Kuehl v City of New York
2020 NY Slip Op 32120(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 157356/2017
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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WILLIAM KUEHL,

Plaintiff,

- v -

CITY OF NEW YORK, SEUNGHWAN KIM, ADAM KARP

Defendant.

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INDEX NO. 157356/2017

MOTION DATE 03/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of plaintiff William Kuehl's claim that he was subject to discrimination on the basis of his age, in violation of the New York City Human Rights Law (NYCHRL). Defendants City of New York (City), Seunghwan Kim (Kim), Assistant Comptroller at the Office of the New York City Comptroller, individually and on behalf of the City, and Adam Karp (Karp), Director of Tort Claims at the Office of the New York City Comptroller, individually and on behalf of the City (collectively, defendants), move, pursuant to CPLR 3212, for summary judgement dismissing the complaint. For the reasons set forth below, defendants' motion is granted in its entirety. [1]

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced his employment with defendant at the New York City Comptroller Office (Comptroller Office) in July 1996—plaintiff was thirty-six years old and was hired as a *claim specialist*. Then, in March 1999, plaintiff was promoted to the position of *Claim Manager*.

[1] The Court would like to thank Jason Petropoulos for his assistance in this matter.

Finally, in December 2008, at the age of forty-nine, plaintiff was promoted to the position of *Assistant Division Chief, School Claims*, where he remained until January 2017.

Plaintiff was born in 1959 and spent just over twenty years at the Comptroller Office. Plaintiff's complaint contains allegations that, beginning in 2014, he has been discriminated against by defendants based on age. Specifically, plaintiff believes that he has been passed over for promotions by candidates who are younger than him and who do not possess his level of qualifications. Plaintiff further alleges that Kim and Karp, two of his supervisors, [2] aided and abetted the City in their discriminatory actions. Lastly, plaintiff alleges that he was constructively discharged from the Comptroller Office on January 28, 2017.[3]

Disparate Treatment Claims

Plaintiff's complaint provides several discriminatory treatment claims that the plaintiff was allegedly subjected to beginning in 2014.[4]

First, plaintiff applied for the position of *Division Chief, Property Damage*, in 2014 at the age of fifty-five. NYSCEF Doc. No. 2, Complaint ¶ 29-33. Plaintiff alleges that he possessed all of the "required qualifications" and "preferred skills" listed in the job posting. *Id.*, ¶ 32. Despite this, Kim, based on the hiring committee's recommendation, chose to promote Emilio Gonzalez (Gonzalez) for the position, a younger candidate who plaintiff alleges was not qualified. *Id.*, ¶ 34.

Then, in 2015, still at the age of fifty-five, plaintiff applied for the position of *Division Chief, Real Property*. *Id.*, ¶ 39. Again, plaintiff alleges that he possessed all of the required qualifications and preferred skills listed in the job posting. *Id.* However, Kim, based on the hiring

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[2] Kim supervised plaintiff from 2014-2017. Karp supervised plaintiff from 2014-2017.
[3] Defendants move to dismiss claims for hostile work environment and retaliation. Plaintiff argues that these claims were not made. As such, the court will not address them.
[4] Plaintiff also brings a derivative aiding and abetting claim against Kim and Karp.

committee's recommendation, chose to promote Betsy Maldonado (Maldonado) for the position, a younger candidate who plaintiff believes was not qualified. *Id.*, ¶ 40.

Finally, in 2016, at the age of fifty-six, plaintiff applied for the position of *Division Chief, School Claims*. *Id.*, ¶ 45. Plaintiff alleges that he met every required qualification and most preferred skills—plaintiff failed to meet the preferred skill of being a licensed attorney—and received an "exemplary recommendation" from Vincent Rivera, his supervisor and retiring Division Chief of School Claims. *Id.*, ¶ 46-47. However, Kim, based on the hiring committee's recommendation—of which Karp was a member—decided to promote Ross Goldband (Goldband) to the position, a younger candidate who plaintiff alleges was "woefully underqualified." *Id.*, ¶ 54.

