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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 58

FLETCHER BENNETT, VINCENT ULIANO, PETER SUSOL, JOHN DESANTIS, RAYMOND AVILES, FRANK TSAVARIS, STEVEN MCCORMACK, ALFRED RUGGIERO, THOMAS BONELLI, RALF ANDERSEN, STEPHEN LAMARCHE, LANCE GIANCOTTI, RONALD INCE, RAYMOND MASSEY, and CHRIS TARTARONE,

Plaintiffs,

- against -

TIME WARNER CABLE, INC.,

Defendant.

Index No.: 152686/2014

DECISION/ORDER

MILLS, DONNA, J.:

In this action, plaintiffs sue to recover damages, and seek injunctive relief, for alleged age-based employment discrimination, in violation of the New York State Human Rights Law (Executive Law § 290 et seq.) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-101 et seq.)(NYCHRL). Defendant Time Warner Cable, Inc. (TWC) makes this pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

BACKGROUND

The following factual allegations are taken from the Complaint (Ex. A to Affirmation of Kenneth Margolis in Support of Defendant's Motion to Dismiss), and, for purposes of this motion,

are presumed to be true.

Plaintiffs, whose ages range between 51 and 69, are employees of TWC, and until about September 2013, held the position of General Foreman. Complaint, ¶¶ 3-17, 23. Each plaintiff held the General Foreman position for many years and performed his job satisfactorily, receiving positive performance evaluations and bonuses. *Id.*, ¶ 28. In or around September 2013, TWC took away the General Foreman title and job duties from plaintiffs, and plaintiffs were effectively demoted, receiving a reduction in pay, and decreased overtime opportunities and monetary bonuses. *Id.*, ¶¶ 29-30. TWC subsequently assigned plaintiffs' General Foreman job duties to newly hired younger employees with less experience than plaintiffs. *Id.*, ¶ 31. Plaintiffs also allege that TWC management representatives made age-related comments to various plaintiffs, including remarks about plaintiffs' gray hair, and statements that they "don't have much more time left" before retiring and that they are now "in the 21st Century." *Id.*, ¶ 32.

DISCUSSION

It is well settled that on a 3211 (a) (7) motion to dismiss addressed to the facial sufficiency of the complaint, the pleadings are to be liberally construed. *See Leon v Martinez*, 84 NY2d 83, 87 (1994); CPLR 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the

benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88; *see Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). Thus, "[t]he scope of the court's inquiry . . . is narrowly circumscribed" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]; *see DeMicco Bros. v Consolidated Edison Co.*, 8 AD3d 99, 99 [1st Dept 2004]), and "if from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 887 (2013).

Further, the court's role in a motion to dismiss is not to determine "whether there is evidentiary support for the complaint" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]; *see Weiss v Lowenberg*, 95 AD3d 405, 406 [1st Dept 2012]); and "the court is not authorized to assess the merits of the complaint or any of its factual allegations." *P.T. Bank Cent. Asia, N.Y. Branch*, 301 AD2d at 376. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see Roni LLC v Arfa*,

18 NY3d 846, 848 (2011); *African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 (1st Dept 2013).

In addition, employment discrimination claims are assessed "under a particularly relaxed 'notice pleading' standard." *Krolick v Natixis Sec. N. Am. Inc.*, 36 Misc 3d 1227(A), *5, 2011 NY Slip Op 52525(U) (Sup Ct, NY County 2011), citing *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009). Under that standard, "a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig*, 67 AD3d at 145, quoting *Swierkiewicz v Sorema, N.A.*, 534 US 506, 514-515 (2002); *see Krzyzowska v Linmar Constr. Corp.*, 2014 WL 4787283, *8, 2014 NY Misc LEXIS 4230, *15-16 (Sup Ct, NY County 2014); *Anderson v Edmiston & Co., Inc.*, 2013 WL 6702092, *1, 2013 NY Misc LEXIS 6097, *8 (Sup Ct, NY County 2013).

Pursuant to the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or otherwise to discriminate against an individual in the terms, conditions or privileges of employment because of, as pertinent here, the individual's age. *See* Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). Both statutes require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-

130; *see Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 65 (1st Dept 2009).

The NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) (Restoration Act), also "explicitly requires an independent liberal construction analysis . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws." *Williams*, 61 AD3d at 66; *see* Administrative Code § 8-130; *Romanello*, 22 NY3d at 884-885; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 (1st Dept 2011); *see also Vig*, 67 AD3d at 145 (state law provides greater protection than federal law and city law provides even broader protections than the state). All provisions of the NYCHRL accordingly must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *see Romanello*, 22 NY3d at 885; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012). Interpretations of state or federal laws, therefore, "may be used as aids in interpretation only to the extent that the counterpart provisions are viewed 'as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.'" *Williams*, 61

AD3d at 66-67 (citation omitted); *see Vig*, 67 AD3d at 145.

To state a cause of action for employment discrimination, generally, plaintiffs must allege that they are members of a protected class, that they were qualified for the positions they held, and that they were terminated from employment or suffered another adverse employment action under circumstances giving rise to an inference of discrimination. *See Stephenson v Hotel Empls. & Restaurant Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 (2006), citing *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *Melman*, 98 AD3d at 112; *Mete v New York State Ofc. of Mental Retardation and Dev. Disabilities*, 21 AD3d 288, 290 (1st Dept 2005). An inference of discrimination "may be drawn from direct evidence, from statistical evidence, or merely from the fact that the position was filled or held open for a person not in the same protected class." *Sogg v American Airlines, Inc.*, 193 AD2d 153, 156 (1st Dept 1993); *see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 326 (2004) (plaintiff does not need to prove discrimination by direct evidence; circumstantial evidence is sufficient); *James v New York Racing Assn.*, 233 F3d 149, 153-54 (2d Cir 2000) (minimal showing for prima facie case requires no evidence of discrimination; preference for person not in protected class is enough). In an age discrimination claim, an inference of discrimination may be supported by showing that a plaintiff's "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 Dept 2007), citing *Ioele v Alden Press*, 145 AD2d 29, 35 (1st Dept 1989); *see Yanai v Columbia Univ.*, 2006 WL 6849491, 2006 NY Misc LEXIS 9354, *27-28 (Sup Ct, NY County 2006). Under the NYCHRL, plaintiffs, to prove a discrimination claim, need only demonstrate that they were "treated less well than other employees," at least in part because of their age. *Williams*, 61 AD3d at 78; *see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 741 (2d Dept 2013); *Melman*, 98 AD3d at 127; *Bennett*, 92 AD3d at 39.

Here, plaintiffs allege that they are employees in their 50's and 60's, and, as such, are members of a protected class based on age; that they were qualified for the General Foreman position, having held the position satisfactorily for many years; that they were subjected to an adverse action when the General Foreman position was eliminated and they were demoted; and that the work they performed as General Foremen was assigned to newly hired, younger employees. Taking all of the allegations in the complaint as true, and resolving all inferences in favor of the plaintiffs, as the court must, the complaint sufficiently states a cause of action for age discrimination. *See Terranova v Liberty Lines Tr., Inc.*, 292 AD2d 441, 442-443 (2d Dept 2002) (allegations that plaintiff performed work satisfactorily, was most senior person in department, was demoted and replaced by

someone younger sufficient to state cause of action for age discrimination); *Fern v IBM Corp.*, 204 AD2d 907, 909 (3d Dept 1994) (allegations that defendant was attempting to induce older workers to retire early, that comments were made to him to take advantage of retirement incentive offer, and that plaintiff was fired when he refused to voluntarily retire stated claim for age discrimination); *Vallone v Banca Nazionale del Lavoro*, 2004 WL 2912887, *3, 2004 US Dist LEXIS 25252, *8 (SD NY 2004) (complaint was sufficient where it alleged that plaintiffs were over 40 and were fired based on their ages to avoid paying them pension benefits); *Moskowitz v Alliance Capital Mgmt., Inc.*, 2003 WL 22427845, *1, 2003 US Dist LEXIS 18893, *2-3 (SD NY 2003) (complaint was sufficient where it alleged that plaintiff was 60 years old when his employment was terminated and that employer's nepotism policies were applied to him as a means of singling him out because of his age); *see also Melman*, 98 AD3d at 114-115 (on summary judgment motion, plaintiff's allegations, that he was paid less than others in similar positions, younger physicians were treated more favorably, and older departmental chairmen were forced out and replaced with younger physicians, sufficient for prima facie showing of age discrimination).

As noted above, plaintiffs' "ultimate ability to prove those allegations is not relevant" at this pre-answer stage. *Wang v Wang*, 96 AD3d 1005, 1008 (2d Dept 2012); *see EBC I, Inc.*, 5 NY3d

at 19. Rather, the relaxed "notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 US at 512; *see Pyett v Pennsylvania Bldg. Co.*, 2006 WL 1520517, *3, 2006 US Dist LEXIS 35952, *10 (SD NY 2006), *affd* 498 F3d 88 (2d Cir 2007) (although plaintiffs will need evidence to survive summary judgment, they have satisfied the "lenient [pleading] standards, as they allege that plaintiffs were over the age of 40, that they were reassigned to positions which led to substantial losses in income, and that their replacements were both younger and had less seniority"); *Cellamare v Millbank, Tweed, Hadley & McCloy LLP*, 2003 WL 22937683, *5, 2003 US Dist LEXIS 22336, *17-18 (ED NY 2003) (complaint was sufficient where plaintiff alleged that she was in her 40's, that she was terminated because of her age and that defendant was hiring younger people to replace her; whether defendant was actually replacing plaintiff with younger employees was a factual matter more appropriately addressed in summary judgment motion).

Moreover, while the alleged ageist remarks (Complaint, ¶ 32) by themselves may not be enough to demonstrate a discriminatory animus (*see Mete*, 21 AD3d at 294 ["a decision maker's stray remark, without more, does not constitute evidence of discrimination"]; *Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*,

120 AD3d 18, 26 [1st Dept 2014] [isolated remarks were nothing more than "petty slights and trivial inconveniences"]), they could obtain a greater significance "when considered within the totality of all the evidence." *Emmer v Trustees of Columbia Univ.*, 2014 WL 1805532, *7, 2014 NY Misc LEXIS 2131, *18 (Sup Ct, NY County 2014) (internal quotation marks and citation omitted). Even without considering the alleged remarks, however, the complaint sufficiently pleads a claim for age discrimination. Therefore, the branch of defendant's motion to dismiss the complaint to the extent that it alleges disparate treatment based on age, is denied.

Turning to the branch of the motion seeking dismissal of the disparate impact claim, the court notes, at the start, that disparate treatment and disparate impact theories of recovery "'are simply alternative doctrinal premises for a statutory violation.'" *Emmer*, 2014 WL 1805532, at *6, 2014 NY Misc LEXIS 2131, at *13, quoting *Maresco v Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F2d 106, 115 (2d Cir 1992); *see also Nathe v Weight Watchers Intl., Inc.*, 2010 WL 3000175, *3, 2010 US Dist LEXIS 76623, *9 (SD NY 2010). The major difference between the theories is that disparate treatment claims require proof of discriminatory intent, while disparate impact claims do not. *See Matter of New York State Ofc. of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights*, 223 AD2d

88, 90 (3d Dept 1996); *Emmer*, 2014 WL 1805532, at *7, 2014 NY Misc LEXIS 2131, at *11-12. Disparate impact claims instead are based on allegations that a facially neutral practice or policy has a disparate adverse effect on members of a protected class. *See People v New York City Tr. Auth.*, 59 NY2d 343, 348-349 (1983); *Matter of New York State Ofc. of Mental Health, Manhattan Psychiatric Ctr.*, 223 AD2d at 90; *see also Levin v Yeshiva Univ.*, 96 NY2d 484, 489 (2001); *Smith v City of Jackson*, 544 US 228, 236 (2005) (disparate impact "focuses on the effects of the action on the employee rather than the motivation for the action of the employer").

Defendant argues, relying chiefly on *Bohlke v General Elec. Co.* (293 AD2d 198 [3d Dept 2002]), that plaintiffs' disparate impact age discrimination claims should be dismissed as a matter of law because such claims are not actionable under either the NYSHRL or the NYCHRL. In *Bohlke*, the Third Department adopted the Second Circuit's reasoning that, under the federal Age Discrimination in Employment Act (ADEA), a disparate impact claim must "'allege a disparate impact on the *entire* protected group, *i.e.*, workers aged 40 and over'" (293 AD2d at 200, quoting *Criley v Delta Air Lines, Inc.*, 119 F3d 102, 105 [2d Cir 1997], *cert denied* 522 US 1028] [emphasis added in *Bohlke*]);[1] and the Court

[1]The court in *Bohlke* noted that, while the Second Circuit recognized disparate impact claims under the ADEA, other federal courts did not. 293 AD2d at 200 n 1. The United States Supreme Court

held that plaintiffs' claim, that defendant's employment practices had a disparate impact on employees over 40, alleged an impact against a "subgroup," not the entire protected class, and, therefore, did not qualify as a disparate impact age discrimination cause of action under the NYSHRL. 293 AD2d at 200.

That is, the Third Department found, as TWC argues here, that in view of the age discrimination provisions of the NYSHRL, which protect employees 18 and over (*see* Executive Law § 296 [3-a] [a]), and applying the reasoning in *Criley* with respect to the ADEA, which protects employees 40 and over, it would be "impossible for plaintiffs herein to assert an age discrimination claim based upon disparate impact under the [NYSHRL] when all of defendant's employees are over the age of 18 and fall within the protected class." *Bohlke*, 293 AD2d at 200. Defendant also argues, using the same reasoning, that a disparate impact claim is not cognizable under the NYCHRL, which prohibits age discrimination against employees of any age.

The question of whether a disparate impact claim is cognizable in an age discrimination case under New York law has not, as defendant acknowledges, been addressed by the Court of Appeals. *See generally Meacham v Knolls Atomic Power Lab.*, 381

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subsequently, in *Smith v City of Jackson* (544 US at 232), made clear that disparate impact claims may be asserted under the ADEA.

F3d 56, 71 (2d Cir 2004) (noting that the premise that "a disparate impact claim is conceptually impossible" under the NYSHRL has been accepted by one of New York's four appellate courts, but has not been addressed by the Court of Appeals); *see also Becker v City of New York*, 249 AD2d 96, 97-98 (1st Dept 1998) (noting, prior to *Smith v City of Jackson*, that "[n]either the United States Supreme Court nor the Court of Appeals has ruled conclusively that disparate impact, as opposed to disparate treatment, constitutes age discrimination," but nonetheless assuming it was a viable claim). Moreover, *Bohlke* has not been adopted by any court in the First Department; to the contrary, courts in the First Department have considered such disparate impact claims on the merits. *See Mete*, 21 AD3d at 290, 296-297 (addressing disparate impact age discrimination claim brought under NYSHRL by class of workers 40 and over, finding prima facie case established, but dismissing on summary judgment because evidence showed employer had legitimate nondiscriminatory reason for action); *Emmer*, 2014 WL 1805532, at *5, 2014 NY Misc LEXIS 2131, at *13 (finding claim for disparate impact based on age under NYSHRL and NYCHRL adequately pled); *Juroviesky v Connaught Group Ltd.*, 2009 WL 159121, 2009 NY Misc LEXIS 3806 (Sup Ct, NY County 2009) (addressing on merits, and dismissing on summary judgment, disparate impact claim under NYSHRL and NYCHRL brought by employees in 60's); *see also Lubin v L.H. Emergency Med.*

Servs., P.C., 2011 WL 2138255, 2011 NY Misc LEXIS 2425 (Sup Ct, NY County 2011) (dismissing, on summary judgment, disparate treatment and disparate impact age discrimination claims; plaintiff did not demonstrate that "policy had a discriminatory impact on physicians over 50 years old").

Courts in the Second and Fourth Departments also apparently have questioned the applicability of *Bohlke*. *See Wander v St. John's Univ.*, 99 AD3d 891 (2d Dept 2012) (allegations that defendants' practices resulted in systematic discrimination against older employees were sufficient to set forth age discrimination claim under NYSHRL and NYCHRL); *Abbey v Bausch & Lomb, Inc.*, 34 AD3d 1244, 1244 (4th Dept 2006) (assuming "arguendo," on summary judgment motion, that disparate impact age discrimination claim may be maintained, but finding defendant showed workforce reduction had no disparate impact on employees over 40); *Blumberg v Patchogue-Medford Union Free School Dist.*, 18 AD3d 486, 488 (2d Dept 2005) (assuming without deciding that disparate impact age discrimination claim may be asserted under NYSHRL, but finding plaintiff abandoned claim).

Notably, the trial court's decisions in *Mete*, affirmed by the Appellate Division, First Department, directly addressed the same argument based on *Bohlke* now made by TWC, and are instructive here. The court rejected the *Bohlke* argument, finding that the First Department has continued to recognize

"both disparate treatment and disparate impact claims and has not specifically ruled on the question of the availability of disparate impact theory on State age discrimination claims." *Mete* (Sup Ct, NY County, May 6, 2003, Omansky, J., Index No. 115683/00), at 5 (citations omitted). As explained by the court, the application of the Second Circuit's ruling in *Criley* to the NYSHRL "contradicts the Court of Appeals' clear and unequivocal holding" in *People v New York City Tr. Auth.* (59 NY2d at 348-349), which

> "interprets the Human Rights Law to prohibit discrimination based on policies or activities which disparately impact on the classes protected under the statute. Moreover, the difficulties of applying the pleading requirements of the ADEA which has a more limited age range as its protected class, to New York's broad statutory scheme is self-evident. Given the Court of Appeals' directive and the First Department's recognition of disparate impact as a viable theory under the [NYSHRL] this court declines to issue a holding which eliminates all disparate impact claims for age-based discrimination . . . . A weakening of New York's anti-discrimination protections is not in keeping with the intent of the New York Legislature as indicated by the plain wording of the Executive Law."

Mete (Sup Ct, NY County, May 6, 2003, Omansky, J., Index No. 115683/00), at 5-6 (citation omitted). Thus, the court held, "plaintiff need not plead nor prove that defendants discriminated against all persons age 18 and over as this would render the age discrimination portion of [the] Human Rights Law meaningless and

would contradict the clear legislative purpose of the State statute which is to bar discriminatory employment decisions based on age after a person has reached his or her majority." *Id.* at 6.

The rationale in *Mete* applies with equal or greater force to claims brought under the NYCHRL, which, as stated above, must be independently and more broadly interpreted than state and federal laws. *See Romanello*, 22 NY3d at 884-885; *Williams*, 61 AD3d at 66. Moreover, the NYCHRL expressly allows disparate impact claims, based on any protected category. *See* Administrative Code § 8-107 (17).[2] *See Teasdale v City of New York*, 2013 WL 5300699, 2013 US Dist LEXIS 133764 (ED NY 2013), *affd* 574 Fed Appx 50 (2d Cir 2014) (addressing on the merits, and dismissing on summary judgment, disparate impact age discrimination claims under federal, state, and city laws; noting NYCHRL must be independently analyzed and applying 8-107 (17) to claim). Nothing in the statute, and no other legal authority, indicates that age-based disparate impact claims cannot be asserted under the NYCHRL.

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[2]Section 8-107 (17) (a) (1) provides that "a]n unlawful discriminatory practice based upon disparate impact is established when . . . a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter."

Accordingly, for the reasons stated above, it is ORDERED that defendant's motion is denied.

Dated: 11/25/14

ENTER:

HON. DONNA MILLS, J.S.C.

DONNA M. MILLS, J.S.C.