SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 47

KEVIN WALSH,

Plaintiff,

- against -

A.R. WALKER & COMPANY, INC. and GEORGE BEANE,

Defendants.

Index No.: 155009/16

DECISION/ORDER

GOETZ, PAUL A., J.:

Plaintiff Kevin Walsh (Walsh) commenced this action against his former employer to recover damages for alleged employment discrimination and retaliation, in violation of the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107)(NYCHRL). Plaintiff's Verified Second Supplemental Complaint (Complaint) alleges five causes of action: hostile work environment based on gender (first); hostile work environment based on actual or perceived sexual orientation (second); hostile work environment based on perceived disability (third); retaliation (fourth); and, as against Beane, aiding and abetting discrimination and retaliation (fifth). Defendants now move for summary judgment dismissing the complaint.

BACKGROUND

Defendant George Beane (Beane) is the president and owner of A.R. Walker & Company, Inc. (Walker), a real estate management company in Manhattan. Plaintiff is a gay man who was employed by Walker for about 15 years, from 2002 until his employment was terminated in August 2017, and he held the position of office/building manager for most of his employment.

Deposition of Walsh (Pl. Dep.), Ex. C to Naylor Affirmation in Support of Defendants' Motion (Naylor Aff.), at 254; Deposition of Beane (Beane Dep.), Ex. B to Naylor Aff., at 21, 27-28. Plaintiff's sexual orientation was known to Beane. *Id.* at 36, 51.

Plaintiff's duties included, among other things, collecting rent, paying bills, responding to tenant inquiries and complaints, and supervising other employees' work. Pl. Dep. at 254-255; Beane Dep. at 21, 28-30. Walker employed about ten people. *Id.* at 18. Plaintiff was the only employee who worked in the management office with Beane; the others "floated" and worked in the buildings owned or managed by Walker. *Id.* at 18, 28. When working together in the management office, plaintiff and Beane sat at desks about nine feet away from each other. Pl. Dep. at 242 277.

Plaintiff argues that Beane sexually harassed him and created a hostile work environment in five different ways. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion, at 5-11. Beane disputes the events as described by plaintiff.

First, plaintiff contends that, from 2002 until 2009 or 2010, Beane engaged in sexual conduct with a male friend in the management office when plaintiff was there. According to plaintiff, Hugo Diez (Diez), Beane's friend and a former tenant in one of his buildings, visited the office on at least a monthly basis, and on numerous occasions, he would sit on Beane's lap and the two would simulate sexual acts and make sexual gestures and sounds. Pl. Dep. at 238, 240-241. Plaintiff claims that Beane also invited plaintiff to join in the activity. *Id.* at 244.

Beane denies that any inappropriate sexual conduct occurred, and testified that Diez, who rented an apartment in a building owned by Walker from about 2002 to 2009, was a friend who came to the management office "from time to time" and monthly to deliver his rent, and did not

come to see him specifically. Beane Dep. at 39, 40, 62-63, 67-68. He knew that Diez was gay (*id.* at 39), but denies that Diez ever sat on his lap, denies that he ever made any sexual sounds or gestures or engaged in simulated sexual activity, and denies that he ever kissed Diez on the lips, although Diez generally greeted people with a hug and kiss on the cheek. *Id.* at 68-69. Beane also denies that he ever asked plaintiff to sit on his knee. *Id.* at 70. Diez, in an affirmation, states that he was a friend of Beane and his wife, and would greet Beane with a kiss on the cheek, as is the custom in his native Argentina, and as was his custom with his friends. Diez Aff., ¶¶ 4, 6. Diez left New York in or around 2009 and his visits to the office then stopped. Pl. Dep. at 241.

Second, plaintiff alleges that Beane subjected him to unwelcome discussions about Beane's visits to nude beaches and gay beaches. Plaintiff claims that Beane told him that he went to nude beaches on Fire Island and in New Jersey, that he enjoyed the company of naked men, that he had gone to a nude beach with Diez, and that he did not bring his wife because "women complicate things." *Id.* at 229-231. Plaintiff claims that Beane made comments to him about visiting nude beaches from 2002 until 2014 or 2015. Walsh Aff., ¶ 3.

Beane acknowledges that he went to nude beaches on six occasions in the last ten years or so, four times to Fire Island with his wife, and twice to Sandy Hook, New Jersey, including one time with Diez. Beane Dep. at 37-39. He testified that he went to a nude beach once with Diez because he liked to swim without clothes and Diez told him about a particular beach. *Id.* at 39-40. Beane stated that, as a matter of course, he told plaintiff where he was when he was not in the office, and told him on the six occasions that he was going to the beach (*id.* at 41), although he does not recall expressly stating to plaintiff that he was going to a nude beach. *Id.* at

43. He denied that he otherwise had conversations with plaintiff about what he did at the beach, other than to say that he liked to swim without his clothes on, which was not a secret. *Id.* at 44-45. He testified that he never told plaintiff that he was excited to be able to be naked on a beach, that it was a wonderful feeling, or that he was excited to be naked on a beach with other men. *Id.* at 45-46. He also denied that he discussed why he did not bring his wife or say women complicate things, or describe the bodies of men on the beach. *Id.* at 46. He also denied that he ever expressed interest in a male housekeeper he employed or ever kissed a man when he went to Fire Island or Sandy Hook. *Id.* at 49-50.

Third, plaintiff alleges that Beane inappropriately discussed with plaintiff his interest in nude yoga for men, and described the naked bodies of men who participated; and, on four occasions, offered plaintiff videos of naked men's yoga, and when plaintiff refused to take them, Beane called him a "prude." Complaint, ¶¶ 16-18.

Beane testified that he became interested in naked yoga some years ago after Diez told him about it, because he was already practicing yoga and was comfortable "being without clothes." Beane Dep. at 70-71, 75. He said that he was reluctant to pursue it at first, because he was not interested in a "gay thing" or a "sex class," but later on went to a class after he was told it was a "nonsexual thing" (*id.* at 71-72, 77-78, 82), and has been taking classes occasionally for five or six years. *Id.* at 96, 97. About a year before he went to a class, he was given some promotional tapes for a particular yoga group, and he looked at a few of them, which showed nude men doing yoga. *Id.* at 82-83, 84-86. He viewed them in his office because they were CDs and he did not have a computer at home. *Id.* at 87. He told plaintiff he was going to do nude yoga, and he offered plaintiff the tapes because he knew plaintiff was interested in yoga (*id.*

at 99, 101), but plaintiff did not want them. *Id.* at 99-100. He did not, he testified, call plaintiff a "prude," or make any other comments, when plaintiff did not want the tapes. *Id.* at 102-103.

Fourth, plaintiff contends that Beane subjected plaintiff to unwelcome and invasive questions about his sexuality and his interest in dressing in drag, and was overly interested in gay culture and plaintiff's participation in gay-related events. According to plaintiff, shortly after he started working at Walker, Beane asked him if he had a boyfriend. Pl. Dep. at 58. Plaintiff said he had a relationship then, possibly talked about it to Beane and another employee (*id.* at 58-59), but has had no other relationship since then to discuss. *Id.* at 61. Plaintiff testified that Beane questioned him on his relationship status and told him he was single because he was overweight and a prude. *Id.* at 59-60.

Plaintiff testified that he dressed in drag on a number of occasions between 2001 and 2004, but not again until he attended gay events on Fire Island in 2014 and 2015. *Id.* at 89, 90. On July 4, 2014, plaintiff attended an event on Fire Island (July 4 event), "a celebration of drag equality." for which he dressed in drag. *Id.* at 85, 89-90. Plaintiff brought the outfit he was wearing to the office, to bring it to be altered, and showed it to Beane. *Id.* at 91-92. Plaintiff stated that when he returned to work after the event, Beane was very interested in how the event went, and asked to see photographs. *Id.* at 87-88. According to plaintiff, Beane took his phone to scroll through the pictures, asked plaintiff if he could send some to his wife, and then sent several to himself. *Id.* at 85-86. Plaintiff also testified that Beane encouraged him to dress in drag, and on two occasions suggested that he come to work in drag. *Id.* at 89, 104-105. On two occasions between 2001 and 2004, plaintiff testified, he borrowed hats and other accessories from Beane's wife to wear when he dressed in drag. *Id.* at 93-95.

Beane, in contrast, testified that plaintiff initiated conversations about dressing in drag, and showed him and others in the office pictures of himself in drag. Beane Dep. at 52-54. Bean asked plaintiff questions about the July 4 event because plaintiff told him about it and seemed excited about it. *Id.* at 52-53. He acknowledged that he asked plaintiff to send him pictures showing him at the July 4 event because they were "amazing photographs" and he wanted to show his wife, who knew plaintiff. *Id.* at 54-55. It was possible, he said, that he took plaintiff's phone and sent pictures to himself. *Id.* at 55-56.

Plaintiff attended the same Fire Island event in 2015, and he sent Beane a photo from the event, because, he testified, Beane expressed interest in it and asked him to send photos. Pl. Dep. at 101, 102, 103, 107. Plaintiff shared the photo from the event with another coworker, and may have shown earlier photos of himself to other coworkers. *Id.* at 113-114, 116.

Plaintiff also testified that Beane showed inappropriate interest in and prodded him about another gay event on Fire Island, a weekly "underwear party," which plaintiff attended, or at least was at the location where it was held. *Id.* at 71-72, 73. Plaintiff said he talked about it with Beane in 2014 after Beane left a New York Times article about it on plaintiff's desk; plaintiff contends that Beane left him several newspaper articles related to gay life. *Id.* at 72-73, 74. Beane testified that he gave plaintiff an article about the underwear because he thought plaintiff would be interested in an event on Fire Island, where plaintiff rented a house. Beane Dep. at 56-59. He said it was possible he gave plaintiff other articles about gay culture, but did not recall doing so. *Id.* at 61-62.

Plaintiff stated that Beane asked him about the underwear party, asked him to describe the men attending, their underwear and their bodies; and he asked about what attire he should wear if

he attended, and plaintiff referred him to a website where he could find out what was appropriate, a website that plaintiff used. Pl. Dep. at 79-80. Plaintiff claims that Beane prodded him, looking for more information about the underwear party and asked about a back room where men "could engage in extracurricular activities." *Id.* at 73-74. Plaintiff asserted that Beane frequently made other inappropriate comments and initiated inappropriate conversations, but was unable to specify anything else. *Id.* at 79. Beane testified that he did not ask plaintiff for details about the underwear party, did not express an interest in going, did not ask about a back room, and did not comment on the attire for the party. Beane Dep. at 60-61.

Plaintiff claims that Beane enjoyed hearing about the events plaintiff attended, was prodding and overly interested, and plaintiff felt the questioning was intrusive. Pl. Dep. at 111. Plaintiff testified that he believed that Beane was gay, but did not acknowledge his sexual orientation. *Id.* at 233. He believed Beane was gay because of his interest in gay culture, because of his questions about plaintiff's sexual orientation and relationships and activities as a an openly gay person, and because he attended naked yoga for men. *Id.* at 234. Beane testified he had no discussions with plaintiff about gay culture other than what plaintiff initiated. Beane Dep. at 51-52. Beane has been married to his wife for more than 37 years and they have two sons. *Id.* at 11-12.

Fifth, plaintiff alleges that, in or around June 2015, in the apartment of a deceased tenant, Beane found items of a sexual nature, including two penis enlargement videos and a bullwhip, which he brought to the management office and placed on plaintiff's desk. Complaint, ¶¶ 27-28; Pl. Dep. at 273. According to plaintiff, Beane told him that he left them on his desk because he thought he might enjoy them, and they got into a "semi heated discussion" about why he would

assume that, and plaintiff asked him to remove the items. *Id.* at 278-279. Beane moved the items to another nearby desk, and plaintiff, annoyed that they were still close to him, moved them to a chair next to Beane's desk, covered them with Beane's coat, and told Beane that it was inappropriate to have these items out in the open. *Id.* at 280. Plaintiff alleges that Beane then told him he was a prude and that was why he was single. *Id.* Plaintiff asked Beane to remove the items from the office, and eventually he did, when he was leaving the office, later emailing plaintiff that the items were put in a garbage can on the street. *Id.* at 280-281.

Beane's version of this incident is different from plaintiff's version. Bean testified that, when the apartment of a deceased tenant was being cleaned out, he found various items of a sexual nature, including sex toys, which he asked his employees to dispose of, and photos of men engaged in sex, which he looked at and then shredded. Beane Dep. at 136-137. He also found two penis enlargement videos and a bullwhip, which he took to the management office, and placed on a desk other than plaintiff's. *Id.* at 138-139, 141-143. He asked plaintiff if he would throw the tapes out, and plaintiff refused and was adamant that they should not be thrown out in front of the building, so Beane took them when he left the office, and although he did not think it was necessary, placed them in a trash can on the street some distance from the building. *Id.* at 143-147. He testified that he did not comment to plaintiff when he refused to throw them out, did not call plaintiff a "kill-joy" or tell him it was the reason he was single. *Id.* at 143-144. At the time, he stated, the tapes did not offend him, and he did not realize they offended plaintiff. *Id.* at 149-150. He sent an email to plaintiff after he threw the items out, stating "you win," and making a joke, he said, about what he did with them. *Id.* at 150-152.

In addition to the harassment allegations, plaintiff also alleges that Beane retaliated

against him for complaining about his "sexual, personal, invasive comments." Complaint, ¶ 22. According to plaintiff, one day in late November 2014, when they were both in the management office, Beane made an inappropriate comment, which plaintiff could not recall (Pl. Dep. at 190), and he told Beane that he could no longer tolerate his "ongoing bad behavior" and made a tearful plea that he stop harassing plaintiff. *Id.* at 189, 191, 196. He might, plaintiff said, have "made reference to the ongoing sexualizing behavior and the inappropriate comments." *Id.* at 192. Plaintiff further testified that, in response, Beane said he had no idea what he was talking about and told plaintiff he should speak to a psychiatrist. *Id.* at 194. Plaintiff did not explain further to Beane what he was talking about, and could not say what comment of Beane's he was objecting to, but testified that Beane knew "perfectly well what [he] was referring to." *Id.* at 197. Plaintiff claims that, days later, Beane retaliated against him by not giving him a three per cent salary increase for 2015, which was given to others, and by reducing his annual bonus. Complaint, ¶ 24; Pl. Dep. at 261-262, 263-265. He received a $7000 bonus in 2013, a $5000 bonus in 2014, and no bonus in 2015. *Id.* at 276.

Beane testified that he had a conversation with plaintiff about his performance in or around November 2014, after noticing that plaintiff seemed depressed and was crying in the office, which he attributed to plaintiff's father having died that year. Beane Dep. at 107, 111-112. Plaintiff was crying as they talked and Beane suggested to plaintiff that he consider seeking professional help, but he did not, he said, use the word psychiatrist or mental. *Id.* at 108, 111-112. Plaintiff did not, Beane testified, complain to him about any sexual comments or actions. *Id.* at 107.

According to Beane, the subsequent reduced bonuses and lack of salary increases were

based on plaintiff's declining performance and "attitude." Beane also testified that, although his first draft of 2014 bonuses gave plaintiff $7000, a revised draft gave him $5000. *Id.* at 117-119, 120-121. Beane stated that he reduced the bonus because plaintiff was not performing well, was "already paid a very high salary," and his "total compensation was more than [he] thought he was worth at the time," but he did not want to eliminate the bonus because plaintiff was not in good shape and was angry and depressed. *Id.* at 121. Beane testified that he was concerned about plaintiff's emotional state, but told him he was reducing the bonus because his attitude was bad and he was not engaged. *Id.* at 122-124. He did not give plaintiff any bonus in 2015 or 2016, for the same reasons. *Id.* at 126, 127, 163-164. He continued to pay plaintiff the same salary and continued to pay plaintiff's college tuition, which he had paid since 2007, until December 2015. *Id.* at 124, 167, 169. Beane testified that he discontinued paying plaintiff's tuition because plaintiff submitted a bill for 2016 in December 2015, when he had already paid more for 2015 than ever before; plaintiff was looking for another job; and there was not enough money in his account to pay. *Id.* at 167-168.

Plaintiff commenced the instant action in June 2016, when he was still employed at Walker. Plaintiff testified at a deposition in June 2017, during which he described a conversation he had with Eric, a tenant in apartment 5E in one of Walker's buildings. Pl. Dep. at 148-151, 154-155, 162. Plaintiff told Eric that he overheard a conversation in which Beane stated to another Walker employee that the tenants in 5E would be notified that they would have to move out because Beane intended to combine apartments 5E and 5D. *Id.* at 162. Following this deposition, by letter dated August 19, 2017, Beane, citing plaintiff's deposition testimony, terminated plaintiff's employment because plaintiff had disclosed to a tenant "highly confidential

and sensitive information related to his plans for apartment 5E." *See* Letter, Ex. A to Beane Affidavit. Beane attests that plaintiff's disclosure was "gross misconduct" warranting immediate termination. Beane Aff., ¶ 7. Plaintiff alleges that his termination was in retaliation for commencing this action.

DISCUSSION

It is well settled that on a motion for summary judgment, the moving party has the initial burden of showing 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); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980). If such showing is made, to defeat summary judgment, the opposing party must show, also by producing 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; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

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 if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978). It also "is not the court's function on a motion for summary judgment to assess credibility." *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *see Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman,* 49 NY2d at 562; *see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 (2016).

In employment discrimination cases, "'trial courts must be especially chary in handing out summary judgment . . . because in such cases the employer's intent is ordinarily at issue.'" *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011), quoting *Chertkova v Connecticut General Life Ins. Co.*, 92 F3d 81, 87 (1996), *cert denied* 531 US 1192 (2001). "'[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Sibilla v Follett Corp.*, 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), quoting *Gallo v Prudential Residential Servs., Ltd. Partnership*, 22 F3d 1219, 1224 (2d Cir 1994).

NEW YORK CITY HUMAN RIGHTS LAW

Under the NYCHRL, it is unlawful for an employer to discriminate against an employee in the terms, conditions or privileges of employment, or to discharge an employee because of, as relevant here, the employee's gender, sexual orientation, or actual or perceived disability. Administrative Code § 8-107 (1) (a). The NYCHRL also prohibits an employer from retaliating against an employee who has complained about unlawful discriminatory practices. Administrative Code § 8-107 (7); *see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 739 (2d Dept 2013).

The NYCHRL, intended to be more protective than its state and federal counterparts, requires that its provisions be liberally construed to accomplish "the uniquely broad and remedial purposes" of the law, regardless of whether federal and state civil and human rights laws have been so construed. Administrative Code §§ 8-101, 8-130; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 (2013); *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009). Courts thus must

construe all provisions of the NYCHRL "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 NY3d at 477-478; *see generally Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 108-109 (2d Cir 2013).

Claims brought under the NYCHRL, including retaliation claims, must be analyzed under both the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), and "the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012). "A plaintiff may prove her case if 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.'" *Watson v Emblem Health Servs.*, 158 AD3d 179, 182-183 (1st Dept 2018), quoting *Melman*, 98 AD3d at 127. On a motion for summary judgment, defendants must show that, "based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes" applicable to NYCHRL claims. *Bennett*, 92 AD3d at 45; *see Watson*, 158 AD3d at 183 (1st Dept 2018); *Hudson v Merrill Lynch & Co.*, 138 AD3d 511, 514 (1st Dept 2016).

Hostile Work Environment

Sexual harassment which results in a hostile or abusive work environment is one form of gender discrimination prohibited by the NYCHRL. *See Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 (1st Dept 2018); *Williams*, 61 AD3d at 75. Hostile work environment discrimination claims also may arise from harassment based on sexual orientation, disability, or other protected categories. *See e.g. Keceli v Yonkers Racing Corp.*, 155 AD3d 1014 (2d Dept

2017) (hostile work environment claim on basis of sexual orientation); *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560 (1st Dept 2017) (hostile work environment claim based on perceived disability); *Marquart v Department of Educ. of the City of New York*, 2017 WL 2781761 , 2017 NY Misc LEXIS 2509, 2017 NY Slip Op 31363(U)(Sup Ct, NY County 2017) (claim based on disability or perceived disability); *Roberts v UPS, Inc.*, 115 F Supp 3d 344, 368 (ED NY 2015) (sexual orientation).

To establish liability for a hostile work environment under the NYCHRL, a plaintiff need not prove that the harassment was "severe or pervasive," the standard applied in cases brought under Title VII and the New York State Human Rights Law, but, instead, must show conduct that was "more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" *Williams*, 61 AD3d at 80; *see Gonzalez v EVG, Inc.*, 123 AD3d 486, 487-488 (1st Dept 2014); *Hernandez v Kaisman*, 103 AD3d 106, 114-115 (1st Dept 2012); *Nelson v HSBC Bank USA*, 87 AD3d 995, 999 (2d Dept 2011). The primary question in harassment cases brought under the NYCHRL, as it is in other terms and conditions cases, is whether plaintiff "has been treated less well than other employees" because of her membership in a protected class. *Williams*, 61 AD3d at 78. That is, a plaintiff must "establish that she suffered a hostile work environment *because of her gender* [or other protected status]." *Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 451 (ED NY 2013) (emphasis in original) (citations omitted); *see Hernandez*, 103 AD3d at 111-112; *Williams*, 61 AD3d at 81; *Mihalik*, 715 F3d at 110; *Cortes v City of New York*, 700 F Supp 2d 474, 485 (SD NY 2010).

While conduct consisting of "'petty slights and trivial inconveniences' . . . do[es] "not suffice to support a hostile work environment claim" (*Buchwald*, 149 AD3d at 560, citing

Williams, 61 AD3d at 80), in "borderline situations" and cases where there are conflicting versions of the events that took place raising issues of fact as to whether discriminatory conduct occurred or whether the alleged harasser's conduct was unwelcome, summary judgment generally should be denied. *Williams*, 61 AD3d at 78, 80; *see Suri*, 164 AD3d at 116 (summary judgment improper "'if there is any evidence . . . from any source from which a reasonable inference could be drawn in favor of the nonmoving party'" [citation omitted]); *Bennett*, 92 AD3d at 44 n 16 (noting "need to permit borderline situations to be heard by a jury"); *see also Overbeck v Alpha Animal Health, P.C.*, 124 AD3d 852, 854 (2d Dept 2015) (conflicting testimony as to whether conduct was consensual or unwelcome raised credibility issues for jury to decide); *Redd v New York State Div. of Parole*, 678 F3d 166, 173-174 (2d Cir 2012) ("[t]he evaluation of ambiguous acts is a task for the jury, not for the judge on summary judgment" [internal quotation marks and citations omitted]).

Plaintiff does not allege or argue that Beane made derogatory or demeaning comments to him about men or gay men. Rather, he contends that Beane created an offensive sexualized work environment by, in sum, engaging in simulated sexual activities with a male friend in front of plaintiff, presenting him with sexual objects and pornographic videos, sharing his interest in naked yoga for men and his experiences at nude and gay beaches, asking invasive questions about plaintiff's sexual orientation and relationships, being overly interested in gay culture and making unwelcome inquiries about plaintiff's participation as an openly gay man in gay events. Beane testified that no sexual activities occurred, no sex tapes or pornographic materials were given to plaintiff, and any discussions about plaintiff's activities as a gay man were initiated by plaintiff.

The sharply divergent testimony of plaintiff and Beane as to what occurred presents classic credibility issues not properly assessed or decided on this motion. *See Ferrante*, 90 NY2d at 631; *Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). Plaintiff's sworn testimony that Beane's offensive conduct included simulated sexual activities and gestures, repeated sex-based remarks, and unwelcome inquiries into plaintiff's sexual orientation and gay activities, is sufficient to raise a question of fact as to whether plaintiff was subjected to a hostile work environment based on sexual orientation. *See Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 595 (1st Dept 2012), *affd* 22 NY3d 914 (2013) (repeated derogatory remarks about gays and lesbians sufficient to raise question of fact); *Suri*, 164 AD3d at 116-117 (jury could find that two compliments followed by touching thigh were more than petty slights and inconveniences); *Kassapian v City of New York*, 155 AD3d 851 (2d Dept 2017)(co-worker repeatedly demonstrating a sex toy to plaintiff states a cause of action for sexual harassment); *Hwang v DQ Mktg. & Pub. Relations Group*, 2009 WL 3696604, 2009 NY Misc LEXIS 5581, *15, 2009 NY Slip Op 32387(U) (Sup Ct, NY County 2009); *see also Sletten v LiquidHub, Inc.*, 2014 WL 3388866, *8, 2014 US Dist LEXIS 94697, *24-25 (SD NY 2014). "How credible that evidence is is irrelevant at this juncture." *Poolt v Brooks*, 38 Misc 3d 1216(A), 2013 WL 323253, *5-6, 2013 NY Misc LEXIS 265, ***14 (Sup Ct, NY County 2013). Even if defendants' evidence serves to undercut plaintiff's credibility, it does not resolve the issues.

Thus, whether the alleged incidents occurred as plaintiff claims, or as Beane claims, and whether plaintiff was a voluntary participant in the events, are factual issues for the jury. As to defendants' argument that the alleged incidents, even if they occurred, constitute no more than petty slights and trivial occurrences, considering "the totality of the circumstances" and the "overall context" in which the conduct occurred (*Hernandez*, 103 AD3d at 115), the court cannot

find, as a matter of law, that the alleged conduct "does not represent a 'borderline' situation." *Williams*, 61 AD3d at 80; *see Suri*, 164 AD3d at 116-117. As one court has noted, in discrimination cases, where it generally "is the job of the jury to decide whether a plaintiff's claim is meritorious or frivolous," courts, when determining summary judgment motions, "should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial." *Poolt*, 2013 WL 323253, at *2, 2013 NY Misc LEXIS 265, at ***3-4.

To the extent that defendants argue that any alleged discriminatory acts occurring more than three years prior to the commencement of this action are time-barred, the court finds, again without assessing credibility, that plaintiff has sufficiently alleged a continuing pattern of conduct. *See Santiago v Bernard F. Dowd, Inc.*, 2017 WL 1398810, 2017 NY Misc LEXIS 1472, 2017 NY Slip Op 30791(U) (Sup Ct, NY County 2017); *Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023(A), 2004 NY Slip Op 51008(U) (Sup Ct, NY County 2004). Therefore, plaintiff's first cause of action, alleging a hostile work environment based on sexual orientation, survives summary judgment. *See Suri*, 164 AD3d at 121; *Hernandez*, 103 AD3d at 115.

Plaintiff's second cause of action for gender-based discrimination, however, does not survive. Even viewing all the evidence, including plaintiff's testimony, in a light most favorable to him, no inference arises that Beane's comments and conduct were motivated in any part by discriminatory animus against plaintiff because he is a man. Moreover, although "[a] member of the same protected group may hold a discriminatory animus against other members of that group . . ., depending upon the context, the inference may become implausible." *Grant v New York Times Co.*, 2017 WL 4119279, 2017 US Dist LEXIS 149403, *18 (SD NY 2017).

Considering that the allegations of harassment focus primarily on plaintiff's sexual orientation, and as plaintiff has made no showing, or even alleged, that he was treated differently than other similarly situated employees, female or male, because he is a man, the inference that Beane's alleged conduct was motivated by a discriminatory animus against plaintiff based on his gender is not plausible. *Id.*

Plaintiff's third cause of action alleging that Beane discriminated against him based on a perceived disability similarly cannot survive. This claim is based on one incident that took place in or around November 2014, when, plaintiff alleges, he complained to Beane about his bad behavior and Beane told plaintiff he needed to see a psychiatrist. Beane testified that he had a conversation with plaintiff, in November 2014, about his work performance, and seeing plaintiff was upset and crying, he asked plaintiff if he had considered seeking professional help. Plaintiff subsequently did go to see a therapist in December 2014, and several times in January 2015, not because he believed he needed help from a mental health professional, but because he needed help coping with his distressing work environment. Pl. Dep. at 199-200. Beane did not, plaintiff acknowledged, diagnose him or tell him he was paranoid. *Id.* at 202.

Whichever version of this incident is credited, it reflects no more than that Beane believed plaintiff needed some counseling, in view of his admittedly tearful state, and does not demonstrate that Bean perceived plaintiff to be mentally disabled. Beane's one comment, in any event, is at most a stray remark that fails to show a bias against plaintiff based on a perceived disability or otherwise establish a disability-based hostile work environment. *see Wecker v City of New York*, 134 AD3d 474, 475-476 (1st Dept 2015).

Retaliation

To establish a claim of unlawful retaliation under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took an action that disadvantaged plaintiff; and 4) a causal connection existed between the protected activity and the employer's action. *See Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). "A causal connection can be established either directly, through evidence of retaliatory animus, such as verbal or written comments, or indirectly, by showing that the employer's action closely followed in time the protected activity or that similarly situated persons were treated differently." *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 2018 WL 5619731, 2018 NY Misc LEXIS 4959, 2018 NY Slip Op 32766(U) (Sup Ct, NY County Oct. 29, 2018) (citations omitted); *see Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 1514 (4th Dept 2018); *Russell v New York Univ.*, 739 Fed Appx 28, 33 (2d Cir 2018). A lack of temporal proximity, however, "is not necessarily fatal to a retaliation claim." *Harrington*, 157 AD3d at 586.

"'To establish its entitlement to summary judgment in a retaliation case, a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual.'" *Brightman*, 108 AD3d at 740-741, quoting *Delrio v City of New York*, 91 AD3d 900, 901 (2d Dept 2012); *see Lambert v Macy's E., Inc.*, 84 AD3d 744, 745 (1st Dept 2011). As with other NYCHRL discrimination claims, it is not necessary in NYCHRL cases based on retaliation to show that retaliation was the sole motive for the adverse employment action. *See Melman*, 98 AD3d at

127.

"An employee engages in a 'protected activity' by 'opposing or complaining about unlawful discrimination.'" *Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1013 (2d Dept 2017), quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 (2004); *see Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010); *Sharpe v MCI Communs. Servs.*, 684 F Supp 2d 394, 406 (SD NY 2010). "To qualify as protected activity, a plaintiff must '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.'" *Sletten*, 2017 US Dist LEXIS 94697, at *14, quoting *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009)(other citations omitted). Complaints about "generalized 'harassment'" (*Forrest*, 3 NY3d at 313) and "conduct other than unlawful discrimination" are not protected activities. *Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008); *see Breitstein v Michael C. Fina Co.*, 156 AD3d 536, 537 (1st Dept 2017) (one complaint about supervisor's conduct in general was not protected activity); *Brunache*, 151 AD3d at 1013-1014 (general complaints about mistreatment are not complaints about statutorily prohibited discrimination); *Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015) (no protected activity where complaints did not reference or otherwise implicate plaintiff's gender); *Gonzales*, 123 AD3d at 487 (complaints about "generalized harassment" too vague to be protected activity); *Jain v Tokio Marine Mgt., Inc.*, 2018 WL 4636842, 2018 US Dist LEXIS 166692, *24, 28 (SD NY 2018) (complaints of harassment with no mention of discrimination is not protected activity).

Plaintiff alleges that he complained to Beane in November 2014 about his "sexual, personal, invasive comments." Complaint, ¶ 22. At his deposition, plaintiff testified that he

complained on a day in late November 2014, after Beane made an inappropriate comment, although he could not remember the comment. Pl. Dep. at 190. He testified that he reminded Beane that in a conversation in 2013 or earlier in 2014, when Beane told plaintiff he was not engaged enough in his work, plaintiff explained to him that the cause of his lack of engagement might be that he was no longer in school and "at loose ends" (*id.* at 191); but during the November 2014 conversation, he told Beane that the reason he was not engaged was because of Beane's "ongoing bad behavior." *Id.*

Plaintiff did not recall providing any specifics to Beane about what behavior he was talking about, and he thought he might have "made reference to sexualizing behavior and the inappropriate comments," but gave no examples to Beane. *Id.* at 192-193. Plaintiff testified that he never objected to or complained about Beane's "bad behavior" before November 2014 (*id.* at 262), and could not recall any examples of Beane's conduct or comments in 2014 or before that were sexualizing or inappropriate. *Id.* at 193-194. While he testified that Beane "knew perfectly well what I was referring to" (*id.* at 196-197), he also testified that Beane's response to him was that he did not know what he was talking about, and plaintiff gave him no further details or explanation. *Id.* at 194,196-197.

Plaintiff's evidence fails to show that he complained to Beane about unlawful discrimination, rather than general grievances, or that Beane knew that he was complaining about sexual harassment. *See Fruchtman*, 129 AD3d at 501; *Gonzalez*, 123 AD3d at 487; *Pezhman*, 47 AD3d at 494; *Crookendale v New York City Health & Hosps. Corp.*, 2018 WL 3145921, 2018 NY Misc LEXIS 2586, *18, 2018 NY Slip Op 31309(U) (Sup Ct, NY County 2018) Plaintiff's vague recollection that he referenced "sexualizing behavior" is insufficient to raise an issue of

fact as to whether he made clear to Beane that he was complaining of unfair treatment due to his membership in a protected class. Thus, defendants' motion seeking dismissal of plaintiff's retaliation claim, to the extent that it is based on the November 2014 complaint, must be granted.

That portion of defendants' motion seeking dismissal of plaintiff's claim alleging that his employment was terminated in retaliation for commencing this lawsuit, on the other hand, must be denied. The filing of this lawsuit is undisputedly a protected activity. Plaintiff's employment was terminated shortly after he was deposed in June 2017, purportedly for disclosing confidential information to a tenant, which defendants assert was made clear when plaintiff testified that he informed a tenant that he overhead Beane tell another employee that he intended to evict the tenant in order to combine the tenant's apartment with another. According to Beane, this disclosure constituted "gross misconduct" warranting plaintiff's immediate termination. Beane Aff., ¶ 7. Defendants also assert that plaintiff's declining performance was a legitimate basis for terminating his employment.

Defendants submit no evidence to show that there was a decline in plaintiff's performance, or that plaintiff violated a company policy regarding confidential information; or that plaintiff otherwise was ever advised that information pertaining to plans for a tenant's apartment should be kept confidential. Plaintiff testified that he did not know the information he shared was confidential, never signed a confidentiality agreement, and was never told that information learned within the office was confidential (Pl. Dep. at 174); which, the court notes, the New York State Department of Labor also found in reversing its decision to deny unemployment benefits to plaintiff. *See* Revised Determination, Ex. P to Naylor Aff. Defendants also submit no evidence that plaintiff was ever told that a disclosure of such

information would result in termination, or that any other employee was or would be similarly terminated; and offer no basis for finding that the alleged poor performance was grounds, at that time, for termination. Defendants thus fail to eliminate triable issues of fact as to whether their reasons for firing plaintiff were false and have not, looking at the evidence as a whole, met their burden of showing that retaliation played no part in their decision to terminate him. *See Bennett*, 92 AD3d at 45. Accordingly, the fourth cause of action survives as to the claim of retaliatory termination.

Aiding and Abetting

Plaintiff's fifth cause of action against Beane for "aiding and abetting" is dismissed, as there are no allegations of discriminatory actions against any party other than Beane. "[A]n 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 (2d Dept 2010); *Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 73 (3d Dept 2005). Further, with respect to the dismissed causes of action, "'[w]here no violation of the Human Rights Law by another party has been established . . . an individual employee cannot be held liable for aiding or abetting such a violation.'" *Id.*

Accordingly, defendants' motion is granted in part and denied in part and it is

ORDERED that defendants' motion is granted to the extent that the first, third, and fifth causes of action are dismissed; and it is further

ORDERED that defendants' motion is granted dismissing the fourth cause of action to the extent that it is based on plaintiff's November 2014 complaint and is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the parties are directed to appear for a conference in Part 47 on January 17, 2019 at 9:30 AM. 80 Centre St, Room 320.

Dated: 12/7/18

ENTER:

PAUL A. GOETZ, J.S.C.