Constructive Discharge

Plaintiff alleges that he was constructively discharged from his position. First, plaintiff alleges that he was passed over for three different promotions due to his age. *Id.*, ¶ 64. Next, plaintiff alleges that Karp "had no intention of considering plaintiff's application" for the *Division Chief, School Claims*, position, as Karp conducted an interview with him "to create an appearance of fairness." *Id.*, ¶ 64. Next, when Kim promoted Goldband to the *Division Chief, School Claims*, position, rather than plaintiff, based on the hiring committee's recommendation—a committee that included Karp—Goldband became a supervisor to the plaintiff and withdrew plaintiff's settlement authority and managerial duties. *Id.*, ¶ 55. Shortly thereafter, plaintiff alleges that Kim stopped communicating with him. *Id.*, ¶ 56. Plaintiff also believes that Kim had made "concerted efforts" to hire younger employees and failed to discipline the younger employees for misconduct. *Id.*, ¶ 20-25. Plaintiff further alleges that Kim "repeatedly taunted Plaintiff about his age." *Id.*, ¶ 26. Specifically, from April 2016 through July

2016, Kim referred to plaintiff as "Mr. White," and "Breaking Bad." *Id.*, ¶ 27.[5] Finally, plaintiff felt that he could not advance further at the Comptroller's Office and alleges that he was constructively discharged on January 28, 2017. *Id.*, ¶ 57-60.

The relevant portions of defendants' and plaintiff's depositions are as follows:

Defendants' testimony

Kim testified as to the hiring process at the Comptroller Office: Kim requests a posting to be made about the open position, applications are then sent to the hiring committee—which is generally formed by the director of the hiring department—and interviews are held by the hiring committee. NYSCEF Doc. No. 33, Kim tr at 35-37. Kim then receives a written recommendation from the committee, which he typically does not stray from. *Id.* Kim further testified that he does not play a large role in drafting the job posting either, as he simply reviews it "because that is not [his] specialty." *Id.* Ultimately, Kim does not "go back and second guess what the committee has determined." *Id.* 56-57. Kim further explained that he is not aware of ages of candidates when selecting candidates for promotions. *Id.* at 40-42. Kim also stated that he has more interactions with court representatives than claims adjustors because court representatives "handle higher-dollar cases than other claims adjustors." *Id.* at 67.

Kim further testified that he did refer to the plaintiff as "Mr. White," but that it was in reference to the plaintiff's facial hair—plaintiff and Mr. White both had a "goatee" facial hair style—and not his age. *Id.* at 78-79. Kim explained that it was a joke meant as a compliment, because Mr. White is a "genius" in the show and is Kim's "favorite character." *Id.* Kim stated that he had "told the joke maybe two or three times." *Id.* at 82.

[5] Mr. White, or Walter White, is a character in the American Television Series "Breaking Bad," who is around fifty years of age and has a goatee in at least some parts of the show.

Karp testified that he wrote the initial draft for the *Division Chief, School Claims*, position and does not recall if the administration made revisions before publishing. NYSCEF Doc. No. 34, Karp tr at 34-36. Karp explained that for this job posting, all internal candidates were given an interview. *Id.* at 41. There were five internal candidates that Karp and the rest of the hiring committee interviewed, including plaintiff and Goldband. *Id.* at 42-43. Karp testified that he discussed plaintiff's managerial experience during their interview. *Id.* at 46. Karp recalled that plaintiff questioned his subordinates' abilities and Karp believed that plaintiff "didn't take ownership at all about the issues or accountability." *Id.* at 47. Karp further testified as to plaintiff's "unusual interviewing technique" in which plaintiff began telling the hiring committee why he should be promoted before they asked him any questions. *Id.* at 50. Karp also explained that plaintiff's OASIS claim notes,[6] which other job candidates brought to his attention, showed that plaintiff's claims lacked discussions of liability and that 50-Hs were not being done for every case that settled. *Id.* at 68. Karp felt that 50-Hs should be done in every case on behalf of the City and that legal acumen was important in justifying settlements. *Id.* at 68-69. Moreover, Karp testified that Rivera, on his last day of work, approached Karp to express "pause for concern" pertaining to plaintiff. NYSCEF Doc. No. 56, Duffy Aff. Exhibit 6. Lastly, Karp testified as to his conversation with Lauren Jacobson, another member of the hiring committee, in which they agreed that Goldband's legal acumen, prior work experience, and prior managerial experience made him the "best candidate" for the position. Karp tr at 67. Specifically, Karp testified that Goldband, in his interview, discussed his background as private practice attorney, his role as a court representative at the Comptroller Office, and his prior managing experience over junior attorneys, paralegals, and administrative staff. *Id.* at 62.

[6] OASIS claim notes refer to claim estimates.

Plaintiff's testimony and 50-H Transcript

Plaintiff testified that he was hired by the Comptroller Office personal injury unit as a *claim specialist* in 1996, was promoted to *claim manager* in the personal injury unit in 1999 and was promoted to the position of *Assistant Division Chief, School Claims*, in 2008. Kuehl tr at 33-36. Plaintiff explained that from 1996 through 2016, he was supervised by Vincent Rivera and was never discriminated against, retaliated against, or subjected to a hostile work environment. *Id.* at 55-57. Under Rivera, plaintiff's settlement authority increased steadily to $50,000 by 2008. *Id.* at 152. This meant that plaintiff could settle a case for up to $50,000 without needing to get Rivera's approval. *Id.* Conversely, plaintiff had to meet with Rivera before settling claims over $50,000. *Id.* at 156. Plaintiff did testify, however, that Rivera ultimately needed to have final sign off on every single claim that plaintiff settled. *Id.* at 155.

