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

**PRESENT:** HON. MARY V. ROSADO **PART** 33M

*Justice*

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EDWIN WETZEL

Plaintiff,

- v -

SYSTRA USA INC.,

Defendant.

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**INDEX NO.** 151707/2022

**MOTION DATE** 05/31/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and oral argument which took place on August 30, 2022, with Edward M. Tobin, Esq. appearing for Plaintiff Edwin Wetzel ("Plaintiff") and Elizabeth R. Gorman, Esq. appearing on behalf of Defendant Systra USA Inc., ("Defendant" or "Systra"), Defendant's motion to dismiss is granted.

## I. Procedural and Factual Background

Plaintiff filed his Complaint on February 25, 2022 alleging age discrimination under the New York State Human Rights Law § 296 ("NYSHRL") and New York City Administrative Code § 8-101 (the "New York City Human Rights Law" or "NYCHRL") (NYSCEF Doc. 1). Specifically, Plaintiff is alleging he suffered disparate treatment from similarly situated employees who were younger than him (*id.*). In response, Defendant has filed the instant motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) (NYSCEF Doc. 5).

Plaintiff is a 63-year-old male who began working for Defendant in 2019 as a project manager (NYSCEF Doc. 1 at ¶ 11). Plaintiff's direct supervisor was Michael Natenzon

("Natenzon"), a vice president of Systra (*id.* at ¶ 12). Plaintiff was hired on a full-time basis with an annual salary of $265,000, medical insurance, and a 401K plan (*id.* at ¶ 13).

Plaintiff alleges that on or about December 2020, Natenzon accused Plaintiff of not completing his job responsibilities (*id.* at ¶ 16). Specifically, it is alleged that Natenzon accused Plaintiff of failing to bring in new clients since he began his employment in 2019 (*id.*) Plaintiff alleges that Natenzon informed Plaintiff that he would remain a project manager but would now be an independent contractor who would be paid hourly and would work on a part-time basis (*id.*). Plaintiff alleges that as a result, he lost his 401K benefits (*id.* at ¶ 17). Plaintiff concedes in his allegations that two other similarly situated employees, Cara Levy and "John Doe", who were younger than Plaintiff, were terminated as employees, but were subsequently asked to return as employees at reduced annual salaries (*id.* at ¶¶ 22-23). Plaintiff also alleges that Cara Levy and "John Doe" were able to retain their 401K plans (*id.*).

Plaintiff further alleges that Natenzon verbally abused him in one instance where Natenzon called and yelled at Plaintiff for taking too long to review 500 project drawings (*id.* at ¶ 19). The other alleged abuse Plaintiff suffered was being required to complete professional development trainings, which was sometimes held during his lunch hour (*id.* at ¶ 20).

Plaintiff concedes in his allegations that two other similarly situated employees, Cara Levy and "John Doe", who were younger than Plaintiff, were also terminated as employees, but were subsequently asked to return as employees at reduced annual salaries (*id.* at ¶¶ 22-23). Plaintiff also alleges that Cara Levy and "John Doe" were able to retain their 401K plans (*id.*).

In support of its motion to dismiss, Defendant submitted the affidavit of Laura Spina-Ferrentino ("Ms. Spina-Ferrentino") (NYSCE Doc. 9). Ms. Spina-Ferrentino is the HR Manager at Systra (*id.*). Attached to Ms. Spina-Ferrentino's affidavit was a letter dated January 21, 2021,

authored by Ms. Spina-Ferrentino to Plaintiff. The letter states that as of January 18, 2021, Plaintiff was changed from a regular full-time employee to part-time employee as a result of a lack of work and that, upon increase in workload, Plaintiff's full-time status would be reinstated (*id.*). In a letter dated April 22, 2021, Plaintiff's hours were increased, and Plaintiff was again informed that he would "continue to be eligible for all benefits." (*id.*). The April 22, 2021 letter reiterated that as the workload increased, Plaintiff would be reinstated to full time (*id.*). In a letter dated March 14, 2022, Plaintiff was reinstated as a full-time employee (*id.*).

Defendant submitted Plaintiff's W-2 forms attached to Ms. Spina-Ferrentino's affidavit which shows that Plaintiff remained an employee and was never an independent contractor (*id.*). Defendant also submitted Plaintiff's performance review, which indicated that Plaintiff was not meeting expectations, needed to bring in more business, and needed to be more responsive (*id.*). In the performance review, Plaintiff admits that he "had some personal issues that have impacted [his] performance", was "trying to become more productive and communicative with the team members" and was "trying to comply with Systra culture" (*id.*). Defendant also submitted a printout of Plaintiff's 401K plan which shows that he has been actively enrolled in the 401K plan (*id.*).

## II. Discussion

As a preliminary matter, Defendant requests this Court disregard Plaintiff's opposition for failure to comply with 22 NYCRR § 202.8-b. This rule requires attorneys to provide a word count certification on motion papers. As this is merely technical and has nothing to do with the merits of the motion, the Court, pursuant to CPLR § 2001, will overlook Plaintiff's violation of 22 NYCRR § 202.8-b. Second, although Plaintiff has not made a cross-motion seeking leave to serve an amended complaint, Plaintiff requests, in a paragraph in his memorandum of law in opposition to

Defendant's motion to dismiss, for permission to serve and file a proposed Amended Complaint (NYSCEF Doc. 16 at page 11). Because the relief Plaintiff requests is buried in one paragraph of Plaintiff's opposition, rather than via cross-motion in compliance with CPLR § 2215, this Court will not entertain Plaintiff's request (*Abizadeh v Abizadeh*, 159 AD3d 856 [2d Dept 2018] [trial court not required to comb through papers to find information that was requirement to be set forth in the notice of motion]).

