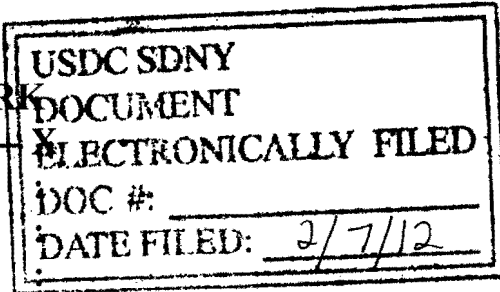


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



PATRICK CAMPBELL,

Plaintiff,

- against -

CELLCO PARTNERSHIP d/b/a/
VERIZON WIRELESS, INC.,

Defendant.

:
:
: **OPINION AND ORDER**

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:
: 10 Civ. 9168 (SAS)

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SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Patrick “Tony” Campbell brings this diversity action against Cellco Partnership, d/b/a Verizon Wireless, Inc. (hereinafter “Verizon”),¹ alleging claims of racial discrimination and retaliation under the New York State Human Rights Law (“NYSHRL”)² and the New York City Human Rights Law (“NYCHRL”).³

¹ The action was initially filed against Verizon and Patrick Devlin as an individual, but on December 30, 2010, the parties stipulated to the voluntary dismissal of Devlin pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

² NY. Exec. Law § 296, *et seq.*

³ N.Y.C. Admin. Code § 8-107(1)(a).

Campbell is an African-American and a citizen of New York.⁴ Verizon is a Delaware corporation, with its principal place of business in New Jersey.⁵ Verizon now moves for partial summary judgment dismissing plaintiff's discrimination claims under Rule 56(c) of the Federal Rules of Civil Procedure. For the following reasons, defendant's motion is granted and the discrimination claims are dismissed.

II. BACKGROUND⁶

A. Undisputed Facts

Plaintiff began his career at Verizon in 2000 as a store manager.⁷ Beginning in 2001, plaintiff received both negative and positive feedback on his performance appraisals. The positive comments included compliments in 2002 that he was the "hardest working store manager"⁸ and in 2004 on his "year over

⁴ See Amended Complaint ("Am. Compl.") ¶ 1.

⁵ See *id.* ¶ 2.

⁶ The following facts are derived from the Amended Complaint and from the parties' Rule 56.1 statements and supporting documents. The facts are undisputed unless otherwise noted; where disputed, they are construed in the light most favorable to the plaintiff. See, e.g., *Federal Ins. Co. v. American Home Assurance Co.*, 639 F.3d 557, 566 (2d Cir. 2011).

⁷ See Am. Compl. ¶ 10.

⁸ Campbell's Answer to Defendant's Rule 56.1 Statement of Material Facts ("Pl. 56.1") ¶ 7.

year growth.”⁹ The negative feedback focused on his brash management style, including a comment in 2001 that plaintiff “must observe staff and give positive feedback” and a “Final Written Warning” in 2002 for using “abusive and threatening language toward an employee.”¹⁰ In 2006, plaintiff’s supervisor told him that his staff found him “unapproachable.”¹¹ When he challenged these complaints about his management ability in an email sent to the Human Resources Department (“HR”), plaintiff was told that the concerns raised by his colleagues were a “consistent theme that we have heard over time.”¹²

In 2005, plaintiff applied for, but was not awarded, the position of District Manager (“DM”) for Verizon’s Manhattan stores; instead, he became the DM of the Westchester/Putnam Zone.¹³ In 2006, plaintiff began reporting to Kevin Zavaglia (a Caucasian)¹⁴ and, in April of 2006, plaintiff became the DM of the

⁹ *Id.* ¶ 14.

¹⁰ Verizon’s Rule 56.1 Statement of Undisputed Facts (“Def. 56.1”) ¶ 7.

¹¹ *Id.* ¶ 19.

¹² 4/28/06 Email from Annette Lowther (an HR employee) to Campbell (4:47 PM), Ex. 2 to Declaration of Lisa E. Dayan, defendant’s counsel, in Support of Motion for Partial Summary Judgment (“Dayan Decl.”).

¹³ *See* Def. 56.1 ¶ 16. The position of Manhattan DM was given to Frank Campbell, a Caucasian unrelated to plaintiff. *See* Pl. 56.1 ¶ 15.

¹⁴ *See* Def. 56.1 ¶ 18.

Brooklyn and Queens Zone.¹⁵ John McCarthy (a Caucasian), replaced plaintiff as DM of the Westchester/Putnam Zone.¹⁶ In January 2008, Patrick Devlin (a Caucasian) was hired as Regional President¹⁷ and, in March 2008, Devlin interviewed plaintiff for the Director of Regional Sales position — the supervisor of the DM’s¹⁸ — but hired Michael Scribner (an African-American) for the position instead. That same month, plaintiff’s staff tampered with the Net Promoter Scores (“NPS”) in order to increase the customer service ranking for their stores.¹⁹ Scribner spoke to plaintiff about this incident and was “very angry and yelling.”²⁰ Plaintiff’s performance appraisal for 2008 was “largely positive,” but included familiar concerns “voiced by some of the members of Tony’s team about the means in which he communicates with them.”²¹

¹⁵ See *id.* ¶ 22.

¹⁶ See *id.* ¶ 23. Plaintiff alleges that McCarthy was an employee used by defendant to “take care of any messy situation” including taking “action to squelch [] union activity.” Am. Compl. ¶¶ 34-35.

¹⁷ See Def. 56.1 ¶ 24.

¹⁸ See *id.* ¶ 25.

¹⁹ See *id.* ¶ 30. NPS are customer satisfaction surveys. Plaintiff’s staff allegedly “fill[ed] out [the] customer surveys themselves.” *Id.*

²⁰ Pl. 56.1 ¶ 30. While plaintiff pleads a hostile work environment claim, this is the only instance of any such hostility evident in the record.

²¹ Def. 56.1 ¶ 32.

