Brager v Quality Bldg. Servs. Corp.
2022 NY Slip Op 31629(U)
May 20, 2022
Supreme Court, New York County
Docket Number: Index No. 155832/2021
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE, *Justice* — PART 12

--X

HAL BRAGER,

Plaintiff,

- v -

QUALITY BUILDING SERVICES CORP., QUALITY PROTECTION SERVICES, INC, MIRJANA MIRJANIC,

Defendants.

--X

INDEX NO. 155832/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4-14 were read on this motion to dismiss.

Defendants move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's causes of action against them for discrimination based on sex pursuant to Title VII of the Civil Rights Act of 1964, 42 USC § 882000e, *et. seq.*, and partially dismissing his causes of action for discrimination in violation of Executive Law § 296 and the New York City Human Rights Law, Admin. Code of the City of New York § 68-101, *et. seq.*, with prejudice, and granting them costs, fees, and disbursements. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 6)

Plaintiff alleges that he is disabled as a result of a compromised respiratory system due to his activities as a 9/11 first responder. He claims that on or about February 19, 2018, defendants Quality Business Services Corp. (QBS) and Quality Protection Services, Inc. (QPS) employed him as vice president of human resources and labor relations. Before accepting their job offer,

plaintiff informed defendant Mirjanic about the ongoing medical treatment he receives as a 9/11 first responder. Once on the job and for some time thereafter, Mirjanic expressed her appreciation of his service as a first responder and that she understood that his medical needs may require time off. The two had a good initial working relationship.

On April 25, 2018, plaintiff attended a pre-surgery appointment and the following day, underwent throat surgery. He returned to work on or about April 30, 2018 and told Mirjanic that he most likely would need to undergo the same surgery every six to nine months. Immediately thereafter, Mirjanic relieved plaintiff of his responsibility over recruiters who routinely reported to him and asked him for guidance. She screamed at him in front of other employees that he was not to speak to any recruiters. She also became more hostile and critical of his work. She frequently yelled at him, berated, embarrassed, intimidated, and harassed him in front of other employees, and threatened to cut his salary.

In doing so, plaintiff alleges, Murjanic retaliated against him based on his disability, perceiving that he was unable to complete his job duties. She also showed displeasure whenever plaintiff asked for leave to attend medical appointments. Due to her hostility, embarrassing, and intimidating tactics, plaintiff was forced to limit his requests for other accommodations for his disability to the detriment of his health and he attempted to forgo and avoid necessary medical treatment due to the retaliatory manner in which Mirjanic reacted.

On another occasion, when he was counselling an experienced recruiter and coworker who had sought his advice, Mirjanic berated plaintiff in front of his coworker and other colleagues, directing him not to speak to the co-worker. Due to the stress, humiliation, intimidation, embarrassment, and hostile work environment, plaintiff began to develop "psychological issues." Mirjanic also threatened him with physical violence, such as when she

picked up a stapler and acted as if she were going to throw it at him. Several employees were present, along with an outside counsel. Mirjanic then slammed the stapler on plaintiff's desk and continued to berate him in front of the others. Plaintiff feared for his safety as a result of the assault.

Mirjanic's conduct created a hostile work environment, causing plaintiff's psychological impairment, with daily physical manifestations: frequent and intense nausea, uncontrollable shaking, headaches, and difficulty falling and staying asleep. He feared entering the office and going to work for the first time in his adult life.

Plaintiff was typically tasked with consulting with employees about private matters, which required anonymity, tact, and confidentiality. Thus, he would meet with them in his office behind a closed door. Mirjanic objected to the closed-door meetings and after such a meeting, she screamed at and berated plaintiff that he was "never to close his door again," which rendered his job difficult. Eventually, she removed plaintiff from his office, again in front of many colleagues, berating him as she moved him to a smaller office. She yelled at plaintiff to move, adding that she needed to watch him.

Plaintiff alleges, on information and belief, that Mirjanic is of Albanian descent. He states that he is of Jewish descent and claims to be older than most of the employees, some of whom experienced similar abusive and retaliatory conduct from Mirjanic. He contends that Mirjanic typically hired and favored younger employees and those of Albanian descent and that they were rarely if ever chastised for their job performance, enjoyed greater flexibility as to work hours, and were treated with respect as colleagues and friends as opposed to the employees who were not of Albanian descent. In favoring younger employees, Mirjanic would give them employment benefits, such as gift cards and pay raises, more than what she gave older employees, and upon

stripping plaintiff of various responsibilities and duties, she reassigned them to younger, female employees.

