Spiegel v 226 Realty LLC
2023 NY Slip Op 30030(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 150371/2013
Judge: James d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** **PART 55**

Justice

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MICHAEL SPIEGEL,

Plaintiff,

- v -

226 REALTY LLC D/B/A 226 REALTY COMPANY, LLC,228 HOTEL CORP D/B/A HOTEL EDISON AND, EDISON MANAGEMENT COMPANY, LLC D/B/A HOTEL EDISON, 47TH STREET MANAGEMENT CO LLC D/B/A HOTEL EDISON, JOHN VANAVAN, THOMAS WENGELEWSKI, KATARINA SEFRANKOVA,

Defendants.

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INDEX NO. 150371/2013

MOTION DATE 12/20/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for SUMMARY JUDGMENT.

This action arises out of plaintiff Michael Spiegel's claims that his employer, defendants 226 Realty LLC d/b/a 226 Realty Company, LLC, 228 Hotel Corp. d/b/a/ Hotel Edison, 47th Street Management Co., LLC, d/b/a Hotel Edison, Edison Management Company, LLC d/b/a Hotel Edison (collectively, Hotel Edison, or Hotel)[1], as well as John Canavan (Canavan), Thomas Wengelewski (Wengelewski) and Katarina Sefrankova (Sefrankova) (collectively, defendants), acted unlawfully by discriminating and retaliating against him, both prior to and after his termination, in violation of the New York Labor Law (Labor Law) § 740, the New York

[1] Defendants state that, "226 Realty LLC d/b/a 226 Realty Company LLC owns 226 West 47th Street, an office building next to the Hotel Edison. The entity is, therefore, not a proper party to this Action. . . . 228 Hotel Corp. d/b/a Hotel Edison is also not a proper party . . ." (NYSCEF Doc. No. 73, Defendants' memorandum of law in support at 2).

State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint (AC). For the reasons set forth below, defendants' motion is granted and the AC is dismissed.

BACKGROUND AND FACTUAL ALLEGATIONS

In 2006, plaintiff, who is 65 years old, commenced his employment as a front desk agent with Hotel Edison, located at 228 West 47th Street, New York, New York. Plaintiff subsequently became a member of the New York Hotel & Motel Trades Council (Trades Council), the hotel union. During all relevant times, Canavan was Hotel Edison's general manager and Sefrankova was the front desk manager. Wengelewski was the director of human resources until December 2011, when he became the director of operations.

Plaintiff was terminated on August 10, 2012. According to plaintiff, he was unlawfully terminated in retaliation for reporting safety violations to his supervisors. Furthermore, he was allegedly discriminated against on the basis of his age, in violation of the NYSHRL and the NYCHRL. The relevant facts are as follows:

Labor Law § 740

The AC states that, in June 2010, plaintiff complained to Canavan and Sefrankova "about the fact that there were large hallway windows on guest floors . . . which did not have protective bars and which were being left wide open by hotel staff for extended periods of time" (NYSCEF Doc. No. 61, ¶ 21). The lack of window guards allegedly posed a danger to public safety in violation of Administrative Code of the City of New York (Administrative Code) § 27-2043.1. Although plaintiff was advised to "stay out of it," he continued to complain throughout 2010 and 2011 about the lack of window guards. *Id.*, ¶ 26.

The AC also indicates that, in August 2010, plaintiff complained to his supervisors that the basement corridors posed a danger to public safety in violation of Administrative Code § 27-370. According to plaintiff, the basement corridors were "lined with large industrial bins containing garbage and trash," and also had barrels of used oil disposed by the restaurants located in Hotel Edison. *Id.*, ¶ 29. Hotel Edison employees were required to enter and exit the hotel using these basement corridors.

Plaintiff alleges that Hotel Edison, "led by Canavan and Sefrankova," retaliated against him by terminating him for an alleged theft of hotel property after he had exchanged and purchased foreign currency from a hotel guest. Plaintiff, through his union, challenged the termination. On April 6, 2011, the parties attended an arbitration. Pursuant to a decision dated April 14, 2011, the arbitrator found in favor of plaintiff and he was reinstated with back pay.

According to plaintiff, "Canavan and Sefrankova continued to retaliate against [him]." *Id.*, ¶ 41. In July 2011, plaintiff was terminated again for allegedly harassing a co-worker. The matter went to arbitration and the arbitrator found that the hotel did not have just cause to terminate plaintiff. Plaintiff was again reinstated with full back pay and benefits and a prior written warning was expunged.

The AC sets forth that, despite his "success at two separate arbitration hearings, Defendants continued to retaliate against him." *Id.*, ¶ 47. In July 2012, the hotel installed changing rooms and bathrooms in the basement for use by its employees. In August 2012, plaintiff complained to Wengelewski and Thomas Chestaro, Head of Security, about the lack of permits for construction in this area. Wengelewski subsequently brought in the hotel's designated Occupation Safety and Health Administration (OSHA) safety director. Plaintiff "questioned him about the fire hazards in the basement corridors," and complained to him about

the lack of permits. *Id*., ¶ 53. Plaintiff also "complained to management that there were no permits for renovations being performed on guest floors," allegedly, in violation of Administrative Code § 28-105.1. *Id*., ¶ ¶ 56, 58.

Plaintiff was terminated on August 10, 2012, shortly after making the most recent complaint. According to plaintiff, "Wengelewski, Canavan and Sefrankova all exercised control over plaintiff's working conditions and participated in retaliating against plaintiff as a result of his whistleblowing activities." *Id*., ¶ 60.

The record indicates that plaintiff grieved his August 10, 2012 termination, in addition to two written warnings received on March 2, 2012 and March 28, 2012. The union represented him at a hearing in front of the arbitrator. Hotel Edison claimed that it terminated plaintiff in response to plaintiff's hostile conduct towards Mr. Barad (Barad), the hotel's owner. Barad, who passed away prior to the arbitration hearing, was "89 years old and was seriously impaired both physically and mentally as a result of strokes and possibly Alzheimer's disease" (NYSCEF Doc. No. 72 at 1). In brief, Hotel Edison had alleged that plaintiff engaged in a verbal confrontation with Barad on August 4, 2012. The written warnings were also related to incidents where plaintiff allegedly yelled while at the workplace.

The arbitrator acknowledged possible discrepancies involved with the incident. For example, although cameras recorded the incident, there was no audio and part of the alleged incident took place in an area not covered by a security camera. He further conceded that Erin Bekowies (Bekowies), the director of human resources at the time, did not speak to plaintiff to obtain his version of the incident. The arbitrator noted part of Bekowies's testimony, to the extent that "[Bekowies] was told by Canavan that the decision had been made by [Barad] to terminate [plaintiff] and that she follow through." *Id*. at 4.

After reviewing the evidence and listening to the testimony, the arbitrator denied plaintiff's grievance. The decision stated that, "when all of the evidence and the testimony and the credibility of all of the witnesses is considered, the conclusion I reach is that Grievant did engage in serious hostile conduct and did verbally abuse Mr. B." *Id.* at 7. The arbitrator concluded that the Hotel Edison "had just cause to terminate Grievant. Grievant's challenge to prior written warnings is considered moot in view of his discharge." *Id.*

Instant Action and Relevant Testimony/Evidence

Shortly after being terminated, plaintiff commenced this action. The first cause of action, grounded in violations of Labor Law § 740, is alleged against all defendants, and sets forth that plaintiff was terminated on August 10, 2012 in retaliation for complaining to his supervisors about safety violations in the workplace. As noted above, plaintiff reported violations of Administrative Code (New York City Building Code) §§ 27-2043.1, 27-370 and 28-105.1.

In the second and third causes of action, plaintiff alleges that all defendants violated the NYSHRL and the NYCHRL by discriminating against him on the basis of age. The AC states that "Defendants discriminated against Spiegel on account of his age with respect to the terms, conditions, or privileges of his employment and by terminating his employment in violation of the provisions of the [NYSHRL and NYCHRL]." AC, ¶ 76. In pertinent part, plaintiff claims that the individual defendants are liable under the NYSHRL pursuant to Executive Law § 296 (1), and liable under the NYCHRL pursuant to Administrative Code § 8-107(a).

In support of his age discrimination claims, plaintiff asserts that Sefrankova and Margaret Sowa, assistant front desk manager, "constantly taunted plaintiff and made jokes regarding plaintiff's age and age related appearance." *Id.*, ¶ 62. Despite complaining to Sefrankova in 2010 about this allegedly discriminatory treatment, it continued. Plaintiff alleges that he was

terminated and replaced by a younger employee. Furthermore, the Hotel Edison has allegedly "terminated and discriminated against a number of employees over the age of fifty." *Id.*, ¶ 66.

The fourth cause of action alleges that Sefrankova aided and abetted defendants' discrimination.

Defendants move for summary judgment dismissing the complaint. The relevant testimony and evidence from their motion and from plaintiff's opposition, is set forth as follows:

OSHA Whistleblower Complaint

On September 10, 2012, plaintiff filed a whistleblower complaint against the hotel with the United States Department of Labor - OSHA. In November 2012, he received a letter stating, "[t]his letter acknowledges receipt of your whistleblower complaint filed under Section 11(c) of the Occupational Safety & Health Act, 29 U.S.C. §660(c), on September 10, 2012 against Hotel Corp. (d/b/a Hotel Edison) (Respondent)" (NYSCEF Doc. No. 90 at 1). An investigator was assigned to plaintiff's case. On March 18, 2013, plaintiff advised the investigator about "numerous dangerous and illegal activities and conditions prevalent at the hotel." Some of these conditions included the following:

> "Large, open windows on all guest floors, illegal without any protective guard rails . . . . "Long basement corridors filled with foul-smelling garbage and trash, through which all non-management staff were instructed to use to enter and exit the premises. These corridors were designated fire safety exits for the hotel, and were therefore required by law to be free of flammable materials. . . . I have photos of the offending corridors. "Numerous major construction projects at the hotel being done illegally over a period of many years, with no permits at all from the city Department of Buildings (DOB), utilizing unlicensed companies to perform all sorts of electrical, plumbing, HVAC and refiguring of walls, etc., with serious code violations that could endanger human life, particularly through fires. Small fires have occurred at the hotel for these causes. I have photos of some of this construction. The lack of permits is a matter of public record, accessed on the DOB website."

NYSCEF Doc. No. 91 at 2.

In support of his labor law claims, plaintiff states that, at the request of his union, after he was returned to work after the first termination attempt, he wrote a letter to Wengelewski, informing him "of all the harassment and abuse [plaintiff] had endured." Plaintiff's memorandum of law in opposition at 5. Plaintiff did not mention anything about being discriminated against on the basis of age, or even that he was retaliated against for complaining about safety violations. Some of the letter is set forth as follows:

> "1. 4/27/11, Sefrankova disciplines me in her office with a Union delegate present, accusing me of recording false times on the clock for overtime hours. She would not accept my explanation, refused to pay the clocked hours, and refused to look at the security camera tapes to verify my story.
> "2. Early May, Sefrankova berates me for completing a credit slip for a guest movie purchase, claiming that I was doing it incorrectly, even though I did it exactly as I had been instructed and had been doing repeatedly for many years.
> ***
> "8. 6/3, Disciplinary meeting in Sefrankova's office regarding the Mujovic and Gonzalez incidents with a security guard present. When I asked why a security guard was present, which is highly unusual, Sefrankova refused to answer. When I also asked for an explanation of why Gonzalez is allowed by the hotel to consistently eat her lunch in a break room where that practice is strictly forbidden to all other employees, Sefrankova again refused to answer. I will add that at this meeting she was aware of my new position of Union Delegate, and so this is how she responds to the Union when asked a straightforward question."

NYSCEF Doc. No. 86 at 1-2.

Bekowies, Director of Human Resources

Bekowies testified that she was involved in the decision to terminate plaintiff. She stated that she was involved "[t]he way any normal HR director would be involved. . . . Reviewing video footage, preparing documentation for the union, conducting investigation" (NYSCEF Doc. No. 71, Bekowies tr. at 123-124). Bekowies testified that she made the recommendation to fire plaintiff, because he "physically intimidated the owner of the hotel who was unwell, and the arbitrator backed that up . . . ." *Id*. at 125.

Regarding hiring, Bekowies testified that first they "post the position internally, and we also apply to the union hiring hall . . . ." *Id*. at 150. Bekowies confirmed that the hotel was "required by the collective bargaining agreement to go through the union hiring hall, if there was no internal applicant that wanted the position . . . ." *Id*. at 151. The hotel did not have any control over who the union hiring hall sent as applicants and these applicants had priority over outside candidates.

Contractors' Depositions

Joseph McGirl (McGirl) was the electrical contractor hired for the Hotel's construction projects. McGirl testified that electricians have to get their own permits and then they post it on the job site. "And once the work is completed, you call for an electrical inspection," from the Bureau of Electrical Control at the New York City Department of Buildings (DOB) (NYSCEF Doc. No. 69, McGirl tr. at 80). He was present when the inspector performed the electrical inspection and stated that it is not possible for the DOB to sign off on work if there is not a permit. He testified that he was present for multiple projects taking place at the hotel and that, "there was a permit or there would not have been a sign-off." *Id*. at 83. During his testimony, McGirl was handed a NYC Building permit and explained the "sign-offs" for floors 19 and 20, stating that "between the two floors, there were 1008 electrical devices installed, the permits pulled and the fee that we paid was $2,179.50." *Id*. at 68-69. He continued that he "believe[d] we had done that for every project that we have done on this, in this building." *Id*. at 69.

Plaintiff deposed many of the non-party witnesses, including Jami Stutz (Stutz), an architect. Stutz testified that she is a licensed architect who worked on several projects at the Hotel, including architectural work for renovations performed on the 17th through 22nd floors. She was also involved in a fire protection plan and the handicapped rooms on floor three through

12. When plaintiff stated that it was his "contention that you did things that were not correct," Stutz responded, "[w]ell, sir, I am a licensed architect. What are you?" (NYSCEF Doc. No. 79, Stutz tr. at 70). Stutz testified that she is in good standing with her license.

Stutz explained that, as the architect, she is not responsible for permits. "You are using the term 'permit' incorrectly. Permits are taken out after I obtain approval. So, they are taken out by the contractors, plumbing, mechanical, or whatever, contracting, the general contracting." *Id*. at 62. Stutz confirmed that for all the work she performed at the Hotel Edison, "plans were drawn and approved by you and approved by the Department of Buildings." *Id*. at 124. She further stated that some of the issues referred to by plaintiff were just a "repair, sir, and I don't think it needed a permit." *Id*. at 64.

Wengelewski

Wengelewski testified that only "uncovered and unsealed" flammable materials could not be stored in designated fire exits (NYSCEF Doc. No. 67, Wengelewski tr. at 73).

Canavan

Canavan testified that the fire alarm systems are inspected once a month. He testified that the hotel did not receive any building code or fire department violations for storing grease in the barrels in the corridors, or for construction on floors 19 through 21 (NYSCEF Doc. No. 65, Canavan tr. at 181). Although the Hotel may have received building code or fire department violations in the past, which were all subsequently corrected, none of them had "anything to do with the construction or the garbage." *Id.* at 182.

According to Canavan, the hotel windows "did not open enough for people to get hurt. . . . That's what they were supposed to do, not open more than 4 to 6 inches." *Id*. at 106. He continued that he was not "concerned that some of the windows didn't have bars . . . because the

windows did not open all the way." *Id*. at 106. No guest had complained that the windows were opened too wide. To the best of his knowledge, "if the stoppers are installed in the windows and maintained in the windows," window guards would be "redundant." *Id*. at 171. He confirmed that the hotel had a "policy of protecting employees against retaliation if they bring to the attention of management certain issues such as safety concerns." *Id*. at 87.

Canavan testified that he is 52 years old. Canavan was involved in plaintiff's hiring process and interviewed him. He explained that Sefrankova is responsible for hiring front desk agents but that he and Barad had the final approval. It was not Canavan's "intention to have younger people working at the front desk," nor did he state that his "plan was to fill positions, desk manager positions, with young, attractive individuals." *Id*. at 165, 168. Canavan testified that he did not have the authority to fire anyone. He stated that "if [plaintiff] didn't attack the owner he would probably still be working here." *Id*. at 156.

Sefrankova

Sefrankova testified that she was not involved in the August 2012 decision to terminate plaintiff. She stated that, "I never wanted Michael fired, if you are asking me." (NYSCEF Doc. No. 68, Sefrankova tr. at 108). She explained that she "wasn't making the decision. I was involved in the investigation because I was present for the incident." *Id*. at 110. Sefrankova never heard anyone state that the hotel needed to hire younger people for the front desk.

Sefrankova stated that she never heard other employees making jokes about plaintiff. However, she did "hear employees referring to certain guests, and then comparing, say, Mr. Spiegel to any of those guests." *Id*. at 112. According to Sefrankova, "[i]t wasn't only about Michael, though. . . . It was a game that was played not only at the front desk but also amongst bellmen." *Id*. She stated that there was "not a specific guest." There was "one gentleman that

looked like him," who was about 50 years old and looked younger than plaintiff. "It was really about glasses and mustache. . . . It wasn't a game about age. It was about who the person looked like and resembled." *Id*. at 113. Sefrankova stated that she did not like this game and that she "usually told people to stop it or to be quieter or quiet." *Id*. She stated that the other employees "used [her] probably the most for this game." *Id*. at 114.