In 2009, plaintiff accepted a transfer to the position of DM of Zone 9, in Manhattan.²² In early 2009, after Circuit City filed for bankruptcy, Verizon laid off its “lowest performing employees” and froze hiring.²³ From January to June 2009, plaintiff “consistently ranked in the lower half of the DM’s” on the sales score cards.²⁴ Citing his lack of “necessary skills to manage the Manhattan stores”²⁵ and “complaints about [p]laintiff from members of his staff,”²⁶ Scribner transferred plaintiff from his position as DM of Manhattan, Zone 9, back to DM of Brooklyn and Queens, where he replaced Tomas Cain (a Caucasian).²⁷ Khurram Zyed (an Arab-American) replaced plaintiff as DM of Manhattan, Zone 9.²⁸

For the first three months as DM of Queens and Brooklyn, plaintiff ranked eleventh out of sixteen DM’s in July 2009, thirteenth out of sixteen DM’s in August 2009, and eleventh out of sixteen DM’s in September 2009.²⁹ Plaintiff

²² *See id.* ¶ 35.

²³ *Id.* ¶ 59.

²⁴ *Id.* ¶ 69.

²⁵ *Id.* ¶ 72.

²⁶ *Id.* ¶ 70.

²⁷ *See id.* ¶ 72.

²⁸ *See id.* ¶ 73.

²⁹ *See id.* ¶ 77.

made informal complaints about being understaffed,³⁰ but he “never made a written request to the Incentive Review Board (IRB) for quota relief.”³¹ During this time Scribner “received more complaints from members of [p]laintiff’s staff,”³² but plaintiff “was not disciplined in any way at the time”³³

In the middle of September 2009, Scribner emailed Marielena McDonald (an HR employee) seeking to demote plaintiff.³⁴ Scribner attached a letter outlining his reasons, which included complaints about plaintiff’s management style and that his NPS scores were the “lowest;” and that his “Year over Year growth” was the lowest of all DM’s in the same portion of the New York Metro Area.³⁵ Scribner’s request was denied. However, Nancy Percent (an HR employee) expressed “concern that nothing more formal was ever delivered to

³⁰ *See id.* ¶ 64.

³¹ *Id.*

³² *Id.* ¶ 78.

³³ Pl. 56.1 ¶ 78.

³⁴ *See* 9/18/09 Email from Scribner to McDonald (10:33 AM), Ex. 12 to Declaration of Lisa E. Dayan, defendant’s counsel, in Support of Motion for Summary Judgment (“Dayan Decl.”).

³⁵ Def. 56.1 ¶ 82.

Tony” even though she had “heard about these concerns for months.”³⁶

Around the same time, Devlin and his supervisor, David Small, paid a surprise visit to one of plaintiff’s stores.³⁷ After an employee was unable to answer questions about the store’s NPS, plaintiff was placed on an NPS specific Performance Improvement Plan (“PIP”).³⁸ While Devlin was copied on the letter discussing the NPS PIP, it was sent by Scribner.³⁹ Plaintiff met with Scribner in October 2009 to discuss the NPS PIP but he refused to sign it.⁴⁰ After that meeting, plaintiff met with Lambert to complain about racial discrimination.⁴¹ This was the first time plaintiff lodged an official complaint with Lambert.⁴²

In mid-October 2009, Scribner (in consultation with plaintiff, Lambert, and McDonald), drafted an Overall 30-day PIP for plaintiff.⁴³ During

³⁶ 9/29/09 Email from Percent to Eileen Lambert (an HR employee) (5:25 PM), Ex. 12 to Dayan Decl.

³⁷ *See* Def. 56.1 ¶ 88.

³⁸ *See id.* ¶ 93.

³⁹ *See* Letter from Scribner to Campbell, Ex. 9 to Dayan Decl.

⁴⁰ *See* Def. 56.1 ¶ 95.

⁴¹ *See id.* ¶ 96.

⁴² *See id.*

⁴³ *See id.* ¶¶ 100-103.

this time, Scribner accepted the position of Director for the Northeast Area⁴⁴ and McCarthy was hired as Scribner's replacement.⁴⁵ On October 30, 2009, McCarthy and Lambert placed plaintiff on the Overall 30-day PIP.⁴⁶ In November 2009, plaintiff was "given a Final Written Warning for divulging confidential information" about another employee's demotion.⁴⁷ At the end of November, the 30-day PIP was extended another thirty days.⁴⁸ Plaintiff ranked first out of sixteen DM's in November 2009⁴⁹ and fifteenth out of sixteen DM's in December 2009.⁵⁰

In December 2009, plaintiff's Performance Appraisal ranked him as "developing," the lowest possible score.⁵¹ Plaintiff was warned that he would be placed under a Final PIP because he had "failed to reach [his] sales quota and . . . his growth performance was the lowest in the region."⁵² Plaintiff met at least some

⁴⁴ See Deposition of Michael Scribner ("Scribner Dep.") at 82:8-9.

⁴⁵ See Def. 56.1 ¶ 107.

⁴⁶ See *id.* ¶ 109.

⁴⁷ *Id.* ¶ 110.

⁴⁸ See *id.* ¶ 112.

⁴⁹ See Pl. 56.1 ¶ 112.

⁵⁰ See Def. 56.1 ¶ 115.

⁵¹ *Id.* ¶ 118.

⁵² *Id.* ¶¶ 119-120.

of his Management by Objective (“MBO”) goals each quarter of 2009,⁵³ but the MBO metric is not “a measure of overall performance” and does not “measure a DM in comparison with his/her peers in the Region.”⁵⁴ In his Affidavit, McCarthy explains that “a DM could have been doing very poorly and below the region average . . . but still get the full MBO payment goal by showing 3% improvement over his/her own score . . . even if [those] results were still below the regional average.”⁵⁵

In January 2010, plaintiff went on leave to care for his sick father and was not placed on the Final PIP until he returned in April 2010.⁵⁶ The letter placing plaintiff on the Final PIP cites his Zone’s performance in the first three months of 2010 — the time he was on leave.⁵⁷ On August 2, 2010, plaintiff was terminated for failing to meet the goals that were set in the Final PIP.⁵⁸

⁵³ See Defendant’s Reply in Further Support of Motion for Partial Summary Judgment (“Def. Reply”) at 10.