Additionally, plaintiff stated that, once Goldband became his supervisor, his settlement authority did not technically change, but he did have to approach Goldband before settling any claim, no matter the dollar amount. NYSCEF Doc. No. 25 [50h Tr], pp 70. Plaintiff equated this to the process that he underwent with Rivera for claims over $50,000. Kuehl tr at 157. Plaintiff further testifies that Goldband stripped him of his managerial duties because "that's their policy . . . [t]hey want to micromanage." 50h tr at 68. Plaintiff testifies that he had supervised Robert Howe, Michael Reder, Marie Mohan, and interns in the past. Kuehl tr at 53. Plaintiff described Howe as "below average," Reder as "average to a little below average," and Mohan as "average." *Id.* at 52-54.

Plaintiff also testified that Kim referred to him as "Mr. White" from April 2016 through July 2016. *Id.* at 160. At the time in which this occurred, plaintiff "didn't know about the show [Breaking Bad]." *Id.* Plaintiff ultimately stated that his age discrimination case is based on the

ten to eleven younger employees that were recently hired or promoted, in lieu of himself, by the Comptroller Office—specifically Kim and Karp—and on the actions by Kim towards plaintiff. 50h Tr at 54.

PARTIES' ARGUMENTS

Defendants' Arguments

Age Discrimination under the NYCHRL

Defendants argue that plaintiff failed to make out a prima facie case of age discrimination under the NYCHRL by failing to show an adverse working condition and by failing to proffer evidence to prove defendants' discriminatory intent. Alternatively, defendants argue that, even if plaintiff did make out a prima facie case, defendants provided legitimate reasons for their decisions and plaintiff cannot prove that those reasons were a pretext for discrimination.

Defendants argue that, in order to establish a prima facie case of age discrimination under the NYCHRL, a plaintiff must show: "(1) that he belongs to a protected class, (2) that he was qualified for the position, (3) that he was denied the position, and (4) that the denial occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class." *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 311- 312 (2d Cir. 1997). Defendant argues further that, to prove the fourth prong—an inference of discrimination—plaintiff has to show that he was "treated differently from others in a way more that was more than trivial, insubstantial, or petty." *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 258 (E.D.N.Y. 2012). Defendants contend that plaintiff did not prove an inference of discrimination.

Defendants then argue that even if plaintiff is able to establish a prima facie case of age discrimination under the NYCHRL, this would just shift the burden to the defendant to produce a legitimate, non-discriminatory reason for their actions. *See St. Mary's Honor Center v. Hicks*,

509 U.S. 502, 509 (1993). If this burden is met by defendants, the burden of persuasion shifts to the plaintiff to prove that the defendants' proffered reason is merely pretextual and is meant to mask the defendants' true discriminatory reasons. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). Lastly, defendants contend that plaintiff must show the use of pretext, not just that the defendants' alleged motive was false, *see Fisher v. Vassar Coll.*, 114 F.3d 1332, 1339 (2d Cir. 1997((en banc), *cert den,*, 522 U.S. 1075 (1988), and that courts should not act as "'super personnel department[s]' that second guess employers' business decisions." *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (citations omitted). Defendants contend that defendants provided legitimate, non-discriminatory reasons for not promoting plaintiff and plaintiff failed to prove that those reasons were pretextual.

Division Chief, Property Damage

Defendants believe that, for the *Division Chief, Property Damage*, position, plaintiff has done "nothing more than observe that Mr. Gonzalez was younger than he . . . and speculate about the motivations of his interviewers." NYSCEF Doc. No. 20, Mem in Support of Motion pp. 23. Defendants proffer evidence that the hiring committee believed that Gonzalez interviewed well, was motivated, had experience with tort claims and was informed about the division's caseload and statistics. NYSCEF Doc. No. 38, Property Damage Interview Log. Furthermore, the hiring committee believed that plaintiff was "not prepared with respect to prior research into property damage division caseloads." *Id.* Defendants argue that these were legitimate reasons to promote Gonzalez, in lieu of plaintiff, and that plaintiff failed to show that these reasons were pretextual.

Division Chief, Real Property

For the *Division Chief, Real Property*, position, defendants contend that plaintiff relied on speculation that age was a factor in defendants' decision. Mem in Support of Motion at 25.

