SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

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EDGAR MANDEVILLE,

Plaintiff,

- v -

NYC HEALTH & HOSPITALS / HARLEM, NEW YORK CITY HEALTH & HOSPITALS CORPORATION, PHYSICIAN AFFILIATE GROUP OF NEW YORK, P.C.

Defendants.

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INDEX NO. 159748/2020

MOTION DATE 02/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

Plaintiff, Edgar Mandeville, M.D., commenced this action seeking damages for age discrimination under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) and for a hostile work environment under the NYCHRL, stemming from the termination of his employment at Harlem Hospital. Defendants, NYC Health & Hospitals d/b/a Harlem, New York City Health & Hospitals Corporation (HHC), Physician Affiliate Group of New York, P.C. (PAGNY) (collectively, defendants), now move pursuant to CPLR 3211(a)(7) to dismiss the compliant. Plaintiff opposes the motion. For the foregoing reasons, and after oral argument on May 18, 2021, defendants' motion is denied.

FACTUAL ALLEGATIONS

Plaintiff, who was 75 years of age at the relevant time, was employed as Chairman of HHC's Obstetrics and Gynecology department from 2006 through his alleged unlawful termination in December 2017 (NYSCEF # 1, compl at ¶¶ 11, 27). Beginning in 2011, co-defendant PAGNY, as per contract agreement with HHC, began employing physicians and other medical employees, including plaintiff (*id.* at ¶ 28). In March 2016, Eboné Carrington (Carrington) was named HHC's new Chief Executive Officer, the youngest in HHC's history (*id.* at ¶ 37).

According to the complaint, immediately after her appointment as CEO, Carrington sought to remove older workers from management positions at HHC. Part of her alleged plan for HHC was to move the hospital "in a new[er] and younger direction" and that the leadership style of the older generation was no longer working (*id.* at ¶ 40). To this end, the complaint alleges that in June 2017, older workers, including a large percentage laid off managerial workers over

the age of the 40, were laid off (*id.* at ¶ 41). The complaint further alleges that workers over the age of 60 made up a markedly larger proportion of the dismissed managerial workforce than that group's representation in the HHC's managerial workforce. Plaintiff alleges that he too was subject to Carrington's plan. Specifically, plaintiff alleges that Carrington stated that plaintiff "was getting too old for this" work (*id.* ¶ 43).

According to the complaint, plaintiff received generally positive performance reviews during his employment at HHC and successfully the Obstetrics & Gynecology Department since 2006 (*id.* at ¶ 44). However, plaintiff alleges that his performance reviews became negative after Carrington became CEO of HHC (*id.*). Further, plaintiff alleges that the Obstetrics & Gynecology Department began to receive fewer resources after Carrington's appointment. For instance, when plaintiff arranged for the Department to obtain more space for its operations, plaintiff alleges that Carrington intervened and forced the Department to relinquish the space, resulting in the Department having less space than other departments (*id.* at ¶ 48).

In October 2017, Dr. Maurice Wright (Wright), HHC's Chief Medical Officer and Reginald Odom (Odom), PAGNY's Chief Human Resources Officer, called plaintiff in for a meeting to allegedly discuss plaintiff's employment at HHC (*id.* at ¶ 48). At the meeting, Wright indicated his dissatisfaction with plaintiff's lack of engagement during presentations with other HHC staff (*id.* at ¶ 49). According to plaintiff, while other HHC employees were also not engaged in the presentations, Wright stated, in essence, "well, I only care about you" (*id.*).

On November 17, 2017, Mark Hartmann (Hartmann), HHC's Deputy Counsel, forwarded plaintiff an email, presumably inadvertently, wherein the participants, including Carrington, Wright and Odom, were discussing ways in which to terminate plaintiff's employment. (*id.* at ¶ 51). The email revealed that Odom stated that he was planning to set up a meeting with plaintiff, at which time plaintiff would be told that "[Wright] had lost confidence in him" and that plaintiff would be asked "to resign or [the hospital] would be forced to terminate him" (*id.* at ¶ 52). The email chain also included a statement by Carrington, wherein she stated that a memorandum justifying plaintiff's termination had been drafted and that she had decided to fire plaintiff (*id.* at ¶ 53). In December 2017, plaintiff was terminated. According to the complaint, plaintiff was replaced by a physician who is approximately twenty years younger (*id.* at ¶¶ 57-58).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, " 'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . ., are not entitled to such consideration' " (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267, [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

I. Discrimination under the NYSHRL and NYCHRL

Defendants argue that plaintiff has not plead facts showing that he was treated any less well than others or that such treatment was due to his age. Defendants further argue that the alleged statements by Carrington were made in isolation and lack a nexus to plaintiff's employment.

In order to state a claim under the NYSHRL and NYCHRL, a plaintiff must allege: "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]). "In addition, if [a plaintiff] does not produce direct or statistical evidence that would logically support an inference of discrimination, she must show her position was subsequently filled by a younger person or held open for a younger person" (*Bailey v New York Westchester Square Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007], citing *Ioele v Alden Press*, 145 AD2d 29, 35 [1st Dept 1989]).

Here, defendants attempt to pigeonhole Carrington's remarks as stray and unrelated to plaintiff's termination. However, the alleged remark by Carrington, who undisputedly has final authority to terminate staff, that plaintiff was "getting too old for this" work, was more than a stray remark and clearly suggests that plaintiff was unable to perform his work because of his age (*see Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1119 [2d Dept 2016] [plaintiff's allegation, among others, that her "coworkers, managers, and supervisors frequently ridiculed and harassed her because of her age by stating that she was 'too old' and that she 'should retire'" were sufficient to state a claim for age based discrimination under the NYSHRL]; *Rollins v Fencers Club, Inc.*, 128 AD3d 401, 401 [1st Dept 2015] [employer's references to plaintiff, including "'(a)re you sure you're up for this? You know you're at that age where you ... need more rest. You look tired,' and asking whether plaintiff was 'up for' meetings that 'might be too much' for her and would 'tire (her) out'" raised an inference of age-based discrimination]).

Moreover, the remaining alleged remarks concerning the replacement of the old guard and to move the company in a "younger direction," when taken together with Carrington's other remarks, and the allegation that plaintiff was replace by a physician twenty years his junior (*see Colon v Trump Int'l Hotel & Tower*, US Dist Ct, SD NY, 10 Civ 4794, Koeltl, J., 2011] ["Evidence that an employee was replaced by a substantially younger individual or an individual outside the protected class suffices to show circumstances giving rise to an inference of age discrimination"]; *Hosking v Mem'l Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 67 [1st Dept 2020] ["The fact that plaintiff was replaced by a person nearly 30 years younger than her suffices to support an inference that her termination was motivated by age-based animus"]; *Grella v St. Francis Hosp.*, 149 AD3d 1046, 1048 [2d Dept 2017] ["The fact that an employee was replaced by a substantially younger employee gives rise to an inference of discrimination sufficient to make a prima facie case of age discrimination"]), are sufficient to constitute evidence of discrimination (*Danzer v Norden Sys., Inc.*, 151 F3d 50, 56 [2d Cir 1998] ["When, however (as in the instant appeal), other indicia of discrimination are properly presented, the remarks can no

longer be deemed 'stray,' and the jury has a right to conclude that they bear a more ominous significance"]).

Defendants rely on *Melman v Montefiore Med. Ctr.* (98 AD3d 107 [1st Dept 2012]) in support their argument that alleged remarks were limited in scope and not work related. However, the remarks at issue in *Melman* were, first "[s]imply positive references to 'young' professionals that, in the absence of other evidence of ageist bias, do not imply any sinister aspersion on older workers" (*id.* at 125). And second, the remarks made by the defendant's former CEO in a newspaper article profiling him just before his retirement concerning age-related health concerns were unrelated to an employment decision. As discussed above, the remarks at issue here were directed at plaintiff concerning his ability to perform his work, and thus, distinguishable from the remarks at issue in *Melman*.

Likewise, defendants' reference to *Mete v New York State Off. of Mental Retardation & Developmental Disabilities* (21 AD3d 288, 294 [1st Dept 2005]) is also unavailing. Unlike the matter at issue, the plaintiff in *Mete* alleged only one comment concerning the need for "[n]ew and younger employees to take over the leadership of the agency" (*id.*).

Accordingly, plaintiff adequately pleads a claim for age-based discrimination under the NYSHRL and NYCHRL against defendants.

II. Hostile work environment under the NYCHRL

Defendants contend that complaint fails to allege any facts to demonstrate that any employment actions were taken against plaintiff because of his age and that the complaint lacks any allegations that his employer made any derogatory comments plaintiff's age.

To state a claim for a hostile work environment, a plaintiff must allege that "[s]he has been treated less well than other employees because of her protected status; or that discrimination was one of the motivating factors for the defendant's conduct" (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]). "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances" (*Schwapp v Town of Avon*, 118 F3d 106, 110 [2d Cir 1997]). As previously discussed, plaintiff alleges he was the subject of at least one directed comment from Carrington suggesting that he was too old to perform his work, and that he was terminated on the basis of his age. Accordingly, the court finds that plaintiff has adequately alleged a claim for hostile work environment against defendants under the NYCHRL.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the compliant is denied; and it is further

ORDERED that defendants shall serve a copy of the complaint, with notice of entry, upon plaintiff within ten (10) days of entry.

This constitutes the decision and order of the Court.

5/18/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

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