

<b>Attea v Helmsley Enters., Inc.</b>
2014 NY Slip Op 31107(U)
April 25, 2014
Supreme Court, New York County
Docket Number: 155868/2013
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

JOSEPH ATTEA,

Plaintiff,

-against-

DECISION AND  
ORDER

Index No. 155868/2013

HELMSLEY ENTERPRISES, INC.,  
SUPERVISORY MANAGEMENT COPR., and  
CRISTIAN VASQUEZ,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

In this action for damages, plaintiff Joseph Attea (“Plaintiff”) alleges that he was subjected to age discrimination, retaliatory conduct and constructive discharge from his employment in violation of the New York City Human Rights Law (“NYCHRL”) [Administrative Code of the City of NY §§ 8 - 101 et seq.]. Defendants Hemsley Enterprises, Inc., and Supervisory Management Corp., (“Defendants”) move, for an order, pursuant to CPLR 3211 (a) (7) dismissing the complaint on the grounds that it fails to state a cause of action upon which relief can be granted.

Plaintiff was hired as a night service Food & Beverage Manager (“F&B Manager”) in or about April 2001 at the New York Helmsley Hotel which was operated by Defendants. In August of 2008, Cristian Vasquez (“Defendant

Vazquez”) was promoted to the position of F&B Director thus becoming Plaintiff’s direct supervisor. Plaintiff alleges that Defendant Vazquez began hiring F&B Managers who were younger and less experienced than Plaintiff and stripped Plaintiff of his responsibilities in order to grant them to the younger Managers.

In time, Plaintiff suffered his first stroke in July 2009 and his second stroke in September 2010. He returned back to work on September 14, 2010 when Defendant Vazquez informed Plaintiff he would be transferred from the evening service at the hotel restaurant to the busier day service. Plaintiff protested this change but was ultimately transferred. Plaintiff alleges that prior to his transfer Defendant Vasquez told another F&B Manager that “Joe is old. He doesn’t do anything, and I don’t know how to get rid of him. Maybe if I put him on the morning he will quit.” Ultimately, Plaintiff suffered his third stroke on September 24, 2010 and subsequently did not return to his employment.

In resolving a motion to dismiss for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and afford plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable theory. [Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977)]. Furthermore, Plaintiff’s claims for a violation of NYCHR are to be “liberally and independently construed with the aim of making it more

protective than its federal or state counterparts. . . .” [Hanna v. New York Hotel Trades Council, 18 Misc. 3d 436 (Sup. Ct., NY County 2007)].

Under the NYCHRL, the plaintiff must show that “(1) [he] is a member of a protected class; (2) [he] was qualified to hold the position; (3) [he] 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.” [Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 113 (1st Dept 2012)].

As a then sixty-three year old F&B Manager with over nine years of experience in his position, the gravamen of Plaintiffs discrimination claim is whether he was subject to an adverse employment action due to his shift change and alleged reduction in responsibilities. A plaintiff sustains an adverse employment action if he or she endures a “materially adverse change” in the terms and conditions of employment. [Gaffney v. City of New York, 101 A.D.3d 410 (1st Dept 2012)]. A mere alteration of responsibilities where ones employment conditions and salary remain the same are but a mere inconvenience. Id. Here by itself, Plaintiff’s shift change from morning to night service did not constitute an adverse employment action since it is not a demotion evidenced by Plaintiff’s consistent title and salary. [See Block v. Gatling, 84 A.D.3d 445, 445 (1st Dept 2011) (finding food and beverage employee’s transfer as a change in nature of

duties but a retention of employment terms and conditions); Ponterio v. Kaye, 25 A.D.3d 865, 869 (3d Dept 2006) (holding the same on a motion to dismiss)].

On the other hand, Plaintiff alleges Defendants “began stripping Plaintiff of his duties and granting these responsibilities to the much younger and much less experienced F&B Managers. . . .” Complaint ¶21. Taking the Plaintiffs allegations as true and assigning it every favorable inference, this reduction in responsibilities will be sufficient to carry plaintiff’s “de minimis burden” of an adverse employment action. [Brathwaite v. Frankel, 98 A.D.3d 444, 445 (1st Dept 2012)].

Lastly, the issue of whether the adverse employment action occurred under circumstances giving rise to an inference of discrimination may be gleaned from Defendant Vasquez’s alleged statement that, “Joe is old. He doesn’t do anything, and I don’t know how to get rid of him.” Complaint ¶30. [Sogg v. Am. Airlines, Inc., 193 A.D.2d 153, 156 (1st Dept 1993) (finding an inference of discrimination ascertainable from direct evidence)]. Therefore Plaintiff has established a prima facie case for discrimination.

With regards to Plaintiff’s constructive discharge claim, Plaintiff is required to “allege facts sufficiently to support an inference that defendants deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.” [Mascola v. City Univ. of New York, 14 A.D.3d 409, 410 (1st Dept 2005)]. The court finds that the offensive

incidents alleged by plaintiff, which include the stripping away of his responsibilities, can form the basis for a constructive discharge claim. [Weiss v. New York State Human Rights Appeal Bd., 102 A.D.2d 471, 472 (1st Dept 1984)].

Plaintiff's final retaliation claim fails to state a claim because he has not alleged facts that he engaged in a protected activity. In order to establish a claim for retaliation under the "City Human Rights Laws, plaintiff must show that (1) [he has engaged in protected activity, (2) [his] employer was aware that [he participated in such activity, (3) [he suffered adverse employment action based upon [his] activity, and (4) there is causal connection between protected activity and adverse action." [Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 313 (2004)]. Protected activity refers to measures taken to protest or oppose statutory prohibited discrimination. [Kim v. New York State Div. of Human Rights, 107 A.D.3d 434 (1st Dept 2013)]. Here, Plaintiff merely opposes his shift change and makes no mention of age discrimination in his protest thus it is not a protected activity. Id. Defendant Vasquez's statement regarding Plaintiff's age was not made to Plaintiff, but rather, to another employee, thus it has no bearing on Plaintiff's opposition to the shift change. Likewise, Defendants' carrying through with their earlier proposal to transfer Plaintiff would not constitute a retaliation since a protected activity must precede an adverse action. Id.

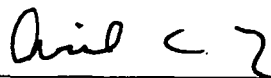
ORDERED that the motion to dismiss is granted in part and the retaliation cause of action of the complaint is dismissed; and it further

ORDERED that defendant is directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry; and is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street on June 18, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 4/25/14  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**