On June 21, 2018, without notice, plaintiff was called into a meeting with Mirjanic, two other QBS executives, and an outside corporate counsel. During the meeting, Mirjanic berated and embarrassed plaintiff by screaming profanities at him. She yelled at plaintiff, "No more Fridays off!" knowing that he was required to attend his medical appointments on Fridays and effectively preventing him from attending them.

Shortly after the June 21, 2018 meeting, plaintiff received a "30-Day Notice to Improve His Performance" signed by Mirjanic, and on June 25, 2018, he was called into another meeting with her and outside counsel representing QBS and QPS. During that meeting, Mirjanic again screamed profanities at him and threatened to fire him. On June 27, 2018, he was fired.

Plaintiff asserts, based on the foregoing, that defendants discriminated against him in the terms, conditions, and/or privileges of his employment by subjecting him to a hostile work environment and terminating his employment in violation of the Americans with Disabilities Act (ADA) (42 USC § 1201 *et seq*., the Age Discrimination in Employment Act (ADEA) 29 USC §§ 621, 623 *et seq*., Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e *et seq*., Executive Law § 290 *et. seq*., and the New York City Human Rights Law, Admin. Code of the City of New York § 8-101 *et seq*., with resulting damages.

Plaintiff also maintains that defendants QBS and QPS violated the ADA by discriminating against him based on his disability, age, and gender by failing to provide him with reasonable accommodation for his disability. Mirjanic too is accused of discriminating against plaintiff based on his disability, age, and gender, with the consent and condonation of defendants and with the express purpose of denying him his rightful terms, benefits, and conditions of

employment by reason of his disability, age and gender, discriminated and generally violating his rights as protected by law.

Plaintiff timely filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), and more than 60 days thereafter, on May 21, 2021, the New York City Commission on Human Rights issued a notice of administrative closure. Within 30 days after receiving it, plaintiff timely filed this action.

Based on the foregoing, plaintiff advances the following causes of action, as pertinent to this motion:

III. discrimination based on his sex in violation of Title VII of the Civil Rights Act of 1964, 42 UCS § 2000e, *et seq*.

IV. sex discrimination based on pay in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et seq*.

V. discrimination based on his age, disability, and sex in violation of New York Executive Law § 296.

VI. discrimination based on his age, disability, and sex in violation of the New York City Human Rights Law, Administrative Code §§ 8-101, *et seq.*

II. GENDER DISCRIMINATION

A. Contentions

1. Defendants (NYSCEF 7)

In light of the conclusory nature of plaintiff's allegations of sex, age, and national origin discrimination, defendants argue that his claim that he was discriminated against due to his gender fails absent an alleged sex-based adverse employment action, and that excessive scrutiny, monitoring, and criticisms of job performance do not constitute adverse employment actions

absent evidence of materially adverse impacts, nor does a change in job responsibilities. According to defendants, while plaintiff claims that he was subject to ridicule and increased scrutiny, and was moved from his office to a cubicle, he does not state that the conduct was due his gender, and that in any event, the allegations constitute conduct that has been found to fall short of adverse employment actions.

Defendants also assert that plaintiff's claims of being discriminated against on the basis of his sex in the compensation, terms, conditions, and privileges of employment, are insufficient absent facts showing that he performed equal work for unequal pay, and plaintiff's claim that younger employees received pay raises does not state a cause of action under Title VII as age is not a protected category.

2. Plaintiff (NYSCEF 11)

Plaintiff denies that his pleading is fatally conclusory, arguing that it suffices to place defendants on notice of each of his claims, which is the pertinent standard for assessing their sufficiency, and observing that the City Human Rights Law imposes a lenient pleading burden for plaintiffs to fulfill its broad and remedial purpose. Thus, he need not demonstrate that the challenged conduct is severe and pervasive. Rather, he asserts, the severity of the alleged conduct is relevant to damages, not liability.

Under these standards, plaintiff maintains that he states a cause of action for sex discrimination as Mirjanic had stripped him of responsibilities and duties and transferred them to a female employee, ridiculed him in front of his coworkers, and paid him less than female employees performing equal work. He claims to have been thereby deprived of a material term and condition of employment in violation of both his state and federal law.

Under the City law, plaintiff contends, he was treated less well than the female employee

to whom Mirjanic assigned his duties, and when Mirjanic fired him, she did so believing that his gender prevented him from performing his duties. He argues that the prior adverse treatment due to his gender permits the finding that, consistent with her discriminatory practices, Mirjanic fired him because of his sex and, to the extent that some of the adverse treatment was not explicitly gender-related, including the public humiliation in the office, as Mirjanic had otherwise discriminated against him on the basis of sex in other contexts, the alleged gender-neutral treatment may also be inferred to have been motivated by plaintiff's gender.

B. Applicable law

1. Title VII

Title VII of the Civil Rights Act of 1964, 42 USC § 882000e, *et. seq.*, prohibits an employer from, in pertinent part, "taking an adverse employment action" against an individual based on sex or national origin. To survive a motion to dismiss a cause of action for sex discrimination, a plaintiff must demonstrate, *prima facie*, that he or she: (1) is a member of a protected class, (2) was qualified for the position, (3) suffered an adverse employment action, and (4) "has at least minimal support for the proposition that the employer was motivated by discriminatory intent." (*Littlejohn v City of New York*, 795 F 3d 297, 311 [2d Cir 2015]; *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 201 n 3 [1st Dept 2015]). State courts have concurrent jurisdiction to hear Title VII claims. (*Meadows v Robert Flemings, Inc.*, 290 AD2d 386 [1st Dept 2002]).

In asserting a claim under Title VII, the plaintiff, at the initial pleading stage, does not need "substantial evidence of discriminatory intent," but rather to "give plausible support to a minimal inference of discriminatory motivation." (*Bockus v Maple Pro, Inc.*, 850 Fed Appx 48 [2d Cir 2021]). To survive a motion to dismiss, a plaintiff must "set forth factual circumstances

from which discriminatory motivation can be inferred, which may include facts suggesting preferential treatment given to similarly situated individuals, or remarks that convey discriminatory animus." (*Algarin v City of New York*, 2012 WL 4814988, *2 [SD NY 2012]). To show disparate treatment, the plaintiff must show that he was similarly situated in all material respects. (*Id.*).

Here, plaintiff alleges no gender-based comments or any actions by Mirjanic from which it may be inferred that she was motivated by a discriminatory intent based on his gender. His allegation that his duties were given to a female employee, by itself, is insufficient absent any facts tending to show that the other employee was similarly situated. The same is true for plaintiff's allegation that he was paid less than female employees. (*See Morrison v Jones,* 2021 WL 5829749 [2d Cir 2021] [plaintiff failed to allege sufficient facts to show that other employees were similarly situated in order to raise inference of discrimination]; *Moultrie v NYS Dept of Corrections and Community Supervision*, 2015 WL 2151827 [SD NY 2015] [that male employees treated more favorably than female plaintiff, absent any other facts, insufficient to show disparate treatment based on gender]).

2. NYSHRL

The New York State Human Rights Law (NYSHRL) (Exec Law § 296 *et seq*) prohibits unlawful discriminatory practices. In 2019, the NYSHRL was amended to provide that

> [t]he provisions of [Executive Law 296] shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

A plaintiff advancing a claim for gender discrimination under the NYSHRL must plead and prove that: (1) he is a member of a protected class; (2) he was qualified to hold his

employment position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the discharge or adverse action took place under circumstances giving rise to an inference of discrimination. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

For the reasons set forth above, plaintiff fails to allege sufficient facts from which it may be inferred that defendants' actions against him were based on gender discrimination. (*See Brightman v Physician Affiliate Group of New York*, P.C., 2021 WL 1999466 [SD NY 2021] [dismissing NYSHRL claim for gender discrimination as "[s]imply pleading that a male colleague, who may or may not have been similarly situated, was treated differently is not enough to plausibly allege that the differential treatment occurred because of [plaintiff's] gender."]).

3. NYCHRL

The NYCHRL provides, in pertinent part, that:

> [i]t shall be an unlawful discriminatory practice … [f]or an employer … because of the actual or perceived gender [or] disability … of any person, . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(Admin Code § 8–107[a][1]). The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." (Admin Code § 8–130).

A cause of action for employment discrimination under the NYCHRL is set forth, *prima facie*, on a showing that (1) the plaintiff is a member of a protected class, (2) the plaintiff was qualified to hold the position, (3) the plaintiff 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. (*Forrest*, 3 NY3d at 295; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). The plaintiff's burden of proof in a gender discrimination case is to show, by a preponderance of the evidence, that he was treated worse than other employees because of his gender. (*Suri v Grey Global Group, Inc.*, 164 AD3d 108 [1st Dept 2018]).

The required element of an adverse employment action must be shown to have occurred under circumstances giving rise to an inference of discrimination. To satisfy this element, a plaintiff must plead facts sufficient to support such an inference beyond conclusory allegations of bias. (*Wolfe-Santos v NYS Gaming Commission*, 188 AD3d 622 [1st Dept 2020]; *Askin v Dept. of Educ. of City of NY*, 110 AD3d 621, 622 [1st Dept 2013]). Allegations of discriminatory comments by an employer may suffice (*O'Rourke v Natl. Foreign Trade Council*, 176 AD3d 517 [1st Dept 2019]; *Whitfield-Ortiz v Dept. of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014]) or of disparate treatment of similarly-situated employees (*Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020]; *Whitfield-Ortiz*, 116 AD3d at 581).

Here, plaintiff alleges no gender-discriminatory comments by defendants, nor does he allege that he was treated differently than female employees to which he was similarly-situated. While plaintiff alleges that others were treated better, he also claims that others "experienced similar abusive and retaliatory conduct from Mirjanic."

Plaintiff thus fails to state a claim for gender discrimination under the NYCHRL. (*See e.g., Suri*, 164 AD3d at 108 [court correctly dismissed gender discrimination claims under State and City HRLs; while non-white female plaintiff was replaced by two white males, she did not show that her termination was discriminatory as duties performed by white males were not same as hers]; *see also Thomas v Mintz*, 182 AD3d 490 [1st Dept 2020] [plaintiff failed to state claim

for discrimination as complaint alleged no facts that would establish that similarly-situated persons were treated more favorably than plaintiff]; *compare with O'Rourke v Ntl. Foreign Trade Council, Inc.*, 176 AD3d 517 [1st Dept 2019] [plaintiff stated gender discrimination claim based on supervisor's remarks reflecting gender-based animus]).

III. PAY DISCRIMINATION

A. Contentions

1. Defendants (NYSCEF 7)

Defendants observe that plaintiff's claims of favoritism toward younger employees, those of Albanian descent, and females do not set forth a *prima facie* case of disparate pay under Title VII, even in the aggregate, as they constitute legal conclusions without factual support. In any event, the receipt of benefits by allegedly favored employees is not stated to be gender-based and is otherwise conclusory, bereft as it is of any comparative data. That plaintiff identifies a younger female employee does not remedy the pleadings absent an indication that she was paid more than him and he offers no facts demonstrating that the terms of her employment are comparable to his. Nor does he demonstrate that the only other named employee is comparable to him. Thus, plaintiff's claims relating to his allegedly unequal pay is fatally speculative.

A discriminatory intent, defendants observe, is also not demonstrated by plaintiff absent any supporting facts. Thus, plaintiff's conclusory allegations of intentional and willful discrimination against him on the basis of his sex in the compensation, terms, conditions, and privileges of employment, are insufficient.

2. Plaintiff (NYSCEF 11)

Plaintiff denies that sex discrimination cases based on unequal pay are held to the strict standards set forth in the Equal Pay Act. Rather, Title VII makes actionable any form of sex-

based compensation discrimination, such as by paying a female less than her male peers who perform equal work. All that need be pleaded, plaintiff argues, is that an employer discriminated against the employee with respect to compensation due to the employee's sex. Thus, a claim for sex-based wage discrimination may be brought under Title VII even though no employee of the opposite sex holds an equal but higher paying job, provided that the challenged wage is not based on seniority, merit, quantity or quality of production or any factor other than sex.

In alleging that he performed work equal to that performed by younger and female employees who earned more compensation than him, plaintiff claims to have satisfied his obligation to place defendants on notice of the claim, and that under the City law, it is sufficient to allege that plaintiff was paid less than other women for similar work. He refers defendants to his bill of particulars for details.

Plaintiff argues that given the difficulties of proving a defendant's intent and state of mind, a plaintiff may rely on the cumulative effect of alleged adverse employment actions when evaluating a claim of discrimination. Thus, in support of an inference of pay discrimination, plaintiff relies on Mirjanic's discrimination against him on the basis of gender, such as the reassignment of his work to a female coworker. He also alleges that Mirjanic regularly doled out unequal pay on the basis of gender. Such allegations, he asserts, establish discriminatory intent under federal, state, and city law.

