Blanc v City of New York
2021 NY Slip Op 30837(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 154032/2020
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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JEAN BLANC,

Plaintiff,

- v -

THE CITY OF NEW YORK, LISETTE CAMILO, MERSIDA IBRIC, ADAM BUCHANAN, JOHN AND JANE DOE

Defendant.

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INDEX NO. 154032/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

This action arises out of plaintiff Jean Blanc's claims that defendants the City of New York, Lisette Camilo (Camilo), Mersida Ibric (Ibric), Adam Buchanan (Buchanan) and John and Jane Doe (said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named Defendants) (collectively, defendants), discriminated against him by demoting him and reducing his salary, on account of his race, color, national origin and age, in violation the New York City Human Rights Law (NYCHRL). Defendants move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3025, for leave to serve and file an amended complaint. For the reasons set forth below, defendants' motion is denied and plaintiff's cross motion is granted[1].

Background and Factual Allegations

Plaintiff has been employed by the City of New York for over thirty years. In 1998, plaintiff "transferred to the City's Department of Information and Technology and

[1] The Court would like to thank Beth Pocius Esq., for her assistance in this matter.

Telecommunications ('DoITT'), as DACCO (Deputy Agency Chief Contracting Officer)." NYSCEF Doc. No. 1, Complaint, ¶ 39. In July 2015, Blanc "was invited, by others (not Camillo, Ibric and Buchanan) and he accepted the position of DACCO with OCP (Office of Citywide Procurement) at DCAS (Department of Citywide Administrative Services), at an annual salary of approximately $130,000.00, which increased his salary by only $10,000.00." Id., ¶ 42. Plaintiff is 57 years old and describes himself as a black male, of Haitian national origin and West Indian ancestry.

In 2016, Mayor Bill De Blasio appointed Camilo as the Commissioner of DCAS, replacing a black woman. Id., ¶ 2. Camilo is a "non-black Hispanic female of Dominican ancestry," in her early forties. Id., ¶ 16. In 2017, Camilo allegedly "retaliatorily and discriminatorily cut the salary of Geneith Turnbull (Turnbull), a black female, by 40%, demoted and removed Ms. Turnbull from the position of Deputy Commissioner of OCP and gave the position to Ibric." Id., ¶ 50. Ibric, who reports to Camilo, is "a white female of Slavic ancestry," in her late thirties. Id., ¶ 21. Buchanan, an Agency Chief Contracting Officer (ACCO) at DCAS, reports to Ibric. Buchanan is a white male in his late thirties.

Prior to April 2018, plaintiff and Donna Meeks (Meeks), a white woman in her sixties, had been the only two DACCOs in OCP, each supervising three procurement groups. However, after Ibric became appointed, Ibric purportedly made several "racially and age motivated hiring decisions." Id., ¶ 58. Plaintiff explains that in April 2018, Ibric promoted "Masha Rudina (Rudina), a white woman of Slavic ancestry in her early forties, to a third DACCO position in OCP." Id., ¶ 60. Ibric then "divided the procurement groups among the three DACCOs, thereby reducing [plaintiff's] responsibilities." Id., ¶ 61. In July 2019, Meeks retired. Ibric replaced her

with "Elisabeth Zelenak (Zelenak), a white woman of Slavic ancestry who is in her mid-30's," and also promoted Harry Tian (Tian), "an Asian male, to a fourth DACCO position." Id., ¶ 63.

In June 2018, Charles Odiase (Odiase), a black man of Nigerian origin, "the first Assistant Commissioner/ACCO, retired from OCP, after years of being discriminatorily denied salary increases by DCAS higher-ups, including Camilo and Ibric." Id., ¶ 65. Plaintiff claims that as a result of racially motived personnel changes, "since Mr. Odiase's retirement in June 2018, Blanc became the highest paid DACCO in OCP, with an annual salary of $143,143.00, as well as the only upper level black employee in the unit." Id., ¶ 66. He alleges that, this made him "an even bigger target by Camilo, Ibric, Buchanan and other DCAS executive staff, who were intent on removing him." Id., ¶ 67.