⁵⁴ 12/06/11 Affidavit of John McCarthy, Verizon Director of Retail Sales for the New York Metro Area, in Support of Defendant’s Motion for Summary Judgment (“McCarthy Aff.”) ¶ 29.

⁵⁵ *Id.* ¶ 30.

⁵⁶ See Def. 56.1 ¶ 121.

⁵⁷ See 4/21/10 Letter from McCarthy to Campbell, Ex. 15 to Dayan Decl.

⁵⁸ See Def. 56.1 ¶¶ 124-125.

B. Disputed Facts

1. Plaintiff's Version

Campbell does not deny the general time line of events, but characterizes most of the transfers and PIPs as part of “Devlin’s discriminatory plot” to have him terminated.⁵⁹ However, some events occurred before Devlin was hired as Regional President in January 2008. Plaintiff states that the “Final Written Warning” he received in 2002 was given after he notified HR about employees in his Zone attempting to unionize.⁶⁰ Plaintiff states further that his transfer from Westchester to Queens in April 2006 was “retaliation for [his] . . . refusal to take action against union activities and because he was black”⁶¹ Plaintiff argues that the decision not to promote him to DM of Manhattan in 2005 was motivated by “discriminatory animus against” him,⁶² because, although he had been characterized as “highly promotable,” the position was given to Frank Campbell (a Caucasian).⁶³ Plaintiff states generally that “Devlin passed him over for promotion

⁵⁹ Pl. 56.1 ¶ 133.

⁶⁰ *See id.* ¶ 14.

⁶¹ Am. Compl. ¶ 29.

⁶² Pl. 56.1 ¶ 15.

⁶³ *Id.*

at least nine times,”⁶⁴ but does not specify these particular instances.

Plaintiff states that he was not hired for the position of Director of Regional Sales in 2008 because, when asked about integrity during his interview with Devlin, he stated that “a white Verizon Wireless employee had less integrity than [he] did.”⁶⁵ Plaintiff claims that Devlin took offense at this remark and withheld the position from him, which he views as discriminatory.⁶⁶

Campbell claims that during the time he was DM of Manhattan, Zone 9, the reductions of staff in his zone “were more extreme”⁶⁷ than in other New York Metro Zones. Plaintiff also states that his two “top producing stores” were taken away from him, thereby hurting his quota,⁶⁸ and that his poor performance as DM of Manhattan, Zone 9 was caused by Devlin’s “plan to realign the borough by taking away lucrative stores” from his supervision.⁶⁹

Plaintiff does not deny that his sales numbers were low, but he blames his low sales numbers on the quota system, which he claims was manipulated by

⁶⁴ *Id.* ¶ 127.

⁶⁵ *Id.* ¶ 27.

⁶⁶ *See id.*

⁶⁷ *Id.* ¶ 62.

⁶⁸ *Id.* ¶ 67

⁶⁹ *Id.* ¶ 69.

Devlin and applied “discriminatorily based on [plaintiff’s] race.”⁷⁰ Plaintiff states that Devlin ordered his transfer back to Queens,⁷¹ and that the number of employees reporting to him in Queens was unfairly reduced after his transfer to that Zone.⁷² Plaintiff also claims that his “movement to and from Manhattan was ‘rigged’” by Devlin.⁷³

According to Plaintiff, Devlin ordered that he be placed on the NPS PIP in retaliation for a prior complaint of discrimination, but he does not specify when this complaint was lodged.⁷⁴ Plaintiff claims that the NPS PIP was “ordered” by Devlin “for discriminatory reasons.”⁷⁵

Even though October 2009 was the first time plaintiff lodged a formal complaint of race discrimination with Lambert, plaintiff states that he also complained to McDonald in June 2009 and directly to Scribner.⁷⁶ Plaintiff states

⁷⁰ Am. Comp. ¶ 47.

⁷¹ See Pl. 56.1 ¶ 74.

⁷² See *id.* ¶ 77.

⁷³ *Id.* ¶ 72.

⁷⁴ See *id.* ¶ 91.

⁷⁵ *Id.* ¶¶ 89, 93.

⁷⁶ See *id.* ¶ 96.

that “he raised allegations of discrimination against senior managers,”⁷⁷ and that he “never received a disciplinary action . . . until after he made race complaints in June 2009.”⁷⁸

Plaintiff claims that he was not given a true opportunity to succeed and that by the time he was placed on the PIPs, Verizon “had decided . . . that [p]laintiff would either accept a demotion or be fired.”⁷⁹ As evidence, plaintiff points to the fact that he consistently met his MBO quotas⁸⁰ and that the performance of his stores during the first quarter of 2010 was incorporated into the decision to place him under the Final PIP even though he was on leave during this time.⁸¹ He also states that he was not permitted to make a lateral transfer because of the PIPs he was placed on.⁸²

2. Defendant’s Version

Defendant provided evidence that Frank Campbell was promoted to DM of Manhattan in 2005 over plaintiff because he had more seniority, having

⁷⁷ *Id.* ¶ 109.

⁷⁸ *Id.* ¶ 123.

⁷⁹ *Id.* ¶ 124.

⁸⁰ *See id.* ¶ 119.

⁸¹ *See id.* ¶ 121.

⁸² *See* Deposition of Tony Campbell (“Pl. Dep.”) at 396:19-23.

worked for Verizon since 1996.⁸³ Furthermore, defendant provided an email wherein Lowther stated that plaintiff was transferred from Westchester to Queens in order to allow him to “start fresh with a new management team and employees.”⁸⁴ Regarding the 2008 Director of Regional Sales position, defendant provided evidence that Scribner was employed by Verizon longer than plaintiff⁸⁵ and that Devlin formed a “poor” impression of plaintiff during the interview.⁸⁶ Verizon addressed four additional promotions: in 2008, Thomas Varghese (an Indian-American) was promoted to Director of Indirect Sales (he had five years of relevant experience compared to less than two for plaintiff;⁸⁷ in June 2010, Frank Campbell was promoted to Director of Telesales (plaintiff did not apply for this position);⁸⁸ in May 2009, James Clifford was promoted to Director of Business Sales (plaintiff did not apply for this position);⁸⁹ and in April 2010, Guiseppe

⁸³ See McCarthy Aff. ¶ 6.