B. Analysis

Under Title VII, a plaintiff alleging pay discrimination may state a claim by pleading facts tending to show that he performed equal work for unequal pay or that his employer discriminated against him regarding his pay because of his sex. (*Brightman v Physician Affiliate Group of New York*, P.C., 2021 WL 1999466 [SD NY 2021]).

A disparate pay claim under the NYSHRL and NYCHRL involves the same standards as a federal Title VII claim. (*Shah v Wilco Sys., Inc*., 27 AD3d 169 [1st Dept 2005]). A plaintiff must establish that he was paid less than similarly-situated coworkers, namely, that the higher-paid coworkers were similarly situated in all material respects and were paid more. (*Id.*). He must also establish that the difference in pay was due to discrimination based on his gender.

As detailed above, plaintiff fails to allege facts from which it may be inferred that defendants acted with discriminatory intent toward him based on his gender. Moreover, he alleges no facts showing that female employees were paid more than him, that he performed equal work for unequal pay, or even that the terms of their employment were similarly situated in all material respects to his. His conclusory allegations are insufficient and, in any event, the only mention of unequal pay in his complaint attributes the discrimination at issue to age, not gender. (*See Hughes v Xerox Corp*., 37 F Supp 3d 629 [WD NY 2014] [dismissing equal pay claim where plaintiff alleged that she was paid less than similarly-situated males for equal work, but did not identify similarly-situated males or offer supporting facts for allegation that she was paid less; observing that plaintiff "takes the (incorrect) position that simply alleging that she was paid less than similarly-situated males for equal work is sufficient to withstand motion to dismiss."]; *Herrington v Metro-North Commuter R.R. Co*., 118 AD3d 544 [1st Dept 2014] [plaintiff failed to allege she was paid less than similarly-situated male counterparts]).

IV. HOSTILE WORK ENVIRONMENT BASED ON AGE AND NATIONAL ORIGIN

A. Contentions

1. Defendants (NYSCEF 7)

Defendants observe that while plaintiff states that he was over 40 years of age when he was hired, he believes that he was older than most of the employees, and offers no facts in

support of his allegation that Mirjanic favored younger employees, observing that Mirjanic hired him, thus negating his allegation that she only hired younger people. They also claim that plaintiff admits that employees both younger and older received more benefits, he does not disclose details, and he conclusorily claims that a female employee was given some of his "various responsibilities and duties."

Although plaintiff is uncertain as to whether Mirjanic is of Albanian descent, defendants allege that plaintiff accuses her of favoring unidentified Albanian employees without stating the source of her knowledge that they are Albanian. Defendants also allege that although plaintiff fails to plead a separate cause of action for national origin discrimination in violation of CPLR 3014, his pertinent contentions include no facts demonstrating how he was treated less well based on his national origin nor does he identify his national origin. That he is Jewish and not Albanian does not do so as such claims are analyzed separately, and in any event, his allegations are fatally conclusory.

2. Plaintiff's contentions (NYSCEF 11)

In alleging that Mirjanic singled out one class of employees for abuse while sparing others on the basis of national origin, plaintiff claims that he states a cause of action for unlawful discrimination based on age and national origin and hostile work environment under federal, state law, and city law, and alleges that Mirjanic's abuse was widespread and not trivial or confined to one or two occasions. In denying that his implicit admission that younger and older employees received job perks renders his cause of action invalid, plaintiff observes that if Mirjanic makes a benefit available to all, but favors one group over another on the basis of age or national origin, she violated the law.

According to plaintiff, he need not set forth a separate claim for national origin

discrimination as long as the facts support it, and as defendants engage in an analysis as to whether the alleged facts support such a claim, they are not prejudiced. Plaintiff asserts that he articulates a cause of action for hostile work environment on the basis of age and national origin, having alleged that Mirjanic favored Albanian employees at the expense of non-Albanians like him with specific instances provided.

Plaintiff is not pursuing a cause of action for a hostile work environment on the basis of gender.

B. Applicable law

A federal hostile work environment claim requires that proof that 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. (*Crews v Ithaca*, 2022 WL 1493762 [2d Cir 2022]).

The NYSHRL defines a hostile work environment claim as arising from acts that subject an individual to inferior terms, conditions or privileges of employment because of the individuals' membership in a protected category. (Executive Law 296[1][h]). The plaintiff need not show that the conduct was severe or pervasive. (*Id*.; NY PJI 9:5 [2002]).