By letter dated February 28, 2020, plaintiff was notified that, effective March 13, 2020, he was being demoted from DACCO to Director of Contract Administration in OCP, and that his salary would be decreased 20%. Plaintiff states that he never received any complaints or warnings about his job performance and that, to date, "has not been given a reason for his demotion." Id., ¶ 78. According to plaintiff, his "demotion and salary cut are part of a campaign by Camilo, Ibric and Buchanan to removed older minorities from senior positions at OCP." Id., ¶ 84. Plaintiff believes that Ibric and Buchanan intended to hire a white individual for plaintiff's former position.

The complaint sets forth that, since Camilo began running DCAS, she has allegedly taken adverse employment actions against numerous other minority employees "on the basis of their race, color, national origin and age, or for reporting improper governmental action." Id., ¶ 54. He claims that his "demotion and deep salary cut follow this pattern of treating older minority employees differently." Id., ¶ 56. These actions were also part of Camilo's alleged plan to use

"DCAS to favor and award top jobs to younger, non-black employees . . . ." Id., ¶ 3. Plaintiff provides the following examples:

> • "Former Deputy Commissioner of Asset Management Ricardo Morales, a Puerto Rican male who, at age 60, was terminated on February 24, 2017, because he opposed improper governmental action;
> • "Former Deputy Commissioner of OCP, Geneith Turnbull, who, at age 56, was demoted on March 24, 2017 to Procurement Analyst, a much lower title, had her salary cut by over $100,000.00 and was replaced by Ibric, then in her late 30s, because of her race and in retaliation for her complaints of improper governmental action;
> • "Former Chief of Staff in Asset Management Shireen Brasse, a black Guyanese female who, at age 47, was demoted to Associate Staff Analyst effective February 26, 2017, replaced by two Hispanic women in their 30s and had her salary decreased by $20,000.00, because of her race and age; and
> • "Former Senior Advisor in Asset Management Ismael Malave, a Puerto Rican male who, at age 47, was demoted to a provisional analyst title effective February 2017, had his salary decreased by $20,000.00 and transferred to the DCAS Central Storehouse in Queens County, giving him a two-hour commute each way from his Bronx home, because of his race and age."

Id., ¶ 55.

The complaint sets forth that defendants allegedly made racially motivated stereotypical comments to plaintiff. For instance, Ibric and Buchanan have frequently commented on plaintiff's clothing, noting their "surprise," at how plaintiff "arrives at work exceptionally well-dressed and well-groomed." Id., ¶ 69.

As another example, on November 9, 2019, when plaintiff asked Buchanan if he should complete a task that was normally another employee's responsibility, Buchanan "snidely told [plaintiff] that he should complete the assignment because he was the highest paid DACCO in OCP." Id., ¶ 72. According to plaintiff, this comment "made it clear to plaintiff that blacks and older employees do not deserve higher but fair salaries for their positions within DCAS." Id., ¶ 70.

After plaintiff was demoted, he commenced this action alleging two causes of action against all defendants. The complaint states that the City of New York and the individual defendants are considered employers under the NYCHRL. Further, "[d]efendants aided and abetted the discriminatory acts of each other taken against [plaintiff]." Id., ¶ 31.

The first cause of action sets forth that plaintiff was subjected to differential terms and conditions of employment and treated less well, due to his race, color and national origin, in violation of the NYCHRL. Plaintiff was demoted and had his salary reduced by $25,000, allegedly due to his race, color and national origin. In addition, he was purportedly subjected to racially motivated comments. In the second cause of action, plaintiff alleges that "Defendants deprived [plaintiff] of equal employment opportunities and other privileges on account of his age." Id., ¶ 104. Plaintiff is seeking declaratory and injunctive relief prohibiting defendants from engaging in discriminatory practices. Plaintiff also seeks compensatory and punitive damages.

Defendants' Motion and Plaintiff's Opposition

Race, Color, National Origin Discrimination

Defendants argue that the complaint should be dismissed as against all defendants, as plaintiff fails to plead that the adverse action occurred under circumstances giving rise to an inference of race, color or national origin discrimination. According to defendants, although plaintiff indicates that employees within the same protected class experienced unfavorable treatment, he fails to allege that a similarly situated comparator outside of his class experienced more favorable treatment. Further, the employees in his protected classes are not similarly situated comparators. In addition, allegations that other minority employees were promoted, purportedly undermine the inference of discrimination against minorities.