⁸⁴ 4/28/06 Email from Lowther to Campbell (4:47 PM), Ex. 2 to Dayan Decl.

⁸⁵ See Scribner Dep. at 8:3 (stating that he has been employed by Verizon for “[t]hirteen and a half years.”).

⁸⁶ Deposition of Patrick Devlin (“Devlin Dep.”) at 101:25.

⁸⁷ See McCarthy Aff. ¶ 5.

⁸⁸ See *id.* ¶ 6.

⁸⁹ See *id.* ¶¶ 8-9.

Salonna was promoted to Director of Indirect Distribution (plaintiff did not apply for this position).⁹⁰

Contrary to plaintiff's assertion that his Manhattan stores lost more employees than other New York Metro Zones, Verizon provided an affidavit stating that during this time "22 Manhattan employees were laid off, 11 from Zone 8 and 11 from Zone 9."⁹¹ Verizon also stated that "quotas are assigned to stores, not individual DM's."⁹² Thus, even if, as plaintiff asserts, his best stores were taken away from him, this would not hinder his ability to meet his overall quota.

During his deposition, Devlin testified that it was Scribner who decided to transfer plaintiff from Manhattan to Queens and merely informed Devlin of his choice.⁹³ Defendant provided substantial evidence showing that Devlin had no influence over the quota system and that the quotas were formulated by Verizon's finance division.⁹⁴ Defendant provided additional evidence that

⁹⁰ See *id.* ¶¶ 10-11.

⁹¹ *Id.* ¶ 15.

⁹² Def. 56.1 ¶ 67.

⁹³ See Devlin Dep. at 251:22-24.

⁹⁴ See 9/20/11 Affidavit of Betty Simon, Verizon Associate Director of Operations in the Northeast Area, in Support of Defendant's Motion for Summary Judgment ("Simon Aff.") ¶ 16; 9/21/11 Affidavit of Russell Herman, Verizon District Manager in the New York Metro Area, in Support of Defendant's Motion for Summary Judgment ("Herman Aff.") ¶ 16.

Devlin was not involved in setting the number of employees for plaintiff's stores.⁹⁵

Devlin further testified that the decision to discipline plaintiff over the NPS tampering incident was "up to Mike Scribner and the HR Department;"⁹⁶ Scribner testified to the same in his deposition.⁹⁷ Defendant acknowledged that plaintiff complained to Lambert in October 2009, but stated that his complaints were non-specific and therefore HR was unable to investigate further.⁹⁸ After Scribner's request to have plaintiff demoted, HR "recommended that [plaintiff] be placed on a written [Performance Improvement Plan]." ⁹⁹

Defendant disputes that the Final PIP was extended another month as a means to discriminate against plaintiff. According to Verizon, to be "taken off a PIP requires consistent improvement,"¹⁰⁰ which plaintiff failed to show, ranking fifteenth out of sixteen DM's in December 2009.¹⁰¹ Furthermore, McCarthy and

⁹⁵ See 10/18/11 Affidavit of Peter Deane, Verizon Manager of Sales Operations for the New York Metro Region, in Support of Defendant's Motion for Summary Judgment ("Deane Aff.") ¶ 19.

⁹⁶ Devlin Dep. at 248:15-16.

⁹⁷ See Scribner Dep. at 6:22.

⁹⁸ See Def. 56.1 ¶ 99.

⁹⁹ *Id.* ¶ 86.

¹⁰⁰ *Id.* ¶ 117.

¹⁰¹ See *id.* ¶ 115.

Lambert could not have known of plaintiff’s sales for the month of November until December — after they had decided to extend the PIP.¹⁰²

III. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁰³ “For summary judgment purposes, a ‘genuine issue’ exists where the evidence is such that a reasonable jury could decide in the non-moving party’s favor.”¹⁰⁴ “A fact is material when it might affect the outcome of the suit under governing law.”¹⁰⁵

In a summary judgment setting, “[t]he burden is on the moving party to demonstrate that no genuine issue respecting any material fact exists.”¹⁰⁶ “When

¹⁰² See *id.* ¶ 113.

¹⁰³ Fed. R. Civ. P. 56(a).

¹⁰⁴ *Sanchez v. Connecticut Natural Gas Co.*, 421 Fed. App’x 33, 34 (2d Cir. 2011) (quoting *Nabisco, Inc. v. Warner–Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000)).

¹⁰⁵ *Carter v. Incorporated Village of Ocean Beach*, 415 Fed. App’x 290, 292 (2d Cir. 2011) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007)).

¹⁰⁶ *Mavrommatis v. Carey Limousine Westchester, Inc.*, No. 10 Civ. 3404, 2011 WL 3903429, at *1 (2d Cir. Sept. 7, 2011) (citing *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir. 1994)).

the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence . . . on an essential element of the nonmovant’s claim.”¹⁰⁷ In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. The non-moving party ““must do more than simply show that there is some metaphysical doubt as to the material facts,””¹⁰⁸ and cannot ““rely on conclusory allegations or unsubstantiated speculation.””¹⁰⁹

In deciding a motion for summary judgment, a court must ““construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.””¹¹⁰ However, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”¹¹¹

¹⁰⁷ *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009).

¹⁰⁸ *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

¹⁰⁹ *Id.* (quoting *Federal Deposit Ins. Corp. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010)).

¹¹⁰ *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)).

¹¹¹ *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)) (emphasis removed).

“The role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried.”¹¹²

Summary judgment may be proper even in workplace discrimination cases, which tend to be very fact-intensive, because “the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to other areas of litigation.”¹¹³ However, “[b]ecause direct evidence of an employer’s discriminatory intent will rarely be found,’ motions for summary judgment in employment discrimination actions should be evaluated with caution.”¹¹⁴ Nonetheless, a plaintiff bringing a workplace discrimination claim must make more than conclusory allegations in order to defeat a motion for summary judgment.¹¹⁵ It is incumbent upon courts to “distinguish between evidence that allows for a reasonable inference of

¹¹² *Brod*, 653 F.3d at 164 (quoting *Wilson v. Northwestern Mut. Ins. Co.*, 625 F.3d 54, 60 (2d Cir. 2010)).

