SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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RAHIM KOLJA,

Plaintiff,

- against -

R.A. COHEN & ASSOCIATES, INC., THE 230 RIVERSIDE CONDOMINIUM, and DOE CORPORATIONS 1-5,

Defendants.

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DECISION AND ORDER

Index No. 152078/2014

Mot. Seq. 002

KELLY O'NEILL LEVY, J.:

Plaintiff Rahim Kolja, now 69 years old, commenced this employment discrimination and retaliation action in 2014 against his employer, R.A. Cohen & Associates, Inc. ("R.A. Cohen"); the 230 Riverside Condominium, the owner of the building at which plaintiff works;[1] and several unnamed entities. R.A. Cohen and 230 Riverside Drive Condominium (collectively "Defendants") jointly move, pursuant to CPLR 3212, for summary judgment dismissing the amended verified complaint. Plaintiff opposes the motion.

BACKGROUND

R.A. Cohen is a real estate investment and property management company responsible for the management of the 230 Riverside Condominium. Plaintiff has been employed by R.A. Cohen as a porter at 230 Riverside Drive ("building") since late 1983 or 1984[2] and continues to work there. He is a member of SEIU 32BJ ("union") and the terms and conditions of his

[1] Amended verified complaint at ¶ 3.
[2] Plaintiff testified at his deposition that he began working at the building on November 15, 1983 (Kolja tr. 28) and December 15, 1983 (Kolja tr. 48-49) but elsewhere in the record are references that his employment there actually began in 1984.

employment are governed by a collective bargaining agreement with the union. Among plaintiff's job responsibilities as a building porter are mopping, vacuuming, dusting light fixtures, removing garbage from the building, and doorman duties.

Plaintiff brought this action against Defendants alleging age discrimination in violation of Chapter I, Title 8, §8-107(1)(a) of the Administrative Code of the City of New York and retaliation in violation of Chapter I, Title 8, §8-107(7); and against R.A. Cohen only for aiding and abetting discrimination and retaliation in violation of Chapter I, Title 8, §8-107(6) (collectively "NYCHRL").

Plaintiff's Deposition Testimony

Plaintiff is a native of Albania and has limited English proficiency. His deposition was taken with the assistance of an Albanian language interpreter. There were many stops and starts over the course of the two-day deposition as plaintiff had difficulty understanding questions and the timeline became muddled.

Rahim Kolja began reporting to the superintendent of the building, Denis McGrath, in 2008. Initially, plaintiff testified that there were no problems in his working relationship with Mr. McGrath until 2011 though he later recalled that Mr. McGrath told him that 2010 would be his last Christmas in the building. He recalled that Mr. McGrath was "calm in the beginning and then afterwards he started the problems, yelling, screaming, and saying this, that, and the other" (Kolja tr. 41). Mr. McGrath "yells at people, residents, people that live there, when they come. I don't know who they are, but he yells at them, why did you leave this thing here, why did you do that thing that way" (Kolja tr. 73). He recalled that McGrath fired a man in his 20s, Alex, who had been working as a porter in the building (Kolja tr. 74).

In or about October of 2011, plaintiff, then 64 years old, developed a non-work-related hernia. He went to Mr. McGrath who insisted that the condition was caused by plaintiff's having moved a mattress while at work which plaintiff vehemently denied. Although the injury did not occur at work, Mr. McGrath urged plaintiff to file a workers' compensation claim and consider retirement. Mr. McGrath instructed plaintiff to tell his wife to call him. Mr. McGrath further told plaintiff to fill out his papers for his pension and that if he could not do it, Mr. McGrath would complete them himself. His wife called McGrath pursuant to his request.

On October 25, 2011, plaintiff filed a grievance with the union alleging that Mr. McGrath was harassing him. Specifically, the complaint, taken by union grievance representative, Frank Monaco, states, "Member claims that he is being harassed by his/her Employer Dennis McGree [sic] during the performance of his work duties and seeks to have this harassment cease and desist" (Ex. 7 to the Affirmation of Clare M. Sproule). After hearing about plaintiff going to the union, Mr. McGrath threatened plaintiff that if he ever went back to the union, he would be fired.

In November 2011, Mr. Kolja underwent surgery for the hernia and took two weeks' vacation to recuperate. On the day he returned to work, the situation with Mr. McGrath escalated. While the two were in the lobby of the building, plaintiff handed Mr. McGrath a letter from his doctor authorizing him to return to work. The note placed no restrictions on what duties he could perform. Upon giving him the note, Mr. McGrath, in the presence of two doormen, yelled at plaintiff, asking what he was doing there, and telling him that he had no use for him, and that he should "get out" and go home. Mr. McGrath then forced plaintiff to stay in the lobby of the building for two hours before allowing him to go to the basement to change his clothes and return to his job duties.