Sefrankova never heard plaintiff saying that he wanted the game to stop as it pertained to him or heard anyone else complain about the game. She testified that she "didn't mind the game. I minded when it was loud. For example, if the guest could hear it. . . ." However, Sefrankova noted that "[i]t wasn't inappropriate" for the game to be played at the workplace. *Id*. at 116. She clarified that "[i]f I had a choice, I would prefer if they didn't play the game. . . . It started way before I was manager." *Id*. at 117. When asked why Sefrankova let the game continue on, she responded, "[g]ood question. I don't know. I guess I wasn't a good manager." *Id*. at 115.

Relevant Parts of Plaintiff's Testimony

Plaintiff testified that he reported his concerns with the windows to the Hotel's OSHA Safety Director. He was not aware if the Window Guard provision in the Building Code applied to transient hotels or if the hotel had ever received a violation from the DOB for not having window guards. He was not aware if the "hotel received a violation for renovating the changing rooms without a permit" (NYSCEF Doc. No. 62, plaintiff's tr. at 96).

In 2006, when plaintiff was 58 or 59, he was interviewed by Canavan and initially hired as an assistant front desk manager. However, after two months, he was moved to the front desk position. Plaintiff believed that Sefrankova "did not want me to be the assistant manager and she conspired to have my job changed." *Id*. at 14. He explained that Sefrankova "was not friendly to me in any way. She was not helpful to me in any way. The rest is my opinion." *Id*. at 15.

Plaintiff alleged that the witnesses who testified against him in his termination hearing were committing perjury.

Plaintiff described a "game" played at work, stating, in relevant part:

> "Sefrankova and Sowa liked to play a little game which they thought was amusing, and the game was that when there was a guest who was walking through the lobby that they felt was a caricature of me, or perhaps other people, but me is what we're talking about, that they would yell out in a very loud voice 'Michael.' Then when I naturally would look to see why someone was yelling out my name at the front desk, I would then see what the point of this joke was in. And my instance it was that they would wait until they saw someone who was a caricature of an aged man, usually in his maybe 80s, who was walking perhaps very unsteadily, maybe with a cane, bent over, and they would yell out 'Michael' and then sometimes they would add 'Michael in five 10 minutes,' and they would laugh hysterically."

NYSCEF Doc. No. 63, plaintiff's continued tr. at 321. Plaintiff states that he was included in the game approximately 25 times between 2006 and 2012.

Plaintiff testified that he thought his age had something to do with the reason he was terminated, "[b]ecause the hotel generally discriminated against middle-aged people." *Id.* at 326." In support of his contention, plaintiff testified that three other hotel employees, over the age of fifty, were allegedly discriminated against. For example, another front desk employee, "Chan," who was 70, was terminated for cheating a guest out of money, but plaintiff did not know if this really occurred. He provided the names of two other employees who worked in security but did not know the reason for the employees' termination. Plaintiff could not recall any other front desk agents who were terminated. He conceded that several front desk managers under the age of 50 were terminated.

Plaintiff testified that the Hotel fired employees of all age but that he had "reason to believe that people over 50 were over represented in terminations," because "there was a definite bias towards older people at the hotel." *Id.* at 334. He did not know if they "were overrepresented in terms of numbers." *Id.* Plaintiff believed there was a bias because

"Christopher Kennington (Kennington) told me that a managers meeting that he attended - actually, two managers meetings, that Canavan spoke to the managers, and Chris was one of them, where he announced that they wanted to get rid of the older people and replace them 4 with younger, more attractive people." *Id.* at 334-335.

Instant Action-Defendants' Motion and Plaintiff's Opposition

Considering the above, defendants argue that plaintiff's "whistleblower claims" fail as a matter of law and argue that plaintiff is unable to establish a prima face case of age discrimination.

Labor Law § 740

According to defendants, plaintiff has allegedly not presented any evidence that an actual violation occurred. Further, plaintiff "has not established a substantial and specific danger to the public health or safety, and that the harm that results from the violation affected the public-at-large" (NYSCEF Doc. No. 73, Defendants' memorandum of law at 8). Moreover, plaintiff's termination was purportedly due to his own misconduct, not due to his threatening to disclose safety violations.

In opposition, plaintiff submits pictures of the windows and asserts that they are dangerous. Regarding the basement corridor, plaintiff states that he complained about how the stored garbage and grease posed a fire safety danger that affected both the employees and the public at large. Plaintiff also complained about the lack of permits for both the construction and renovation taking place in the employee changing rooms and on the guest floors. Evidently defendants advised OSHA "that no permits were required for the changing rooms in the basement because it was a 'soft' renovation" (NYSCEF Doc. No. 119, plaintiff's memorandum of law in opposition at 15). However, "McGirl testified under oath that he performed the

electrical work for the changing rooms and that he had to have 'pulled' a permit as he does every time he does an electrical job." *Id.* As a result, plaintiff does not believe that defendants applied for, and received, a required permit for all the construction and electrical work. He states that, '[t]he fact that to date only the handicap permit and its amendments has been produced, is proof that the Hotel performed all of the construction described above without the legally required DOB permits." *Id.* at 23.

Plaintiff summarizes that his "OSHA complaint was ultimately unsubstantiated due to the fact that the Hotel's attorneys provided OSHA with misleading, inaccurate, and clearly false information to protect the Hotel from severe penalties for various health and safety violations." *Id*. at 11.

Age Discrimination

Defendants argue that plaintiff is unable to establish that his termination occurred under circumstances giving rise to an inference of discrimination. First, defendants argue that even if Sefrankova and others were playing a game that was offensive to plaintiff, stray remarks, even by a decision maker, without more, cannot establish an inference of discrimination. Moreover, any claim that Canavan, or any other employee, was biased against him on the basis of his age, is speculative. They reiterate that plaintiff was terminated for his own misconduct, not due to his age, and that plaintiff's purportedly subjective belief of discriminatory animus cannot establish pretext. Defendants also note that, "as [plaintiff] acknowledged during his deposition, [plaintiff] never mentioned the health and safety violations that form the basis of his whistleblower claim at the arbitration hearings nor did he allege any any-related discrimination or harassment." Defendants' memorandum law in support at 1.

Plaintiff claims that he "experienced adverse actions at the hands of the Defendants while he was ridiculed and humiliated by his supervisor Sefrankova." Plaintiff's memorandum of law at 27. He continues that he also experienced an adverse action when he was wrongfully terminated on the basis of age. Plaintiff argues that he can establish that his termination gives rise to an inference of discrimination because the hotel had intended to terminate him twice under false pretenses but failed. Plaintiff claims that he was humiliated when Sefrankova and the assistant manager would call out his name when an elderly man would walk by the front desk.

Plaintiff asserts that the Hotel has a history of age discrimination and has been sued twice before on this basis. He provides a list of the eight front desk employees hired between 2006 and 2012. The employees' birth dates vary, and he is the only one who was older than 50. Kennington, a former employee, purportedly advised plaintiff that, at a meeting with the front desk managers, Canavan "announced that his plan for the hotel was to fill positions with younger and attractive individuals." *Id.* at 24.

Individual Defendants

Regarding the individual defendants, defendants assert that any aiding and abetting claims must be dismissed as there is no primary employer liability. In any event, "[t]here is no evidence that Sefrankova (or any of the other individual defendants) participated in any discriminatory conduct towards Spiegel because of his age." Defendants' memorandum of law at 14. In addition, claims against Sefrankova are allegedly grounded in plaintiff's subjective belief that he was discriminated against. Further, Sefrankova was not involved in the decision to terminate plaintiff.

Plaintiff argues that "Sefrankova was a central figure in the discriminatory actions towards [plaintiff]." According to plaintiff, Sefrankova "admitted that she didn't stop [the game]

because she was 'not a good manager.'" Plaintiff's memorandum of law at 29. Furthermore, Sefrankova "aided and abetted the discrimination by falsely testifying as to what actually occurred in the incident between [plaintiff] and Barad." *Id.* He believes that all individual defendants aided and abetted the Hotel's discriminatory practices.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dep't 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dep't 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dep't 2010) (internal quotation marks and citation omitted).

II. Section 740 of the Labor Law

Section 740 of the Labor Law, known as the Whistleblower Law, "prohibits 'retaliatory personnel action' against an employee who undertakes to disclose conduct in violation of any law or regulation, who furnishes information to an investigatory body in regard to such activity

or who refuses to participate in such activity." *Seung Won Lee v Woori Bank, N.Y. Agency*,131 AD3d 273, 277 (1st Dep't 2015), quoting Labor Law § 740 (2). Courts have held that "[t]he provisions of Labor Law § 740 regarding retaliatory discharge are to be strictly construed." *Cotrone v Consolidated Edison Co. of N.Y., Inc*., 50 AD3d 354, 354 (1st Dep't 2008). Therefore, the employee "has the burden of proving that an actual violation occurred, as opposed to merely establishing that the plaintiff possessed a reasonable belief that a violation occurred. And, the violation must be of the kind that creates a substantial and specific danger to the public health or safety." *Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 452-453 (2014) (internal citations and quotation marks omitted). However, an employer has "a defense to any action brought pursuant to this section that the retaliatory action was predicated upon grounds other than the employee's exercise of any rights protected by this section." Labor Law § 740 (4) (c).[2]

Here, plaintiff alleges that his supervisors retaliated against him in response to his complaints that the hotel was performing construction work and renovations without permits, in violation of the Administrative Code § 28-105.1. Further, plaintiff also complained that the windows lacked protective bars in violation of Administrative Code § 27-2043.1 and that the basement corridors were not free and clear at all times, in violation of Administrative Code § 27-370. As set forth below, defendants herein "established, prima facie, that the incidents forming the subjects of the plaintiff's complaints did not involve any actual violation of a law, rule, or

[2] Prior to its amendment in 2021, Labor Law § 740 (4) (a) set forth that an "employee who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action . . . within one year after the alleged retaliatory personnel action was taken." At the outset, although plaintiff's whistleblower claim is premised on his August 10, 2012 termination, he frequently references the first and second termination attempts, which occurred in 2011. To the extent that plaintiff is challenging the first and second termination attempts, these are outside of the one-year statute of limitations. However, these events will be used as background.

regulation. In opposition, the plaintiff failed to raise a triable issue of fact." *Ulysse v AAR Aircraft Component Servs.*, 188 AD3d 760, 761 (2d Dep't 2020) (internal citations omitted).

As previously mentioned, plaintiff has the burden of proving that an actual violation occurred. First and foremost, the record indicates that plaintiff reported these exact same purported violations to OSHA in a whistleblower complaint. Although OSHA's documented response does not appear to be in the record, plaintiff conceded that his OSHA complaint was ultimately unsubstantiated. Courts have found that "allegations that plaintiff had a reasonable belief of a possible violation, but no proof of an actual violation . . . . are untenable [to support a Labor Law 740 claim]." *Bordell v General Elec. Co.*, 88 NY2d 869, 871 (1996); *see also Kamdem-Oauffo v Pepsico, Inc*., 133 AD3d 825, 827 (2d Dep't 2015) ("As to the alleged OSHA violations, the defendant met its prima facie burden by submitting a January 21, 2010, determination by the Regional Administrator of OSHA, finding that there was no reasonable cause to believe that the defendant had violated OSHA. In opposition, the plaintiff failed to raise a triable issue of fact").

Taking the OSHA complaint aside, plaintiff fails to raise an issue of fact in response to defendants' submissions. To start, Administrative Code § 27-2043.1 sets forth the following, in relevant part: "An owner of a multiple dwelling and an owner of a dwelling unit in a multiple dwelling owned as a condominium shall provide, install and maintain a window guard . . . on each window of each dwelling unit in which a child ten years of age or under resides, and on the windows, if any, in the public areas of a multiple dwelling in which such a child resides." Through testimony in support of their summary judgment motion, defendants asserted that window guards were not required because the windows had stoppers on them and were designed so that they would not open more than six inches. Although plaintiff claimed that the hotel

violated Administrative Code § 27-2043.1, he failed to raise a triable issue of fact, as he could not confirm whether the hotel was even subject to this provision in the building code.

Next, Administrative Code § 28-105.1 addresses the requirement to obtain a written permit prior to commencing construction work. Defendants' architect testified that all the architectural plans were drawn by her and approved by the DOB. The contractor testified that he was present for the electrical inspections and that it is not possible for the DOB to sign off on work if there is not a permit. Plaintiff is in neither one of these licensed professions, nor did he submit any expert testimony demonstrating any violations of the regulations. The general manager testified that the hotel did not receive any building code violations for construction on floors 19 through 21. In opposition, plaintiff "did not submit any evidence of action taken against the defendant by the [DOB]. *Ulysse v AAR Aircraft Component Servs.*, 188 AD3d at 761.

Similarly, plaintiff only speculates that the employee entrance was unsafe and a fire hazard, in violation of Administrative Code § 27-370. *See e.g. Khan v State Univ. of N.Y. Health Sc. Ctr. at Brooklyn*, 288 AD2d 350, 351 (2d Dep't 2001) (internal quotation marks and citations omitted) ("The plaintiff's own uncorroborated and unsubstantiated opinion that the laboratories were unsafe amounts to no more than a reasonable belief of a possible violation, which, without proof, will not support a cause of action to recover damages under Labor Law § 740").

As plaintiff failed to meet his burden of proving that an actual violation occurred, the court need not address whether plaintiff was terminated for his complaints or for a legitimate reason. *See* Labor Law § 740 (4) (c). Accordingly, plaintiff's submissions are insufficient, and defendants are granted summary judgment dismissing the first cause of action alleging a violation of Labor Law § 740.

III. Discrimination Claims under the NYSHRL and NYCHRL

Pursuant to the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's age. *See* Executive Law § 296 (1) (a); Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

Under the NYSHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 (2004). Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp*., 65 AD3d 961, 965 (1st Dep't 2009).[3]

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* at 965. If the employer meets this burden, the plaintiff is still entitled to "prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citation omitted).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc*., 138 AD3d 598, 599 (1st Dep't 2016). On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell*

[3] Here, defendants do not dispute that plaintiff was a member of a protected class, that he was qualified for the position or that he was terminated.

Douglas Corp. v Green, in addition to the mixed-motive analysis. *See Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dep't 2016) (internal quotation marks and citations omitted) ("A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework").

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dep't 2012) (internal quotation marks and citation omitted).

Further, to establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that [he] has been treated less well than other employees because of [his protected characteristic]." *Williams v New York City Housing Auth.*, 61 AD3d 62, 78 (1st Dep't 2009). Under the NYCHRL, the focus is on "unequal treatment based on [a protected characteristic] . . . ." *Id.* at 79. "Thus, even assuming that a plaintiff could not prove that [he] was dismissed for a discriminatory reason, [he] could still recover for other differential treatment based on [his protected status]." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 (1st Dep't 2018) (internal citation omitted).

Adverse Actions other than Termination

Although framed as an adverse action, the "ridicule" itself by Sefrankova and "supervisors," does not "rise to the level of adverse action as defined by [the NYSHRL]." *Forrest v Jewish Guild for the Blind*, 3 NY3d at 307. "An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an

alteration of job responsibilities. . . ." *Messinger v Girl Scouts of U.S.A*, 16 AD3d 314, 314-315 (1st Dep't 2005) (internal quotation marks and citations omitted). Courts have found that "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Holtz v Rockefeller & Co*., 258 F3d 62, 75 (2d Cir 2001) (internal quotation marks and citation omitted).

Inference of Age Discrimination

Allegations that "decisionmakers made remarks that showed any discriminatory intent," or "facts that would establish that similarly situated persons who did not share his [protected characteristic] were treated more favorably than he was," can be used by plaintiff to establish that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Brown v City of New York*, 188 AD3d 518, 519 (1st Dep't 2020) (internal citations omitted).

At the outset, according to plaintiff, his "history of wrongful terminations," demonstrates that the Hotel intended to terminate him under false pretenses. Plaintiff's memorandum of law at 28.[4] Nonetheless, "although plaintiff asserts that defendants' actions were motivated by age-related bias, [he] does not make any concrete factual allegation in support of that claim . . . ." *Askin v Dept. of Educ. of City of N.Y*., 110 AD3d 621, 622 (1st Dep't 2013).

Here, plaintiff claims that he has established that his termination occurred under the inference of discrimination based on comments made during a game played by Sefrankova and others. As set forth in the facts, the record indicates that various hotel employees, including

[4] In his former complaints to OSHA and others, plaintiff had argued that the pattern to terminate him was based on exposing their illegal practices. In addition, he never mentioned during any of the related arbitration hearings that he believed he was being retaliated against, or that any of the defendants' actions were taken as a result of a discriminatory animus based on age.

Sefrankova, plaintiff, the bellmen, and the ones at the front desk, played a "game," where they would call out the name of an employee when a guest walked by who resembled that employee. According to Sefrankova, the resemblance to plaintiff was about the glasses and mustache, and the guests were younger than he was. According to plaintiff, his name was called out when an elderly guest walked by, and the resemblance was linked to his age. He testified that, between 2006 and 2012, his name was called out about 25 times. Sefrankova testified that the employees had been playing the game since before she started as manager and that no one had ever complained to her about it. Sefrankova states that she was mostly a recipient, and never called plaintiff's name out loud. She also testified that, although she did not think the game was inappropriate, she would have preferred if the employees did not play.[5] While Sefrankova's behavior may have been immature and her comments inappropriate, "under the circumstances, they constitute, at most, stray remarks which, even if made by a decisionmaker, do not, without more, constitute evidence of discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 38 AD3d at 517 (internal quotation marks and citations omitted).

Plaintiff also testified that, from the time he was hired, Sefrankova conspired against him and was not friendly or helpful. However, there was no indication, beyond plaintiff's personal belief, that Sefrankova's actions were motivated by plaintiff's age. It is well settled that "a plaintiff's sense of being discriminated against does not constitute evidence of discrimination." *Johnson v IAC/Interactive Corp.*, 2018 NY Slip Op 31720[U], **6 (Sup Ct, NY County 2018), *affd* 179 AD3d 551 (1st Dep't 2020) (internal citation omitted).

[5] When asked why she let it continue, if she, herself, did not like the game, she stated that, "I don't know. I guess I wasn't a good manager." Without addressing credibility issues, it is clear from the transcript that plaintiff inaccurately mischaracterizes this statement as Sefrankova conceding that she was discriminating against plaintiff on the basis of age.

In addition, plaintiff claims that he can establish an inference of discrimination based on Canavan's one comment, not even heard by plaintiff, that it was the Hotel's intention to fill hotel positions with young and attractive people. However, remarks allegedly made by Canavan, even if inappropriate, are insufficient to establish a discriminatory animus. The record indicates that Barad, with the assistance of Bekowies as human resources director, ultimately made the determination to terminate plaintiff. After listening to the testimony and reviewing the evidence, the arbitrator found there was just cause for the termination. In fact, Canavan testified that he did not have the authority to fire anyone, and neither he, nor Sefrankova, had any involvement in the decision to terminate plaintiff. "Indeed, plaintiff did not demonstrate a nexus between the employee's remark and the decision to terminate him." *Godbolt v Verizon N.Y., Inc.*, 115 AD3d 493, 494 (1st Dep't 2014); *see also Cook v Emblem Health Servs. Co., LLC*, 59 Misc 3d 1209(A), 2018 NY Slip Op 50451(U), *24 (Sup Ct, NY County 2018), *affd* 167 AD3d 459 (1st Dep't 2018) (Comments made by employees who had no role in the decision to terminate, "in and of themselves, and even if deemed to be racially charged, are insufficient to establish discriminatory intent").

The record also indicates that numerous employees were part of this game, which, apparently, had been taking place for years. Plaintiff was not singled out and his name was called out only a handful of times every year of his employment. Accordingly, even viewing the evidence in a light most favorable to plaintiff, he "does not allege facts that would establish that similarly situated persons who [were younger than plaintiff] were treated more favorably than plaintiff was." *Thomas v Mintz*, 182 AD3d 490, 490 (1st Dep't 2022).

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 Dep't 2007). Plaintiff provides a list of all hires from 2006 to 2012. Out of the eight people listed, including plaintiff, the dates of birth varied. Nonetheless, plaintiff alleges that this list, along with a comment allegedly made by Canavan about hiring young and attractive people, raises an inference of discrimination. He states, "[a]s is evident, Canavan's plan of hiring young and attractive people was well implemented."

Although he did not know if people over the age of 50 were overrepresented in terms of termination, he just believed there was a bias, due to the alleged comment made by Canavan at the meeting. It is unclear who replaced plaintiff. Regardless, although this person may have been under 50 years of age, there is no evidence to support an inference of discrimination. Plaintiff testified employees of all ages were fired for various reasons. The record indicates that, pursuant its collective bargaining agreement, the hotel was required to post internally and then take applications from the union. The hotel had no control over who was sent over as an applicant from the union. Plaintiff does not allege that the union's application process was pretextual. Accordingly, "plaintiff has presented no statistical data or analysis in support of [his] argument that defendants declined to [hire] older [employees] at a higher rate than younger [employees] during the relevant period." *Hamburg v New York Univ. Sch. of Medicine,* 155 AD3d 66, 78 (1st Dep't 2017).

Plaintiff is unable to meet his prima facie burden under the *McDonnell Douglas* framework. "The *McDonnell Douglas* framework and the mixed motive framework diverge only after the plaintiff has established a prima facie case of discrimination . . . ." *Id.* at 73. Assuming, arguendo, that plaintiff could meet the "de minimis burden," as set forth below,

defendants have submitted admissible evidence, in support of the "legitimate, independent and nondiscriminatory reasons" for terminating plaintiff's employment. *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 (1st Dep't 2010).

As set forth in the facts, the Hotel Edison made the decision to terminate plaintiff after an incident occurred on August 4, 2012. Barad, the hotel's elderly owner, and plaintiff, engaged in some sort of verbal altercation and Barad initiated the termination. Plaintiff disputed what transpired during the interaction and the cameras did not record the sound or all of what took place. Barad passed away prior to the hearing. The arbitrator heard testimony from plaintiff and from the parties who witnessed the incident. After considering the evidence and weighing the credibility of the witnesses, the arbitrator concluded that plaintiff engaged in serious hostile conduct and verbally abused Barad, and that the Hotel had just cause to terminate him.

In response to defendants' nondiscriminatory reasons for its actions, plaintiff failed to meet his burden to demonstrate that the Hotel Edison's decision, at the time, to terminate him, was pretextual. It is irrelevant if plaintiff disagrees with that decision or refuted what transpired during his interaction with Barad. It is well settled that a "plaintiff cannot meet his burden of proving pretext simply by refuting or questioning the defendants' articulated reason." *Ioele v Alden Press,* 145 AD2d 29, 36 (1st Dep't 1989) (internal quotation marks and citation omitted). Further, it is not "enough [for plaintiff] to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that *age* was a motivating factor." *Id*. at 36 (internal quotation marks and citation omitted).

Accordingly, plaintiff has failed to demonstrate that the Hotel Edison's decision, at the time, to terminate him, was pretextual. His unsupported belief that defendants terminated him due to his age is based on nothing more than "speculation [which] is insufficient to defeat

summary judgment." *Ellison v Chartis Claims, Inc*., 178 AD3d 665, 669 (2d Dep't 2019). The court will "not sit as a super-personnel department that reexamines an entity's business decisions." *Baldwin v Cablevision Sys. Corp*., 65 AD3d at 966 (internal quotation marks and citation omitted).

Turning to the mixed-motive analysis under the NYCHRL, none of plaintiff's allegations can establish that his termination was motivated, even in part, by discrimination. *See e.g. Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dep't 2016) ("The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]"). Plaintiff's arguments largely focus on proving his Whistleblower claims and rebutting the prior arbitration hearings. His claims for age discrimination are barely addressed and completely unsubstantiated. Contrary to plaintiff's contention, to establish age discrimination plaintiff must demonstrate that there was discriminatory animus based on age. *See e.g. Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 (1st Dep't 2014) (Plaintiff's NYCHRL claim fails because it does not "contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff").

In conclusion, plaintiff has failed to establish how defendants' conduct was caused by a discriminatory motive and that they treated him less well because of his age. *See Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013) (internal quotation marks and citation omitted) ("Courts 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"). Accordingly, defendants are granted summary judgment dismissing the claims made under the NYSHRL and NYCHRL for age discrimination.

IV. Individual Defendants

Plaintiff alleges that all individual defendants should be held liable under Executive Law § 296 (1) and Administrative Code § 8-107 (1) (a) and that all individual defendants aided and abetted discriminatory practices. However, the individual defendants cannot be held liable as employers under either statute. First, the NYSHRL prohibits discriminatory conduct by "employer[s] only, not individual employees." *Kwong v City of New York*, ____AD3d____, 2022 NY Slip Op 02342, *3 (1st Dep't 2022) (internal quotation marks and citations omitted).

Next, the individual defendants may also not be held vicariously liable as employers under the NYCHRL. "[W]here 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.*, 36 NY3d 450, 459 (2021). Under the NYCHRL, employees may be held individually liable for their own discriminatory acts. *See* Administrative Code § 8-107 (1) (a).

In its decision, the court has addressed Sefrankova and Canavan's alleged conduct and found that it was not actionable. Moreover, plaintiff claims that Wengelewski "perjured himself" while testifying during the first arbitration hearing. However, plaintiff has not proffered any factual allegations in support of his claim that Wengelewski discriminated against him based on age. *See e.g. Feingold v State of New York*, 366 F3d 138, 158-159 (2d Cir 2004) (internal quotation marks and citations omitted) ("Employees may be held personally liable under the NYSHRL and the NYCHRL if they participate in the conduct giving rise to a discrimination claim").

Accordingly, as plaintiff has failed to raise a triable issue of fact that any actionable discriminatory conduct took place, the individual defendants are granted summary judgment dismissing the claims made under the NYSHRL and the NYCHRL for age discrimination.

V. Aiding and Abetting Age Discrimination

Executive Law § 296 (6) states that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." In general, one who actually participates in the actual conduct giving rise to the discrimination claim is an aider and abettor, even though they lack the authority to either hire or fire the plaintiff. *Feingold v State of New York*, 366 F3d at 158. Further, "[i]t is the employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting." *Murphy v ERA United Realty*, 251 AD2d 469, 472 (2d Dep't 1998).

As the Hotel Edison, as employer, is not liable for discrimination, no liability can attach to any individual co-employees as aiders and abettors under the NYSHRL. *See e.g. Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 (1st Dep't 2005) ("As the claims against the university were properly dismissed, the court also properly dismissed the claims against the individual defendants for aiding and abetting").

Administrative Code § 8-107 (6) also 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 Dep't 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 both the [New York State Human Rights Law] and the NYCHRL"). But, as plaintiff fails to raise a triable issue of fact that the Hotel Edison discriminated against him in

violation of the NYCHRL, claims that the individual defendants aided and abetted such conduct must also be dismissed. *See e.g. Abe v Cohen*, 115 AD3d 491, 492 (1st Dep't 2014) ("[Defendant] cannot be held liable for aiding and abetting an act which itself is not actionable").

The court notes that, with respect to Sefrankova, plaintiff alleges that it was the majority of Sefrankova's conduct that gives rise to the discrimination claim alleged against the Hotel Edison. However, Sefrankova cannot be held liable for aiding and abetting her own alleged discriminatory conduct. *See Hardwick v Auriemma*, 116 AD3d 465, 468 (1st Dep't 2014). Plaintiff further alleges that Sefrankova and others falsely testified at his termination hearing. Although plaintiff disagrees with the arbitrator's credibility determinations, it is well settled that it is within the purview of the hearing officer to determine the credibility of the witnesses. *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 (1st Dep't 2013).

Accordingly, defendants are granted summary judgment dismissing the cause of action alleging aiding and abetting discrimination in violation of the NYSHRL and the NYCHRL.

Based upon the foregoing, defendants' 226 Realty LLC d/b/a 226 Realty Company, LLC, 228 Hotel Corp. d/b/a/ Hotel Edison, 47th Street Management Co., LLC, d/b/a Hotel Edison, Edison Management Company, LLC d/b/a Hotel Edison, John Canavan, Thomas Wengelewski and Katarina Sefrankova's motion for summary judgment is granted and the Clerk is directed to dismiss the complaint with prejudice and without costs or disbursements.

1/9/2022
DATE

Hon. James d'Auguste, J.S.C.

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