Defendants provided evidence that the hiring committee believed that Maldonado interviewed well, was motivated and articulate, and separated herself from the other candidates because she "possess[ed] some relevant real property experience in her background." NYSCEF Doc. No. 43, Real Property Selection Memo and Interview Notes. In contrast, the committee noted that, although plaintiff "shows initiative" and is "smart," he may not be a good fit because he "does not possess experience with real property claims." *Id.* Defendants argue that these were legitimate reasons to promote Maldonado, in lieu of plaintiff, and that plaintiff failed to show that these reasons were pretextual.

Division Chief, School Claims

Lastly, for the *Division Chief, School Claims,* position, defendants argue that plaintiff relies on a "subjective and uninformed contention that he was more qualified than Mr. Goldband." *Id.* at 26. Defendants show evidence that the hiring committee believed that Goldband was the "best candidate" for the position based on his legal acumen, work experience, and managerial experience. Karp tr at 67. In contrast, the hiring committee believed that plaintiff had an "unusual interviewing technique" and that he didn't take any ownership over his subordinates' questionable abilities. *Id.* at 47-50. Defendants also contend that plaintiff was offered an extended interview, despite not possessing the preferred skill of being an attorney. Mem in Support of Motion at 25. Defendants argue that these were legitimate reasons to promote Goldband, in lieu of plaintiff, and that plaintiff failed to show that these reasons were pretextual.

Aiding and Abetting

Defendants argue that the aiding and abetting claims are derivative and must fail when the underlying claim fails to survive summary judgement. NYSCEF Doc. No. 59, Reply Memo

in Support of Motion, 11. As such, defendants contend that the aiding and abetting claims must be dismissed with the disparate treatment claims. *Id.*

Constructive Discharge

Defendants also argue that the plaintiff's constructive discharge claim is not a standalone claim, but is rather a part of the age discrimination claim and, because plaintiff failed to show discriminatory intent and failed to make out a prima facie age discrimination case, the constructive discharge claim must fail because the age discrimination claim fails. *Id.* at 10 (citing *Terry v. Ashcroft*, 336 F. 3d 128, 152 (2d Cir. 2003). Defendants contend that, even if this were not the case, plaintiff's failure-to-promote claims and reduction of managerial duties and settlement authority do not establish enough intolerability to prove a constructive discharge claim. *Id.*

Plaintiff's Arguments

Age Discrimination under the NYCHRL

Plaintiff argues that summary judgement motions, when it comes to the NYCHRL, are different than actions brought under federal or state anti-discrimination statutes because the question courts should consider is whether "the defendant has sufficiently met its initial burden . . . showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action." *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 39-40 (2011). Plaintiff further argues that "courts urge caution in granting summary judgement in employment discrimination cases." NYSCEF Doc. No. 54, Memo in Opp. of Motion pp. 13 (citing *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 631 (1997)). Plaintiff argues that, on a motion for summary judgement under the NYCHRL, the motion can only be granted if, by direct or circumstantial evidence, the defendant demonstrates that it is entitled to summary judgement

both under the *McDonnell-Douglas* burden-shifting framework and the mixed-motive framework. *Hudson v. Merrill Lynch & Co., Inc.*, 138 A.D.3d 511, 514 (1st Dep't 2016).

The *McDonnell-Douglas* test states that if the plaintiff is able to make a prima facie age discrimination case, a defendant must rebut the presumption by offering a non-discriminatory reason and "[i]f this burden is met, a plaintiff may defeat summary judgement by offering 'some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete.'" *Watson v. Emblem Health Servs.*, 158 A.D.3d 179, 183 (1st Dep't 2018) (quoting *Bennett*, 92 A.D.3d at 45). The mixed-motive test asks the plaintiff to, if a defendant has raised a legitimate reason for their action, "rais[e] an issue as to whether the action was motivated at least in part . . . by discrimination." *Melman v. Montefiore Medical Center*, 98 A.D.3d 107, 127 (1st Dep't 2012).

Division Chief, School Claims

Plaintiff relies solely on the *Division Chief, School Claims*, failure-to-promote claim in his Memorandum in Opposition to the Motion. Plaintiff argues that he has met his prima facie burden because he was a member of a protected class when he applied for the *Division Chief, School Claims*, position, he was qualified for the position, he was denied the promotion, and he suffered from an adverse employment action by being denied the promotion. Memo in Opp. of Motion 15-16. Furthermore, plaintiff argues that there is a material question of fact as to whether the defendants' non-discriminatory reasons for their actions are pretextual. *Id.* at 17. First, plaintiff argues that the reasons proffered by the defendants are subjective and not enough to defeat a summary judgement motion. *Id.* Second, plaintiff argues that plaintiff was "much more experienced and qualified for the position than Mr. Goldband," and defendants overlooked Goldband's shortcomings while scrutinizing plaintiff's credentials. *Id.* at 18. Next, plaintiff

argues that "the record is replete with evidence of the weaknesses, implausibilities, and inconsistencies . . . demonstrating that Defendants' excuses are pretextual." *Id.* at 19. Plaintiff further contends that Karp did not take plaintiff's candidacy seriously based on questions Karp asked during the interview and because he took the word of other candidates who raised issues about plaintiff's work. *Id.* Plaintiff also contends that Karp's credibility is questionable because he did not take Rivera's recommendation to hire plaintiff but rather testified that Rivera came to him with a change of heart the day Rivera retired. *Id.* Plaintiff argues that these reasons proffer questions of fact as to whether the defendants' reasons are pretextual.