Defendants continue that any discriminatory remarks allegedly made by Ibric and Buchanan fail to create an inference of discrimination.

In opposition, plaintiff argues that he had plead several sufficient claims under the relaxed pleading standard required to defeat a motion to dismiss. For example, plaintiff maintains that he was demoted and replaced by younger or non-black employees, and that defendants did not give a reason for his demotion. Plaintiff explains that "[t]he complaint clearly alleges that Plaintiff's DACCO duties were taken over by the three other younger, non-black DACCOs, whom in reality, replaced plaintiff," and that this would allege favorable treatment of those outside the protected class. Plaintiff's memorandum of law at 16.
According to plaintiff, given the close timing between the remarks and plaintiff's demotion, the remarks should not be dismissed as stray. Further, Buchanan's remarks about being surprised at plaintiff's well-groomed appearance also support an inference that Buchanan, who was an influential employee, generally thought "less" of black employees and that he was involved in plaintiff's demotion. Similarly, plaintiff claims that Ibric's frequent remarks about plaintiff's appearance should not be dismissed as stray, in light of her influential status as an employee and her involvement in plaintiff's demotion.

Age Discrimination

According to defendants, plaintiff fails to plead a cause of action for age discrimination because he only speculates that his demotion was linked to his age. To start, plaintiff does not allege that defendants made any comments to him based on his age. Further, plaintiff does not identify who replaced him after his demotion. Moreover, plaintiff fails to identify any comparators who were younger and more favorably treated. For instance, the two employees who were 60 and 56 years old, were allegedly not demoted due to their age. The remaining two

employees who were demoted or terminated were about ten years younger than plaintiff. Plaintiff does not state the age of Odiase, the last employee, but claims that he retired "after years of being discriminatorily denied salary increases . . . ." Id., ¶ 65.

In opposition, plaintiff explains that his claim is an "age-plus" claim, and that he has sufficiently plead that defendants engaged in a pattern of demoting older minorities. Plaintiff is asserting that "minorities are being removed or demoted, not just black employees." Id. at 23. In addition, even if the minorities are replaced with Hispanic employees, these replacements are younger. He continues that, as Camilo and Ibric were also in involved those determinations, it is irrelevant if the other employees were similarly situated to plaintiff.

Plaintiff states the following, in relevant part:

> "Under an age-plus race claim, the only outlier is that Tian's age is unknown. But being of Asian descent, for purposes of this lawsuit, he is a non-black, non-Hispanic individual and not considered a 'minority' under the theory of this case. More importantly, Tian being a DACCO does not undermine an inference of discrimination because the main beneficiary of Plaintiff's demotion were two white, younger DACCOs."

Id. at 22.

Plaintiff claims that, similar to his race, color and national origin claims, the comments made by Ibric and Buchanan are not stray remarks and support a discriminatory inference against older employees.

Individual Defendants

Defendants argue that the complaint should be dismissed as against Camilo and Buchanan as plaintiff fails to allege their personal involvement in his demotion or salary reduction. For example, Camilo is only alleged to have appointed Ibric, who then demoted plaintiff and engaged in other discriminatory hiring decisions. Otherwise, there are no factual allegations linking Camilo to adverse employment actions taken against plaintiff.

Regarding Buchanan, the complaint sets forth that Buchanan was intent on removing him and that Buchanan made a snide comment to plaintiff. Defendants continue that plaintiff fails to plead any factual allegations that Buchanan was involved in the decision to demote plaintiff. Furthermore, the alleged comment fails to support an inference of discrimination.

In opposition, plaintiff alleges that he has sufficiently pled claims against the individual defendants. Plaintiff reiterates that he was a high-level DCAS employee. With respect to Camilo, plaintiff maintains that Camilo, as an agency head, would be involved in demoting him and cutting his salary. Further, as Camilo was involved in demoting or cutting the salaries of other older minorities such as Turnbull, who were also high-level DCAS employees, there is a plausible inference that she is involved with other personnel decisions such as demoting plaintiff. However, as the facts related to personnel actions are within defendants' possession, plaintiff requires further discovery to disclose additional facts about Camilo's involvement. In any event, Camilo "has continued to support and aid and abet subordinate employees in discriminating against other black employees over the age of 40, including Plaintiff." Id. at 9.

According to plaintiff, he has sufficiently plead claims against Buchanan as he alleged that Buchanan reduced plaintiff's duties around the same time that other DACCOs, who were younger and white, took over his duties. He continues that, contrary to defendants' contention, the removal of job responsibilities was a materially adverse employment action because it "laid the groundwork for Plaintiff's demotion and salary cut after Defendants increased the number of DACCO's from two to four in 2019, making Blanc an unnecessary fourth DACCO." Id. at 11. Further, Buchanan made the allegedly sarcastic remark to plaintiff and not to other employees implying that, as an older minority employee, plaintiff's salary was too high.

Cross Motion to Amend

In the event the complaint is dismissed in whole or in part, plaintiff is seeking leave to amend his complaint to supplement some of the factual allegations included in the complaint. See NYSCEF Doc. No. 16, proposed verified amended complaint (PAC). The proposed clarifications are as follows:

> "Buchanan supervises Blanc and the other DACCOs . . . ." Id., ¶ 26.
>
> Odiase was in "his sixties." Id., ¶ 45.
>
> "Testifying under oath on June 11, 2019, Camilo said that she demoted Turnbull, in part, because she wanted someone with 'more energy' in the position, which is a reference to Turnbull's age and Camilo's preference for younger employees." Id., ¶ 53.
>
> Turnbull was replaced "because of her age and race and in retaliation for her complaints of improper governmental action." Id., ¶ 58.
>
> "After Blanc received the [demotion] letter, he asked Buchanan why he was demoted and Buchanan answered that the demotion was because he was not doing what Buchanan told him to do." Id., ¶ 80.

In opposition, defendants argue that plaintiff's request to amend should be denied as futile.

DISCUSSION

I. Leave to Amend

In general, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay." *Murray v City of New York*, 51 AD3d 502, 503 [1st Dept 2008] (internal quotation marks and citations omitted). "[P]laintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit . . . ." *MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499, 500 [1st Dept 2010] (internal citations omitted).

A copy of the PAC has been attached to the pleadings. Defendants oppose the PAC by only generally reiterating that the PAC "makes no effort to cure Plaintiff's attempted comparators- many of whom are in an entirely separate unit and who were not subject to DC Ibric's supervisory role-and thus Plaintiff's [sic] cannot show an inference of discrimination." NYSCEF Doc. No. 19, defendants' reply memorandum of law at 17.

At this stage, prior to an answer or discovery, defendants have not shown that they would be prejudiced by the proposed amendment. As addressed below, the complaint, as it stands, sets forth viable claims. Although the PAC contains only minimal changes, it provides clarification on Buchanan's purported role in plaintiff's demotion, among other things. Accordingly, the cross motion seeking leave to amend is granted, and for purposes of efficiency, the court considers the sufficiency of the PAC with respect to allegations against the individual defendants.

II. Dismissal

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]. It is well settled that a plaintiff may submit an affidavit in opposition to a 3211 motion "to remedy defects in the complaint, and the allegations contained therein, like the allegations contained in the complaint, are deemed to be true for purposes of the motion." *Anderson v Pinn*, 185 AD3d 534, 535 [2d Dept 2020]. However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 [2d Dept 2013] (internal quotation marks and citation omitted).

III. Discrimination Claims under the NYCHRL

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer or an employee or agent thereof, to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's actual of perceived age, race, color or national origin. See Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

To establish a prima facie discrimination claim under the NYCHRL, a plaintiff must allege, "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) . . . [that] he/she was treated differently or worse than other employees . . . , and (4) that the . . . different treatment occurred under circumstances giving rise to an inference of discrimination." *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]. With respect to age discrimination, if plaintiff "does not produce direct or statistical evidence that would logically support an inference of discrimination, [he] must show [his] position was subsequently filled by a younger person or held open for a younger person." *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; see also *Littlejohn v City of New York*, 795 F3d 297, 312-313 (2d Cir 2015) ("an inference of discrimination also arises when an employer replaces a terminated or demoted employee with an individual outside the employee's protected class").

In addition, on a motion to dismiss, employment discrimination cases are "generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] (internal citation omitted).