**A. Standard**

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). Likewise, a Court need not accept as true

factual claims that are either inherently incredible or totally contradicted by the documentary evidence (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

**B. NYSHRL Claim**

To state a claim for discrimination under the NYSHRL a Plaintiff must allege that (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified to hold the position where he or she suffered an adverse employment action, and (4) the suffered adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NYS3d 265, 269-270 [2006]; *McGuirk v New York State Div. of Human Rights*, 139 AD3d 570, 570-571 [1st Dept 2016]).

The Court finds that Plaintiff's first cause of action alleging age discrimination and disparate treatment in violation of the NYSHRL must be dismissed. Although Plaintiff pleads that he is a member of a protected class, he was qualified for his position, and he has suffered adverse employment action, the Court finds Plaintiff has failed to allege that the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

Defendant has produced documentary evidence contradicting Plaintiff's claims of adverse employment action (NYSCEF Doc. 9). Specifically, Defendant produced letters and W-2 forms which show that Plaintiff was not an independent contractor and that it was Defendant's intention to return Plaintiff to a full-time position once the workload picked up (*id.*). Moreover, Defendant submitted documentary evidence that Plaintiff did not lose his 401K benefits, but is an active

participant in Systra's 401k plan. In opposition, Plaintiff submits no documentary or testamentary evidence to controvert Defendant's evidence in support of its motion to dismiss (*Dragon Head LLC v Elkman*, 102 AD3d 552 [1st Dept 2013] [factual allegations flatly contradicted by documentary evidence are not entitled to be deemed true on defendant's motion to dismiss]). Therefore, the Court disregards these allegations in its analysis of determining whether Plaintiff has sufficiently alleged an adverse employment action.

The only remaining allegedly adverse employment actions taken against Plaintiff are (1) he had to attend professional development training; (2) he was berated for not reviewing project drawings quickly enough; and (3) he had his hours cut from full time to part-time (NYSCEF Doc. 1 at ¶¶ 17-20). While reprimands and excessive scrutiny do not constitute adverse employment actions required to establish an age-based discrimination claim under the NYSHRL, these acts coupled with a decrease in pay may constitute adverse employment action (*Mejia v Roosevelt Island Medical Associates*, 95AD3d 570, 572 [1st Dept 2012]). Being asked to work quicker and to attend professional development trainings alone do not constitute adverse employment action. However, the reduction of Plaintiff's status from full-time employee to part-time employee and the reduction in pay that accompanied that status change, do constitute adverse employment action.

While Plaintiff has pled adverse employment action, Plaintiff's own allegations defeat his NYSHRL claim. Specifically, Plaintiff alleges that two other employees, who are younger than Plaintiff, also had their hours reduced (NYSCEF Doc. 1 at ¶ 23-24). Although Plaintiff alleges these employees retained their 401K plans when their hours were reduced, the documentary evidence establishes that Plaintiff also retained his 401K plan, and therefore the remaining uncontroverted factual pleadings do not show that Plaintiff was treated any worse than similarly situated employees who are younger than him. As such, there are no facts pled which give rise to

an inference that the adverse treatment Plaintiff experienced was due to his age (*see Thomas v Mintz*, 182 AD3d 490, 490-491 [1st Dept 2020] ["the complaint fails to state causes of action for discrimination and a hostile work environment, because it does not allege that defendants' actions occurred under circumstances that give rise to an inference of discrimination…It does not allege facts that would establish that similarly situated persons who were male or were not African American were treated more favorably than Plaintiff was."]). Therefore, the first cause of action is dismissed.

**C. NYCHRL Claim**

To state a claim for age discrimination under the NYCHRL, a Plaintiff must allege that (1) he was a member of a protected class; (2) he was qualified for his position; (3) he was treated differently or less well, and (4) such treatment occurred under circumstances giving rise to an inference of discrimination (*Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621 [1st Dept 2013]). Claims for discrimination under the NYCHRL are analyzed under a more lenient standard than claims under the NYSHRL (*Albunio v City of New York*, 16 NY3d 472, 477 [2011]). However, even under this more liberal standard, the Court finds that Plaintiff's allegations fails to adequately plead that he was treated differently under the circumstances giving rise to an inference of discrimination (*Wolfe-Santos v NYS Gaming Commission*, 188 AD3d 622 [1st Dept 2020] [complaint's legal conclusions that defendants actions were due to her disability insufficient to survive motion to dismiss]; *Brown v City of New York*, 188 AD3d 518, 518-519 [1st Dept 2020]; *Thomas v Mintz*, 182 AD3d 490 [1st Dept 2020]; *Llanos v City of New York*, 129 AD3d 620 [1st Dept 2015]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621 [1st Dept 2013] [no concrete factual allegations other than being 54 years old and adverse treatment warranted dismissal of age-based discrimination under NYSHRL and NYCHRL]).

Plaintiff alleges in his Complaint that similarly situated individuals younger than him also had their hours cut and pay reduced in the same pattern as Plaintiff. The only difference alleged between Plaintiff and the other individuals is that allegedly the other individuals retained their 401k plans while Plaintiff lost his 401k benefits. However, this allegation is contradicted by the documentary evidence. Therefore, given other individuals who were younger than Plaintiff also suffered the same adverse employment actions, the Court finds it implausible that, based on the pleadings, there is an inference of age-based discrimination behind the adverse employment actions Plaintiff suffered. The bare legal conclusions pled by Plaintiff do not support a claim for disparate treatment based on age under the NYCHRL. Plaintiff's second cause of action is dismissed.

Accordingly, it is hereby,

ORDERED that Defendant Systra USA Inc.'s motion to dismiss Plaintiff Edwin Wetzel's Complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

11/1/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | x | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
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