Constructive Discharge

Plaintiff contends that plaintiff's constructive discharge claim must proceed because defendants did not put forth arguments against it and defendants must demonstrate "the absence of any material issue of fact," to carry the burden of summary judgement. *Jacobson v. N.Y.C. Health & Hosp. Corp.*, 22 N.Y.3d 824, 833 (2014). Even if defendants did address the claims, plaintiff argues that "[t]o state a claim for constructive discharge, plaintiff must allege facts showing that defendant 'deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.'" *Polidori v. Societe Generate Groupe*, 39 A.D.3d 404, 405 (1st Dep't 2007) (quoting *Mascola v. City Univ. of N.Y.*, 14 A.D.3d 409, 410 [1st Dep't 2005]). Plaintiff further argues that "dashing reasonable expectations of career advancement may create intolerable working conditions that rise to the level of constructive discharge." *Halbrook v. Reichhold Chemicals, Inc.*, 735 F. Supp. 121, 127 (S.D.N.Y. 1990).

Plaintiff argues that he was constructively discharged because he was denied a promotion and was stripped of his managerial duties and settlement authority, relegating his duties to that of when he began his career twenty years ago.[7]

ANALYSIS

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, or discharge a person or discriminate against a person in terms of compensation, conditions, or privileges, on the actual or perceived basis of age. *See* N.Y.C. Admin. Code § 8-107 (1)(a). In terms of proving a case, New York State and City human rights laws proceed under the same analysis as federal Title VII cases. *Melman*, 8 A.D.3d at113. It is also an unlawful discriminatory practice for a person to "aid, abet, incite, compel or coerce the doing of . . .or attempt to do," any acts forbidden under the NYCHRL. N.Y.C Admin. Code. § 8-107(6).

I. Summary Judgment

A. Generally

On a motion for summary judgment, the movant "must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgement as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D3d 303, 306 (1st Dep't 2007). The movant carries a heavy burden because "on a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party." *Vega v. Restani Const. Corp.*, N.Y.3d 499, 503 (2012).

B. Discrimination Cases

The summary judgment standard in NYCHRL cases is more liberal than in state or federal cases, as a plaintiff can defeat a defendant's motion by "produc[ing] less evidence than

[7] Plaintiff did not address the aiding and abetting claim in its Memorandum in Opposition.

would be required under the state and federal laws." *Cadet-Legros v. New York University Hosp. Center*, 135 A.D.3d 196, 201 (1st Dep't 2015). The defendant must meet the initial burden of showing that "there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action." *Bennett*, 92 A.D.3d at 39-40 (1st Dep't 2011). Furthermore, "[a] motion for summary judgment dismissing a [NYCHRL] 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." *Hudson*, 138 A.D.3d at 514 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [1973]; *Melman,* 98 A.D.3d at 113).

II. Age Discrimination in Violation of the NYCHRL

Under the *McDonnell-Douglas* burden-shifting framework, the plaintiff, in order to make out a prima facie age discrimination case, must proffer evidence showing that: "(1) he belongs to a protected class, (2) that he was qualified for the position, (3) that he was denied the position, and (4) that the denial occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class." *Stern*, 131 F.3d at 311-12 (internal citation omitted); *see Baldwin v. Cablevision Sys. Corp.*, 65 A.D.3d 961, 965 (1st Dep't 2009). The inference of discrimination prong may be satisfied if a plaintiff shows that he or she "was treated differently than a worker who was not a member of that protected class" and is able to "link the adverse employment action to a discriminatory motivation." *Sotomayor*, 862 F. Supp. 2d at 258 (internal citation omitted). If the plaintiff successfully proffers the necessary evidence to make a prima facie case, the burden of production then shifts to the defendant to show that they had a legitimate, non-discriminatory reason for their action. *See Baldwin*, 65 A.D.3d at 965. If this burden of production is met, the burden of persuasion shifts to the plaintiff to "prove that the

legitimate reasons proffered by the defendant were merely a pretext for discrimination." *Id.* (internal quotation marks and citations omitted). If the plaintiff "goes the 'pretext' route," plaintiff need only to produce "some evidence to suggest that *at least one reason* is false, misleading, or incomplete." *Cadet-Legros*, 135 A.D.3d at 201.