Over the days that followed, Mr. McGrath repeatedly made disparaging remarks about the plaintiff's age, and screamed and yelled at him with the intention of forcing plaintiff out of his job. McGrath's comments were made on multiple occasions and included that plaintiff is an "old man," "can't work anymore," and "should be on his pension." Plaintiff recalled that "He would push me into different rooms and into different spaces, screaming and yelling at me, and I got sick from it…He also pushed the other employees to say all kinds of things to me, all kinds of things" (Kolja tr. 53).

Plaintiff recalled other discriminatory behavior, including that Mr. McGrath allowed other employees to leave the building to get coffee and breakfast in the morning but prohibited plaintiff from doing so, and also that he was not permitted to wear his work jacket while he was cleaning in the gym, which was cold. Plaintiff further testified that John Glasser, who at the time served as RA Cohen's account manager, told him to pick up his "shit" and leave. He specifically recalled one occasion when Messrs. Glasser and McGrath took him to the building's locker room and told him to remove his belongings and that if he ever went to the union again, he "would be out." He recounted that Glasser told him that he was going to be cut from the payroll.

On August 3, 2012, Mr. Glasser issued a memo to building staff outlining their primary functions. On August 15, 2012, plaintiff received a letter from Mr. Glasser outlining a new schedule of work hours for "porter east." Before August 15, 2012, plaintiff had Saturdays and Sundays off from work. The August 15, 2012 letter changed plaintiff's schedule so that his days off were Sunday and Monday. In addition, pursuant to the 2012 directive, plaintiff started working both the east and west sides of the building in 2012. One specific change was that he was tasked with emptying the compactors and taking out the garbage on both the east and west sides of the building which he stated was a job for two people. Plaintiff later learned that the

other porters were also directed to empty both compactors. Plaintiff believed that his work schedule was changed due to his age and that McGrath and Glasser increased his job duties with the intention of tiring him out so he would leave (Kolja tr. 53).

On August 28, 2012, plaintiff filed another grievance with the union, this one about being assigned additional job responsibilities and the change in his work hours without sufficient cause or reason. Plaintiff recalls that on that day, he went to the union to complain about discrimination and abuse. A handwritten note added to the bottom of the union complaint form states: "10/2/12 Upon receiving claim mbr says harassment portion was not put in claim + was mention [sic] please call + add this to claim" (Ex. 10 to the Sproule Aff.). On September 24, 2012 plaintiff again complained to the union, this time alleging harassment due to his schedule change. Plaintiff's son and one of his daughters served as his interpreters when he filed the complaints.

Plaintiff recalled writing a complaint letter on September 24, 2012 with the assistance of two of his children and his wife. At the crux of the complaint was a recent statement Mr. McGrath made about his age and the hostile work environment that ensued after he filed his complaint/grievance in August 2012. Plaintiff gave the letter to his union and mailed a copy to R.A. Cohen which was returned to him by mail unopened.

On October 16, 2012, plaintiff's children wrote a letter on their father's behalf, which plaintiff signed,[3] to union grievance representative Frank Monaco which was also sent to RA Cohen. On November 20, 2012, plaintiff's children wrote a complaint letter to Amy Ravitz-Hogan at the union using the words that plaintiff gave them. This letter was also sent to R.A.

[3] Ex. 11 to the Sproule Aff.

Cohen. On December 27, 2012, Mr. Kolja wrote another complaint letter to the union with the assistance of his children, Ron and Lily. Plaintiff believed he mailed the letter to R.A. Cohen himself from the post office.

Plaintiff recalled that the union interviewed him on February 6, 2013. His wife and son were present with an interpreter as was his attorney, Mr. Heller. On March 11, 2013, plaintiff's son, Ron, wrote another complaint letter on his father's behalf using his father's words.

By letter dated March 28, 2013, the union determined that it would not be arbitrating plaintiff's claim (Ex. 11 to the Sproule Aff.). It stated that after an interview with plaintiff on February 6, 2013 and interviews of several of plaintiff's coworkers, it determined that there was not sufficient evidence to support a meritorious claim of discrimination based on age against the employer under the collective bargaining agreement. The plaintiff recalled that in 2013, his co-workers had a meeting with the union at 230 Riverside but that they were scared and did not speak. Plaintiff stated that the union did not help him and that Mr. McGrath was about to fire him "because I'm old and he wanted a young person there. He always mentioned that" (Kolja tr. 71).

Plaintiff complained that the abuse by his employer "got [him] sick, ill…they pushed [him] to a point where [he's] on medication and my life is nothing. I am no longer the way I was before" (Kolja tr. 236).