Plaintiff has alleged that he is a member of a protected class, that he was qualified for his position, that he was treated less well than other employees when his duties were reduced and when he was demoted, and that this differential treatment occurred under circumstances giving rise to an inference of race, color, national origin and age discrimination. At the outset, plaintiff argues that he has pled a viable discrimination claim on the basis of having his job duties initially reduced in 2018. Among other things, defendants argue that this cannot support a discrimination claim as a reduction in workload is not a materially adverse employment action.

Under the NYCHRL, a plaintiff can plead a successful claim without alleging that he was subjected to a materially adverse employment action. See *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 [1st Dept 2017] ("the City HRL does not require that a plaintiff suffer a materially adverse employment action in order to succeed in an anti-discrimination action under the City HRL"). Instead, "a focus on unequal treatment based on [a protected characteristic] -- regardless of whether the conduct is 'tangible' (like hiring or firing) or not -- is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 114 (2d Cir 2013) (internal question marks and citation omitted).

Nevertheless, plaintiff's allegation that his workload was reduced when the third DACCO was hired cannot support a viable discrimination claim as plaintiff fails to plead that he was treated unequally based on a protected characteristic. The complaint indicates that Meeks, the other DACCO originally working with plaintiff, also had her responsibilities reduced when the procurement groups were now divided among the three DACCOs. The three DACCOs remained in their positions for over a year, until July 2019, when Meeks retired and was replaced by Zelenak and when Tian was also promoted to a DACCO position.

Turning to the fourth element, plaintiff argues that he has established that his demotion and salary decrease occurred under circumstances giving rise to an inference of discrimination because defendants made negative stereotypical comments to him based on his age and race, and because he was treated less well than other employees who were not in his protected classes. *See Mazzeo v Mnuchin*, 751 Fed Appx 13, 14 (2d Cir 2018) (internal quotation marks and citation omitted) ("Discriminatory motivation may be inferred from, among other things, invidious comments about others in the employee's protected group, or the more favorable treatment of employees not in the protected group").

Alleged Pattern of Removing Older Minorities

Plaintiff alleges that he was demoted as part of defendants' pattern of demoting or removing older minorities and that this pattern supports a plausible inference that his demotion was discriminatory. According to plaintiff, "evidence that five older minorities were removed is not undermined by claiming they each had different duties or different direct supervisors. That difference is immaterial, on the pleadings, in light of their shared characteristic that motivated their removal." Plaintiff's memorandum of law at 19. Defendants devote the bulk of their arguments attempting to debunk plaintiff's theory by claiming that these employees are not proper comparators. However, plaintiff is not relying on his pattern allegations to demonstrate that similarly situated comparators received more favorable treatment. He is alleging "evidence of an employer's general practice of discrimination, [which] may be highly relevant to an individual disparate treatment . . . . claim." *Forte v Liquidnet Holdings, Inc.*, 2015 WL 5820976, *6, 2015 US Dist LEXIS 136474, *19 (SD NY 2015), affd 675 F Appx 21 (2d Cir 2017). Plaintiff has alleged that other high-level older minority employees have been forced out or demoted and were replaced with younger non-black employees. "[I]n an individual disparate

treatment case, unlike in a class action or case alleging widespread disparate treatment, statistics alone do not suffice to establish discriminatory intent." *Bussey v Phillips*, 419 F Supp 2d 569, 583 (SD NY 2006). Nevertheless, plaintiff may still use statistical evidence to support an inference of discrimination in a disparate treatment claim. *See Abbott v Memorial Sloan-Kettering Cancer Ctr.*, 276 AD2d 432, 433 [1st Dept 2000]; see e.g. *Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018] ("The allegations that there was disparate treatment of older employees, including the plaintiff, and that the plaintiff's disciplinary charges were based, in part, on age discrimination, sufficiently stated a cause of action to recover for age discrimination pursuant to the NYCHRL").

Invidious Comments

Without providing any dates, the complaint sets forth that Ibric and Buchanan frequently commented about their surprise at plaintiff being well-dressed and well-groomed. According to plaintiff, these comments about his appearance can support an inference of discriminatory intent as it indicates Ibric and Buchanan's "surprise that a minority (black man) defies a negative stereotype." Plaintiff's memorandum of law at 12. Further, these comments establish how Ibric and Buchanan thought less of black employees and did not think that they deserved high-ranking positions. In addition, rather than giving plaintiff a yes or no answer when he asked Buchanan if he should complete another task that was normally another employee's responsibility, Buchanan "snidely told [plaintiff] that he should complete the assignment because he was the highest paid DACCO in OCP." Complaint, ¶ 72. Plaintiff argues that this comment is discriminatory because Buchanan was purportedly showing his negative attitude that older minorities did not deserve a high salary. Ibric and Buchanan then allegedly acted on their views by demoting plaintiff on February 28, 2020.

The court finds that the comments identified by plaintiff fail to raise an inference of discriminatory animus as the only allegedly derogatory remarks are vague and do not reference any protected characteristic. *See* e.g. *Matter of Tenenbein v New York City Dept. of Educ.*, 178 AD3d 510, 511 [1st Dept 2019] (Petitioner failed to state a claim under the NYCHRL as he "fails to show that any conduct or comments by respondent's staff members were based on his alleged learning disability. The comments made by staff members did not reference his disability"); see also *Pelepelin v City of New York*, 189 AD3d 450, 451 [1st Dept 2020] ("The only derogatory remarks identified by plaintiff, however (for instance, that he was 'too intimidating for the Mayor's family'), do not evince any ageist or anti-Russian bias," and fail to support an inference of discrimination).

Plaintiff claims that, "the reasonable inference is that Buchanan was implying that he views black individuals as messy and inappropriately dressed and groomed, and that Plaintiff is a rare outlier." Plaintiff's memorandum of law at 13. However, perceptions of being stereotyped are "insufficient to raise an inference of discrimination" on a motion to dismiss. *Williams v Time Warner, Inc.*, 2010 WL 846970, *4, 2010 US Dist LEXIS 20916, *11 (SD NY 2010), affd 440 F Appx 7 (2d Cir 2011); see also *Johnson v IAC/Interactive Corp.*, 2018 NY Slip Op 31720[U], **6 (NY Sup Ct, 2018), affd 179 AD3d 551 [1st Dept 2020] (internal citation omitted) ("a plaintiff's sense of being discriminated against does not constitute evidence of discrimination").

Better Treatment of Employees Outside Plaintiff's Protected Classes

Plaintiff alleges that he was a 57-year old black male and qualified for his position. In July 2019, defendants hired an additional DACCO, raising the total count to four DACCOs. Plaintiff's job responsibilities were initially diluted and, by February 2020, he was ultimately demoted and his salary was reduced by 20 percent. Defendants purportedly did not identify any

deficiencies in plaintiff's performance, nor did they provide an explanation for their actions at the time. Although the age of Tian is unknown, at least two out of the three remaining DACCOs were younger than plaintiff and all were non-black.

Accordingly, set forth above, plaintiff has "made allegations, that, if true, would carry [his] 'de minimis burden' of establishing a prima facie case of discrimination in violation of the [NYCHRL]." *Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012] (internal citations omitted). Plaintiff has alleged that he was a member of a protected classes due to his race, color, national origin and age, that he was demoted despite being qualified to hold the position, and that the demotion occurred under circumstances giving rise to an inference of discrimination. Despite the fact that plaintiff had been in the position the longest amount of time, he was the only DACCO who was demoted, while the other three, who were outside of plaintiff's protected classes, were allowed to remain. Although it is unclear if another DACCO will be appointed to officially replace plaintiff's position, it is irrelevant at this time. Given the liberal pleading standards, the court finds that plaintiff has sufficiently alleged that he was treated less well than other employees because of his age and race. *See e.g. Brathwaite v Frankel*, 98 AD3d at 445 ("The inference of discrimination arises from the complaint's allegations that plaintiffs, who performed clerical work, were laid off as a result of the elimination of their job title, under which all the employees were disabled, while other job titles involving clerical work were not eliminated").