The mixed-motive analysis is similar in that, once a defendant produces evidence of a legitimate reason for their action, the lesser burden shifts to the plaintiff to "rais[e] an issue as to whether the action was motivated at least in part by . . . discrimination." *Melman*, 98 A.D.3d at 127 (internal quotation marks and citations omitted).

Plaintiff relied solely on the *Division Chief, School Claims*, failure-to-promote claim in their memorandum of opposition. Regarding this claim, plaintiff and defendants concede that plaintiff meets the first three prongs of the *McDonnell-Douglas* framework—plaintiff is a member of a protected class, plaintiff was qualified for the position, and plaintiff was denied the position. Plaintiff argues that the denial itself is an adverse employment action that meets prong four, while defendants argue that plaintiff failed to show the "inference of discrimination" that is necessary to meet prong four.

Adverse Working Conditions

For a change in working conditions to be considered materially adverse, plaintiff must have suffered more than a "mere inconvenience or an alteration of job responsibilities." *Messinger v. Girl Scouts of U.S.A*, 16 A.D.3d 314, 315 (1st Dep't 2005) (internal quotation marks and citations omitted). Furthermore, the First Department has urged plaintiffs in age discrimination cases to proffer evidence showing how an alleged adverse action "was not applied equally to all employees." *See Kosarin-Ritter v. Mrs. John L. Strong, LLC*, 117 A.D.3d 603, 604 (1st Dep't 2014).

Plaintiff alleges only one adverse working condition in their Memorandum of Opposition: failure-to-promote. In stating that this is an adverse working condition, plaintiff fails to proffer any evidence showing any inconvenience or alteration to his job responsibilities or that he was treated differently than any other employee. Plaintiff incorrectly believes that a failure-to-promote claim alone could constitute an adverse working condition without evidence as to plaintiff's alleged disparate treatment. If the Court were to adopt this approach, anyone passed over for a promotion in the future would be able to claim an adverse action, which, of course, is not what the NYCHRL stands for.

Looking into the record for evidence, plaintiff testified that his job responsibilities changed after Goldband was hired, in lieu of plaintiff. However, plaintiff did not discuss this as an adverse working condition. This is likely because the changes Goldband made were department-wide, which would show that plaintiff had been treated like "any other employee." Plaintiff also testified that the Comptroller Office favors younger employees but fails to offer any evidence beyond subjective blanket statements. Plaintiff cannot solely rely on "subjective conclusions without evidence that would reasonably support [...] a finding of prohibited discrimination." *Bringley v. Donahoe*, 499 Fed. App'x 116, 119 (2d Cir. 2012) (internal citations and quotation marks omitted).

Plaintiff fails to allege any evidence of disparate treatment beyond not being selected for a promotion and fails to show any adverse employment actions. As such, this claim must be dismissed.

Inference of Discrimination

Even if the failure-to-promote claim alone did constitute an adverse employment action, plaintiff fails to proffer any inferences of discrimination—a necessary element of *McDonnell-*

Douglas analysis. As the defendants discussed in their motion papers, plaintiff showed that he is in a protected class and that he was denied the promotion, but plaintiff did not attempt to show the necessary inference of discrimination that would causally relate these two things. Instead, plaintiff simply states that he has met his prima facie burden without any causal analysis.

Furthermore, as defendants again discussed in their motion papers, plaintiff cites to cases in which a younger person replaces a terminated older employee to support their arguments. Those cases are distinct from failure-to-promote claims and, as such, are not relevant. Plaintiff does give an example where a plaintiff defeated summary judgement on a failure-to-promote claim, but the court in that case outright stated that there were other reasons for denying summary judgement. *Kinney v. Duane Reade, Inc.*, 2019 WL 2995809 (N.Y.Sup.). The plaintiff defeated summary judgement because "he was denied training, was treated like an outcast and was issued excessive disciplinary warnings for things that other employees were not written up for." *Id.*, at **12. These reasons proffer an inference of discrimination to supplement the failure-to-promote claim, which is exactly what the plaintiff fails to do here.

Plaintiff fails to proffer any inferences of discrimination. As such, this claim must be dismissed.

Legitimate reasons for decision

Even if plaintiff did show an adverse employment action and then proffered enough evidence to prove an inference of discrimination, defendants offered legitimate, non-discriminatory reasons for their decision and plaintiff failed to show that those reasons offered were a pretext for discrimination.

Once a defendant has provided a legitimate reason for their decision, the burden turns to the plaintiff to show that the reasons advanced were pretextual and intended to mask the

employer's true discriminatory reason for its actions. *St. Mary's Honor Center*, 509 U.S. at 509; *See Texas Dep't of Cmty. Affairs*, 450 U.S. at 254-56. It is not the Court's job to determine who is most qualified, but to see if there was discrimination. *See Vill. of Freeport v. Barrella*, 814 F.3d 594, 614 (2d Cir. 2016). Defendants may not rely on "wholly subjective and unarticulated standards" to judge plaintiff's performance for the purposes of a promotion. *Byrnie*, 243 F.3d at 104 (citing *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 161 (2d. Cir 1981). However, "[w]here an employer's explanation, offered in clear and specific terms, 'is reasonably attributable to an honest even though partially subjective evaluation of . . . qualifications, *no inference of discrimination can be drawn.*'" *Id.* at 105 (citing *Lieberman v. Gant*, 630 F.2d 60, 67 (2d. Cir. 1980) (emphasis added). Lastly, courts should not act as "'super personnel department[s]' that second guess employers' business decisions," and summary judgement can only be avoided if a "plaintiff's credentials [are] *so superior*," to the person selected that "no reasonable person could have chosen the candidate selected over the plaintiff . . . ." *Id* at 103.

Plaintiff provides no more than conclusory allegations to allege that defendants' reasons proffered were pretexts for discrimination. Plaintiff provides a list of allegations to prove pretext: (1) the reasons proffered by the defendants are subjective, (2) plaintiff was much more qualified and experienced than Ross Goldband, (3) the record is replete with weaknesses and implausibilities, (4) Karp did not take plaintiff's candidacy seriously, and (5) Karp's credibility is questionable. These reasons offered by plaintiff, individually and cumulatively, are insufficient to allege pretext.

The defendants' decision may include some subjectivity, but the reasoning offered was in clear and specific terms and does not come close to being "wholly subjective." Examples of wholly subjective reasoning include when a plaintiff, a teacher of twenty-one years, was said to

have lacked "basic competencies necessary for effective teaching," *Id.* at 105, and when a plaintiff, who had already taught at the defendant's school and received positive letters of recommendation from their hiring committee, was denied the position and told that her recommendations were outdated. *Widoe v. Dist. #111 Otoe County Sch.*, 147 F.3d 726, 729-30 (8th Cir. 1998). The plaintiff here does not offer any evidence that anything close to this level of blatant subjectivity was used by defendants.

Moreover, defendants' main issues with the plaintiff's candidacy was that he did not take ownership over his subordinates' abilities and that he did not possess the legal acumen necessary for the *Division Chief, School Claims*, position. When reviewing plaintiff's interview for the position, Karp expressed that plaintiff's lack of ownership over his subordinates' abilities was a concern. Plaintiff's testimony in which he described his subordinates Howe, Reder, and Mohan as "below average," "average to a little below average," and "average," respectively, aligns with Karp's concerns. Furthermore, Karp claims that plaintiff's OASIS claim notes showed that plaintiff's claims did not possess the liability discussions that the hiring committee was looking for and lacked the number of 50-Hs that sought by the hiring committee. Considering that the plaintiff also lacked the preferred skill of being a practiced attorney, the plaintiff's lack of legal acumen gave the hiring committee a legitimate reason for concern.

Additionally, plaintiff argues that he was more qualified than Goldband, but plaintiff does not demonstrate nearly enough of a discrepancy in credentials to show that he was "so superior" to Goldband that no reasonable person could have chosen to promote Goldband over him. While plaintiff certainly had more experience in the department than Goldband did, defendants proffered legitimate reasons for hiring Goldband. Goldband was a licensed attorney with a background in private practice, something that could not be said about plaintiff. Moreover,

Goldband was previously a court representative at the Comptroller Office, a role that dealt with "higher-dollar cases" than claims adjustors, and Goldband possessed prior managing experience over junior attorneys, paralegals, and administrative staff.

Moreover, Karp's treatment of plaintiff aligns with everything stated above and does not raise any genuine issues of fact as to whether he took plaintiff's candidacy seriously or whether he lacks credibility. Karp interviewed every internal candidate, gave plaintiff extra time during the interview, and asked questions that he felt were necessary given plaintiff's "unique" interviewing techniques. Kim, who does not second-guess the hiring committee's decisions and does not know a candidate's age when choosing the candidate for a promotion, also did not show any sign that he did not take plaintiff's candidacy seriously.

It is not this Court's job to act as a "super personnel department," and defendants' offered reasons for their decision that were, even if slightly subjective, reasonably attributable to an honest evaluation of qualifications. As such, no inference of discrimination can be drawn.

Plaintiff failed to allege adverse working conditions, failed to show an inference of discrimination, and failed to bring forth enough evidence to show that the defendants' legitimate reasons for their decision were a pretext for discrimination. Defendants have established that they are entitled to summary judgement under the *McDonnell-Douglas* framework and under mixed-motive analysis. As such, this claim must be dismissed.

Aiding and Abetting

When summary judgement is granted dismissing a NYCHRL discrimination claim, the aider and abettor claim against an employee that is derivative of that claim must also be dismissed. *Bliss v. MXK Rest. Corp.*, 220 F. Supp. 3d 419, 426 (S.D.N.Y 2016) (internal citations omitted). Furthermore, "an individual cannot aid or abet his or her own violation of the Human

Rights Law." *Id.* (quoting *Strauss v. N.Y. State Dept. of Education*, 26 A.D.3d 67 [App. Div. 2005]). Plaintiff's aider and abettor claim is derivative of his age discrimination claim in which he failed to establish liability under NYCHRL against the City and against each individual defendant. As such, this claim must also be dismissed.

III. Constructive Discharge

"To state a claim for constructive discharge, plaintiff must allege facts showing that defendant 'deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.'" *Polidori*, 39 A.D.3d at 405 (citations omitted). The test is not "merely whether the employee's working conditions were difficult or unpleasant." *Spence v. Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). A prima facie constructive discharge claim may not be made out if the claim is based on dissatisfaction with promotions rather than intolerable working conditions. *Esterquest v. Booz-Allen & Hamilton Inc.*, 2002 U.S. Dist. LEXIS 2545, *25-26 (S.D.N.Y. 2002).[8]

Plaintiff argues that he was constructively discharged because he was denied a promotion, stripped of his managerial duties, and had his settlement authority reduced. Plaintiff did not argue that any other actions taken towards him, including Kim referring to him as "Mr. White," contributed to the intolerable working conditions.[9] Therefore, plaintiff's sole argument for a constructive discharge claim rests almost entirely on the failure-to-promote claim alone. A

[8] Defendants' conflated the constructive discharge claim with a discriminatory discharge claim and were incorrect in arguing that the constructive discharge claim fails outright because plaintiff failed to show an inference of discrimination. Constructive discharge is a distinct claim that can be used to support a discriminatory discharge claim. *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996).

[9] This Court's decision would not have been different had this or anything else from the record also been discussed by the plaintiff in his constructive discharge claim.

failure-to-promote claim alone does not establish constructive discharge. *Petrosino v. Bell Atl.*, 385 F.3d 210 (2d Cir. 2004).

Furthermore, plaintiff relies on a case where "dashing reasonable expectations of career advancement" created intolerable working conditions for the employee who alleges that they were constructively discharged. *Halbrook*, F.Supp. at 127 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 [1989]). However, plaintiff's case is not comparable to the one relied upon by plaintiff.

In *Halbrook*, plaintiff defeated summary judgement on a constructive discharge claim because the "change in responsibilities, reduction in workload, humiliation and embarrassment, and the absence of any further chance of advancement" raised a reasonable question of fact as to the employee's constructive discharge. *Halbrook*, 735 F.Supp at 127. In *Halbrook*, the plaintiff was denied a promotion in favor of someone she had trained herself, *Id.*, plaintiff believed that the promotions in her company were "chimerical," *Id.*, and plaintiff and defendant disagreed as to the number of new assignments, or lack thereof, that plaintiff was given. *Id.* at 126.

Here, plaintiff was not passed over for a promotion by someone he had trained, plaintiff does not allege that promotions within Comptroller office are "chimerical," or anything close to that, as he had been promoted two times before in the past, and plaintiff and defendants do not disagree on the amount of work given to plaintiff, or any other possible disagreement of that type. Plaintiff concedes that his settlement authority was not technically reduced, but that he had to report to his new supervisor, Ross Goldband, before settling any claim. While plaintiff may have been unhappy with this change, it was not something that was new to him. Plaintiff testified that his previous supervisor Rivera had to sign off on all his claims, no matter the dollar amount, and that he had to report to Rivera before settling any claims above $50,000. Moreover, while

plaintiff was upset that his managerial duties were stripped, this was a department-wide change that did not affect the type of work he was given. Plaintiff also applied, and was ultimately denied, for three different positions in the Comptroller Office, suggesting that there are many paths to promotion for plaintiff and that denial of the *Division Chief, School Claims*, position is not a career-ending action.

Plaintiff's claims fail to make out a prima facie constructive discharge case and do not create a question of fact as to whether they could. As such, the claim is dismissed. Accordingly, it is hereby

ORDERED that defendants City of New York, Seunghwan Kim, and Adam Karp motion for summary judgement, pursuant to CPLR 3212, is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/1/2020
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
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	