Deposition of Denis McGrath

At his deposition and in his August 29, 2016 affidavit in support of defendants' motion, building superintendent Denis McGrath gave a much different recounting of events and denied having engaged in discriminatory or retaliatory conduct. He denied having made specific

comments to plaintiff or giving him retirement papers or encouraging him to take his pension soon. He did recall that Mr. Kolja's colleagues talked about his age, but could not remember what they said. (*id.* at 22-23, 33)

After plaintiff told him he was injured in the waist area, he told plaintiff to have his wife call him (*id.* at 41). He received a call several days later from a woman who identified herself as the plaintiff's wife. About an hour and a half later, he received a call from a woman who identified herself as the plaintiff's daughter. She "did a lot of screaming and yelling. Said something about…her father not hurting himself at the job" (*id.* at 42, 146).

McGrath emailed building manager, Ross Milhiser, and Andrew Loizides, who was head of payroll, to inform them that "On Thursday, October 20, Rahim Kolja approached me around noon and described to me what was a hernia injury. I suggest whatever course of action we could take to protect the condominium against any possible liability concerning Rahim Kolja we should do so immediately. He has been diagnosed with a hernia and he's a porter. Heavy lifting was required, and that hernia could rupture at any time." He went on to say in his email, "If it's legally possible to relieve Rahim from his job until all medical issues are resolved, I suggest we do so" (*id.* at 37). At the direction of management, he later spoke with the insurance carrier about the situation (*id.* at 49).

Mr. McGrath recalled that upon his return to work after the hernia surgery, plaintiff gave him a doctor's note (*id.* at 47). Plaintiff waited in the lobby for 10 minutes while McGrath was upstairs contacting Mr. Loizides to make sure plaintiff had clearance to work (*id.* at 47).

He claimed that he neither wanted plaintiff to take workers' compensation nor had a problem if he did not take it (*id.* at 44, 49). Ultimately, plaintiff did not take workers' compensation.

Because plaintiff was "acting irrational and making all kinds of claims" and "yelling and screaming" in the basement at no one in a language he did not understand, he contacted the Union to request that a delegate meet with them (*id.* at 52-57). The meeting with the union delegate, John Grier, occurred on February 12, 2013 (*id.* at 115). Unbeknownst to Mr. McGrath, plaintiff had filed a grievance with the union months before. McGrath only discovered that the grievance had been filed during the meeting when Mr. Grier made a call to Frank Monaco at the union (*id.* at 54-55). At that point, plaintiff did not wish to speak further and the meeting was over (*id.* at 55).

The August 15, 2012 change to plaintiff's work schedule was precipitated by the building managers' wish to "run the building more efficiently" (*id.* at 59). McGrath was involved in the discussion with the building managers (*id.* at 59). McGrath stated that there was no problem that precipitated the change (*id.* at 59-60). Several employees' schedules were changed, but McGrath did not recall if it was just the porters or everyone. Upon receiving the letter, plaintiff approached McGrath because he did not like the schedule change. McGrath advised him to speak with the building managers, Jon Glasser and Ross Milhiser. According to the porter schedule as revised in 2012 (which was drafted by Glasser, Milhiser, and McGrath) (*id.* at 62-63), several days a week, the east side porter was responsible for collecting the garbage on for both the east and west sides of the 250-unit apartment building while the west side porter was not responsible for any of the trash, but rather for the vacuuming. According to the new schedule, there was no day when the west side porters were responsible for trash removal on both sides of

the building. However, the revised schedule noted that duties and responsibilities were subject to change which meant that on any given day, the workers' duties and responsibilities might change based on the needs of the building (*id.* at 69-70). McGrath was not sure whether he had become aware that Mr. Kolja had gone to the union at the time that the lists of duties were issued (*id.* at 78). He recalled that the meeting with the union occurred after the schedule change. McGrath stated, "I don't think I really realized he filed a grievance until after the schedule change, which would have been 2013" (*id.* at 79).

McGrath recalled that plaintiff complained to him about his increased job responsibilities, in particular that he never before had to collect garbage on both sides of the building. (*id.* at 74). At times, McGrath personally assisted plaintiff with helping him take out the garbage (*id.* at 75).

Alex Trinidad was working as the west side porter in December 2012 (*id.* at 67). He was not fired but left his job voluntarily in "2013, 2014, maybe" when he took another job (*id.*).

On September 22, 2012, Mr. McGrath received an email from Yaron Werber, a building resident who at the time served on the condominium board, wherein Mr. Werber recounted that plaintiff had asked him about the schedule change. Mr. Werber advised plaintiff to discuss the issue with management. That same day, plaintiff approached Mr. McGrath and told him he was not going to mention it again. The next day, Mr. Werber emailed again and stated that he had just seen plaintiff who told him he decided not to speak with management about the change (*id.* at 83-86).

