UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS FITZGERALD, Plaintiff,

v.

SIGNATURE FLIGHT SUPPORT CORPORATION, JOE LINERO, and IVETTE CARABALLO, Defendants.

**MEMORANDUM DECISION**

13 CV 4026 (VB)

Briccetti, J.:

Plaintiff Thomas Fitzgerald, proceeding pro se, brings this action for age discrimination and retaliation under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"), the New York State Human Rights Law ("NYSHRL"), and the New York Labor Law ("NYLL").

Now pending is defendants' motion to dismiss the amended complaint. (Doc. #16).

For the reasons set forth below, defendants' motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

## BACKGROUND

For purposes of deciding the pending motion, the Court accepts as true all well-pleaded allegations in the amended complaint and draws all reasonable inferences in plaintiff's favor. Because plaintiff is proceeding pro se, the Court also considers allegations made for the first time

in his opposition brief. See Rodriguez v. Rodriguez, 2013 WL 4779639, at *1 (S.D.N.Y. July 8, 2013) (collecting cases).[1]

Plaintiff alleges he was employed by defendant Signature Flight Support Corporation ("Signature") from 1982 until March 1, 2012,[2] when he was terminated for purportedly "sleeping on the job." In truth, plaintiff alleges, his termination was the product of age discrimination by his manager, defendant Joe Linero, and retribution by plaintiff's co-worker, defendant Ivette Caraballo.

In support, plaintiff alleges Linero laughed at him "for wearing reading glasses" and stated within earshot of Caraballo that plaintiff was "getting old." Almost immediately thereafter, plaintiff alleges, Linero falsely accused him of sleeping on the job and suspended him from work. Plaintiff was terminated less than one week later. At the time of his termination, plaintiff, who was then 49 years old, was the oldest and highest-paid "lead line technician"[3] at Signature's White Plains location. Plaintiff alleges he was replaced by two younger employees, both of whom were in their twenties and "ma[d]e less than half" of plaintiff's salary.

Plaintiff alleges Linero also "pushed out two other senior employees . . . by harassing them and causing them to resign" and "complained to numerous employees" that plaintiff and "another older worker" made "too much money."

Caraballo also allegedly played a role in plaintiff's termination. During his employment at Signature, plaintiff alleges, he "was active for years in trying to unseat the shop stewards of

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[1] Plaintiff will be provided with copies of all unpublished opinions cited in this ruling. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

[2] Plaintiff inconsistently alleges his date of termination as either March 1, 2012, or March 12, 2012. It appears from the administrative record that plaintiff was terminated on March 1, 2012.

[3] Plaintiff alternatively refers to his position as "lead line technician" and "lead line technician trainer."

the incumbent union Teamsters Local 560," one of whom was Caraballo. Caraballo, in turn, allegedly retaliated against plaintiff by falsely claiming to have seen him sleeping on the job, and "coerc[ing] other employees" into doing the same.

Although plaintiff denies sleeping on the job, he admits he was "taking a rest break . . . at the time he was alleged to have been sleeping." In any event, plaintiff alleges, Linero "stated several times" he "did not care if employees slept on the third shift as long as someone was 'on point' to cover emergencies." As a result, plaintiff alleges, "sleeping on the third overnight shift was not uncommon," and other employees slept or napped on the job "without adverse consequences."

Following his termination, plaintiff filed a claim for unemployment benefits. Defendants challenged plaintiff's application, arguing his termination for cause rendered him ineligible for benefits. The New York State Department of Labor initially denied plaintiff's claim, but its determination was overruled following a hearing before an administrative law judge ("ALJ"), who allowed benefits. The ALJ's determination was affirmed on appeal to the Unemployment Insurance Appeal Board. (Am. Compl. Ex. A).

On November 16, 2012, plaintiff filed a verified complaint with the New York State Division of Human Rights ("NYSDHR"), alleging age discrimination in violation of the ADEA and the NYSHRL.[4] The NYSDHR forwarded plaintiff's verified complaint to the U.S. Equal Employment Opportunity Commission ("EEOC") for enforcement of the ADEA claim. On May 13, 2013, the NYSDHR determined there was "NO PROBABLE CAUSE to believe [defendants] ha[d] engaged in . . . the unlawful discriminatory practice complained of." (Konkel Aff. Ex. C).

[4] Although plaintiff's verified complaint is not attached to the amended complaint in this action, the Court may take judicial notice of the administrative record of the NYSDHR without converting defendant's motion into a motion for summary judgment. See Evans v. N.Y. Botanical Garden, 2002 WL 31002814, at *4 (S.D.N.Y. Sept. 4, 2002).

On June 5, 2013, the EEOC issued a "Dismissal and Notice of Rights" in which it adopted the findings of the NYSDHR. (Am. Compl. Ex. B).

Plaintiff commended this action on June 12, 2013, and, with leave of the Court, filed the operative amended complaint on September 16, 2013, alleging (i) age discrimination and retaliation under the ADEA, (ii) age discrimination and retaliation under the NYSHRL, and (iii) violation of the NYLL.

Defendants now move to dismiss the amended complaint under Rules 12(b)(1) and 12(b)(6), arguing (i) plaintiff's ADEA claims against the individual defendants must be dismissed since there is no individual liability under the ADEA, (ii) plaintiff fails to state a claim under the ADEA, (iii) plaintiff's NYSHRL claims are barred by the election of remedies doctrine, and (iv) plaintiff's NYLL claim is preempted by federal law.[5]

**DISCUSSION**

I. Legal Standards

A. Subject Matter Jurisdiction

"[F]ederal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress." Durant, Nichols, Houston, Hodgson, & CorteseCosta, P.C. v. Dupont, 565 F.3d 56, 62 (2d Cir. 2009) (internal quotation marks omitted). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Nike, Inc. v. Already, LLC, 663 F.3d 89, 94 (2d Cir. 2011) (internal quotation marks omitted). The party invoking the Court's jurisdiction bears the burden of establishing that jurisdiction

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[5] In the alternative, defendants argue plaintiff fails to state a claim under the NYLL. Because the Court agrees plaintiff's NYLL claim is preempted, it does not reach this alternative argument.

exists. Conyers v. Rossides, 558 F.3d 137, 143 (2d Cir. 2009). When, as here, the case is at the pleading stage, in deciding a motion to dismiss under Rule 12(b)(1), the Court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." Id. "However, argumentative inferences favorable to the party asserting jurisdiction should not be drawn." Buday v. N.Y. Yankees P'ship, 486 F. App'x 894, 895 (2d Cir. 2012) (summary order) (quoting Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)) (internal quotation marks omitted).

B. Failure to State a Claim

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates the sufficiency of the complaint under the "two-pronged approach" announced by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." Ashcroft v. Iqbal, 556 U.S. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Because plaintiff is proceeding pro se, the Court must construe his submissions liberally and "interpret them to raise the strongest arguments that they suggest." Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006) (internal quotation marks omitted). "Even in a pro se case, however . . . threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation marks omitted). Nor may the Court "invent factual allegations" plaintiff has not pleaded. Id.

II. ADEA

A. Individual Liability

As a threshold matter, defendants correctly argue plaintiff's ADEA claims must be dismissed as against the individual defendants because individuals are not subject to ADEA liability. See Mabry v. Neighborhood Defender Serv., 769 F. Supp. 2d 381, 391 (S.D.N.Y. 2011).

Accordingly, plaintiff's ADEA claims are dismissed as against Linero and Caraballo.

B. Age Discrimination

As to Signature, defendants argue plaintiff fails to state a claim under the ADEA.

The Court disagrees.

The ADEA makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The statute's protections are "limited to individuals who are at least 40 years of age." Id. § 631.

To establish a prima facie case of age discrimination under the ADEA, a plaintiff must show "(1) that [he] was within the protected age group, (2) that [he] was qualified for the position, (3) that [he] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination." Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 107 (2d Cir. 2010). An inference of discrimination cannot rest on mixed motives; to prevail on an ADEA claim, a plaintiff "must demonstrate that age was not just a motivating factor behind the adverse action, but rather the 'but-for' cause of it." Leibowitz v. Cornell Univ., 584 F.3d 487, 498 n.2 (2d Cir. 2009) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009)).

"[E]ven though establishing a prima facie case of age discrimination is not necessary to survive a motion to dismiss, courts do use the standard as a guidepost when determining whether the plaintiff has provided the defendant with fair notice of her claim." Barker v. UBS AG, 2011 WL 283993, at *5 (D. Conn. Jan. 26, 2011); see also Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-11 (2002). Thus, "while an ADEA plaintiff need not plead 'but-for' causation, his complaint must contain sufficient facts to make plausible the conclusion that 'but for' [his] age, he would not have suffered the challenged action." Williams v. Addie Mae Collins Cmty. Serv., 2012 WL 4471544, at *3 (S.D.N.Y. Sept. 27, 2012) (alterations in original) (internal quotation marks omitted).

There is no dispute plaintiff, who was then 49 years old, was within the protected age group when he was terminated, and no doubt his termination was an "adverse employment action." From the allegation plaintiff was the employee "with the most years of service in [his] job classification," the Court infers plaintiff was qualified to work as a "lead line technician."

The issue is therefore whether plaintiff alleges facts supporting a plausible inference of discrimination.

At the outset, the Court disregards plaintiff's unelaborated allegation that Linero "pushed out two other senior employees . . . by harassing them and causing them to resign." See, e.g., Thompson v. ABVI Goodwill Servs., 2013 WL 505491, at *3 (W.D.N.Y. Feb. 8, 2013) (disregarding allegation plaintiff was terminated "because of [her] age, while other similarly situated younger employees were retained" when no facts alleged to support that contention), aff'd, 531 F. App'x 160 (2d Cir. Sept. 9, 2013) (summary order).

The sole remaining allegation in the amended complaint suggesting ageism—that Linero laughed at plaintiff for "wearing glasses" and "getting old"—does not by itself support an inference of discrimination. See Carlton v. Mystic Transp., Inc., 202 F.3d 129, 136 (2d Cir. 2000) ("[E]vidence of one stray comment by itself is usually not sufficient proof to show age discrimination."); Timbie v. Eli Lilly & Co., 2010 WL 9067050, at *9 (D. Conn. July 14, 2010) ("Even an ostensibly age-related remark made in direct reference to the contested employment decision is not usually sufficient, in and of itself, to create an inference of discrimination.").

But plaintiff's opposition alleges substantially more, and places Linero's alleged comment in context. Specifically, plaintiff alleges, Linero "repeatedly complained to numerous employees that [p]laintiff and another older worker made 'too much money.'" And after terminating plaintiff, Linero allegedly replaced him with two men in their twenties, each of whom earned less than half of plaintiff's salary. See Anand v. N.Y. Dep't of Taxation and Fin., 2013 WL 3874425, at *4 (E.D.N.Y. July 25, 2013) ("[T]he fact that a position was given to someone younger and less qualified may give rise to a prima facie inference of discrimination.").

Of course, "in assessing the plausibility of [p]laintiff's [discrimination] claims, alternative explanations for the alleged treatment at issue must be evaluated." See Rolle v. Educ. Bus Transp., Inc., 2014 WL 1330568, at *10 (E.D.N.Y. Mar. 31, 2014). But taken as true, plaintiff's allegations cast doubt on the alternative explanation that he was fired for sleeping. If, as here alleged, employees were permitted a "rest break" during overnight shifts, and Linero did not care if employees rested "as long as someone was 'on point' to cover emergencies," then it would be incongruous if plaintiff were abruptly terminated after nearly thirty years at Signature for taking a break to rest, or even sleep. And even if Signature did not permit its employees to take rest breaks, the fact that other employees allegedly "slept or napped on the job without adverse consequences" allows the plausible inference that Linero discriminated against plaintiff by selectively enforcing the rules. See Carlton v. Mystic Transp., Inc., 202 F.3d at 137 (reasonable jury could infer age discrimination from inconsistent application of employer's disciplinary policy).

In sum, plaintiff's allegations allow the Court to draw the plausible inference that plaintiff was terminated because of his age. See, e.g., Roginsky v. Cnty. of Suffolk, N.Y., 729 F. Supp. 2d 561, 569 (E.D.N.Y. 2010) (plaintiff-prison physician plausibly pleaded discriminatory constructive discharge by alleging he was forced to retire after writing prescriptions for prison employees, an "accepted practice").

Thus, plaintiff has stated a plausible age discrimination claim under the ADEA.

C. Retaliation

The basis for plaintiff's ADEA retaliation claim, however, is far from clear since the amended complaint is devoid of any suggestion that defendants retaliated against plaintiff for filing this action.

Thus, plaintiff has failed to state a claim for retaliation under the ADEA.

III. NYSHRL

Defendants argue plaintiff's NYSHRL claims are barred by the election of remedies doctrine.

The Court agrees.

An individual who files a complaint with the NYSDHR is barred from filing a lawsuit in state or federal court for the same cause of action. See N.Y. Exec. Law § 297(9) ("Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . unless such person had filed a complaint hereunder or with any local commission on human rights."). This jurisdictional bar is applicable to both state and federal courts because "a state law depriving its courts of jurisdiction over a state law claim also operates to divest a federal court of jurisdiction to decide the claim." Moodie v. Fed. Reserve Bank of N.Y., 58 F.3d 879, 884 (2d Cir. 1995). Thus, once a plaintiff elects to pursue his claims before the NYSDHR, a federal district court is barred from later hearing his case. See York v. Ass'n of the Bar, 286 F.3d 122, 127 (2d Cir. 2002) ("[NYS]HRL . . . claims, once brought before the NYSDHR, may not be brought again as a plenary action in another court."); McNulty v. N.Y.C. Dep't of Fin., 45 F. Supp. 2d 296, 303 (S.D.N.Y. 1999) ("Having elected to pursue redress for those grievances before the [NYSDHR], Plaintiff is now foreclosed from bringing . . . [her NYSHRL] claims before this Court.").

Here, plaintiff elected his remedy by filing a verified complaint with the NYSDHR, which found there was no probable cause to support his claims. Because the NYSDHR issued a ruling on the merits of these claims, plaintiff is procedurally barred from asserting them before this Court.

Thus, plaintiff's NYSHRL claims are dismissed.

IV. NYLL

Plaintiff alleges "his membership in [a] union and his attempts to change the union leadership caused him to be retaliated against by the existing union leadership," in violation of New York Labor Law § 201-d ("Section 201-d"). A liberal reading of plaintiff's allegations suggests an attempt to invoke Section 201-d(2)(d) of the New York Labor Law, which prohibits employers from terminating any employee because of his "membership in a union." New York Labor Law § 201-d(2)(d). Defendants move to dismiss this claim, arguing the federal National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), preempts Section 201-d here.

The Court agrees with defendants.

"The NLRA reflects congressional intent to create a uniform, nationwide body of labor law interpreted by a centralized expert agency—the National Labor Relations Board (NLRB). Accordingly, the NLRA vests the NLRB with primary jurisdiction over unfair labor practices." Tamburello v. Comm-Tract Corp., 67 F.3d 973, 976 (1st Cir. 1995); see 29 U.S.C. § 160. Thus, "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 245 (1959) (emphasis added); see also Vaca v. Sipes, 386 U.S. 171, 179 (1967) ("[A]s a general rule, neither state nor federal courts have jurisdiction over suits directly involving activity (which) is arguably subject to [Section] 7 or [Section] 8 of the [NLRA]." (internal quotation marks omitted)).

Here, the conduct complained of is at the very least "arguably subject" to Section 8 of the NLRA which, in relevant part, provides an employee with a cause of action against a labor organization for "caus[ing] or attempt[ing] to cause [his] employer to discriminate against" him.

29 U.S.C. § 158(b)(2). Indeed, because plaintiff's Section 201-d claim is premised on Caraballo's alleged attempts to procure plaintiff's termination in retaliation for his efforts to unseat her as a shop steward, plaintiff's Section 201-d claim falls squarely within the ambit of Section 8 of the NLRA, and is thus preempted. See, e.g., NLRB v. A & B Zinman, Inc., 372 F.2d 444, 445 (2d Cir. 1967) (union violated 29 U.S.C. § 158(b)(2) by "procuring the discharge" of employee in retaliation for "his support of a particular candidate for Union office"). Because exclusive jurisdiction over NLRA claims is lodged in the NLRB (subject to exceptions not relevant here), the Court is without jurisdiction to decide this claim.

Accordingly, plaintiff's Section 201-d claim is dismissed.

**CONCLUSION**

Defendants' motion to dismiss the amended complaint is GRANTED as to (i) plaintiff's ADEA claims against the individual defendants, (ii) plaintiff's ADEA retaliation claim as against all defendants, and (iii) plaintiff's state law claims as against all defendants.

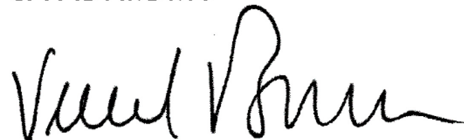
Defendants' motion to dismiss is DENIED only as to plaintiff's ADEA wrongful discharge claim against defendant Signature Flight Support Corporation.

Individual defendants Joe Linero and Ivette Caraballo are dismissed from this action.

The Clerk is directed to terminate the pending motion. (Doc. #16).

Dated: August 5, 2014
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge