

11-762-cv

Rivera v. Rochester Genesee Regional Transportation Authority

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2011

(Submitted: March 1, 2012

Decided: December 21, 2012

Amended: February 10, 2014)

Docket No. 11-762-cv

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ENIO R. RIVERA,
MICHAEL TALTON,

Plaintiffs-Appellants,

v.

ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY,

Defendant-Appellee,

JOHN TIBERIO,

Defendant.¹

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¹ For the reasons stated in the opinion, see footnote 2, the Clerk of Court is directed to amend the official caption to conform with the above.

1 Before: KEARSE, LOHIER, and DRONEY, Circuit Judges.

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3 Enio Rivera and Michael Talton, employees of the Rochester Genesee
4 Regional Transportation Authority (“RGRTA”), sued that agency, alleging that
5 they were subjected to a hostile work environment on the basis of race and
6 national origin and were retaliated against for complaining about the hostile
7 work environment. The District Court granted summary judgment to RGRTA on
8 all claims. Because we conclude that genuine issues of material fact exist as to
9 plaintiff-appellant Rivera’s hostile work environment claims against RGRTA and
10 as to all of plaintiff-appellant Talton’s claims against RGRTA, we VACATE in
11 part the grant of summary judgment and REMAND to the District Court for
12 further proceedings as to these claims. However, we AFFIRM the judgment of
13 the District Court as to plaintiff-appellant Rivera’s claims of retaliation.

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15 CHRISTINA A. AGOLA, Christina A. Agola, PLLC,
16 Rochester, NY, for Plaintiffs-Appellants.

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18 SCOTT D. PIPER, Harris Beach PLLC, Pittsford, NY,
19 for Defendant-Appellee.

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22 LOHIER, Circuit Judge:

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24 Plaintiffs Enio Rivera and Michael Talton, employees of Lift Line, Inc., a
25 subsidiary of Rochester Genesee Regional Transportation Authority (“RGRTA”),
26 appeal from a judgment of the United States District Court for the Western
27 District of New York (Larimer, J.), granting the summary judgment motion of
28 RGRTA and dismissing the plaintiffs’ claims of discrimination and retaliation
29 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title
30 VII”), 42 U.S.C. § 1981, and the New York State Human Rights Law (“NYSHRL”).
31 RGRTA is the only defendant against which this appeal was taken.² On appeal,

² Rivera and Talton also pursued discrimination and retaliation claims against John Tiberio, a supervisory employee, and Talton alleged causes of action for violations of, and retaliation under, the Family Medical Leave Act, 29 U.S.C.

1 Rivera, who is of Puerto Rican descent, and Talton, an African American, contend
2 that they proffered sufficient evidence that they were subjected to a hostile work
3 environment based on national origin and race, respectively, and thereafter were
4 retaliated against for complaining about it.³ For the reasons that follow, we
5 affirm the judgment of the District Court as to Rivera's retaliation claims, but
6 vacate the judgment of the District Court as to plaintiffs' remaining claims
7 against RGRTA and remand to the District Court for further proceedings.

8 BACKGROUND

9 In reviewing the District Court's grant of summary judgment in favor of
10 RGRTA, "we construe the evidence in the light most favorable to the plaintiff[s],
11 drawing all reasonable inferences and resolving all ambiguities in [their] favor."

§ 2601 et seq. Those claims are not pursued in this appeal. In the opinion issued on December 21, 2012, we directed the Clerk of Court to amend the caption to designate John Tiberio as a defendant-appellee. Shortly thereafter, Tiberio filed a motion to recall the mandate and amend the decision by removing him from the caption. In an order issued on June 13, 2013, we recalled the mandate, but reserved decision with respect to the motion to amend, instead remanding the case to the District Court to make factual findings to aid us in resolving the motion. On November 8, 2013, the District Court issued a decision and order answering the questions posed by this Court. After reviewing submissions from plaintiffs-appellants and Tiberio, and in light of the District Court's findings with respect to Tiberio's representation, plaintiffs-appellants' failure to serve any papers on Tiberio's counsel, and plaintiffs-appellants' designation of Tiberio as a "defendant," not as a "defendant-appellee," in its papers on appeal, we grant Tiberio's motion to amend the caption. See Fed. R. App. P. 25(b); cf. Garner v. Cuyahoga Cnty. Juvenile Court, 554 F.3d 624, 644-45 (6th Cir. 2009); Brookens v. White, 795 F.2d 178, 181 (D.C. Cir. 1986).

³ Although Rivera purported to state a claim for discrimination on account of his "race . . . and national origin," all of his factual allegations concerned discrimination on the basis of his Puerto Rican national origin.

1 In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 504 (2d Cir. 2010) (quotation
2 marks omitted).

3 **1. Rivera**

4 Lift Line is an RGRTA subsidiary that provides door-to-door public
5 transportation services for elderly and disabled persons. Rivera, a Hispanic of
6 Puerto Rican descent, started working for Lift Line as a bus driver in 1994 and
7 remained in that position at all relevant times. Sometime in 2001, Dominic
8 Folino, the senior mechanic at Lift Line, began an affair with Rivera's then-wife,
9 Kimberly. Kimberly and Rivera divorced in 2002 or 2003, after Rivera learned
10 about the affair, and Kimberly married Folino. Rivera also remarried, in 2006.
11 Other than a brief period in 2006, Rivera's son lived with Folino and Kimberly
12 from 2002 onward. The affair predictably ignited a deep personal conflict
13 between Rivera and Folino at work.

14 As relevant to his claims of discrimination, Rivera testified that between
15 2003 and 2007 Folino called him a "spic" twice and a "Taco Bell" at least five
16 times. Rivera testified that there were several occasions on which he pulled into
17 the Lift Line garage to find Folino and Tim Driscoll, another Lift Line mechanic,
18 chanting "What's that smell, look at the fat f***, there is Taco Bell." During his
19 deposition, Talton confirmed that Folino openly referred to Rivera as a "spic"
20 and a "nigger spic" outside of Rivera's presence on at least one occasion. Talton
21 further testified that Folino "looked at me and he said, 'Mike, I'm not talking
22 about you. A nigger can mean anybody. I'm talking about that spic, Ralph
23 Rivera.'"

24 Rivera also presented extensive contemporaneous evidence suggesting that
25 Folino and several other Lift Line mechanics regularly harassed and bullied him
26 throughout this period, but without using ethnic slurs. Rivera reported many of

1 these instances of harassment to RGRTA shortly after they occurred. For
2 example, on April 23, 2003, Rivera filed an "Incident Report" in which he
3 asserted that mechanic John Stiggins and another employee stopped and
4 confronted him as he was driving out of the Lift Line parking lot after work. In
5 May 2003 he followed up with a letter to Lift Line's Human Resources
6 Department, claiming that Folino and another mechanic had cursed and stared at
7 him menacingly. In another letter four months later, Rivera complained that
8 Folino had cursed at him again and tampered with his time card slot. Rivera also
9 alleged that Lift Line had ignored his complaints of harassment. None of these
10 2003 complaints referred to the use of ethnic slurs or harassment motivated by
11 Rivera's national origin.

12 The following year, in June 2004, Folino filed an internal complaint of his
13 own, claiming that Rivera had threatened him. In September 2004 Robert Bilsky,
14 Lift Line's Vice President for Human Resources, informed Rivera that he had
15 become aware of conflicts between Rivera and Folino due to "problems in [their]
16 personal home lives." Bilsky said that he could "find no proof of exactly who is
17 right or wrong in this harassment complaint," but that he was "extremely
18 concerned" about the ongoing hostility between Folino and Rivera.

19 Although a change in shift times in late 2004 apparently reduced the
20 frequency of interactions between Rivera and Folino at work, the conflicts
21 between the two men resumed in 2005. Between March 2005 and September
22 2007, Rivera filed seven complaints about Folino's conduct, again accusing Folino
23 of threatening and harassing him. For example, Rivera claimed that Folino
24 sprayed Rivera with paint thinner, posted photos in the workplace of lavish gifts
25 he had purchased for Rivera's son, stared menacingly at Rivera, swerved his car
26 toward Rivera in the parking lot, and generally undermined Rivera's ability to do

1 his job. Rivera's internal complaints employed the terms "prejudice,"
2 "harassment," and "discrimination," but they did not mention or suggest that
3 Folino's conduct involved ethnic slurs or was otherwise on account of Rivera's
4 national origin. In his September 2005 complaint, Rivera attributed Folino's
5 behavior to their personal conflict, asserting that Folino "insist[ed] to bring these
6 very personal issues to work . . . causing a very uncomfortable and hostile work
7 environment." Talton testified, however, that it was during this time period that
8 Folino referred to Rivera as a "spic" and "nigger spic."

9 Rivera first formally accused Folino of harassment on account of national
10 origin in March 2007, when he filed a complaint with the New York State
11 Division of Human Rights ("NYSDHR"). The NYSDHR complaint attributed the
12 harassment to "an old boys club, specifically of Italian American descent that
13 have a conspiracy against me and are trying to have me fired from Lift Line." As
14 with Rivera's earlier internal complaints, the complaint alleged that Folino,
15 Stiggins, a supervisor, John Tiberio, and others had engaged in boorish or
16 harassing behavior directed at Rivera, but failed to mention the use of ethnic
17 slurs by any of his co-workers.

18 NYSDHR notified Lift Line of Rivera's complaint by letter dated March 7,
19 2007. Rivera claims that Lift Line retaliated against him thereafter. He testified
20 that (1) he was disciplined for insubordination twice in approximately 2008 or
21 2009; (2) Lift Line rejected his request for a half day off for a doctor's
22 appointment, in violation of a collective bargaining agreement; (3) he was
23 assigned particularly "dirty buses" to drive; (4) he once received his overtime pay
24 two weeks late; and (5) after he was involved in a minor driving accident, Folino
25 unsuccessfully urged the Lift Line road supervisor to drug test him, even though
26 company policy did not mandate it.

1 **2. Talton**

2 Talton was hired by Lift Line in 2004 as a “fueler-washer” responsible for
3 refueling, cleaning, and servicing the buses when the drivers returned from their
4 runs. Talton alleges that co-workers taunted him with racial slurs. During
5 discovery, Talton testified about two specific incidents in which John Stiggins, a
6 white mechanic, called him a “nigger.” He also presented evidence that his white
7 supervisor, Tiberio, used the same racial slur.

8 In the first of two incidents involving Stiggins’s conduct on the Lift Line
9 premises, Stiggins told Talton, “I thought you was my boy,” and, “You know
10 what I’m talking about, nigger. You were supposed to look out for us.” The
11 statement apparently referred to Talton’s failure to cover for Stiggins when a Lift
12 Line dispatcher was looking for him. When Talton responded, “Who . . . are you
13 calling nigger?,” Stiggins aggressively approached Talton and said “We could do
14 this right here.” In the second incident, Talton and Stiggins were talking casually
15 when Stiggins abruptly announced that he had been “out drinking with Mingo
16 [Sanhueza, a co-worker] last night” and that Sanhueza had “started talking about
17 niggers.” Stiggins claimed that Sanhueza had said that he “wished all you
18 niggers died.”

19 Talton further testified that his supervisor, Tiberio, called him a “nigger,”
20 and also told him to “[g]et over it” when he complained that his co-workers had
21 used the slur. This testimony is consistent with a charge that Talton filed with
22 the Equal Employment Opportunity Commission (“EEOC”) in May 2006, which
23 asserted that his supervisor — presumably Tiberio — responded to Talton’s
24 complaint about racial harassment by laughing and then telling Talton that he
25 “should just ‘suck it up and get over it, nigger!’” In support of the defendant’s
26 summary judgment motion, Tiberio submitted an affidavit in which he denied

1 that he ever used that or any other racial slur and similarly denied that Talton
2 complained to him about racial harassment.

3 Talton also claims that he was racially harassed after he told Lift Line's
4 management that Sanhueza, a bus driver, kept a gun on one of the buses. After
5 discovering the gun while cleaning the bus, Talton immediately called Tiberio,
6 who retrieved the gun and started an investigation. Upset by the disciplinary
7 hearing that followed, Sanhueza threatened Talton by shaping his hand in the
8 form of a gun and saying, "I'm going to kick your ass, nigger." Sanhueza was
9 initially terminated as a result of the gun incident. In September 2005, however,
10 Sanhueza's union settled with RGRTA, and Sanhueza was reinstated as a fueler-
11 washer rather than a driver. Somewhat ironically, Talton was made responsible
12 for training Sanhueza in his new position. In October 2005 Talton, Tiberio, and
13 Sanhueza met to discuss the fact that some of the buses were not adequately
14 cleaned. After the meeting, according to Talton, Sanhueza threatened Talton and
15 again called him a "nigger." Talton complained to Tiberio, who sought
16 disciplinary action, and Sanhueza was permanently terminated sometime, it
17 appears, in autumn 2005.

18 In May 2006 Talton filed his first charge of discrimination with the EEOC.
19 The charge primarily recounted his encounters with Sanhueza, but also reported
20 that other co-workers — including Tiberio, as described above — had called
21 Talton a "nigger." In both his EEOC charge and in his deposition during
22 discovery in this case, Talton asserted that he had complained in hand-delivered
23 letters to management about the incidents described above, but that Lift Line had
24 failed to take remedial action.

25 After the initial May 2006 charge, Talton filed two more EEOC charges of
26 discrimination. The first of these charges, filed in August 2006, alleged that

1 Tiberio warned Talton that he could lose his job for filing the initial EEOC charge.
2 The last EEOC charge was precipitated by internal complaints against Talton that
3 were filed by Stiggins and Edwin Ayala, a fueler-washer, claiming that Talton
4 had made various menacing comments and “false accusations” in the workplace.
5 Their complaints quickly culminated in Talton meeting with RGRTA’s Vice
6 President of Regional Operations, Debie Himmelsbach, who told Talton that she
7 had “received reports from several employees . . . regarding behavior he had
8 exhibited which made them uncomfortable” and that he “needed to be more
9 careful in his relationships with other employees.” Talton charged that this
10 counseling meeting with Himmelsbach was held in retaliation for his first two
11 EEOC charges.

12 Talton also points to at least four other acts of retaliation, not all of which
13 were described in his EEOC charges. First, he testified that he was disciplined
14 three times for insubordination after filing his EEOC charges. Second, he claims
15 Tiberio distributed copies of at least one of Talton’s EEOC charges to co-workers
16 and directed the other fueler-washers not to interact with him. Third, Talton
17 submitted an affirmation from a co-worker asserting, among other things, that
18 Talton had been forced to clean buses containing blood and vomit after other
19 employees had refused to do so. Fourth, approximately one month after Talton
20 filed his first EEOC charge, an unidentified person called him a “nigger” and
21 threw a brick at him.

22 **3. District Court Proceedings**

23 Rivera and Talton jointly filed an amended complaint in May 2008 and,
24 after discovery, RGRTA moved for summary judgment. The District Court
25 granted the motion as to both plaintiffs, concluding that the harassment that
26 Rivera allegedly experienced arose from a personal conflict rather than Rivera’s

1 national origin, and that Talton had presented evidence only of “isolated
2 incidents of crude and offensive language taking place over a period of several
3 years.” Rivera v. Rochester Genesee Reg’l Transp. Auth., 761 F. Supp. 2d 54, 58
4 (W.D.N.Y. 2011). After concluding that the plaintiffs could not “establish adverse
5 employment actions, or a causal connection between those actions and their
6 protected activity,” the court also dismissed both plaintiffs’ retaliation claims. Id.

7 Both plaintiffs timely appealed.

8 DISCUSSION

9 1. Standard of Review

10 We review an award of summary judgment de novo. See Gorzynski v.
11 JetBlue Airways Corp., 596 F.3d 93, 101 (2d Cir. 2010). Summary judgment is
12 appropriate “only where, construing all the evidence in the light most favorable
13 to the non-movant and drawing all reasonable inferences in that party’s favor,
14 ‘there is no genuine issue as to any material fact and . . . the movant is entitled to
15 judgment as a matter of law,’” McBride v. BIC Consumer Prods. Mfg. Co., 583
16 F.3d 92, 96 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(c)); see Guilbert v. Gardner,
17 480 F.3d 140, 145 (2d Cir. 2007) (“A genuine issue exists for summary judgment
18 purposes where the evidence, viewed in the light most favorable to the
19 nonmoving party, is such that a reasonable jury could decide in that party’s
20 favor.”) (quotation marks omitted). Although summary judgment is proper
21 where there is “nothing in the record to support plaintiff’s allegations other than
22 plaintiff’s own contradictory and incomplete testimony,” Jeffreys v. City of New
23 York, 426 F.3d 549, 555 (2d Cir. 2005), district courts should not “engage in
24 searching, skeptical analyses of parties’ testimony in opposition to summary
25 judgment,” Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 106 (2d
26 Cir. 2011).

2. Hostile Work Environment

1 “In order to establish a hostile work environment claim under Title VII, a
2 plaintiff must produce enough evidence to show that ‘the workplace is
3 permeated with discriminatory intimidation, ridicule, and insult, that is
4 sufficiently severe or pervasive to alter the conditions of the victim’s employment
5 and create an abusive working environment.’” Gorzynski, 596 F.3d at 102
6 (quoting Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir. 2006)).⁴ In considering
7 whether a plaintiff has met this burden, courts should “examin[e] the totality of
8 the circumstances, including: the frequency of the discriminatory conduct; its
9 severity; whether it is physically threatening or humiliating, or a mere offensive
10 utterance; and whether it unreasonably interferes with the victim’s [job]
11 performance.” Hayut v. State Univ. of N.Y., 352 F.3d 733, 745 (2d Cir. 2003)
12 (quotation marks omitted). Moreover, the “test has objective and subjective
13 elements: the misconduct shown must be severe or pervasive enough to create an
14 objectively hostile or abusive work environment, and the victim must also
15 subjectively perceive that environment to be abusive.” Alfano v. Costello, 294
16 F.3d 365, 374 (2d Cir. 2002) (quotation marks omitted). Of course, “[i]t is
17 axiomatic that mistreatment at work, whether through subjection to a hostile
18 environment or through [other means], is actionable under Title VII only when it
19 occurs because of an employee’s . . . protected characteristic,” such as race or
20 national origin. Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) (emphasis
21 added).
22

⁴ The same standards apply to the plaintiffs’ hostile environment claims arising under the NYSHRL, see Pucino v. Verizon Comm’cns., Inc., 618 F.3d 112, 117 n.2 (2d Cir. 2010), and to their claims arising under 42 U.S.C. § 1981, see Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000).

1 With these principles in mind, and recognizing that there is no genuine
2 dispute that Rivera and Talton each subjectively perceived his environment to be
3 hostile and abusive, we review the hostile work environment claims of each
4 plaintiff.

5 **a. Rivera**

6 Rivera presented evidence that Folino, sometimes alone and sometimes
7 with other Lift Line mechanics, harassed him based on his national origin and in
8 a manner that interfered with his ability to do his job. We therefore disagree with
9 the able and experienced District Judge that Rivera did not present any genuine
10 dispute of material fact regarding whether the mistreatment included ethnic slurs
11 or otherwise reflected ethnic animus.

12 We recognize, however, that this is a close call. From 2003 to 2007, Rivera
13 filed several complaints with RGRTA's Human Resources Department regarding
14 Folino's conduct, none of which referenced Folino's use of ethnic slurs or
15 harassment based on national origin. Indeed, Rivera's testimony that Folino and
16 others chronically directed ethnic slurs at him is somewhat belied by his early
17 assertions that the "hostile work environment" he experienced was a result of his
18 personal conflict with Folino. For example, one of Rivera's complaints explicitly
19 attributed Folino's harassment to their personal conflict, and criticized Folino for
20 "bring[ing] these very personal issues to work . . . causing a very uncomfortable
21 and hostile work environment." Rivera's NYSDHR complaint, which, in contrast
22 to prior complaints, asserted that Folino's conduct constituted national origin
23 discrimination, again made no reference to Folino's use of ethnic slurs or other
24 ethnically based harassment. If the instances of ethnic name-calling were
25 "sufficiently severe or pervasive to alter the conditions of [Rivera's] employment
26 and create an abusive working environment," Gorzynski, 596 F.3d at 102

1 (quotation marks omitted), it is reasonable to expect Rivera to have adverted to
2 them at least once in his lengthy correspondence with RGRTA's Human
3 Resources Department as well as the NYSDHR.

4 Still, this issue is left for the jury to decide at trial, since Rivera's deposition
5 testimony about Folino's use of ethnic slurs was not conclusory, and a reasonable
6 jury could credit Rivera's testimony on this point, and discount the evidence
7 demonstrating that Folino's harassment was not on account of Rivera's national
8 origin. See Redd v. N.Y. Div. of Parole, 678 F.3d 166, 178 (2d Cir. 2012). We
9 arrive at this conclusion for three reasons.

10 First, Rivera testified that Folino or Driscoll called him "spic" "probably
11 like three times." Although Rivera was unable to provide information about the
12 specific timing and circumstances of these "spic" slurs, he testified more
13 specifically that Folino and Driscoll together chanted another slur — "What's that
14 smell . . . there is Taco Bell" — at least once after Rivera pulled into a Lift Line
15 garage. Rivera variously testified that he heard the same chant anywhere from
16 "[e]very time" he pulled into the garage to "about five" times. We are obliged to
17 consider the defendants' alleged uses of slurs "cumulatively in order to obtain a
18 realistic view of the work environment," Aulicino v. N.Y.C. Dep't of Homeless
19 Servs., 580 F.3d 73, 83 (2d Cir. 2009) (quotation marks omitted), and to determine
20 whether they "alter[ed] the conditions of [Rivera's] employment and create[d] an
21 abusive working environment," Gorzynski, 596 F.3d at 102 (quotation marks
22 omitted). Second, Rivera's testimony was corroborated by Talton's deposition
23 testimony, and that of other non-party witnesses who provided evidence about
24 ethnically and racially hostile comments made outside of Rivera's presence, both
25 about Rivera and about Talton. See Schwapp v. Town of Avon, 118 F.3d 106, 111
26 (2d Cir. 1997) ("The district court appears to have reasoned that because only the

1 first four incidents occurred 'in the plaintiff's presence,' only those four are
2 relevant to this action. The district court's failure to consider the totality of the
3 circumstances in this case, including its selective treatment of the evidence in the
4 record, was in error and necessitates reversal." (internal citations omitted)); Perry
5 v. Ethan Allen, Inc., 115 F.3d 143, 150–51 (2d Cir. 1997) ("Since one of the critical
6 inquiries with respect to a hostile environment claim is the nature of the
7 environment itself, evidence of the general work atmosphere is relevant.").
8 Third, in addition to the evidence of the use of ethnic slurs, Rivera offered
9 detailed testimony about extensive bullying and physical harassment by Folino
10 and others that occurred during the relevant period. A reasonable jury could
11 conclude that the alleged incidents of harassment in the record, including the
12 slurs, constituted more than "mere offensive utterance[s]." Hayut, 352 F.3d at
13 745; see Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 437 (2d Cir.
14 1999), abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,
15 548 U.S. 53 (2006) ("Burlington Northern").⁵

16 Rivera's harassment claim does not present circumstances like those found
17 appropriate for summary judgment in Jeffreys and Rojas. In Jeffreys, for
18 example, we held that summary judgment was proper where the plaintiff's case
19 relied entirely on self-serving testimony and, prior to giving that testimony, the
20 plaintiff made "multiple admissions" that were "inconsistent with his later
21 testimony" and that he "failed to explain away" with "any plausible

⁵ We caution, however, that "[t]here is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.'" Richardson, 180 F.3d at 439 (quoting Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993), abrogated on other grounds by Burlington Northern, 548 U.S. 53).

1 explanation.” 426 F.3d at 555 n.2 (quotation marks omitted). The plaintiff, Percy
2 Jeffreys, brought suit against several police officers who allegedly assaulted him
3 with a flashlight before throwing him out of a third-story window. Jeffreys’s
4 account of the incident at his deposition differed on all points from several
5 accounts that Jeffreys gave shortly after the incident happened. On at least three
6 occasions Jeffreys “confessed to having jumped out of the third-story window,”
7 and made “no mention of any police misconduct.” Id. at 552. Similarly, “[a]t his
8 arraignment, guilty plea, and sentencing, Jeffreys . . . made no mention of any
9 beating or defenestration,” id., and medical records also appeared to belie his
10 claim, id. at 552–53. During his deposition testimony, moreover, Jeffreys was
11 unable to provide any specific details about the incident, and the testimony was
12 corroborated only by two family members who submitted affidavits that
13 established, at best, what Jeffreys had told them about the incident sometime
14 after it occurred. Id. at 553. We concluded that “[i]n the circumstances presented
15 in the instant case — where (1) the District Court found nothing in the record to
16 support plaintiff’s allegations other than plaintiff’s own contradictory and
17 incomplete testimony, and (2) the District Court, even after drawing all
18 inferences in the light most favorable to the plaintiff, determined that no
19 reasonable person could believe Jeffreys’[s] testimony, . . . the District Court did
20 not err by awarding summary judgment.” Id. at 555 (alteration in original)
21 (quotation marks omitted); see also Rojas, 660 F.3d at 105 (summary judgment
22 properly granted to defendants where plaintiff “relied almost entirely on her
23 own testimony,” which was contradicted by “contemporaneous letters and

1 meeting notes” suggesting that the plaintiff had complained only of “general
2 friction” with her supervisor, as opposed to sexual harassment).⁶

3 Here, by contrast, Rivera does not allege the occurrence of something that
4 he previously described as not happening. He claimed ethnic discrimination in
5 his 2007 complaint to the administrative agency, as was required for purposes of
6 exhaustion. In his administrative and court assertions he has not been
7 inconsistent in claiming that he was subjected to ethnic slurs. Any variance in
8 those assertions has been in the number of times he was subjected to such slurs.
9 That Rivera did not complain of ethnic slurs to RGRTA may lead a factfinder to
10 find that claim not credible, but there is no real, unequivocal, and inescapable
11 contradiction of the sort we contemplated in Jeffreys and Rojas, and matters of
12 credibility are not to be determined on a motion for summary judgment. In
13 addition, unlike in Jeffreys or Rojas, Rivera’s testimony was corroborated by
14 other independent evidence, including the testimony of Talton.

15 Further, although RGRTA suggests that Rivera lacked detailed direct
16 evidence of a hostile work environment based on his national origin, his
17 testimony and Talton’s testimony provided that evidence. We have cautioned
18 that a hostile work environment claim need not be supported by direct evidence
19 of explicit racial harassment. Circumstantial evidence may do. See Raniola v.
20 Bratton, 243 F.3d 610, 621–22 (2d Cir. 2001) (explaining that a hostile work
21 environment plaintiff may prevail by adducing “circumstantial proof that . . .
22 adverse treatment that was not explicitly sex-based was, nevertheless, suffered

⁶ Cf. Scott v. Harris, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

1 on account of sex”). Nor was Rivera required to demonstrate that his national
2 origin was the only motivating factor. He needed to show only that “a
3 reasonable fact-finder could conclude that race [or national origin] was a
4 motivating factor in the harassment.” See Terry v. Ashcroft, 336 F.3d 128, 150 (2d
5 Cir. 2003) (emphasis added). Here, there was (barely) enough evidence — both
6 the use of ethnic slurs and the broader bullying and physical harassment —
7 from which a reasonable jury could find that Folino harassed Rivera not merely
8 because of their personal history, but also because Rivera was Puerto Rican.
9 Raniola, 243 F.3d at 622. Considering that evidence, together with the evidence
10 of a racially hostile work environment for Talton, his co-worker, in the light most
11 favorable to Rivera, and resolving all ambiguities in his favor, we conclude that
12 the District Court erred in granting summary judgment to the RGRTA on
13 Rivera’s hostile work environment claim.

14 **b. Talton**

15 Talton gave detailed and uncontradicted testimony indicating both that his
16 supervisor directed the word “nigger” at him, and that co-workers directed the
17 word at him in a physically threatening manner. For example, he specifically
18 recounted that his co-worker, John Stiggins, called him a “nigger” on at least two
19 occasions, and that both times Stiggins threatened him with physical violence,
20 once by saying, “We could do this right here,” and another time by referencing a
21 co-worker’s statement that he “wished all you niggers died.” Similarly, Talton
22 testified that another co-worker, Mingo Sanhueza, called him a “nigger” and
23 threatened him physically by shaping his hand in the form of a gun. In addition,
24 Talton testified that Tiberio, his supervisor, called him a “nigger,” and that
25 Tiberio also told him to “get over it” when Talton complained about racial
26 harassment by co-workers. The claim involving Tiberio was consistent with

1 Talton's May 2006 EEOC charge, in which he alleged that Tiberio had responded
2 to his complaints of racial harassment by telling him to "suck it up and get over
3 it, nigger!"

4 RGRTA contends that Talton's hostile work environment claim was
5 properly dismissed because, among other things, he was unable to provide
6 enough details regarding Tiberio's use of any racial slur. We disagree. Although
7 it is true that Talton could not recall certain details of this incident during his
8 deposition testimony, he provided enough details, which were supported by
9 contemporaneous evidence in the form of an EEOC charge filed against Lift Line.
10 A reasonable factfinder could conclude that Tiberio and other RGRTA employees
11 directed the racial slur at Talton. See Richardson, 180 F.3d at 439–40 (vacating
12 grant of summary judgment where plaintiff presented detailed evidence that her
13 supervisor and several co-workers used racial slurs); cf. Singletary v. Mo. Dep't
14 of Corr., 423 F.3d 886, 893 (8th Cir. 2005) (supervisor's use of racial epithets not
15 sufficient to create racially hostile work environment in violation of Title VII
16 when none of the comments were made directly to African-American employee).
17 We emphasize that "[p]erhaps no single act can more quickly alter the conditions
18 of employment and create an abusive working environment than the use of an
19 unambiguously racial epithet such as 'nigger' by a supervisor in the presence of
20 his subordinates." Richardson, 180 F.3d at 439 (quoting Rodgers, 12 F.3d at 675)
21 (quotation marks omitted). The use of racially offensive language is particularly
22 likely to create a hostile work environment when, as here, it is presented in a
23 "physically threatening" manner. Hayut, 352 F.3d at 745.

24 With that in mind, whether the conduct taken together created a work
25 environment that was sufficiently hostile to violate Title VII is a question of fact
26 for the jury. Redd, 678 F.3d at 178. Taking the evidence in the light most

1 favorable to Talton and accepting his version of the events as true, we conclude
2 that the District Court erred in dismissing Talton’s hostile work environment
3 claim against RGRTA.⁷

4 **3. Retaliation Claims**

5 Rivera and Talton also appeal the District Court’s dismissal of their
6 retaliation claims against RGRTA. At the outset, we note that in order to prevail
7 on a retaliation claim, “the plaintiff need not prove that h[is] underlying
8 complaint of discrimination had merit,” Lore v. City of Syracuse, 670 F.3d 127,
9 157 (2d Cir. 2012), but only that it was motivated by a “good faith, reasonable
10 belief that the underlying employment practice was unlawful,” Reed v. A.W.
11 Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996) (quotation marks omitted). The
12 good faith and reasonableness of the plaintiffs’ beliefs that they were subjected to
13 discrimination is not an issue on this appeal.

14 Title VII’s antiretaliation provision prohibits an employer from
15 discriminating against an employee for opposing any practice made unlawful by
16 Title VII. Burlington Northern, 548 U.S. at 59–60. To establish a prima facie case
17 of unlawful retaliation under Title VII, “an employee must show that (1) [h]e was
18 engaged in protected activity; (2) the employer was aware of that activity; (3) the

⁷ RGRTA also raises in a footnote a perfunctory argument that summary judgment was nevertheless proper because it was entitled to an affirmative defense under Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). RGRTA states that this Court “is free” to “elect[] to engage in the Faragher/Ellerth analysis” in order to uphold the dismissal of the hostile work environment claim on the basis of an affirmative defense under those cases even though the District Court did not reach the issue, pointing out that we may affirm on any ground supported by the record. However, as RGRTA has provided no argument on this appeal as to why it was entitled to prevail on the basis of that defense, we do not reach that issue.

1 employee suffered a materially adverse action; and (4) there was a causal
2 connection between the protected activity and that adverse action.” Lore, 670
3 F.3d at 157. The requirement of a materially adverse employment action reflects
4 the principle that “Title VII does not protect an employee from ‘all retaliation,’
5 but only ‘retaliation that produces an injury or harm.’” Tepperwien v. Entergy
6 Nuclear Operations, Inc., 663 F.3d 556, 569 (2d Cir. 2011) (quoting Burlington
7 Northern, 548 U.S. at 67).

8 In Burlington Northern, the Supreme Court described a “material adverse
9 action” as follows: “a plaintiff must show that a reasonable employee would have
10 found the challenged action materially adverse, which in this context means it
11 well might have dissuaded a reasonable worker from making or supporting a
12 charge of discrimination.” Burlington Northern, 548 U.S. at 68 (citation and
13 quotation marks omitted); see also Kessler v. Westchester Cnty. Dep’t of Soc.
14 Servs., 461 F.3d 199, 207 (2d Cir. 2006) (noting that Burlington Northern
15 announced a different standard of material adversity than that previously
16 employed in this Circuit in, for example, Williams v. R.H. Donnelley, Corp., 368
17 F.3d 123, 128 (2d Cir. 2004)). Still, “[a]ctions that are ‘trivial harms’ — *i.e.*, ‘those
18 petty slights or minor annoyances that often take place at work and that all
19 employees experience’ — are not materially adverse.” Tepperwien, 663 F.3d at
20 568 (quoting Burlington Northern, 548 U.S. at 68).⁸

21 In reviewing a grant of summary judgment, therefore, we are mindful that
22 material adversity is to be determined objectively, based on the reactions of a
23 reasonable employee. Burlington Northern, 548 U.S. at 69–70. But “[c]ontext

⁸ “[R]etaliation claims under the [New York State Human Rights Law] are generally governed by the same standards as federal claims under Title VII.” Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 609 (2d Cir. 2006).

1 matters,' as some actions may take on more or less significance depending on the
2 context," Tepperwien, 663 F.3d at 568 (quoting Burlington Northern, 548 U.S. at
3 69), and "[a]lleged acts of retaliation must be evaluated both separately and in the
4 aggregate, as even trivial acts may take on greater significance when they are
5 viewed as part of a larger course of conduct," id.

6 As a threshold matter, we note that in concluding that both plaintiffs'
7 retaliation claims should be dismissed because neither "allege[d] any adverse
8 employment action occurring prior to his initial engagement in protected
9 activity," Rivera, 761 F. Supp. 2d at 58, the District Court, no doubt inadvertently,
10 misstated the applicable law. Title VII does not require that a causal connection
11 exist between a protected activity and an adverse employment action that
12 occurred before that activity. In any event, RGRTA does not dispute that both
13 Rivera and Talton engaged in protected activity — Rivera by filing a complaint
14 with the NYSDHR,⁹ and Talton by complaining to management and filing a
15 series of EEOC charges — and that they at least alleged that some material
16 adverse employment action occurred thereafter.

17 **a. Rivera**

18 Despite the District Court's misstatement, we conclude that Rivera's
19 retaliation claim was properly dismissed. Rivera did not present evidence of any
20 discrete actions that "well might have dissuaded a reasonable worker from
21 making or supporting a charge of discrimination" after he filed his charge of
22 discrimination with the New York State Department of Human Resources in

⁹ The NYSDHR appears to have forwarded Rivera's complaint to the EEOC, noting that doing so "creates a complaint separate and apart from the complaint filed with" the NYSHDR. In any event, Rivera's administrative exhaustion of his Title VII claim is not at issue on appeal.

1 March 2007. In urging otherwise, Rivera points to two disciplinary citations he
2 received for insubordination over a two-year period, his assignment to drive
3 particularly “dirty buses,” one late overtime payment, and Lift Line’s one-time
4 refusal to give him a half-day off for a doctor’s appointment.

5 Although there is some dispute about whether Rivera received one or two
6 citations for insubordination,¹⁰ he presented no evidence that they reflected
7 anything other than RGRTA’s “enforce[ment] [of] its preexisting disciplinary
8 policies in a reasonable manner.” See Brown v. City of Syracuse, 673 F.3d 141,
9 150 (2d Cir. 2012) (quotation marks omitted). Rivera testified that one of the
10 citations came about after he refused to attend a meeting with RGRTA managers
11 without his preferred union representative, rather than a union representative
12 who had been selected for him. Rivera also testified that he received the second
13 citation after he again refused to attend a meeting with one or more of his
14 supervisors. Without more, no reasonable jury could conclude that these acts of
15 discipline, either alone or in conjunction with the other acts of retaliation Rivera
16 alleges, represented a departure from Lift Line’s normal disciplinary practices,
17 such that they might have “dissuaded a reasonable worker from making or

¹⁰ RGRTA submits that Rivera was suspended for insubordination only once, in 2008, after he “refused to participate in an investigatory interview with” his supervisor and other RGRTA managers and his union representative, “because he insisted that his legal counsel and union business representative also be present.” Rivera acknowledges that he declined to participate in an investigation without his attorney and preferred union representative, and that he received an insubordination charge for that refusal, but he testified that the “[s]ame thing” then happened a second time.

1 supporting a charge of discrimination.” Burlington Northern, 548 U.S. at 68
2 (quotation marks omitted).¹¹

3 Accordingly, we affirm the District Court’s grant of summary judgment to
4 RGRTA on Rivera’s retaliation claim.

5 **b. Talton**

6 By contrast, we disagree with the District Court insofar as it also granted
7 summary judgment to RGRTA on Talton’s retaliation claim. Talton presented
8 evidence, in the form of deposition testimony, that Tiberio suggested that he
9 could lose his job for filing complaints of discrimination. Talton’s testimony
10 echoed a previously filed EEOC charge in which he alleged that Tiberio had once
11 indicated “that [Talton] could get fired for the filing of the EEOC charge” and
12 “said that ‘this is you[r] job too.’” A reasonable juror could find both that Tiberio
13 threatened Talton with the loss of his job, and that this threat would “dissuade[]
14 a reasonable worker from making or supporting a charge of discrimination.”
15 Burlington Northern, 548 U.S. at 68 (quotation marks omitted).

16 Talton also presented evidence that when he complained to Tiberio about
17 his co-workers’ use of racial slurs, Tiberio told him to “suck it up and get over it,
18 nigger!” In our view, such discriminatory harassment from a supervisor may
19 alone suffice to establish an adverse employment action, as “unchecked
20 retaliatory co-worker harassment, if sufficiently severe, may constitute adverse
21 employment action so as to satisfy the [third] prong of the retaliation prima facie
22 case.” Richardson, 180 F.3d at 446.

¹¹ In addition, there was no evidence that any of the alleged acts of retaliation had a material effect on Rivera’s job or standing. Rivera acknowledged that his pay was not reduced after he filed the charge or at any other time during his employment at Lift Line.

1 In contrast to the evidence of Tiberio's harassing response to Talton's
2 complaints was the evidence of Lift Line's almost immediate response to
3 Stiggins's and Ayala's complaints that Talton had made disturbing comments
4 and "false accusations" in the workplace. Very shortly after those complaints
5 were made against Talton, who had recently filed his EEOC charges,
6 Himmelsbach, the Vice President of Regional Operations for RGRTA, arranged a
7 meeting during which she admonished Talton. A record of the meeting was
8 maintained in Talton's personnel file. Based on the disputed record before us, a
9 reasonable juror could infer that RGRTA's swift response to the complaints by
10 Talton's co-workers was designed to, and did, send a message that Talton's
11 employment at Lift Line was in serious jeopardy as a result of the EEOC charges.
12 See Burlington Northern, 548 U.S. at 72-73 (action is materially adverse where
13 plaintiff "fac[es] the choice between retaining her job . . . and filing a
14 discrimination complaint").

15 Accordingly, we vacate the District Court's grant of summary judgment in
16 favor of RGRTA on Talton's retaliation claim.

17 **4. Supplemental Jurisdiction over State Law Claims**

18 Because, as discussed above, we vacate the District Court's dismissal of
19 Talton's federal claims under Title VII, we also vacate the judgment of the
20 District Court dismissing Talton's state law claims against RGRTA. "[W]e have
21 held that 'the discretion to decline supplemental jurisdiction is available only if
22 founded upon an enumerated category of [28 U.S.C. § 1367(c)].'" Treglia v. Town
23 of Manlius, 313 F.3d 713, 723 (2d Cir. 2002) (quoting Itar-Tass Russian News
24 Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998) (alteration in
25 Treglia)). In view of our decision, we see no basis under that statute for declining
26 to exercise supplemental jurisdiction: the state-law discrimination claim does not

1 “raise[] a novel or complex issue of State law,” does not “substantially
2 predominate[] over the claim or claims over which the district court has original
3 jurisdiction,” and does not present “exceptional circumstances” leading to “other
4 compelling reasons for declining jurisdiction.” 28 U.S.C. § 1367(c)(1), (2) & (4).
5 Under these circumstances, “[t]he district court . . . should retain jurisdiction over
6 the state discrimination claim.” Treglia, 313 F.3d at 723. For the same reasons,
7 we vacate the summary dismissal of Rivera’s state law hostile work environment
8 claim. But we affirm the judgment of the District Court dismissing Rivera’s claim
9 of retaliation under state law for the same reasons that we do so with respect to
10 his federal retaliation claim. See Salamon v. Our Lady of Victory Hosp., 514 F.3d
11 217, 226 n.9 (2d Cir. 2008) (“We typically treat Title VII and NYHRL
12 discrimination claims as analytically identical, applying the same standard of
13 proof to both claims.”); Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 609 (2d
14 Cir. 2006).

15 CONCLUSION

16 For the foregoing reasons, we AFFIRM the District Court’s judgment with
17 respect to Enio Rivera’s claims of retaliation, VACATE the District Court’s
18 judgment with respect to Rivera’s hostile work environment claims and Michael
19 Talton’s claims against RGRTA, and REMAND for further proceedings consistent
20 with this opinion.