UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD M. RUSS,	:	
	:	
Plaintiff,	:	CASE NO. 3:04CV014 (AWT)
v.	:	
	:	
TOWN OF WATERTOWN and TOWN OF WATERTOWN ACTING BY AND THROUGH ITS WATER AND SEWER AUTHORITY,	:	
	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

Plaintiff Ronald M. Russ claims the defendants failed to promote him to the position of supervisor at the Water and Sewer Authority and engaged in conduct that effectively forced him to retire in December of 2002. The defendants have filed a motion to dismiss the complaint. Because the plaintiff has not alleged facts sufficient to support a finding of constructive discharge, the motion to dismiss is being granted.

I. Background

For purposes of this motion to dismiss, the court accepts as true the following facts, taken from the Complaint. The plaintiff was employed by the defendants from 1977 until his retirement on December 27, 2002. At that time, he was employed as a maintainer.

More than a year earlier, in November of 2001, the plaintiff attempted to apply for a position as supervisor at the defendant Water and Sewer Commission (the "Commission"). The position had

been vacant since July 27, 2001. The Commission's superintendent required the plaintiff to take a water distribution test as part of the application process. The plaintiff was later informed that none of the eight parties who took the test at that time passed it. He also was told the new supervisor would be required to possess a state class two water distribution license, a certification the plaintiff did not possess.

The position remained open throughout 2002, despite the fact that the defendants twice advertised the opening in newspapers. In the fall of 2002, the plaintiff was asked if he would be willing to take the course necessary to obtain the class two license. The plaintiff stated he would obtain the required license if he were appointed to the position first. After this offer was apparently rejected, the plaintiff decided that he would never be promoted to supervisor. The plaintiff also alleges that the defendants forced him into retirement by "micro-managing" him, by continually changing the job requirements for the supervisor's position, and by failing to promote him because of his age. The plaintiff retired on December 27, 2002. In early January, 2003, the defendants promoted a younger maintainer to the position of supervisor.

The plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities ("CHRO") on

April 30, 2003.[1] He received a notice of right to sue letter from the federal Equal Employment Opportunity Commission in September, 2003, and a release of jurisdiction letter from the CHRO in October, 2003. The plaintiff initiated the current action on December 10, 2003.

II. Standard

Dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted is not warranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The task of the court in ruling on a Rule 12(b)(6) motion "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984) (internal quotes and citation omitted). The court is required to accept as true all factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff. See Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994). However,

[1]Because the plaintiff filed his CHRO complaint on April 30, 2003, he is statutorily barred from asserting claims regarding conduct occurring more than 180 days (CFEPA claims) and 300 days (ADEA claims) prior to that date. See 29 § U.S.C. 626 (d)(2)(ADEA); Conn. Gen. Stat. § 46a-82(e)(CFEPA). Here, the cutoff date is July 3, 2002 for ADEA claims and November 1, 2002 for CFEPA claims.

while "the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

III. Discussion

The Complaint the alleges the plaintiff was discriminated against because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"), and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. 46a-60 ("CFEPA"). To establish a prima facie case of age discrimination under either statute, the plaintiff must show, among other things, that he has suffered an adverse employment action. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466-67 (2d Cir. 2001)(applying McDonnel Douglas test to ADEA claim); Wroblewski v. Lexington Gardens, Inc., 188 Conn. 44, 53 (1982) (applying McDonnel Douglas test to CFEPA claim).

The plaintiff further alleges that the defendants retaliated against him for calling attention to their age discrimination against him. Such a claim also requires the plaintiff to show that he suffered an adverse employment action in order to establish a prima facie case. See Jetter v. Knothe Corp., 324 F.3d 73, 75 (2d Cir. 2003)(ADEA); Miller v. Edward Jones & Co., 355 F. Supp. 2d 629 (D. Conn. 2005)(CFEPA).

_____The plaintiff concedes his discrimination and retaliation claims are based entirely on the assertion that the adverse action in this case was the alleged constructive discharge by the defendants in December of 2002.[2] A constructive discharge occurs "when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983)(internal quotes and citation omitted). Absent additional aggravating factors, a failure to promote is insufficient to support a claim of constructive discharge. See Hill v. META Group, 62 F. Supp. 2d 639, 642-43 (D. Conn. 1999). Dissatisfaction with assignments, or a perception that the employee is being unfairly criticized, or exposure to difficult or unpleasant conditions does not rise to the level of a constructive discharge. Stetson v. NYNEX Serv. Co., 995 F.2d 355, 360 (2d Cir. 1993). A claim of constructive discharge

[2]The plaintiff's opposition to the motion to dismiss states:

> Admittedly, the first count of plaintiff's complaint, and the main claim of discrimination presented by his case, sets forth the facts associated with his having been discriminated against based on his constructive discharge. The second and third counts of plaintiff's complaint tie the constructive discharge to illegal discrimination of a specific kind; to wit: Age discrimination that violated state and federal law.

(Pl.'s Mem. in Opp'n to Defs.'Mot. to Dismiss p.7.)

without a sufficient factual basis "must be dismissed." Id. at 361.

In this case, the plaintiff alleges only that the defendants failed to promote him to the position of supervisor, and engaged in a "pattern and practice of micro-management of plaintiff's work."[3] (Compl. ¶ 3.) These allegations are insufficient as a matter of law to demonstrate "intolerable" working conditions under Pena, Hill and Stetson. The allegations of the Complaint fail to support the plaintiff's claim of constructive discharge. Accordingly, the defendants' motion to dismiss is hereby granted with respect to the second and third counts of the Complaint.[4]

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[3]The defendants note the plaintiff failed to raise the issue of micro-management in his complaint to the CHRO, and argue the court is therefore barred from adjudicating that aspect of the claim. For the purposes of the instant motion to dismiss, the court considers all the allegations regarding constructive discharge contained in the Complaint.

[4]The plaintiff appears to use the first count of the complaint to explain the facts of his constructive discharge claim, which he uses to show the adverse employment action required to establish the second and third claims of the Complaint. (See Pl.'s Mem. in Opp'n to Defs.'Mot. to Dismiss p.7.). To the extent the first count pleads a claim of wrongful discharge under Connecticut common law based upon his alleged constructive discharge, the defendants' motion to dismiss is being granted. The existence of other statutory remedies bars the plaintiff from bringing such a claim. See Burnham v. Karl & Gelb, P.C., 252 Conn. 153, 159-60 (2000) (requiring a plaintiff to be "otherwise without remedy" in a wrongful discharge claim).

IV. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss [Doc. # 10] is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.

Dated at Hartford, Connecticut this 29th day of March, 2005.

/s/

Alvin W. Thompson
United States District Judge