The plaintiff's unsupported assertion that defendant's nonretaliatory reasons for the challenged actions were pretextual is insufficient to raise a triable issue of fact in opposition to the defendant's *prima facie* showing (*see generally Forrest v Jewish Guild for the Blind,* 3 NY3d at 308 n. 6, citing *Reeves v Sanderson Plumbing Products, Inc.,* 530 US 133, 148 [2000]). Additionally, plaintiff has failed to raise a triable issue of fact as to whether the individuals who allegedly retaliated against him were aware that he had engaged in a protected activity (*see Bendeck v NYU Hosps.*

Ctr., 77 AD3d 552, 553 [1st Dept 2010]), nor did he demonstrate any causal nexus between his protected activity and the alleged retaliation (*compare Matter of Pace Univ. v New York City Commn. on Human Rights,* 85 NY2d 125, 129 [1995]; *Forrest v Jewish Guild for the Blind,* 3 NY3d at 314 n. 13; *Baldwin v Cablevision Sys. Corp.,* 65 AD3d 961, 967 [1st Dept 2009]; *Ponterio v Kaye,* 25 AD3d 865, 869 [3d Dept 2006]).

Finally, since the age discrimination and retaliation claims are dismissed, plaintiff's claims for aiding and abetting under the New York State Human Rights Law and New York City Human Rights Law are also dismissed. A finding of either discrimination or retaliation by another party is essential to establishing liability for aiding and abetting under both statutes (*see DeWitt v Lieberman,* 48 F. Supp 2d 280, 293 [SDNY 1999]). If a plaintiff has failed "to raise a triable issue of material fact that [he] was either retaliated against or discriminated against ..., [his] claims that defendants aided and abetted each other in any discrimination or retaliation cannot survive" pursuant to Executive Law § 296 (6)" (*Forrest v Jewish Guild for the Blind, supra,* 3 NY3d at 314).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted in its entirety.

Dated: September 23, 2013

DARRELL L. GAVRIN, J.S.C.