A hostile work environment may be shown to be in violation of the NYCHRL where an employee "has been treated less well than other employees because of [his/her] protected status." (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]; *see also Golston-Green v City of New York*, 184 AD3d 24, 40-41[2d Dept 2020] [internal quotation marks and citation omitted] ["Another way in which a plaintiff may establish discrimination in the terms, conditions, and privileges or employment is by showing that she or he was subject to a hostile work environment"]. Under the NYCHRL, "the conduct's severity and pervasiveness are

relevant only to the issue of damages." (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d at 110] [2d Cir 2013] [internal citation omitted]).

Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences . . . do[es] not suffice to support a hostile work environment claim." (*Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 [1st Dept 2017] [citation omitted]). However, "the employer has the burden of proving the conduct's triviality . . . ." (*Mihalik*, 715 F3d at 111). Nonetheless, "[c]ourts must be mindful that the NYCHRL is not a general civility code. The plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive." (*Id.* at 110 [internal quotation marks and citation omitted]).

C. Age claim

As detailed above, plaintiff fails to show that defendants' actions toward him were motivated by a discriminatory intent based on his age. (*See Gittens-Bridges v City of New York*, 2022 WL 954462 [SD NY 2022] [dismissing plaintiff's federal, state and city hostile work environment claims as no evidence that defendants' conduct toward her was related to her age]; *Sedhom v SUNY Downstate Med. Ctr.*, 201 AD3d 536 [1st Dept 2022] [dismissing hostile work environment claim absent evidence that alleged hostile conduct toward plaintiff had anything to do with plaintiff's age]).

Moreover, his allegations regarding the alleged hostile work environment related to age discrimination, namely, that Mirjanic "favored" younger employees and typically hired them over older employees, are not only vague and conclusory, but in general constitute the types of petty slights or trivial inconveniences that are not actionable. He concedes that he was not the only employee subjected to Mirjanic's alleged abuse, and he cites no age-based comments made

by Mirjanic, nor any intimidation, ridicule, or insult based on age.

The fact that he was hired by Mirjanic negates the inference that she discriminated against plaintiff because of his age. (*See e.g., Carlton v Mystic Transp.*, 202 F3d 129 [2d Cir 2000] [when same actor hires person within protected class and then later fires him or her, it is difficult to impute a discriminatory motivation to actor]).

Moreover, that plaintiff's duties were given to someone younger than him, by itself, does not establish that it was based on age discrimination. (*See Green v Citibank, N.A.*, 299 AD2d 182 [1st Dept 2002] [replacement by a younger employee not enough to support claim of age discrimination absent other facts]; *Demay v Miller & Wrubel P.C.*, 262 AD2d 184, 185 [1st Dept 1999] [allegation that plaintiff was replaced by younger employee insufficient to support age discrimination claim absent age-related comments or evidence that younger employee was desired]).

Plaintiff's thus fails to state a claim for age-based hostile work environment under federal, state, or city law. (*See Lorber v Lew*, 2017 WL 633446 [SD NY 2017] [allegations that over several years, plaintiff's supervisors "passed over him for promotions, gave him lower performance evaluations to prevent him from being promoted, intentionally excluded him from consideration for promotions, excluded him from meetings, ridiculed him or embarrassed him, gave him more menial tasks and less substantive work, and removed his insubordinates" did not constitute hostile work environment; plaintiff also failed to allege facts to support inference of discrimination but rather alleged that similarly-situated employees did not suffer same hardships]).

D. National origin claim

Although plaintiff believes that Mirjanic is Albanian, he offers no factual support for his

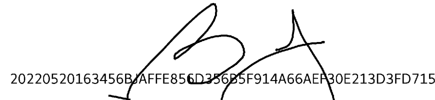
belief, nor for his allegation that the other employees favored or hired by her were also Albanian and not Jewish. Moreover, being Jewish is not a covered national origin category. (*Doran v New York State Dept. of Health Off. of Medicaid Inspector Genl.*, 2019 WL 4735484 [SD NY 2019]).

In any event, as above, the allegations that, in essence, Mirjanic treated Albanians better than non-Albanians does not constitute an actionable hostile work environment claim under any law.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of severing and dismissing plaintiff's claims for gender discrimination, pay discrimination, and hostile work environment based on age and national origin.



5/20/2022					
DATE				BARBARA JAFFE, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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