It is well settled that "[a] plaintiff relying on disparate treatment evidence must show she[/he] was similarly situated in all material respects to the individuals with whom she[/he] seeks to compare her[/him]self." *Mandell v County of Suffolk*, 316 F3d 368, 379 (2d Cir 2003) (internal quotation marks and citation omitted). Defendants argue that plaintiff fails to allege

that a similarly situated comparator outside of his class experienced more favorable treatment. However, construing the complaint liberally and giving plaintiff the benefit of every possible inference, plaintiff has alleged that three other employees who share the same job title, have been allowed to remain in their positions and did not have their salary reduced, while he was demoted and had his salary reduced. Plaintiff had been in the DACCO position longer than any of the other employees. On this pre-answer motion to dismiss stage, plaintiff has presented "sufficient allegations that the comparators had similar workloads and responsibilities. The purported comparators are [DACCOs], like Plaintiff. And it is alleged that they have similar responsibilities, including responsibilities that were once Plaintiff's but were reassigned to the younger [DACCOs]." *Alexander v New York City Dept. of Educ.*, 2020 WL 7027509, *6, 2020 US Dist LEXIS 223311, *19 (SD NY 2020) (citation omitted).

Accordingly, defendants' motion to dismiss the complaint is denied. Under the lenient notice pleading standard, plaintiff has adequately plead that his demotion occurred under circumstances giving rise to an inference of race, color, national origin or age discrimination. During subsequent litigation, "defendants will have an opportunity to attempt to rebut the presumption of discrimination arising from [plaintiff's] prima facie case by setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support [their] employment decision . . . ." *Brathwaite v Frankel*, 98 AD3d at 445 (internal quotation marks and citation omitted).

IV. Individual Defendants

Plaintiff alleges that the individual defendants are employers, that they each engaged in unlawful conduct and that they aided and abetted each other in the unlawful actions taken against plaintiff. The Court of Appeals has recently held that "where a plaintiff's employer is a business

entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL." *Doe v Bloomberg, L.P.*, __NY3d__, 2021 NY Slip Op 00898, *4 (2021). As a result, the individual defendants are not all vicariously liable as employers under the NYCHRL. "Rather, those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct." Id., citing Administrative Code § 8-107 (1), (6) and (7).

Plaintiff has alleged that, after Ibric was hired, she appointed or promoted the three other people to the DACCO positions and that these personnel changes were racially motivated. Regarding Buchanan, Buchanan supervised plaintiff and also allegedly advised plaintiff that he was directly responsible for plaintiff's demotion. With respect to Camilo, plaintiff has alleged that Camilo appointed Ibric and, as head of the agency, Camilo would be involved in personnel decisions related to high-level employees, such as plaintiff, and that she has been involved in a pattern of discriminatorily reducing the salary of and/or demoting higher level older and/or minority employees in DCAS. Taking all the allegations in the complaint as true and resolving all inferences in favor of plaintiff, even excluding any alleged comments made by Ibric and Buchanan, plaintiff has sufficiently alleged that the individual defendants were involved in the underlying decision to demote him and reduce his salary. While it is unlikely that every one of the individual defendants had a role in the decision to demote plaintiff, the court has no other information at this time. This "information [is] particularly within [defendants'] knowledge and control." *Boykin v Keycorp*, 521 F3d 202, 215 (2d Cir 2008). Accordingly, the complaint sufficiently states a claim under the NYCHRL against the individual defendants alleging that they discriminated against plaintiff in violation of the NYCHRL.

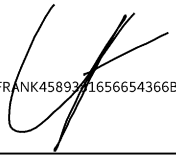
Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. *See e.g. Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 AD3d 915, 917 [2d Dept 2017] ("An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under . . . . the NYCHRL"). If the demotion is found to constitute a violation under the NYCHRL, both the City of New York, as employer, and also the decision-maker, will be held liable. With such limited information at this stage, even if the individual defendants were not directly involved in the demotion, their alleged participation may give rise to aider and abettor liability. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]. Thus, the claims against the individual defendants alleging aiding and abetting discrimination survive the motion to dismiss. Accordingly, it is hereby

ORDERED that the motion by defendants the City of New York, Lisette Camilo, Mersida Ibric and Adam Buchanan and John and Jane Doe (said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named Defendants) seeking to dismiss the complaint for failure to state a cause of action is denied; and it is further

ORDERED that the cross motion by plaintiff Jean Blanc for leave to serve and file an amended complaint is granted; and it is further

ORDERED plaintiff shall serve a copy of the Proposed Verified Amended Complaint in the proposed form annexed to the moving papers as Exhibit "A" along with a copy of this order with notice of entry; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days from the date of said service.



3/17/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE