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

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JEFFREY WALLACH, JEFFREY WALLACH, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

INDEX NO. 156269/2018

MOTION DATE 03/21/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for CROSS MOTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Upon the foregoing documents, it is

Plaintiff Jeffrey Wallach has commenced this action on behalf of himself and a putative class of individuals who were terminated by Defendant New York City Health and Hospitals Corporation ("HHC" or "Defendant") pursuant to an initiative designed to reduce costs and overhead by instituting a series of mass management layoffs throughout the HHC system. The plaintiff claims that this layoff policy resulted in the disproportionate termination of employees who were 40 years of age or older. Plaintiff is seeking to certify the following class:

> All managers who were 40 years or older who were laid off by HHC on or around June of 2017 pursuant to Phase II of HHC's Management Efficiency Improvement Initiative.

The plaintiff now moves for class certification pursuant to Article 9 of the CPLR. Defendants oppose the motion. For the reasons set forth below, the motion for class certification is granted in part.

BACKGROUND

HHC is the public health entity of New York City and runs 11 acute care hospitals in New York City. Acute care facilities provide inpatient care. The acute care hospitals are Bellevue, Coney Island, Elmhurst, Harlem, Jacobi, Kings, Lincoln, Metropolitan, North Central Bronx, and Woodhull. Acute Care hospitals are broken down into different subcategories, community and tertiary hospitals, which are determined based on the size. HHC runs other facilities throughout New York City which are designated as nonacute or long-term care facilities. HHC also maintains a central office for various functions including administrative, marketing, and communications.

Starting in the spring of 2016, HHC began to engage in a series of cost-cutting measures designed to reduce its operating deficit. Those measures included a reduction in full-time management positions through layoffs. In order to determine which positions needed to be terminated, HHC instituted a series of initiatives known as Management Efficiency Improvements Initiatives, or MEII. MEII was implemented in two phases: MEII-1 and MEII-2. For purposes of this purported class action, only MEII-2 is at issue.

According to the complaint, MEII-2 was more formal and had more specific directives regarding which employee positions to eliminate than MEII-1. With regards to acute facilities, HHC set a target number of full-time employees to be eliminated and the date by which these employees' positions needed to be terminated. The target number of employees that each facility needed to eliminate was set by HHC, rather than the facilities themselves. HHC also provided

what it termed a Table of Organization to the acute facilities and directed that any reduction decisions be based on the table. Specifically, the Table of Organization that was provided to each acute care facility was a standardized chart of managerial positions at each facility and only differed between large and smaller facilities. HHC instructed each acute care facility to base its proposed reductions on the employee's position and/or fit within the Table of Organization and not on any performance-based factors such as performance evaluation ratings, attendance or disciplinary history. In fact, it specifically prohibited hospitals from evaluating employees based on any such performance-based measures. Senior HHC executives also had discussions with hospital executives on occasions when the local facilities decided not to eliminate certain employees even though they were not a fit within the Table of Organization.

In addition to the Table of Organization, the chief executives at the acute care facilities were provided with other documents designed to guide them in determining which employees to consider for termination. These documents included flow-charts, decision trees, employee rosters and other guidelines. However, HHC did not determine which specific employees to terminate. Instead, it provided guidance to local acute care facilities as to positions that may have been redundant or outside the scope of the Table of Organization.

It is not disputed that the executives of the various acute care facilities had at least some amount of discretion regarding which specific employees should be terminated. The plaintiff alleges that once the acute care facilities created a list of employees to terminate, HHC instituted a two-step procedure to review the submitted lists. Initially, the CEO of each facility met with HHC's senior acute care leadership and HR to compare the list of terminated employees with the Table of Organization. If the list did not conform with the Table of Organization, then HHC leadership questioned the decision and the CEO of the local facility had to justify the

terminations and/or modify the list. The plaintiff alleges that on several occasions, senior HHC leadership directed local acute care executives to reevaluate the list of proposed terminations because the list did not sufficiently conform with the Table of Organization. Subsequently, HHC's HR and Legal Department further reviewed the list and final approval had to be obtained from HR before any terminations could take effect. HR could reject terminations and require the acute care facility to terminate another employee.

The process for instituting employee layoffs pursuant to MEII2 was different for non-acute care facilities than the process described above. Terminations for non-acute care facilities were initiated and controlled directly by senior HHC leadership and HR. It appears from the record before the court that the local non-acute care facilities had little or no decision-making authority regarding the termination of their employees.

Plaintiff alleges that MEII-2 resulted in the disproportionate termination of older employees (40 years of age and older). According to a statistical analysis provided by the plaintiff, which the court accepts as true for purposes of this motion, approximately 395 managerial fulltime employees were terminated as a result of MEII-2. There were 3,386 managerial full-time employees considered for termination. Of those, 2,721 (80.4%) were 40 or older, while the remaining 665 (19.6%) were younger than 40. Of the 395 employees who were terminated, 54 were under 40 and 341 were 40 or older. The percentage of younger than 40 employees who were terminated (8.12%) is less than 80% of the number of 40 or older employees (12.53%).

Plaintiff, Jeffrey Wallach, is a former managerial employee of HHC. His position was eliminated in June of 2017 as a result of MEII-2. Plaintiff has filed this class-action claiming that defendant HHC violated New York City Human Rights Law, NYC Admin Code § 8-107

("NYCHRL") by initiating a workforce reduction policy that had a disparate impact on older employees. Plaintiff originally moved to certify the class in February of 2020. That motion was denied without prejudice by the Honorable Lyle Frank. Further discovery was conducted, and the plaintiff once again has moved for class certification. HHC opposes the motion and argues that the plaintiff has failed to identify a uniform policy or practice that resulted in an adverse disparate impact on older employees.

After reviewing the papers and oral argument on the record, the Court grants the plaintiff's motion to the extent that it will certify the proposed class but further limit it to only those managers 40 years and older who were employed by acute care facilities and laid off or terminated as a result of MEII-2.

Given the liberal standards for class certification in New York, the Court finds that the plaintiff has adequately satisfied all the prerequisites for certification outlined in CPLR §901. Of principal concern in this case is the "commonality" element, which, as set forth in CPLR §901(a)(2), inquires whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." Whether common questions of law or fact predominate "should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Frier v Vanguard Holding*, 78 AD2d 83, 96 [2d Dept 1980]). The rule requires predominance, not identity or unanimity among class members and the fact that questions unique to each individual remain after resolution of the common questions is not fatal to certification of the class action (*see Frier*, 78 AD2d at 97; *see also Weinberg v Hertz Corp.*, 116 AD2d 1, 6 [1st Dept 1986]). The issue here is whether the plaintiff can sufficiently demonstrate, at this stage of the litigation, that the defendant had a

uniform policy concerning employee terminations that had an unlawful disparate impact on older employees.

In this case, the Court finds that the plaintiff has sufficiently demonstrated, for certification purposes at this stage of the litigation, both the existence of a uniform policy that HHC implemented in order to terminate employees at acute care facilities and that the implementation of that policy may have disparately impacted older managers. While HHC senior managers did not themselves choose the specific managers to be terminated, they gave substantial guidance and instruction to the local facilities. Including providing them with the Table of Organization and other documents, including flow charts and cheat sheets, as well as by reviewing each decision to ensure that the proposed terminations conformed with their guidelines. HHC also further ensured that each local facility would utilize the Table of Organization as the primary standard for termination decisions by instructing acute care facilities not to consider any performance-based evaluations such as work performance, disciplinary history or attendance records in making the termination decisions. The Court finds this to be sufficient to demonstrate that HHC mangers utilized a "common mode of discretion" in determining which management employees should be terminated pursuant to the MEII-2 policy (*see Chen-Oster v Goldman, Sachs & Co.*, 325 FRD 55, 72-74[SDNY 2018]).

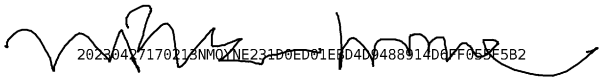
The Court stresses that this is a close decision as it seems clear that the common mode of discretion utilized by HHC local facilities was less rigid and/or more informal than the discretion at issue in *Chen-Oster*. In *Chen-Oster*, Goldman Sachs managers established a performance review method that determined employee ratings and managers assigned specific scores to performance value categories dictated by the company and then ranked each employee based on those predetermined values (*Id.* at 74). Unlike Goldman Sachs, HHC did not mandate a specific

method for reviewing employees and there was no formal rating system utilized to determine which employees fit within the Table of Organization and/or should be made subject to termination.

Nevertheless, at this stage of the process, the Court must give the plaintiff the benefit of every inference. In deciding whether to certify a class, the Court is to interpret the statutory class certification provisions broadly, in light of the clear intent of the legislature in enacting Article 9 to substitute liberal class-action provisions for the far more narrow class action legislation which preceded it (*see City of New York v Maul*, 14 NY3d 499, 508 [2010]). Since the class action statute is liberally construed, any doubt as to whether to certify a proposed class should be resolved in favor of allowing the class action to proceed (*see Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 21 [1st Dept 1991]). Class certification is appropriate if on the surface there appears to be a cause of action that is not frivolous or a sham. (*see Pludeman v N. Leasing Sysy., Inc.*, 74 Ad3rd 420, 422 [1st Dept 2010]). If further discovery or proceedings reveal that the amount of discretion provided to management was far broader and more individualized than is now apparent, the Court reserves the right to revisit the issue and, if warranted, decertify the class. Furthermore, the Court is limiting the class to older managers employed by acute care facilities as it is clear that the process utilized for termination of non-acute care managers was very different and more individualized than the process for acute-care managers.

The Court has considered the remaining arguments against class certification and finds them unavailing. Accordingly, the plaintiff's motion for class certification is granted with the proposed class as limited per above. The plaintiff shall submit a proposed order on notice along

with a proposed amended Notice of Class action to be provided to the prospective class members.



4/27/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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