On October 4, 2012, he emailed Jon Glasser letting him know that he had spoken with plaintiff who informed him that he had gone to the hospital for an anxiety attack (*id.* at 96-97).

Mr. McGrath denied knowledge that Frank Monaco ever met with the employees at the building (*id.* at 100-101) but did recall going to the union to speak with Mr. Monaco (*id.* at 108-109). He also denied ever prohibiting plaintiff from leaving the building and in fact recalled plaintiff leaving the building for coffee (*id.* at 103-104). Plaintiff had been "continuously sulking since the shift change" (McGrath tr. 113). Mr. McGrath denied being aware of any grievance until February 12, 2013 when John Grier from the Union went to the building to meet with plaintiff and him (*id.* at 114-116).

He was asked about an email from unit owner Kelsey Bachelder to several board members about an incident Mr. Bachelder had observed in the building between plaintiff and McGrath (Ex. T to the Heller Aff.). He recalled that there was a meeting in June 2014 with staff members and a union representative at which complaints were made against him which Mr. Bachelder referenced (McGrath tr. 138-141).

Affidavit of Denis McGrath

In his affidavit, Mr. McGrath again denied ever having made any comments about plaintiff's age or when he was going to retire and denied that he had ever heard Mr. Glasser intimidate or harass plaintiff. Mr. McGrath stated that plaintiff approached him on October 20, 2011 and told him of an injury he had sustained which sounded like a hernia (McGrath Affidavit at ¶ 6). Mr. Kolja actually told Mr. McGrath that the injury was caused by carrying a mattress that one of the tenants had discarded and requested one week off work to have surgery (*id.* at ¶ 6). Mr. McGrath's later review of a surveillance tape confirmed that plaintiff had moved a mattress on October 14, 2011, the date on which Mr. McGrath believed plaintiff told him he was injured (*id.* at ¶ 14).

Mr. McGrath suggested to Mr. Kolja that a week was not long enough to heal and that he could apply for Workman's Compensation to get paid for his time off (*id.* at ¶ 6). Since plaintiff has limited English proficiency, Mr. McGrath suggested that plaintiff's wife call him to he could explain (*id.* at ¶ 6). When McGrath spoke with plaintiff's wife, he told her that plaintiff would not be able to return to full duties until he had a letter from his doctor stating same (*id.* at ¶ 7). He also told her that he was eligible for Workman's Compensation because he had been hurt on the job (*id.* at ¶ 7).

Plaintiff's daughter called Mr. McGrath later that day and told him that the question of whether her father went out on workers' compensation was for plaintiff's doctor, not Mr. McGrath (*id.* at ¶ 8). Mr. McGrath told her that he was not making a determination but a suggestion. She denied that her father had been hurt on the job and asked where she could get disability paperwork and Mr. McGrath directed her to R.A. Cohen's office (*id.* at ¶ 9).

When plaintiff returned to work after his hernia surgery in November 2011, he handed Mr. McGrath a note from his hospital that plaintiff was not to engage in any heavy lifting at work (*id.* at ¶ 16). He asked plaintiff to wait in the lobby while he called Mr. Milhiser to get approval for plaintiff to work in light of the restriction (*id.*). Plaintiff only waited in the lobby for 10 to 15 minutes while Mr. McGrath made the call (McGrath Aff. at ¶ 17). Plaintiff was then permitted to return to work that day (*id.*). Jon Glasser was not in the building that day as he had not even begun to work at the company until some months later (McGrath Aff. at ¶ 18).

Mr. McGrath stated that plaintiff was unhappy with his schedule change and denied having had anything to do with that change. He stated:

> Soon after Jon [Glasser] became the account executive for the 230 Riverside Drive property, he and Ross Milhiser [also identified in McGrath's affidavit as an

> account executive for the building] decided to change the work schedules for the employees who worked there, in order to run the building more efficiently. I was involved in the discussions, but I did not make the decision to change the schedules. These changes included the hours and days of the week that each of the porters would be working (and their days off), and the schedules for when the specific job duties for the porter positions were to be performed. On August 15, 2012, Jon sent a letter to each of the employees that told them of their new schedules, which were to be effective September 9, 2012.

(*id.* at ¶ 19).

He recalled that plaintiff was upset about his schedule change and the fact that on some days, he had to remove garbage from both sides of the building which he had not done before (*id.* at ¶ 20). The schedule changes affected not just Mr. Kolja, but other building employees. McGrath maintained that the change in duties occurred prior to his becoming aware that Mr. Kolja accused him of making age related comments (*id.* at ¶ 22).

He forwarded the September 21 and 22, 2012 emails he had received from building resident Mr. Werber to Messrs. Glasser and Milhiser. Mr. Glasser told him that plaintiff's conduct was insubordination. The three had a meeting on September 25, 2012 to discuss the matter with Kolja and to give him the written warning concerning his insubordination (*id.* at ¶ 26).

On September 27, 2012, McGrath had a conference call with Frank Monaco at the union about a meeting that Monaco had had with plaintiff's children on September 26th. McGrath believed that Mr. Kolja was complaining about the change in his work schedule (*id.* at ¶ 27). A meeting for the three of them was scheduled for October 3, 2012 and was adjourned to the next day for an interpreter. On the day of the meeting, McGrath received an email from Mr. Glasser telling him the meeting was canceled. Unbeknownst to Mr. Grath, plaintiff had submitted a note from his doctor stating that the meeting

would be too stressful for plaintiff (*id.* at ¶ 28). On November 30, 2012, plaintiff filed a grievance with the union alleging age discrimination, which McGrath learned of later (*id.* at ¶ 29).

On or about December 13, 2012, McGrath spoke with Mr. Monaco about the allegations. He denied calling plaintiff an old man or encouraging him to retire. (*id.* at ¶ 30). He also denied to Monaco that he had anything to do with the August 2012 schedule change (*id.*). McGrath denied that he told plaintiff not to go to the union or that he did anything to plaintiff in retaliation for his having gone to the union and maintained that he treats all workers evenhandedly (McGrath Aff. at ¶ 33).

Deposition of Jonathan Glasser

Mr. Glasser worked as an account executive for R.A. Cohen from May 2012 until May 2015. The account executive functioned as a property manager. He succeeded Ross Milhiser, who was promoted to vice president. While at R.A. Cohen, Mr. Glasser managed seven buildings, one of which was the building. He left the company in May 2015 to start a real estate development company.

He recalled that plaintiff's work schedule changed in 2012 because "we were trying to make the schedules of all the staff members more efficient as it related to the operations of the building. I think I had looked at the schedule when I started, and…there were little areas where it looked like we could do some improvement" (Glasser tr. 24-25). "The main reason, to my memory, was that we were trying to get two men down in the front lobby for as much time as possible during the day because we wanted one at the door and we wanted one at the desk" (*id.* at 25). Glasser did not know, however, how

changing Mr. Kolja's schedule impacted having two people at the front at all times (*id.*). He recalled that plaintiff was irate after hearing that his schedule was being changed. He told him he could not change his days, and threatened him with a lawsuit at least twice.

Mr. Glasser denied knowing that plaintiff had filed a grievance in August 2012 at the time (Glasser tr. 34). He recalled that "We took certain actions that involved meetings with the union rep, meetings with staff as a whole, meeting with the staff members that were involved at certain points, I don't remember the dates, trying to flush out what was going on. So…the gist of these complaints was discussed, but I believe I learned about it after he had actually filed the grievance" (*id.* at 35). He recalled a meeting that management called with the union at which the plaintiff did not appear. He also recalled a meeting that he and Mr. McGrath had arranged to discuss a conflict between plaintiff and another employee. He denied ever telling plaintiff to "get your shit out of your locker" (*id.* at 89-90).

Glasser recalled learning of an incident wherein plaintiff complained to a resident board member but could not recall if the board member had told him about it or whether he had heard about it from Mr. McGrath. He did not remember whether the plaintiff had complained to Mr. Werber or another resident. In response, Mr. Glasser wrote plaintiff a letter dated September 25, 2012 hand-delivered and sent by certified mail that complained that "On August 24, 2012, I informed you about a change in your work schedule at 230 Riverside Drive. …It came as a surprise to learn that on Thursday, September 20, 2012, you approached a resident board member to express your dissatisfaction regarding the updated schedule. …This is completely unacceptable, and your insubordination will not be tolerated in the future. …This letter is a written warning

and will become part of your employment file." Mr. Glasser did not recall if he knew when he wrote the letter that Mr. Kolja had filed a grievance with the union a month earlier on August 28, 2012 (*id.* at 46).

Glasser maintained that R.A. Cohen investigated and addressed plaintiff's complaints. "We made multiple meetings at the building involving Kol[j]a, involving Denis, involving Enver (a coworker by whom plaintiff reported being threatened), involving union reps, involving at one point the entire staff…I remember one meeting where we called the entire staff, at least one meeting, to tell them that if there are any issues, to please – I think the union member was there, or maybe there was one meeting where the union member wasn't there and a second where the union member was, and that if there are any complaints or issues, that this is the time – I think we had sent a memo we were going to have that meeting, and then at the time we said…if there are any issues…please come forth now, this is an open forum to discuss them" (Glasser tr. 51). He did not know of anyone from R.A. Cohen besides himself going to the building in connection with plaintiff's complaints (*id.* at 67).

