Tarascio v NBC Universal
2016 NY Slip Op 30200(U)
February 4, 2016
Supreme Court, New York County
Docket Number: 150042/12
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

PAUL TARASCIO,

Plaintiff,

- against -

NBC UNIVERSAL, NBC STUDIOS, INC., JAMES ("JIMMY") FALLON, HILLARY HUNN, MICHAEL SHOEMAKER, DAVID DIOMEDI and KAREN DELANEY,

Defendants.

Index No.: 150042/12

DECISION/ORDER

COIN, ELLEN M., J.:

In this action, plaintiff Paul Tarascio (Tarascio) sues his former employer for alleged employment discrimination, claiming that defendants discriminated against him in the terms and conditions of his employment because of his gender, and retaliated against him for complaining about discrimination, in violation of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII), the New York State Human Rights Law (Executive Law § 296 *et seq.*) (NYSHRL), and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 *et seq.*) (NYCHRL).[1] Defendants now

[1] The Court thanks staff attorney Elizabeth Gertz, Esq. for her indispensable assistance in drafting this decision.

move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff Tarascio was employed by NBC Studios, Inc., a wholly owned subsidiary of NBC Universal (together, NBC), as a stage manager for NBC's Late Night with Jimmy Fallon television show (Late Night), from February 2009 until his employment was terminated in March 2010. Plaintiff was an at-will employee, and was paid through Entertainment Partners. Complaint, Ex. JJ to Sandak Affirmation in Support of Defendants' Motion (Sandak Aff.), ¶¶ 27, 28. Defendant Michael Shoemaker (Shoemaker) was, at all times relevant to the complaint, the Producer of Late Night, responsible for making "key personnel decisions." *Id.*, ¶ 11. Defendant David Diomedi (Diomedi) was Director, defendant Hillary Hunn (Hunn) was Coordinating Producer, and defendant Jimmy Fallon (Fallon) was the host of Late Night, at all relevant times; and defendant Karen Delaney (Delaney) was employed in NBC's Human Resources department.

Prior to being hired by Late Night, plaintiff was employed for 13 years as a stage manager for the Late Night with Conan O'Brien television show (Conan), working primarily as the back stage, or second stage, manager. Tarascio Deposition (Pl.

Dep.), at 45, 59.[2] In or around February 2009, Conan O'Brien became the host of the Tonight Show, production of the show moved to California, and plaintiff did not continue with it. *Id.* at 59, 61. Fallon became the host of Late Night, and plaintiff interviewed with Diomedi, Hunn, and Shoemaker for a position as stage manager with Late Night. He was being considered for, or was offered, the position of second stage manager, but he let Diomedi and Hunn know that he was only interested in the front stage manager position. Pl. Dep. at 64-65, 69, 72; Diomedi Dep. at 18-19; 19-20.

At about the same time, Niclana Tolmasoff (Tolmasoff), who had worked for about 10 years as a stage manager at MTV, also applied for a stage manager position with Late Night. *See* Email, Ex. K to Sandak Aff. Tolmasoff testified that after she interviewed with Diomedi, it was her understanding that she was being hired as the front stage manager, but she was subsequently told that plaintiff was offered that position because he had more late night experience. Tolmasoff Dep. at 11-12, 15-16. Shoemaker hired plaintiff as front stage manager, after

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[2]The parties submit different portions of the deposition of plaintiff, annexed as Ex. A to Sandak's Affirmation in Support of Defendants' Motion, and Ex. OO to Grennan's Affirmation in Opposition. Similarly, different portions of the depositions of Fallon, Diomedi, Shoemaker, Hunn, Delaney, and Tolmasoff are annexed as Exs. B-G to Sandak's Aff., and Exs. PP-UU to Grennan's Aff. References herein will cite to the depositions and not to the parties' exhibits.

consulting with Diomedi and Hunn and another producer, Brian McDonald (Shoemaker Dep. at 12), because plaintiff requested that position, although, to Shoemaker, the front and back stage positions seemed interchangeable. *Id.* at 20-21. Shoemaker did not refer to the stage manager positions as front and back, but he was aware that other people used the terms. *Id.* at 22.

Plaintiff testified that, in his experience, all television shows had at least two stage managers, generally referred to as front, or first, stage manager, and back, or second, stage manager, and each had separate responsibilities. Pl. Dep. at 53, 70, 157. The front stage manager works primarily in front of the stage, coordinating on-stage activities, working with the guests, making sure that the host gets proper time cues, communicating with the control room; and, generally, is responsible for keeping the show running smoothly. *Id.* at 51-52, 573; Fallon Dep. at 58. The front stage manager also communicates directly with the host and director, and acts as a communication link between the director and the staff. Pl. Dep. at 51, 52. The back stage manager is responsible for organizing all departments backstage, including props, staging, wardrobe, makeup, music, and cue cards; making sure that actors, props and wardrobe items make it to the stage for rehearsal and blocking;

getting guests to the stage on time; getting information from the front stage manager to the backstage crew. *Id.* at 82-89, 149-150; 167. Basically, plaintiff testified, everything that happens backstage is the responsibility of the back stage manager. *Id.* at 90.

For about four months, from the time Late Night first aired in March 2009 through June 2009, plaintiff acted as front stage manager, and Tolmasoff acted as back stage manager. *Id.* at 240. Plaintiff's immediate supervisor was Hunn, who, as coordinating producer, dealt with everyday events at the show, including scheduling and coordinating, and, on stage, figuring out where to put cameras to best tape the scene. *Id.* at 82-83. According to plaintiff, he performed his job well and received no criticism or feedback from Shoemaker, Diomedi, Hunn, or Fallon through the end of June 2009. *Id.* at 115-116. He also testified that he thought Tolmasoff did an "okay" job, once he trained her and "got her in the groove." *Id.* at 240.

According to Shoemaker and Fallon, plaintiff was not able to satisfactorily perform as front stage manager. Fallon testified that he approved the decision to hire plaintiff as front stage manager (Fallon Dep. at 13-14), but plaintiff was not good at the job, because he was disorganized, did not pay

attention and did not look at Fallon, was not sharp, and was "more of a hit or miss than a help." *Id.* at 15. Shoemaker testified that "none of us were comfortable with Mr. Tarascio serving as a front stage manager. . . . [H]is demeanor was tentative and halting. . . . He didn't really have command of the stage that one would expect, and that led to discomfort." Shoemaker Dep. at 13-14. Shoemaker observed, for instance, that plaintiff did not keep him or Fallon informed about what was going on during rehearsals; if a rehearsal was stopped, he did not offer an explanation, and, even when asked for one, did not have a ready answer and they had to wait for him to find out. *Id.* at 14-15. Shoemaker also felt that plaintiff was not comfortable in the front stage position, and that his personality was not right for the job. *Id.* at 51. Diomedi testified that he spoke to plaintiff sometime in June 2009, and told him that the producers felt they were not getting enough information from plaintiff about what and why things were happening during a show. Diomedi Dep. at 44-46.

In late June 2009, when plaintiff was out sick, Tolmasoff filled in as front stage manager and, Shoemaker testified, she was "exceptional." Shoemaker Dep. at 49. Fallon testified that when Tolmasoff substituted for plaintiff as front stage manager,

the show went smoothly, and "it was like night and day." Fallon Dep. at 44-45. Shoemaker then decided, with input from Diomedi and Hunn, that they would move Tolmasoff to the front stage position and move plaintiff to the back stage position to see if things worked better with that arrangement. Shoemaker Dep. at 47-48; Diomedi Dep. at 51. Diomedi testified that the show was "instantly better" with Tolmasoff working in front. *Id.* at 22, 131. Diomedi did not consider plaintiff's move from front to back stage manager a demotion because the front and back stage manager "work on the same team" and help each other out, and he needed "good people working everywhere." Diomedi Dep. at 53.

Plaintiff was informed by Diomedi in July 2009 that Tolmasoff was replacing him as front stage manager, and he was being moved to back stage manager. Plaintiff claims that when he asked why the change was being made, Diomedi told him that he was doing a great job, but "Jimmy just prefers to take direction from a woman." Pl. Dep. at 123. Plaintiff also claims that Diomedi told him that he was concerned about his own position as director, because he believed Fallon would prefer a woman in the position and had hired him only after two women declined the job. *Id.* at 124, 262. Plaintiff testified that he told Diomedi

that the decision was hard for him to accept and was "blatant discrimination." *Id.* at 123-124.

Diomedi testified that he told plaintiff that the producers wanted to make a change on a "trial basis," and did not give plaintiff a reason at that time, but later told him it was a "personality thing." Diomedi Dep. at 71-72. Diomedi testified that he knew plaintiff was upset (*id.* at 70-71), and at some point plaintiff told him that he thought he was being transferred "because he's a guy." *Id.* at 126-127. Diomedi said that he told plaintiff that was not what happened, and to make plaintiff feel better, in response to plaintiff saying that he felt he would never fit in, Diomedi told him that he got his job after a woman, who worked with Fallon at Saturday Night Live (SNL), turned it down. *Id.* at 127-128. Diomedi denied that he told plaintiff that Fallon preferred taking direction from a woman, or that he wanted a woman to be director. *Id.* at 130, 131.

After receiving the "shocking news" (Pl. Dep. at 124) about his transfer from Diomedi, plaintiff spoke to Shoemaker, who, plaintiff asserts, told him he had not done anything wrong and that "it's just a comfort thing" with Fallon. *Id.* at 126-127. Shoemaker testified that he told plaintiff that he was not

working out as front stage manager, and he wanted to try putting Tolmasoff in that position. Shoemaker Dep. at 29-30. He testified that he said that Fallon's comfort was a factor, but nothing else, and plaintiff did not say that Diomedi told him that Fallon preferred to take direction from a woman. *Id.* at 34. Shoemaker never saw Fallon exhibit any discomfort taking directions from men, and never heard from anyone that Fallon preferred to take direction from a woman. *Id.* at 16, 34. Fallon also denied that he ever said that he was more comfortable taking direction from a woman. Fallon Dep. at 20-21.

Plaintiff told Shoemaker that he intended to resign rather than take the back stage position, but decided to stay after Shoemaker urged him to think about it, because he needed the money. Pl. Dep. at 138-139, 140; Shoemaker Dep. at 30-31. The change in position did not affect plaintiff's title, salary, medical or other benefits, or working hours. Pl. Dep. at 146-147; Shoemaker Dep. at 48. Plaintiff knew that Shoemaker and Fallon had previously worked at SNL, where stage managers share similar duties, and they considered the front stage manager and the back stage manager to be co-equal positions, but he thought that because of their limited experience, they did

not know that the positions had different duties. Pl. Dep. at 513-514; *see* Notes, Ex. NN to Grennan Aff. in Opp., at 0008.

Plaintiff testified that he complained to Diomedi, Shoemaker and Tolmasoff that his transfer to backstage manager was discriminatory, and he made a complaint to his union, although he does not know whether the union contacted NBC or what action it took. *Id.* at 326-328. He claims that after he complained, Hunn became hostile toward him, and that in a conversation in September 2009, she told him that he was not doing his job back stage and that other departments had complained about him. He then asked every department about any complaints, and every department told him that he was doing nothing wrong and that there were no complaints. *Id.* at 273-274, 285-286. Based on what the departments told him, he concluded that there was nothing in his performance to improve or change. *Id.* at 275-276. He also claims that Hunn then stopped speaking to him, and enlisted others, including Tolmasoff, to find fault with his work.

Hunn testified that she was not involved in the decision to move plaintiff to the backstage manager position (Hunn Dep. at 13). She knew that he had complained to Shoemaker about the move (*id.* at 15, 48-49), and had complained about her (*id.* at

47), but no one ever told her that he complained about discrimination or retaliation. *Id.* at 46-48. In August 2009, Hunn met with plaintiff to criticize his performance (*id.* at 16-17), and went through a list of things he was not doing satisfactorily. *Id.* at 18. She told him that he needed to be more engaged, pay more attention at morning meetings and not to read the newspaper, and needed to get the Roots out to rehearsal on time. *Id.* She subsequently spoke to Delaney several times in August and September 2009 about plaintiff's performance, complaining that, among other things, plaintiff was not paying attention, not getting talent ready, and not pulling his weight. *See* Notes, Exs. M, R, T to Sandak Aff. Plaintiff claims that no one other than Hunn had a problem with his performance, and that she was conducting a "witch hunt." *See* Notes, Exs. A, D to Grennan Aff.

In mid-September 2009, Delaney met with plaintiff, Shoemaker and Diomedi, without Hunn, to discuss concerns about plaintiff's performance. Plaintiff was advised that his performance needed to improve. *See* Notes, Ex. D to Grennan Aff. Shoemaker testified that plaintiff was told that he needed to be a more present participant in the show, needed to help more, and basically needed to do a better job. Shoemaker Dep. at 62-63.

Shoemaker stated that plaintiff did not seem to understand that he needed to improve his performance, and instead blamed Tolmasoff for mistakes. *Id.* at 77-78. Diomedi testified that at this meeting, he and Shoemaker and Delaney tried to explain to plaintiff what was expected of him, and that he was not delivering; that Late Night operated differently than Conan; and that he needed to be more of a team player and to do more than the bare minimum. Diomedi Dep. at 79, 80-81. Diomedi explained that, in contrast to how plaintiff worked on Conan, he needed to be more involved from the start of rehearsals, to be familiar with scripts, to not have to be told every single thing he had to do. *Id.* at 82-83. Diomedi wanted, for instance, both stage managers to be involved in blocking the show, which happened when Tolmasoff was back stage manager, but not when plaintiff became back stage manager. *Id.* at 83.

Plaintiff recalled that this meeting was a disciplinary meeting to discuss his performance, and that Shoemaker and Diomedi agreed that he was not doing his job "as best as [he] could," but he recalled no specifics about what was said at the meeting. Pl. Dep. at 305-309. Diomedi testified that plaintiff's performance improved right after this meeting, but that within a couple of weeks, things were not going well again.

Diomedi Dep. at 89-90, 123. Diomedi met with plaintiff in December 2009, and told him that he appeared to be slipping back to being uninvolved. *Id.* at 91-92.

In January 2010, after hearing from Tolmasoff that he might be fired, and believing that Hunn wanted him terminated, plaintiff spoke to Delaney, wanting to know if he could be fired for not liking his job. He complained that Hunn had not spoken to him since he had met with her in September, and that he had not been informed of any specific deficiencies in his performance. Pl. Dep. at 815; Notes, Ex. F to Grennan Aff. He thought that Hunn had something "personal" against him, as long ago he had heard that she did not like him. Pl. Dep. at 816-817; *see* Notes, Ex. N to Sandak Aff., at 0365.

On February 4, 2010, plaintiff again met with Delaney, Shoemaker, and Diomedi to discuss issues about his performance. Pl. Dep. at 747, 753; *see* Talking Points, Ex. T to Sandak Aff.; Notes, Ex. N to Sandak Aff., at 0368-0376. Plaintiff testified that Diomedi went over a list of things that plaintiff was doing wrong, which plaintiff alleges were "fabricated." Pl. Dep. at 756-757, 758-760, 765-767; *see generally* Notes, Ex. W to Sandak Aff.; Complaint, ¶¶ 108-111. At this meeting, he was informed that this was a serious, last chance meeting (Shoemaker Dep. at

64-65). He knew that he was being given a final warning. Pl. Dep. at 400-401. Plaintiff understood that defendants believed he was doing things wrong as back stage manager (*id.* at 753), but he did not recall whether he thought that any of the criticisms were legitimate (*id.* at 754). He told Delaney that he did not think he was doing anything wrong. *Id.* at 786-787. Plaintiff was not given a written warning at that time, or, although he requested it, detailed documentation of his performance deficiencies.

On March 8, 2010, a guest on Late Night missed his cue to appear on stage after he was introduced by Fallon, which Fallon described as one of the "biggest mistakes" he had ever seen on television. Fallon Dep. at 30-31. Plaintiff, as backstage manager, was responsible for timely escorting guests to the stage, and admittedly made a mistake when he misjudged the time it would take to get the guest from his dressing room to the curtain. Pl. Dep. at 402-403, 405, 413. Plaintiff claims, however, that it was not his mistake, but Tolmasoff's, because she should have interrupted Fallon's introduction when plaintiff asked for a hold. *Id.* at 403-404, 413, 416. He also asserted that it could not have been a big mistake because it was left in the show when it could have been fixed. *Id.* at 404-405.

After the March 8 incident, Shoemaker, after consulting with Diomedi, Hunn, and Delaney, made the decision to terminate plaintiff's employment. Shoemaker Dep. at 73. On March 18, 2010, plaintiff was asked to meet with Delaney and Shoemaker, and he was fired. *See* Emails, Exs. Z, AA to Sandak Aff.; Notes, Ex. BB to Sandak Aff. Shoemaker testified that plaintiff was fired "[b]ecause after repeated warnings and discussions, we found that he was not performing the job to what we wanted, to what he even thought was satisfactory. . . . And we felt that it was not getting better. It was only getting worse. And we really had no recourse." Shoemaker Dep. at 73. Shoemaker also stated that plaintiff "appeared to be unhappy in his job" (*id.* at 74), and "did not seem to be trying to join in or support the show in any way." *Id.* at 75. According to Shoemaker, plaintiff, when asked to make changes in his behavior and be more helpful and present, seemed not to understand or want to do that. *Id.* at 74. There were also specific things that went wrong, Shoemaker testified, but to him, those were less important than the lack of commitment on plaintiff's part to be better at his job. *Id.*

In March 2010, Mike Kilkenny, who had been working as a Late Night back-up stage manager, replaced plaintiff as back stage manager. For a few days after plaintiff left, Gena Rositano, then a SNL stage manager, worked as back stage manager for Late Night, until Kilkenny returned from an overseas trip. Tolmasoff Dep. at 44-45; Hunn Aff., Ex. II to Sandak Aff., ¶¶ 2, 3.

In July 2010, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC), which issued a right to sue letter in October 2011. Plaintiff commenced the instant action in January 2012, alleging eight causes of action, for gender discrimination and retaliation under Title VII, the NYSHRL, and the NYCHRL (1st - 6th causes of action), for aiding and abetting discrimination under the NYSHRL and the NYCHRL (7th cause of action), and for breach of the implied covenant of good faith and fair dealing (8th cause of action).

The gravamen of plaintiff's complaint, as articulated in opposition to defendants' motion, is that he was transferred to the "less desirable position of back stage manager" based on his gender, and his employment was terminated in retaliation for complaining about discrimination against him. *See* Plaintiff's

Memorandum of Law in Opposition (Pl. Memo in Opp.), at 17, 27.[3] He also contends that individual defendants Shoemaker, Hunn, and Diomedi facilitated, aided and abetted the discriminatory transfer; that Hunn retaliated against him for complaining about the transfer and "enlisted" Shoemaker, Diomedi, and Delaney to aid and abet her retaliatory conduct; and that Shoemaker, Hunn, Diomedi, and Delaney were involved in the decision to terminate his employment and should be held individually liable for it. *Id.* at 37, 38, 40.

DISCUSSION

As is well settled, on a motion for summary judgment, the moving party has the initial burden to show its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing is made, the

[3]Although the complaint also alleges that his gender was the basis for termination of his employment (Complaint, ¶¶ 171, 191, 207), plaintiff does not oppose the branch of defendants' motion seeking dismissal of that claim, or otherwise address it. Plaintiff also does not oppose dismissal of, or otherwise address, the cause of action for breach of the implied covenant of good faith and fair dealing. The branches of defendants' motion seeking dismissal of those claims are, therefore, granted without opposition.

burden then shifts to the opposing party to establish, also by submitting evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Alvarez*, 68 NY2d at 324.

The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied where there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968). It is not the function of the court on a motion for summary judgment to assess credibility. *See Vega*, 18 NY3d at 505; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997). The nonmoving party must show, however, "the existence of a bona fide issue raised by evidentiary facts." *Rotuba Extruders*, 46 NY2d at 231; *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012); *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact.

Zuckerman, 49 NY2d at 562; *see Colarossi v University of Rochester*, 2 NY3d 773, 774 (2004).

In employment discrimination cases, courts also urge caution in granting summary judgment, since direct evidence of an employer's discriminatory intent is rarely available. *See Ferrante*, 90 NY2d at 629; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). Summary judgment nonetheless remains available in discrimination cases, and is appropriate, even under the more liberal NYCHRL, when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v International Shoppes, Inc.*, 2010 WL 1270173, *5, 2010 US Dist LEXIS 30912, *16 (ED NY 2010) (internal quotation marks and citation omitted); *see Ferrante*, 90 NY2d at 631; *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 (1st Dept 2012); *Bennett*, 92 AD3d at 46; *see also Kerman-Mastour v Financial Indus. Reg. Auth., Inc.*, 814 F Supp 2d 355, 365, 367 (SD NY 2011).

Employment Discrimination

Under the NYSHRL and the NYCHRL, as under Title VII, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and

privileges of employment, because of, as relevant here, an individual's sex or gender. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a); 42 USC § 2000e-2 (a). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7); 42 USC § 2000e-3 (a).

The standards for recovery under the NYSHRL are similar to the standards under Title VII, and employment discrimination claims under both are analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]). *See Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO,* 6 NY3d 265, 270 (2006); *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 n 3 (2004); *Ferrante,* 90 NY2d at 629. Under *McDonnell Douglas,* the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that she or he is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. *See Stephenson,* 6 NY3d at

270, citing *Ferrante*, 90 NY2d at 629; *Forrest*, 3 NY3d at 305; *Melman*, 98 AD3d at 113-114; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). If plaintiff makes this prima facie showing, the burden then shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and nondiscriminatory reason for its employment decision. If the employer articulates a legitimate, nondiscriminatory basis for its decision, the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 (1981).

While the NYCHRL must be construed more liberally than its state and federal counterparts, and claims under it must be independently analyzed (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *Bennett*, 92 AD3d at 34), courts have continued to apply the analytical framework set out in *McDonnell Douglas Corp.* to NYCHRL claims. *See Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 (2d Dept 2013); *Melman*, 98 AD3d at 113-114; *Gordon v Kadet*, 95 AD3d 606, 606-607 (1st Dept 2012); *Koester v New York Blood Ctr.*, 55 AD3d 447, 448 (1st Dept 2008). As applied to the NYCHRL, however, the burden-

shifting framework was modified by the First Department in *Bennett* (92 AD3d at 39-40), to the extent that on a motion for summary judgment, when a defendant offers evidence of a nondiscriminatory basis for its actions, a court need not decide whether plaintiff has made a prima facie case. Instead, the court should "proceed directly to looking at the evidence as a whole" to determine whether defendant, as the moving party, has met its burden of showing that "no jury could find defendant liable under any of the evidentiary routes -- *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Id.* at 45; *see Melman*, 98 AD3d at 113-114; *Furfero v St. John's Univ.*, 94 AD3d 695, 697 (2d Dept 2012).

Courts subsequently have held that NYCHRL claims must "be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Melman*, 98 AD3d at 113; *see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 (1st Dept 2014); *Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 (1st Dept 2012). Thus, once a defendant has produced evidence of a legitimate reason for its action, "[t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate

motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Bennett*, 92 AD3d at 39; *see Brightman*, 108 AD3d at 741; *Melman*, 98 AD3d at 127; *Carryl*, 93 AD3d at 590. A plaintiff may prevail "in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision . . . or, stated otherwise, [the action] was 'more likely than not based in whole or in part on discrimination.'" *Melman*, 98 AD3d at 127, quoting *Aulicino v New York City Dept. of Homeless Servs.*, 580 F3d 73, 80 (2d Cir 2009) (other citations omitted); *see Brightman*, 108 AD3d at 741; *Bennett*, 92 AD3d at 39; *Williams*, 61 AD3d at 78. "[A] plaintiff asserting an NYCHRL claim must still establish 'by a preponderance of the evidence that she [or he] has been treated less well than other employees' due to protected status." *Julius v Department of Human Resources Admin.*, 2010 WL 1253163, 2010 US Dist LEXIS 33259, *13 (SD NY 2010), quoting *Williams*, 61 AD3d at 78.

Gender Discrimination

In his complaint, plaintiff alleges NBC was "that unusual employer who discriminates against the majority" (Complaint, ¶ 172), and discriminated against him because he is male, which,

for purposes of his gender discrimination claim, is a protected class. *See Matter of Arcuri v Kirkland*, 113 AD3d 912, 914 (3d Dept 2014); *Yukoweic v International Bus. Machs., Inc.*, 228 AD2d 775, 776 (3d Dept 1996); *see also Oncale v Sundowner Offshore Servs., Inc.*, 523 US 75, 78 (1998). Plaintiff claims that he suffered an adverse employment action based on his gender when, four months after he was hired as the front stage manager for Late Night, he was demoted to the "less distinguished" position of back stage manager, with "significantly diminished material responsibilities" (Pl. Memo in Opp., at 14); and a woman, Tolmasoff, was moved from the back stage manager position to replace him as front stage manager.

According to plaintiff, front stage and back stage managers have different responsibilities, and carry different levels of prestige. *Id.* The front stage manager works primarily at the front of the stage, and is responsible for keeping the show running smoothly. Pl. Dep. at 51-52, 52-53, 572-573; Fallon Dep. at 58. The back stage manager is responsible for coordinating all departments backstage, such as props, wardrobe, makeup, and music, which, plaintiff testified, he also supervised as front stage manager. Pl. Dep. at 76, 82-89, 149-150. In contrast to the front stage manager, however, the

back stage manager does not directly communicate with the host and the director, and, plaintiff claims, has less input into the show. Pl. Memo in Opp., at 14. Plaintiff did not enjoy being second stage manager because he did not have the same decision-making authority, and had to take more direction from the front stage manager, Tolmasoff, who, he thought, was not as competent as he was. *Id.* at 537, 572-574.

"An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Forrest*, 3 NY3d at 306, quoting *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 (2d Cir 2000); *see Burlington Indus., Inc. v Ellerth*, 524 US 742, 761 (1998); *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 (1st Dept 2005). "Employment actions that have been deemed sufficiently disadvantageous to constitute an adverse employment action include 'a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.'" *Williams v R.H. Donnelley, Corp.*, 368 F3d 123, 128

(2d Cir 2004), quoting *Galabya*, 202 F3d at 640; *see Forrest*, 3 NY3d at 306; *Littlejohn v City of New York*, 795 F3d 297, 312 (2d Cir 2015).

"[A]n involuntary transfer may constitute an adverse employment action if the plaintiff 'shows that the transfer created a materially significant disadvantage' with respect to the terms of her [or his] employment." *Williams*, 368 F3d at 128, quoting *Galabya*, 202 F3d at 641. "[A] transfer from a job with prestige and opportunity for professional growth to a job with less prestige and little opportunity for growth could constitute an adverse employment action, even though the employer considered the jobs equal in status." *Beyer v County of Nassau*, 524 F3d 160, 165 (2d Cir 2008), citing *De La Cruz v New York City Human Resources Admin. Dept. of Soc. Servs.*, 82 F3d 16, 21 (2d Cir 1996). Plaintiff must show, however, "that the transfer was to an assignment that was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement." *Galabya*, 202 F3d at 641; *see Beyer*, 524 F3d at 165. "[A] 'bruised ego,' a 'demotion without change in pay, benefits, duties, or prestige,' or 'reassignment to [a] more inconvenient job' are all insufficient to constitute a tangible or material adverse

employment action." *Yin v North Shore LIJ Health Sys.*, 20 F Supp 3d 359, 373 (ED NY 2014), quoting *Ellerth*, 524 US at 761; *see Brierly v Deer Park Union Free Sch. Dist.*, 359 F Supp 2d 275, 295 (ED NY 2005).

"'[I]f a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer . . . negatively does not itself render the . . . transfer [an] adverse employment action.'" *Mejia v Roosevelt Is. Med. Assocs.*, 31 Misc 3d 1206(A), 2011 NY Slip Op 50506(U) (Sup Ct, NY County 2011), *affd* 95 AD3d 570 (1st Dept 2012) (citations omitted); *see Carter v State of New York*, 151 Fed Appx. 40, 41 (2d Cir 2005); *Williams*, 368 F3d at 128; *see e.g. Gaffney v City of New York*, 101 AD3d 410 (1st Dept 2012) (assignment of assistant principal to nonsupervisory tasks usually performed by teachers not materially adverse change); *Silvis v City of New York*, 95 AD3d 665 (1st Dept 2012) (transfer from position of literacy coach to classroom teacher, which changed nature of duties, was "merely an alternation of responsibilities"); *Matter of Block v Gatling*, 84 AD3d 445 (1st Dept 2011) (food and beverage employee's transfer to location where she earned less money was a change in nature of duties but not a material adverse change); *Ponterio v*

Kaye, 25 AD3d 865 (3d Dept 2006) (judge's reassignment from matrimonial part to general civil part was not an adverse employment action). Further, a plaintiff must "proffer objective indicia of material disadvantage; 'subjective, personal disappointment[]' is not enough." *Beyer*, 524 F3d at 164 (citation omitted).

As back stage manager, plaintiff's salary, title, benefits, and working hours remained the same. Although the focus of plaintiff's responsibilities shifted, and no longer included having direct communication with Fallon and the director, he has not shown, or even alleged, that he had a material reduction in his responsibilities, or that the responsibilities of the back stage manager were less important than those of the front stage manager. They were, as he testified, just different. Pl. Dep. at 572-573. "[A]part from a change in the nature of his duties, plaintiff 'retained the terms and conditions of [his] employment' . . . [and] his transfer was 'merely an alteration of [his] responsibilities.'" *Mejia*, 95 AD3d at 571 (citation omitted). His dissatisfaction with the position, and his subjective belief that it was less prestigious, are insufficient to raise triable issues of fact as to whether the back stage manager position was "materially less prestigious, materially

less suited to his skills and expertise, or materially less conducive to career advancement." *Galabya*, 202 F3d at 641; *Beyer*, 524 F3d at 165; *see Beyer*, 524 F3d at 164; *Filippi v Elmont Union Free Sch. Dist. Bd. of Educ.*, 2012 WL 4483046, *12, 2012 US Dist LEXIS 139702, *40 (ED NY 2012) ("subjective belief that the new position is less prestigious, absent any objective evidence to support that position, is not enough").

Even if plaintiff could show an adverse employment action, he fails to show that the transfer occurred under circumstances giving rise to an inference of discrimination. "The *sine qua non* of a gender-based discriminatory action claim under Title VII [or the NYSHRL or NYCHRL] is that 'the discrimination must be *because* of sex.'" *Patane v Clark*, 508 F3d 106, 112 (2d Cir 2007) (emphasis in original) (citation omitted); *see Williams*, 61 AD3d at 78 (critical inquiry under NYCHRL is whether employee treated less well because of gender); *Oncale*, 523 US at 80 (critical issue in gender discrimination claims under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"). "Preferential treatment, favoritism, and cronyism, while unjust and unfair, do not constitute sexual discrimination." *Matter of Fella v County of Rockland*, 297 AD2d

813, 815 (2d Dept 2002) (internal quotation marks and citation omitted); *see Kelly v Howard I. Shapiro & Assocs. Consulting Engrs.*, 2012 WL 3241402, 2012 US Dist LEXIS 110935, *19 (ED NY 2012) ("'showing favoritism toward workers with whom a decisionmaker is familiar does not amount to discrimination based on a protected category'"), *affd* 716 F3d 10 (2d Cir 2013).

Plaintiff's claim of gender bias rests almost entirely on alleged remarks made by Diomedi, that plaintiff and Tolmasoff were switched because Fallon "prefers to take direction from a woman" (Complaint, ¶ 54) or "feels more comfortable taking direction from a woman." Pl. Dep. at 471-472. Plaintiff also claims that Diomedi remarked that "Jimmy likes his women," and told plaintiff that Fallon wanted a woman director, hiring Diomedi only after two women were not available. Pl. Dep. at 123-124. While Diomedi acknowledged that he told plaintiff that he was hired as director after a woman, who had an established relationship with Fallon, was not available, he denied that he said that Fallon wanted a woman for the director position, or that he made any comment that Fallon prefers to take direction from a woman. Diomedi Dep. at 128, 130.

Plaintiff argues that an inference of discrimination also can be found in comments made by Shoemaker, as well as by Hunn

and Delaney, that Fallon's comfort was a factor in making staff decisions, including the decision to switch the positions of plaintiff and Tolmasoff. Plaintiff does not claim, however, that Shoemaker, or Hunn or Delaney, said that Fallon would be more comfortable working with a woman (*see* Notes, Ex. BB to Sandak Aff., at 00128) or that gender otherwise played a role in staff decisions; and there is no evidence that suggests that considering Fallon's comfort level in making staff decisions creates an inference of gender discrimination.

Similarly, the fact that Diomedi was hired as director after two women were considered for the position, undercuts, rather than supports, plaintiff's gender bias claim. Plaintiff's apparent argument, that offering the director position to two women before considering Diomedi creates an inference of gender discrimination, without any evidence of the relative qualifications of the candidates or of the circumstances surrounding the hiring process, is barely plausible, and completely collapses in view of the fact that Diomedi was hired as director, and a woman was not.

To the extent that plaintiff argues that Fallon had a "preference for women in authority roles" (Pl. Memo at 18), and wanted only women staff members (A2s) to place microphones on

him (*id.*), plaintiff submits no evidence to substantiate these claims, other than his testimony that a former employee told him that a Late Night "tech manager," Tom Popple, told her that Fallon preferred female A2s to put microphones on him. Pl. Dep. at 566-568. In his affidavit, however, Popple, NBCUniversal's Director of Technical Operations and Staging at the time in question, attests that both men and women were employed as A2s and put microphones on Fallon; Fallon had no role in hiring A2s; and that Fallon never expressed a gender-based preference about which assistants worked with him. *See* Affidavit of Tom Popple, Ex. H to Sandak Supplemental Affirmation.

Notably, evidence, including a list of credits identifying Late Night staff, far from showing a preference for women in positions of authority, shows that all the top positions - Executive Producer, Producer, Director, Supervising Producer and Head Writer - were filled by men; the Line Producer and Segment Producers and most of the writers also were men. *See* Late Night Credits, Ex. Q to Sandak Aff. Plaintiff himself testified that during the time that he was back stage manager, the majority of the staff on stage during the shooting of the show were men, including the announcer, the band, the producer and associate producer, the segment producers, and the camera

operators. *Id.* at 875-877.[4] Plaintiff, moreover, testified that he never saw anything to suggest that Fallon favored women over men, was more comfortable with women, preferred to take direction from women, or preferred to have women around him on the Late Night set. Pl. Dep. at 872-874. He also never observed anything to suggest that Diomedi or Hunn favored women over men or were more comfortable working with women than with men. *Id.* at 880-882.

"Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where, as here, it is the only evidence submitted in opposition." *Briggs v 2244 Morris, L.P.*, 30 AD3d 216, 216 (1st Dept 2006); *see Mermelstein v Singer*, 85 AD3d 440,

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[4]"In 'reverse discrimination' claims, such as [plaintiff's] gender discrimination claim, some [federal] courts have applied a somewhat stricter (towards the plaintiff) version of the *McDonnell-Douglas* standard, holding that a prima facie case of reverse discrimination must indicate some 'background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against a [favored group].' *See e.g. Parker v Baltimore & Ohio R.R. Co.*, 652 F2d 1012, 1017 (DC Cir 1981) (explaining that 'membership in a socially disfavored group was the assumption on which the entire *McDonnell-Douglas* analysis was predicated')." *Brierly*, 359 F Supp 2d at 294 n 7.. District courts in the Second Circuit are split on whether to apply the heightened standard, and the Second Circuit has not taken a position on it. *See id.* No New York court has applied that stricter analysis to claims under the NYSHRL or the NYCHRL, and this court does not do so now, noting only that were such a standard applied to plaintiff's claims, it would be significant that most of the individuals in positions of authority at Late Night, including the individuals primarily responsible for hiring and firing plaintiff, were men.

440 (1st Dept 2011); *Narvaez v NYRAC*, 290 AD2d 400 (1st Dept 2002); *Hernandez v Research Found. of City Univ. of N.Y.*, 19 Misc 3d 1110(A), 2007 NY Slip Op 52545(U) (Sup Ct, NY County 2007). As such, in the absence of any nonhearsay evidence, plaintiff's hearsay testimony is insufficient to create an inference of gender discrimination.

Plaintiff's gender bias claim is further undermined by the fact that plaintiff was hired and transferred by the same person within a four-month period. Shoemaker hired plaintiff in late February 2009, in consultation with Diomedi and Hunn and with the approval of Fallon, and Shoemaker made the decision in July 2009 to move plaintiff to the back stage position.

"A plaintiff's being hired and fired [or subjected to an adverse employment action] by the same manager is a highly relevant factor suggesting that invidious discrimination was unlikely." *Chin v ABN-Amro N. Am., Inc.*, 463 F Supp 2d 294, 304 (ED NY 2006) (citing cases); *see Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 72 (1st Dept 2001) (plaintiff failed to overcome "strong inference" against discriminatory animus where same person hired and fired her). When the person who hires an employee is the same person who makes the decision to take an adverse employment action, "it is difficult to impute to her [or

him] an invidious motivation that would be inconsistent with the decision to hire." *Grady v. Affiliated Cent., Inc.*, 130 F3d 553, 560 (2d Cir 1997), *cert denied*, 525 US 936 (1998)); *see Inguanzo v Housing & Servs., Inc.*, 621 Fed Appx 91 (2d Cir 2015); *Chuang v T.W. Wang Inc.*, 647 F Supp 2d 221, 233 (ED NY 2009). "This is especially so when the . . . [adverse employment action] has occurred only a short time after the hiring." *Grady*, 130 F3d at 560 (citation omitted); *see Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005) ("'same actor inference' is more compelling where the termination occurs within a relatively short time after the hiring"); *Campbell v Alliance Natl. Inc.*, 107 F Supp 2d 234, 248 (SD NY, 2000) (same actor inference significant when interval is under two years).

The rationale underlying the same actor inference, particularly when the time between hiring and adverse action is short, is simply that "'it is suspect to claim that the same manager who hired a person in the protected class would suddenly develop an aversion to members of that class.'" *Watt v New York Botanical Garden*, 2000 WL 193626, *7, 2000 US Dist LEXIS 1611, *23 (SD NY 2000) (citation omitted); *see Altman v New Rochelle Pub. Sch. Dist.*, 2014 WL 2809134, *13, 2014 US Dist LEXIS 84714,

*37 (SD NY 2014). That rationale and the same actor inference are especially compelling here, considering that just months before the decision was made to transfer him, plaintiff was hired for the front stage manager position over a woman candidate. *See Singh v State of New York Ofc. of Real Prop. Servs.*, 40 AD3d 1354, 1357 (3d Dept 2007); *see also Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 505 (1st Dept 2010) ("prior equal treatment of an employee undermines an inference of subsequent discrimination"); *Lifranc v New York City Dept. of Educ.*, 2010 WL 1330136, *15, 2010 US Dist LEXIS 34009, *47 (ED NY 2010) (same), *affd* 415 Fed Appx 318 (2d Cir 2011).

Moreover, defendants have articulated legitimate, nondiscriminatory reasons for the decision to move plaintiff to the back stage manager position. Fallon testified that from the start of plaintiff's employment as front stage manager, he was not good at the job, as he was disorganized, did not pay attention or look at Fallon, and was not sharp. Fallon Dep. at 13-14, 15. Shoemaker similarly testified that plaintiff was tentative, did not have command of the stage, and did not have ready answers to their questions (Shoemaker Dep. at 13-14); and he could see that Fallon was frustrated with things not moving smoothly. *Id.* at 16-17. Shoemaker made the decision to put

Tolmasoff in the front stage manager position after she did an "exceptional" job when plaintiff was not there. *Id.* at 49. Shoemaker also recalled that there were discussions about firing plaintiff before he was moved, but he thought that plaintiff might be "just in the wrong spot" in the front of the stage, and that the back stage position would be better for him. *Id.* at 49-51. Diomedi testified that within a month of the show going on the air, Tolmasoff was taking on more responsibilities (Diomedi Dep. at 84-85), and that Shoemaker subsequently approached him about "a trial experiment" with Tolmasoff as front stage manager and plaintiff as back stage manager. *Id.* at 22, 50-51. According to Diomedi, after the change was made, the show did run better. *Id.* at 131.

Plaintiff disputes defendants' evaluation of his performance, and contends that he received no criticism from anyone during his first four months as front stage manager; that Tolmasoff was not qualified to do the front stage manager job; and that problems with the show were caused by Tolmasoff's lack of experience and Shoemaker and Fallon's lack of understanding of the "real world" of television. He provides no evidence, however, to refute defendants' testimony that he was not meeting their expectations for the position, and that they believed that

the show ran better with Tolmasoff as front stage manager.

"The mere fact that [plaintiff] may disagree with [his] employer's actions or think that [his] behavior was justified does not raise an inference of pretext. . . . Nor can plaintiff establish pretext by rationalizing [his] errors or by blaming others." *Melman*, 98 AD3d at 121; *see Forrest*, 3 NY3d at 312; *Saenger v Montefiore Med. Ctr.*, 706 F Supp 2d 494, 509 (SD NY 2010). "'An employee's opinion about his own qualifications does not suffice to give rise to an issue of fact about whether he was discriminated against, and that is particularly true where the employer's decision . . . did not depend on whether he was qualified, but whether he was the best candidate for the job.'" *Brierly*, 359 F Supp 2d at 296 (citation omitted). Assuming that plaintiff had the basic qualifications for the position (*see De la Cruz*, 82 F3d at 20; *Karim v Department of Educ.*, 2011 WL 809568, 2010 US Dist LEXIS 141756, *17 [ED NY 2011])[5], the evidence as a whole, viewed in a light most favorable to plaintiff, is insufficient to raise a triable issue

[5]"In order to establish the satisfactory job performance element of his prima facie case, . . . Plaintiff 'need not demonstrate that his performance was flawless or superior.' Instead, Plaintiff must simply 'demonstrate that he possesses the basic skills necessary' for performance of the job in question. Having already hired the employee in question, an 'employer itself has already expressed a belief that [he] is minimally qualified.'" *Karim*, 2010 US Dist LEXIS 141756, at *17, quoting *De la Cruz*, 82 F3d at 20 (other citations omitted).

of fact as to whether he was more qualified than Tolmasoff and whether defendants' reason for changing plaintiff's position was merely a pretext for discrimination or that plaintiff's gender was a motivating factor, even in part, for the decision to transfer him. *See Gonzalez v EVG, Inc.* 123 AD3d 486, 487 (1st Dept 2014); *Furfero*, 94 AD3d at 697; *Bennett*, 92 AD3d at 45.

Further, "'a challenge . . . to the *correctness* of an employer's decision does not, without more, give rise to the inference that the [adverse action] was due to . . . discrimination.'" *Melman*, 98 AD3d at 121 (internal citation omitted; emphasis in original); *see Kelderhouse v St. Cabrini Home*, 259 AD2d 938, 939 (3d Dept 1999); *Ioele v Alden Press, Inc.*, 145 AD2d 29, 36 (1st Dept 1989). That is, "'[i]t is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that [discrimination] was a motivating factor.'" *Miranda v ESA Hudson Val., Inc.*, 124 AD3d 1158, 1160-1161 (3d Dept 2015) (citation omitted). Plaintiff also "does not raise a jury issue merely by showing that the employer's decision was . . . unsupported by the facts." *Ioele*, 145 AD2d at 36; *see Kaiser v*

Raoul's Rest. Corp., 112 AD3d 426, 427 (1st Dept 2013) (plaintiff's attempt to conflate falsity of accusation with the legitimacy of defendant's belief in the accusation is unavailing); *Octobre v Radio Shack Corp.*, 2010 WL 850189, 2010 US Dist LEXIS 22997, *29-30 (SD NY 2010) ("an employer may rely on . . . erroneous information in making employment decisions, so long as it does so in good faith").

Thus, "[i]n determining whether the reason for an adverse action was pretextual, '[i]t is not for the Court to decide whether the[] complaints [against plaintiff] were truthful or fair, as long as they were made in good faith.'" *Melman*, 98 AD3d at 121 (citation omitted); *see Johnson v New York City Dept. of Educ.*, 39 F Supp 3d 314, 324 n 10 (ED NY 2014) (whether evaluation was accurate is not the question; question is whether employer motivated by reasons for evaluation); *Saenger*, 706 F Supp 2d at 508 (poor attitude and unprofessional conduct were legitimate, nondiscriminatory reasons); *see also McPherson v New York City Dept. of Educ.*, 457 F3d 211, 216 (2d Cir 2006) (in discrimination case, court is not interested in the truth of the allegations against plaintiff; interested in what motivated the employer). As courts have repeatedly found, in such circumstances, the court "'should not sit as a super-personnel

department that reexamines an entity's business decisions.'" *Melman*, 98 AD3d at 121 (citation omitted); *see also Citibank v New York State Div. of Human Rights*, 227 AD2d 322, 325 (1st Dept 1996) (court's function is not to substitute its business judgment for that of the employer); *Fleming v MaxMara USA, Inc.*, 371 Fed Appx 115, 117-118 (2d Cir 2010) (same); *Dorcely v Wyandanch Union Free School Dist.*, 665 F Supp 2d 178, 193 (ED NY 2009) ("not a court's role to second-guess an employer's personnel decisions, even if foolish, so long as they are nondiscriminatory").

Retaliation

To prevail on a retaliation claim under the NYSHRL, the NYCHRL, and Title VII, a plaintiff must establish that (1) she or he engaged in a protected activity; (2) the employer was aware of the activity; (3) plaintiff was subjected to an adverse or "disadvantageous" employment action; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest*, 3 NY3d at 312-313; *Serdans v New York Presbyterian Hosp.*, 112 AD3d 449, 450-451 (1st Dept 2013); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012); *Feingold v New York*, 366 F3d 138, 156 (2d Cir 2004).

A causal connection can be established either directly, through evidence of retaliatory animus, such as verbal or written remarks, or indirectly, by showing that the adverse action closely followed in time the protected activity. *See Calhoun v County of Herkimer*, 114 AD3d 1304, 1307 (4th Dept 2014); *Hicks v Baines*, 593 F3d 159, 170 (2d Cir 2010).

"Protected activity" refers to action taken to oppose or complain about unlawful discrimination. *See Forrest*, 3 NY3d at 313; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010); *Sharpe v MCI Communications Servs., Inc.*, 684 F Supp 2d 394, 406 (SD NY 2010). "[C]omplaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." *Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008). "'The onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally.'" *Sharpe*, 684 F Supp 2d at 406, quoting *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009). Further, "the employee cannot merely show that she subjectively believed her employer was engaged in unlawful employment practices, but also must demonstrate that her belief

was '*objectively* reasonable in light of the facts and record presented.'" *Thomas v Westchester County Health Care Corp.*, 232 F Supp 2d 273, 279 (SD NY 2002) (citations omitted)(emphasis in original); *see Brown v Northrup Grumman Corp.*, 2014 WL 4175795, 2014 US Dist LEXIS 116188, *31 (ED NY 2014); *Sullivan-Weaver v New York Power Auth.*, 114 F Supp 2d 240, 243 (SD NY 2000).

Plaintiff claims that he complained to Diomedi that his transfer to the backstage manager position was "blatant" gender discrimination. Pl. Dep. at 123-124, 326. He claims that he also told Shoemaker and Tolmasoff that it was not fair that he was being replaced by Tolmasoff "just because she's a woman" (*id.* at 126, 139, 327-328, 883), and he asserts that he filed a discrimination complaint with his union. Diomedi acknowledged that plaintiff told him that he thought that the transfer might be happening because he is a man (Diomedi Dep. at 127), but Shoemaker denied that plaintiff told him that he thought that the transfer was based on his gender. Shoemaker Dep. at 34.

After he complained to Diomedi and Shoemaker about being transferred, plaintiff contends, Hunn became hostile to him, stopped speaking to him, and fabricated performance deficiencies in an effort to get him fired, and enlisted others in her

effort. By his own testimony, plaintiff does not claim that any defendant other than Hunn retaliated against him. Pl. Dep. at 872. Plaintiff also does not claim that he complained to Hunn about discrimination, and, although he argues that she was aware of his discrimination complaints because she knew that he had complained about being moved (Pl. Memo in Opp., at 23), Diomedi testified that he had no conversations with Hunn about changing plaintiff's position (Diomedi Dep. at 75-76), and Hunn testified that Diomedi did not tell her that plaintiff had complained about discrimination. Hunn Dep. at 45-46. There is no testimony or other evidence that Shoemaker, Tolmasoff, or anyone else told Hunn that plaintiff had complained about discrimination; she testified that she was not informed by anyone, prior to commencement of the instant action, that he made a discrimination complaint. *Id.* at 46-47.

Plaintiff's speculation that Hunn knew he was complaining about sex discrimination thus is insufficient to raise an issue of fact as to whether she was aware that plaintiff engaged in a protected activity. *See Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 742 (2d Dept 2013); *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553 (1st Dept 2010); *Singh*, 40 AD3d at 1357. There also is no evidence, and plaintiff does not argue, that the union

ever informed defendants that plaintiff had made a discrimination complaint.

Absent admissible evidence that Hunn had any knowledge that plaintiff engaged in a protected activity, he cannot show a causal connection between her alleged retaliatory conduct and his complaint, and his retaliation claim fails. To the extent that he claims that she had input into the decision to terminate his employment, even if she did, he still fails to show that she was aware of his discrimination complaint. Nor does he demonstrate, or argue, that Shoemaker, Diomedi, Delaney or Fallon, retaliated against him, at least up until his termination; or that his termination in March 2010 was causally connected to his July 2009 complaint. *See Clark County Sch. Dist. v Breeden*, 532 US 268, 273-74 (2001) ("cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . uniformly hold that the temporal proximity must be 'very close'"); *Baldwin*, 65 AD3d at 967 (no sufficient temporal proximity to establish causal connection between protected act and adverse action four months later). Plaintiff thus does not demonstrate a causal nexus between his protected activity and the alleged retaliatory

actions. *See Matter of Pace Univ. v New York City Commn. on Human Rights*, 85 NY2d 125, 129 (1995).

Plaintiff's retaliation claim also fails because he has not rebutted defendants' legitimate, nondiscriminatory reasons for his termination. *See Williams*, 38 AD3d at 238; *see generally Forrest*, 3 NY3d at 312-313. Defendants submit admissible evidence, including deposition transcripts, affidavits, and documents, that plaintiff's employment was terminated because he was not performing his job as stage manager satisfactorily; had been advised of that on several occasions during meetings with Shoemaker, Hunn, Diomedi and Delaney; and was informed in February 2010 that a failure to improve could lead to termination of his employment.

Plaintiff argues that defendants' dissatisfaction with his performance was based on false accusations of poor performance. He testified, for instance, that claims that other departments complained about him were not true, as he asked people in other departments and heard no complaints. Based on his own inquiries, he did not think the criticisms were valid and he concluded that he did not need to improve or change anything he was doing as back stage manager. He also claims that errors attributed to him, such as the incident when a Late Night guest

was late entering the stage, were not his fault, but that of Tolmasoff.

It is undisputed that plaintiff was unhappy about being transferred from front stage manager to back stage manager; he told Shoemaker he was resigning, and testified that he decided to stay only because he needed the money. Shoemaker testified that plaintiff appeared unhappy and withdrawn, and did not have a positive attitude about the show; and that when plaintiff was told that he needed to do a better job, to make changes and be a more present participant, he could not figure out how to do that. Shoemaker Dep. at 62-63, 74-76. Tolmasoff also attests that shortly after the transfer, plaintiff told her that he would do only what he had done while working as back stage manager on the Conan show, despite the expectations of Late Night's producers and director that the stage managers work as a team. Tolmasoff Aff., Ex. GG to Sandak Aff., ¶ 2.

On this record, plaintiff's challenge to defendants' perceptions, and assertions that defendants' criticisms of his work were false, do not demonstrate that defendants did not find his performance unsatisfactory, and are insufficient to raise a triable issue of fact as to whether defendants' proffered reasons for his termination were pretextual, or whether

defendants were motivated, at least in part, by a retaliatory motive. *See Brightman*, 108 AD3d at 741; *Bendeck*, 77 AD3d at 554; *Best v Peninsula N.Y. Hotel Mgt.*, 309 AD2d 524, 524 (1st Dept 2003).

Aiding and Abetting Discrimination

In view of the above findings, the claims for aiding and abetting cannot survive. *See Forrest*, 3 NY3d at 314. "Where no violation of the Human Rights Law by another party has been established, . . . an individual cannot be held liable for aiding or abetting such violation." *Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 73 (3rd Dept 2005). Further, "an individual cannot aid and abet his or her own violation of the Human Rights Law." *Hardwick v Auriemma*, 116 AD3d 465, 468 (1st Dept 2014); *see Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 (2nd Dept 2010).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 4, 2016

ENTER:

HON. ELLEN M. COIN, A.J.S.C.