On February 12, 2013, Mr. McGrath emailed him that "Kol[j]a is complaining that his workload is too much, his days off have been changed, and that he's being forced into retirement because of a heavy workload. Kol[j]a is also claiming that I keep pushing him to retire." Mr. Glasser did not recall having heard those allegations before receiving that email (*id.* at 70-72). He recalled that in July 2014, Mr. Kolja had complained that his co-worker Enver threatened his life but upon meeting with him about it, verbally retracted his complaint (*id.* at 79-81). Mr. Glasser conducted an investigation nonetheless and Enver denied the allegation (*id.* at 81-82). Mr. Glasser responded to

plaintiff by letter on September 15, 2014 indicating that he had investigated the complaint and the results were found to be inconclusive (*id.* at 81-84). He was, however, aware that plaintiff had complained about Enver before (*id.* at 84-85).

While no other employees complained to Mr. Glasser about Mr. McGrath, some residents did. Specifically, they complained about his "brusqueness" or not giving them the attention they sought about their concerns. He met with Denis and reminded him to be polite to the residents. He also recalled residents praising Mr. McGrath about how hard he worked. Mr. McGrath was a super he could rely on (*id.* at 53-59).

Mr. Glasser did not believe that he had ever seen any of the letters plaintiff wrote to the union nor did he recall the union sharing any documents about Mr. Kolja. He did not recall when he learned about Mr. Kolja complaining about age discrimination but believes he learned of it before the complaint in the instant action was filed from speaking to one of the union delegates.

Mr. Glasser recalled hearing of a complaint from Mrs. Batchelder, a building resident whom he described as a "serial complainer," along with her husband, about Mr. McGrath's treatment of Mr. Kolja (Glasser tr. 99-101). The resident emailed several board members in the building on March 11, 2015 to complain about an incident he had observed in the basement wherein Mr. McGrath "accosted" Mr. Kolja "verbally abused him" and blamed him for several problems in the building (Ex. T to Heller Aff.). Mr. Glasser asked Mr. McGrath about it and he denied having spoken with plaintiff in that manner and stated that the resident had blown the incident out of proportion (Glasser tr. 101-102).

Affidavit of Fatmire Kolja

Plaintiff submits the October 24, 2016 affidavits of his wife, Fatmire Kolja, and son, Rasim "Ron" Kolja. Mrs. Kolja recalled having called Mr. McGrath on October 23, 2011 at his request. She put the call on speakerphone so that her son, Rasim, and daughter, Lily, could listen. She stated that Mr. McGrath was "remarkably nasty" and told her that Mr. Kolja had to take disability or go on workers' compensation because he was hurt on the job carrying a mattress. Though she insisted that her husband was not hurt on the job and he did not need either, Mr. McGrath told her that she did not know what she was talking about and told her, "I don't have any position for [Rahim] here...We should remember that we have no other position for [my husband] and that he's old, and that he should really think about workers' comp or disability and taking his pension soon" (Aff. of Fatmire Kolja ¶ 6).

Affidavit of Rasim "Ron" Kolja

Rasim Kolja stated in his affidavit that he had kept a notebook of his father's complaints about his job since October 2011 in which he recorded numerous instances spanning over three years of his father telling him that that Mr. McGrath had commented on his age, and told him to retire. He recalled listening in on an October 2011 conversation his mother had with Mr. McGrath via speakerphone wherein Mr. McGrath referred to plaintiff as "old" and "said my father 'should really think about workmens' comp/disability and taking his pension soon'" (Aff. of Rasim Kolja ¶ 3).

DISCUSSION

Summary Judgment Standard

As a preliminary matter, the court finds that the motion was timely filed within 120 days of the filing of the Note of Issue pursuant to CPLR 3212(a) and in accordance with this part's rules.[4] *See* CPLR § 3212(a). CPLR 3212 provides that

> Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Here, the Note of Issue was filed on April 29, 2016 and defendant's motion for summary judgment was filed within the 120-day timeframe.

The plaintiff contends that the 60-day deadline set forth in the Preliminary Conference Order was in effect at the time the motion was filed. However, the rule of this part is that summary judgment motions must be filed within 120 days after the filing of the NOI. Therefore, notwithstanding the 60-day deadline imposed in the preliminary conference order issued before this matter was administratively transferred to this court, the motion for summary judgment is considered timely.

On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to

[4] Part 19 Rules are available at http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf

establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 AD2d 129, 130 (1st Dep't 1997). If there is "any doubt as to the existence of triable issues of fact," the motion must be denied. *See Hammond v. State of N.Y.*, 157 AD2d 391, 393 (1st Dep't 1990), *citing Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978). Importantly here, "[i]t is not the court's function on a motion for summary judgment to assess credibility." *Ferrante v. American Lung Ass'n*, 90 NY2d 623, 631 (1997).

Age Discrimination Claim

Courts have acknowledged that the NYCHRL "is more liberal than either its state or federal counterpart." *Brightman v. Prison Health Servs.*, 62 A.D.3d 472 (1st Dep't 2009); *see also Kennington v. 226 Realty LLC*, 2013 WL 5793304, *1 (Sup. Ct., NY Co., Oct. 24, 2013) [citing *Farrugia v North Shore University Hospital*, 13 Misc.3d 740, 745, (Sup Ct, NY Co. 2006) and *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011) and describing the NYCHRL as "the most progressive anti-discrimination law in the nation" that is to be "construed broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible"]; *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 78 (2009) ("at the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred.")

To establish an age discrimination claim under the NYCHRL, the plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified to hold his position; (3) he was subjected to an adverse employment action or treated "less well" because of his age; and (4) the adverse employment action or differential treatment occurred under circumstances giving rise to

an inference of age discrimination. *See Askin v. Dep't of Educ. of the City of New York*, 110 A.D.3d 621, 622 (1st Dep't 2013) citing *Melman v. Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dep't 2012) and *Bennett v. Health Mgmt. Sys.*, 92 A.D.3d 29, 35-36 (1st Dep't 2011). It is undisputed that plaintiff has satisfied the first two requirements and that plaintiff is the oldest staff member working at the building.

Defendants argue that plaintiff has not established the third element, that he was subjected to an adverse employment action or treated "less well" because of his age. However, weighing the evidence in the light most favorable to the non-moving party and not making credibility determinations, the plaintiff has proffered adequate evidence to demonstrate that his supervisor made discriminatory remarks and that he was treated less well because of his age.

Plaintiff testified at his deposition that his direct supervisor, Mr. McGrath, made repeated comments about his age, including that he is an "old man," "can't work anymore," and "should be on his pension." Further, the 2012 changes to plaintiff's schedule and duties are evidence that plaintiff was treated differently. McGrath testified that the plaintiff, as an east side porter, was only responsible for taking out garbage from the east side of the building prior to the change. After the change, as shown on the letter from R.A. Cohen to building employees, several days a week, plaintiff was assigned to take out garbage of both sides of the building. Although the letter also shows (and McGrath testified) that the west side porter was assigned to vacuum both sides of the building on those days, whether the plaintiff was treated unequally in the reassignment is a question that should be left to the factfinder at trial.

That plaintiff remains employed by R.A. Cohen is not determinative as unequal treatment may be found regardless of whether there was "tangible" conduct by a defendant such as hiring or firing. *Williams*, 61 A.D.3d at 79; *see also Gorokhovsky v. N.Y. City Hous. Auth.*, 552

Fed.Appx. 100, 102 (2d Cir. 2014) (noting that neither materially adverse employment actions nor severe and pervasive conduct are required to show differential treatment under the NYCHRL); *Williams v. Regus Mgmt. Grp.*, 836 F.Supp.2d 159, 173 (S.D.N.Y. 2011) ("[I]n order to make out the third prong of a prima facie case of discrimination under the NYCHRL, a plaintiff must simply show that she was treated differently from others in a way that was more than trivial, insubstantial, or petty.")

The August 2012 changes to plaintiff's work schedule and job duties made a significant impact on him. While plaintiff testified at his deposition that he later learned that the other porters were also directed to empty both compactors, (Kolja tr. 100), the deposition of Mr. McGrath, who drafted the schedule change with Glasser and Milhiser (McGrath tr. 62-63), raises an issue as to that. During McGrath's deposition, he acknowledged that the revised porter schedule made a change that affected plaintiff in a way that it did not impact others. Several days a week, the east side porter was responsible for collecting the garbage on for both the east and west sides of the 250-unit apartment building while the west side porter was not responsible for any of the trash, but rather for the vacuuming (McGrath tr. 66-68). According to the new schedule, there was no day when the west side porter was responsible for trash removal on both sides of the building (*id.*).

Here, plaintiff has offered adequate evidence to establish his prima facie case and the Defendants have failed to offer evidence of nondiscriminatory motives. *See Rollins v. Fencers Club*, 128 A.D.3d 401, 401–02 (1st Dep't 2015)(alleged frequent remarks made by terminated plaintiff's employer raised an inference of age-related bias sufficient to make out plaintiff's prima facie case of employment discrimination. *Id.* Notwithstanding several inconsistencies in

his testimony, plaintiff here has proffered adequate evidence of discriminatory conduct by Defendants to survive summary judgment.

Retaliation Claim

To establish a claim of unlawful retaliation under the NYCHRL, the plaintiff must show that: (1) he engaged in protected activity; (2) he was aware that he participated in such activity; (3) he was subjected to adverse employment action and (4) there is a causal connection between the protected activity and the adverse action. *Williams*, 61 A.D.3d 71-72. The Court of Appeals has defined protected activity as conduct "opposing or complaining about unlawful discrimination." *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 314 (2004); *see also Gorokhovsky*, 552 Fed. Appx. 100, 102 (2d Cir. 2014) ("[T]o prevail on a retaliation claim under the NYCHRL, a plaintiff need only show that he took an action opposing his employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action.").

Courts have interpreted protected activity liberally and suggested that a jury is best suited to evaluate the issue. In *Williams*, the First Department stated that for retaliation claims, it is important to consider "the fact that the 'chilling effect' of particular conduct is context-dependent and…a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities." 61 A.D.3d at 71. It further stated that under the NYCHRL, "no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'" *Id.*

Here, the plaintiff engaged in a protected activity when he made complaints to the union. The plaintiff's first grievance to the union was on October 25, 2011. Although the union's complaint form only mentioned that the plaintiff complained that he was being harassed by McGrath (Ex. 7 to Sproule Aff.), the notes taken by the union representative, Frank Monaco, entered on that date show that the plaintiff alleged that "The superintendent tells grievant you need to retire and your English is not good" (Ex. D to Heller Aff.). The notes also show that on November 1, 2011, Mr. Monaco "spoke to Mgmt Rep Rob Sparer about this." Mr. Sparer had previously represented R.A. Cohen (Heller Aff. at ¶ 10). The union notes also state that a "harassment letter" was sent on November 1, 2011 (Ex. D to Heller Aff.). Moreover, plaintiff received a letter from John Glasser accusing him of insubordination for speaking with a resident of the building about his schedule change mere weeks after filing a second grievance with the union, this one about the schedule change. Ryan Borgen, Associate General Counsel of the union, sent a letter via email to Mr. Sparer following the August 2012 schedule/assignment change stating that the union was investigating a complaint made by Mr. Kolja and requesting certain information from the building (Ex. E to Heller Aff.)[5] While Defendants deny having been aware of the grievance until March 2013, their conduct raises a question of whether they were indeed aware, particularly in light of plaintiff's testimony that various letters and complaints were mailed to R.A. Cohen.

A jury may reasonably find that the plaintiff complained about age discrimination and that Defendants were aware of plaintiff's complaints and engaged in retaliatory conduct against him over several years. Defendants argue the plaintiff's second complaint to the Union on

[5] While the letter is dated February 19, 2012, that date clearly contains a typographical error as the letter makes reference to the "August/September 2012" schedule/assignment change.

August 28, 2012 only shows that he complained about schedule changes without mentioning age discrimination. That plaintiff made his third complaint to the Union on November 30, 2012, after the alleged adverse employment actions is not determinative of the retaliation claim.

Here, the timing of the change in plaintiff's work schedule and job duties raises an inference that it might have been done in retaliation for plaintiff's complaints to his union. There is an issue of fact as to why, after 28 years of having weekends off work, plaintiff's work schedule suddenly changed to have Sunday and Monday off. Furthermore, the management's reasons for making schedule changes for efficiency's sake may be a pretext [*see Ferrante v. American Lung Ass'n*, 90 NY2d 623, 629-30 (1997)] and do not explain why plaintiff in particular experienced a major change in his schedule and job responsibilities. In addition, the plaintiff was given a written warning by Glasser on September 25, 2012, about alleged insubordination after he complained of age discrimination to the union.

Here, defendants' alleged retaliatory acts of threatening plaintiff with termination, modifying the his job responsibilities and work schedule and issuing the warning letter due to alleged insubordination "were 'materially adverse' in that they 'well might have dissuaded a reasonable worker from making ... a charge of discrimination' (*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 [2006] [internal quotation marks omitted]) [and]...satisfy the requirement of the New York City Human Rights Law that they "must be reasonably likely to deter a person from engaging in protected activity." *Brightman v. Prison Health Servs.*, 62 A.D.3d 472 (1st Dep't 2009).

Accordingly, plaintiff's claims of retaliation and aiding and abetting discrimination and retaliation survive summary judgment.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER:

Date: April 27, 2017

Kelly O'Neill Levy, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.