¹¹³ *Hongyan Lu v. Chase Inv. Servs. Corp.*, 412 Fed. App’x 413, 415 (2d Cir. 2011) (quoting *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000)). *Accord Abdu–Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001).

¹¹⁴ *Gear v. Department of Educ.*, No. 07 Civ. 11102, 2011 WL 1362093, at *2 (S.D.N.Y. Mar. 30, 2011) (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)).

¹¹⁵ *See id.*

discrimination and evidence that gives rise to mere speculation and conjecture.”¹¹⁶

And “[a]lthough claims under the NYCHRL are ‘more liberally construed than claims under Title VII and the NYSHRL, the NYCHRL does not alter the kind, quality or nature of evidence that is necessary to support or defeat a motion for summary judgment under Rule 56.’”¹¹⁷

B. NYCHRL

Campbell brings his discrimination claims under the NYSHRL and the NYCHRL. The NYCHRL provides, in relevant part, that

[i]t shall be an unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms,

¹¹⁶ *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir. 1999). *Accord Cameron v. Community Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003) (“[P]urely conclusory allegations of discrimination, absent any concrete particulars, are insufficient” to satisfy an employee’s burden on a motion for summary judgment) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) (alteration in original)). *Accord Jenkins v. New York State Banking Dep’t*, Nos. 07 Civ. 6322, 07 Civ. 11317, 2010 WL 2382417 (S.D.N.Y. Sept. 30, 2010).

¹¹⁷ *Ballard v. Children’s Aid Soc’y*, 781 F. Supp. 2d 198, 211 (S.D.N.Y. 2011) (quoting *Deshpande v. Medisys Health Network, Inc.*, No. 07 Civ. 375, 2010 WL 1539745, at *22 (E.D.N.Y. Apr. 16, 2010)) (quotation marks omitted). *Accord Julius v. Department of Human Res. Admin.*, No. 08 Civ. 3091, 2010 WL 1253163, at *5 (S.D.N.Y. Mar. 24, 2010).

conditions or privileges of employment.¹¹⁸

Courts have previously interpreted the NYCHRL as being coextensive with Title VII and the NYSHRL, but by enacting the Local Civil Rights Restoration Act of 2005 (“Restoration Act”),¹¹⁹ “the New York City Council . . . rejected such equivalence.”¹²⁰ The City Council’s passage of the Restoration Act “confirm[ed] the legislative intent to abolish ‘parallelism’ between the [NYCHRL] and federal and state anti-discrimination law.”¹²¹ The NYCHRL must be construed “independently from and ‘more liberally’ than [its] federal and state counterparts.”¹²² As a result, although interpretations of similar laws may be used, they act only as “a floor below which the City’s Human Rights law cannot fall.”¹²³

Under the Restoration Act, the NYCHRL “explicitly requires an

¹¹⁸ N.Y.C. Admin. Code § 8-107(1)(a).

¹¹⁹ N.Y.C. Local Law No. 85 (2005).

¹²⁰ *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009). *Accord Buckman v. Calyon Sec. (USA) Inc.*, No. 09 Civ. 6566, 2011 WL 4153429, at *7 (S.D.N.Y. Sept. 13, 2011).

¹²¹ *Loeffler*, 582 F.3d at 278 (quoting *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 31 (1st Dep’t 2009)).

¹²² *Id.*

¹²³ *Id.* (emphasis removed). Because of this, if plaintiff’s claims fail under the NYCHRL they necessarily fail under the NYSHRL.

independent liberal construction analysis in all circumstances, even where [s]tate and federal civil rights laws have comparable language.”¹²⁴ However, for both discrimination and retaliation claims under the NYCHRL, courts continue to apply the three-step, burden-shifting framework that the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*.¹²⁵ Under the NYCHRL, unlike Title VII, courts must address the “‘uniquely broad and remedial’ purposes [of the NYCHRL], which go beyond those of counterpart [s]tate or federal civil rights laws.”¹²⁶ That said, a plaintiff must still demonstrate “by a preponderance of the evidence that [he] has been treated less well than other employees” due to unlawful discrimination.¹²⁷

Under the *McDonnell Douglas* framework, an employee initially bears the burden of producing evidence sufficient to support a prima facie case of discrimination.¹²⁸ Such evidence need be no more than “minimal” or “de

¹²⁴ *Williams*, 872 N.Y.S.2d at 31.

¹²⁵ *See* 411 U.S. 792, 802-03 (1973).

¹²⁶ *Williams*, 872 N.Y.S.2d at 31 (quoting the Restoration Act, N.Y.C. Local Law No. 85).

¹²⁷ *Id.* at 39.

¹²⁸ *See McDonnell Douglas*, 411 U.S. at 802.

minimis.”¹²⁹ Once the plaintiff demonstrates a prima facie case, the burden shifts in the second step to the defendant to articulate a legitimate, nondiscriminatory reason for the differential treatment.¹³⁰ “[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for” its actions.¹³¹ If the explanation is legitimate and nondiscriminatory, the burden shifts back to the plaintiff in the third step to demonstrate that the defendant’s proffered explanation is merely a pretext for discrimination.¹³² “[P]laintiff bears the burden of proving not just pretext, but racial discrimination . . . and thus the burden of pointing the court to the existence of evidence that would raise a disputed issue of material fact on this score.”¹³³

Notably, in order to raise an issue of fact that is sufficiently material to defeat a motion for summary judgment, the plaintiff must produce enough evidence to support a rational finding that the defendant’s explanation for the

¹²⁹ See, e.g., *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005).

¹³⁰ See *Ruiz v. County of Rockland*, 609 F.3d 486, 492 (2d Cir. 2005).

¹³¹ *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

¹³² See *Patterson v. County of Oneida, New York*, 375 F.3d 206, 221 (2d Cir. 2004). See also *Beachum v. AWISCO New York*, 785 F. Supp. 2d 84, 93-94 (S.D.N.Y. 2011).

¹³³ *Yarde v. Good Samaritan Hosp.*, 360 F. Supp. 2d 552, 561 (S.D.N.Y. 2005).

adverse action is actually a pretext to disguise discrimination.¹³⁴ He is required to do “more than cite to [his] mistreatment and ask the court to conclude that it must have been related to [his] race.”¹³⁵

“The factfinder’s disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.”¹³⁶ The factfinder may disbelieve the defendant’s explanation either because the facts underlying the explanation are false or because the explanation is weakened by inconsistencies or logical flaws.¹³⁷ Therefore, the plaintiff can survive summary judgment if he produces facts sufficient to permit a reasonable factfinder to disbelieve the defendant’s explanation in favor of the plaintiff’s explanation that discrimination occurred. The plaintiff can sustain this burden by proving that “the evidence in plaintiff’s favor, when viewed in the light most favorable to the plaintiff, is sufficient to sustain a reasonable finding that [the

¹³⁴ See *Weinstock*, 224 F.3d at 42. See also *Mavrommatis*, 2011 WL 3903429, at *2; *Ochei v. Coler/Goldwater Mem’l Hosp.*, 450 F. Supp. 2d 275, 283 (S.D.N.Y. 2006).

¹³⁵ *Lizardo v. Denny’s, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001).

¹³⁶ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). Accord *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000).

¹³⁷ See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 110 (2d Cir. 2001) (stating that summary judgment for defendant was improper where the defendant’s stated reasons for its actions lacked credibility due to inconsistencies).

adverse employment decision] was motivated at least in part by . . . discrimination.”¹³⁸

1. Statute of Limitations

Campbell’s NYSHRL and NYCHRL claims are subject to a three-year statute of limitations.¹³⁹ Plaintiff commenced this action on December 8, 2010. Therefore, claims regarding events that occurred prior to December 8, 2007 are time barred unless he can show that they were part of a “continuing violation.” The continuing violation doctrine — which provides an exception to the general rule barring recovery for acts occurring outside the statute of limitations — is most often applied to Title VII claims, but has been applied to NYCHRL and NYSHRL claims as well.¹⁴⁰

Under the continuing violation exception, where a “plaintiff has experienced a ‘continuous practice and policy of discrimination, . . . the commencement of the statute of limitations period may be delayed until the last

¹³⁸ *Tomassi v. Insignia Fin. Grp.*, 478 F.3d 111, 114 (2d Cir. 2007).

¹³⁹ N.Y. C.P.L.R. § 214(2) (McKinney 2003) (NYSHRL claims); N.Y.C. Admin. Code § 8–502(d) (NYCHRL claims).

¹⁴⁰ *See Williams*, 872 N.Y.S.2d at 35; *Burmudez v. City of New York*, 783 F. Supp. 2d 560, 574 (S.D.N.Y. 2011); *Drew v. Plaza Constr. Corp.*, 688 F. Supp. 2d 270, 278-79 (S.D.N.Y. 2010).

discriminatory act in furtherance of it.”¹⁴¹ The Supreme Court, in *National R.R. Passenger Corp. v. Morgan*, identified the following discrete acts: “termination, failure to promote, denial of transfer, [and] refusal to hire”¹⁴² Because each such incident “constitutes a separate actionable ‘unlawful employment practice,’”¹⁴³ the Supreme Court refused to apply the continuing violation exception to discrete, time-barred incidents, even where those incidents were related to actionable ones.¹⁴⁴

In *Williams v. New York City Housing Authority*, a New York appellate court addressed the continuing violation doctrine in the context of the NYCHRL, stating “the Restoration Act’s uniquely remedial provisions are consistent with a rule that [does not] penalize[] workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble”¹⁴⁵ However, in applying the continuing violation doctrine, the *Williams* court found the plaintiff’s sexual harassment claims to be time barred because the pre-

¹⁴¹ *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001) (quoting *Gomes v. Avco Corp.*, 964 F.2d 1330, 1333 (2d Cir. 1992) (alteration in original)).

¹⁴² 536 U.S. 101, 114 (2002).

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ 872 N.Y.S.2d at 35.

limitation-period conduct was not sufficiently “joined to actionable conduct within the limitation period”¹⁴⁶

2. Failure to Promote

The courts have yet to establish a test for analyzing failure to promote claims under the NYCHRL. To establish a prima facie case of discrimination for failure to promote under Title VII a plaintiff must show that: “1) [he] ‘is a member of a protected class;’ 2) [his] job performance was satisfactory; 3) [he] applied for and was denied promotion to a position for which [he] was qualified; and 4) the position ‘remained open and the employer continued to seek applicants.’”¹⁴⁷ While bearing in mind the more liberal standards of the NYCHRL, I use this test as a guide in analyzing plaintiff’s failure to promote claims.

3. Hostile Work Environment

“To make out a successful hostile work environment claim, a plaintiff must show that ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult, that . . . alter[s] the conditions of the victim’s employment.’”¹⁴⁸

¹⁴⁶ *Id.* at 41.

¹⁴⁷ *Campbell v. Alliance Nat’l, Inc.*, 107 F. Supp. 2d 234, 242 (S.D.N.Y. 2000) (quoting *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000)).

¹⁴⁸ *Fleming v. MaxMara USA, Inc.*, 644 F. Supp. 2d 247, 262 (E.D.N.Y. 2009) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

In keeping with the more lenient interpretation of the NYCHRL, the *Williams* court held that a plaintiff is no longer required to show “severe and pervasive” conduct to establish a hostile work environment claim under the NYCHRL.¹⁴⁹ The NYCHRL, though, is not a “general civility code”¹⁵⁰ and “petty slights and trivial inconveniences”¹⁵¹ are not actionable under the NYCHRL. In determining whether a claim of hostile work environment survives summary judgment, the relevant consideration is whether there is a triable issue of fact as to whether the plaintiff “has been treated less well than other employees because of [his race].”¹⁵² “Under the [NYCHRL], liability should be determined by the existence of unequal treatment and questions of severity and frequency reserved for consideration of damages.”¹⁵³

4. Discriminatory Discharge

Because *McDonnell Douglas* addressed a failure to hire claim,

¹⁴⁹ See 872 N.Y.S.2d at 38.

¹⁵⁰ *Id.* at 40 (quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (discussing Title VII)).

¹⁵¹ *Id.* at 41.

¹⁵² *Id.* at 39.

¹⁵³ *Selmanovic v. NYSE Group, Inc.*, No. 06 Civ. 3046, 2007 WL 4563431, at *4 (S.D.N.Y. Dec. 21, 2007) (quoting *Farrugia v. North Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 725 (Sup. Ct. N.Y. Co. 2006)).

“discharge cases do not fit as neatly under the wording of [its] prima facie case formula.”¹⁵⁴ Courts have adopted various formulations of the fourth prong of the *McDonnell Douglas* prima facie case, ranging from a requirement that the plaintiff show he was replaced by someone outside his protected class,¹⁵⁵ to the Second Circuit’s requirement that the plaintiff produce evidence that “creates an inference of discrimination.”¹⁵⁶

Under the Second Circuit’s requirements a plaintiff makes out a prima facie case of discriminatory discharge under Title VII if he: “(1) belongs to a protected class, (2) was qualified for the position he held, (3) experienced an adverse employment action, and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination.”¹⁵⁷ “An inference of discriminatory intent may be derived from a variety of circumstances, including . .

¹⁵⁴ Lex Larson, *Employment Discrimination* § 8.08[4]. The original *McDonnell Douglas* test required a plaintiff in a failure to hire case to show: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” 411 U.S. at 802.

¹⁵⁵ See, e.g., *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977).

¹⁵⁶ *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

¹⁵⁷ See *Ruiz*, 609 F.3d at 491-92.

. ‘more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff’s discharge.’¹⁵⁸

While some cases have held that “[a] prima facie case of race discrimination under the NYCHRL contains the same elements as those required under Title VII,”¹⁵⁹ treating these statutes identically ignores the effect of the Restoration Act. No court has articulated what supports an inference of discriminatory intent under the more liberal NYCHRL, but that must wait for another day. Where, as here, the employer has offered admissible evidence to support a legitimate, nondiscriminatory reason for its actions, courts need not tarry over the question of whether the plaintiff has made out a prima facie case.¹⁶⁰

IV. DISCUSSION

A. Failure to Promote

The crux of plaintiff’s failure to promote claim is that he was treated

¹⁵⁸ *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 502 (2d Cir. 2009) (quoting *Chambers*, 43 F.3d at 37).

¹⁵⁹ *Fleming*, 644 F. Supp. 2d at 268.

¹⁶⁰ *See Bennett v. Health Mgmt. Sys., Inc.*, — N.Y.S.2d —, 2011 WL 6347918, at *6 (1st Dep’t Dec. 20, 2011) (“Where a defendant in a discrimination case has moved for summary judgment and has offered evidence in admissible form of one or more nondiscriminatory motivations for its actions, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place.”).

unfairly by Devlin and other employees who were controlled by Devlin. Plaintiff states that Devlin withheld promotions that were awarded to non-African-American employees, but he only submits evidence that he applied for two of these positions.¹⁶¹ For the following reasons, plaintiff's failure to promote claims are dismissed.

1. 2005: DM of Manhattan Zone 9 Position

In 2005, plaintiff was not awarded the position of DM of the Manhattan Zone.¹⁶² Instead, Frank Campbell was given the position¹⁶³ and plaintiff became DM of the Westchester/Putnam Zone.¹⁶⁴ This claim falls outside of the three-year statute of limitations and is therefore time barred because it is not part of a continuing violation.

Failure to promote is a "discrete act" as defined by the Supreme Court in *Morgan*¹⁶⁵ and, therefore, is not governed by the continuing violation exception. Even under the more lenient NYCHRL, the 2005 failure to promote claim is not connected to claims of actionable conduct that occurred during the limitations

¹⁶¹ See Pl. 56.1 ¶¶ 15, 26.

¹⁶² See *id.* ¶ 15.

¹⁶³ See Def. 56.1 ¶ 16.

¹⁶⁴ See *id.* ¶ 15.

¹⁶⁵ 536 U.S. at 114.

period.¹⁶⁶ The decision to award the position to Frank Campbell was not made by Devlin or anyone under his control, as it was not until three years later that Devlin was hired as Regional President. Because of this, the 2005 failure to promote claim is dismissed as time barred.

2. 2008: Director of Regional Sales Position

It is undisputed that plaintiff is a member of a protected class and that he applied for, but was denied, the promotion to Director of Regional Sales. However, the position was awarded to Scribner, who is a member of the same protected class as plaintiff, which “undercuts [his] claim of racial discrimination.”¹⁶⁷ Furthermore, defendant’s stated reason for not awarding the position to plaintiff — his inferior performance during the interview —¹⁶⁸ “constitutes a legitimate, non-discriminatory reason.”¹⁶⁹ ““There is nothing unlawful about an employer’s [sic] basing its hiring decision on subjective criteria,

¹⁶⁶ See *Williams*, 872 N.Y.S.2d at 35.

¹⁶⁷ *Horsford v. Salvation Army*, No. 99 Civ. 5721, 2001 WL 1335005, at *5 (S.D.N.Y. Oct. 29, 2001) (citing *McCulley v. Southern Conn. Newspapers, Inc.*, 98 F. Supp. 2d 216, 223 (D. Conn. 2000)).

¹⁶⁸ See Devlin Dep. 108:13-18.

¹⁶⁹ *Bielinski v. Hotel Pierre*, 591 F. Supp. 2d 541, 551 (S.D.N.Y. 2008).

such as the impression an individual makes during an interview.”¹⁷⁰ Plaintiff fails to set forth any evidence that he was denied the 2008 promotion to Director of Regional Sales for racially discriminatory reasons.

3. Other Positions Generally

Campbell lists generally “six other director positions” that he was not awarded.¹⁷¹ However, it is undisputed that plaintiff did not apply for these positions.¹⁷² Campbell claims that he was unable to apply because the positions were not posted, but defendant submits evidence that at least three of the positions were posted.¹⁷³ If plaintiff “was qualified for the position . . . [y]et he never applied . . . [he] was never rejected under circumstances that would give rise to an inference of racial discrimination.”¹⁷⁴

B. Discriminatory Transfer

In April 2006, plaintiff was transferred to Brooklyn and McCarthy

¹⁷⁰ *Tucker v. New York City*, 376 Fed. App’x 100, 102 (2d Cir. 2010) (quoting *Byrnie*, 243 F.3d at 104.).

¹⁷¹ Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment at 4.

¹⁷² *See id.*

¹⁷³ *See* McCarthy Aff. ¶¶ 6, 9, 11.

¹⁷⁴ *Fraser v. Fiduciary Trust Co. Int’l*, No. 04 Civ. 6958, 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009).

replaced him in Westchester. Plaintiff claims that this transfer was made in retaliation for his failure to quell certain union activity, but he does not provide any evidence to connect this transfer to later actions that occurred within the limitations period. While McCarthy did eventually become plaintiff's supervisor and was responsible for placing plaintiff on the Final PIP, plaintiff does not present facts that connect his 2006 transfer to any allegedly discriminatory treatment that occurred during the limitations period. For this reason, plaintiff's discriminatory transfer claim is a discrete act, not connected to actionable conduct that occurred during the limitations period, and is therefore time barred.

In July 2009, Campbell was transferred from Manhattan, Zone 9 to Queens.¹⁷⁵ From the beginning of 2009, plaintiff's sales numbers placed him consistently in the bottom half of the DM score card for all DM's in the New York Metro Area.¹⁷⁶ Because the primary mechanism for evaluating a DM's performance was the score card,¹⁷⁷ his steadily poor performance was a legitimate basis for removing him from the "visible" Manhattan Zone.¹⁷⁸

¹⁷⁵ See Def. 56.1 ¶ 72.

¹⁷⁶ See *id.* ¶ 69.

¹⁷⁷ See McCarthy Aff. ¶ 29.

¹⁷⁸ Am. Compl. ¶ 19.

Plaintiff emailed McDonald in June 2009, complaining generally that his transfer to and from Manhattan, Zone 9 was “rigged,”¹⁷⁹ and states that he complained to McDonald in a phone conversation about “race discrimination,”¹⁸⁰ but provides no evidence to support this allegation. Without more, he has failed to offer sufficient evidence from which a reasonable juror could conclude that defendant’s strong showing of legitimate business justification was a pretext.

C. Hostile Work Environment

In March 2008, it was discovered that employees in one of plaintiff’s stores had tampered with the NPS ratings.¹⁸¹ Plaintiff testified that Scribner was very upset over this incident and told plaintiff “he wouldn’t take a fall for somebody else’s failure to perform”¹⁸² Plaintiff stated that Scribner “felt comfortable enough to raise his voice and shout at [him] . . . because [they were] the same complexion”¹⁸³ In his deposition testimony, however, plaintiff also stated that Scribner yelled at other employees over the same incident and that these

¹⁷⁹ 6/23/09 Email from Campbell to McDonald (2:16 PM), Ex. 8 to Pl. 56.1.

¹⁸⁰ Pl. 56.1 ¶ 72.

¹⁸¹ *See* Def. 56.1 ¶ 30.

¹⁸² Pl. Dep. at 44:5-6.

¹⁸³ *Id.* at 45:14-18.

employees were white, African-American, and Asian.¹⁸⁴ Thus, the record does not support an inference that Scribner’s shouting was racially motivated. Nor is there any allegation that plaintiff’s supervisors or fellow employees ever made any discriminatory remarks to, or about, plaintiff.

Plaintiff alleges, without any factual support, that Devlin adjusted his sales quota, making it impossible for him to succeed, and transferred him to Manhattan during the economic downturn to ensure that he would fail. In addition to Verizon’s evidence showing that Devlin had no influence over the quotas,¹⁸⁵ and that it was Scribner who transferred plaintiff to Manhattan,¹⁸⁶ there is no evidence to connect these claims to racial animus. Where there is no evidence of racial animus, a hostile work environment claim must fail.¹⁸⁷

Plaintiff claims that Zone 9 was understaffed as part of the plot to have his management of this region fail, but defendant provides evidence that, in

¹⁸⁴ See *id.* at 46:4-47:4.

¹⁸⁵ See Simon Aff. ¶ 16; Herman Aff. ¶ 16; Scribner Dep. 158:10-19.

¹⁸⁶ See Scribner Dep. 109:13.

¹⁸⁷ See, e.g., *Woods v. Enlarged City School Dist. of Newburgh*, 473 F. Supp. 2d 498, 520-21 (S.D.N.Y. 2007) (granting defendant summary judgment on hostile work environment claims because “[o]f the approximately two hundred specific incidents of alleged harassment, only one has racial overtones whatsoever” and that was “clearly insufficient, standing alone, to sustain a hostile work[] environment claim”).

light of the economic climate, almost all Zones were understaffed.¹⁸⁸ This fails to give rise to an inference of a hostile work environment. Furthermore, plaintiff provides no evidence that the months his headcount was under the budgeted amount, it was racially motivated, especially in light of defendant's evidence that Zones managed by Caucasian, African-American, and Asian employees were understaffed more often than plaintiff's Zone.¹⁸⁹

Plaintiff has not raised a triable issue of fact as to whether he was "treated less well than other employees because of [his race]."¹⁹⁰ In fact, the record is devoid of any evidence connecting his treatment to race. As such, his hostile workplace claim fails.

D. Discriminatory Discharge

Finally, plaintiff claims that he was unfairly placed on PIPs that were not appropriately administered and that this led to his termination. Because "[t]he

¹⁸⁸ See Deane Aff. ¶¶ 22, 25, 27, 30, 33, 36 (showing the number of employees reporting to each DM in the New York Metro region, January - June 2009).

¹⁸⁹ See *id.* Plaintiff's Zone was understaffed four out of six months from January to June 2009, whereas the Zone managed by Angelo Demonte (Caucasian) was understaffed all six months; the Zone managed by Chris Syed (Asian) was understaffed five out of the six months; and Brian Weatherly (African-American) was understaffed all six months.

¹⁹⁰ *Williams*, 872 N.Y.S. 2d at 39.

prima facie case method established in *McDonnell Douglas* was ‘never intended to be rigid, mechanized, or ritualistic,’”¹⁹¹ “[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.”¹⁹² Therefore, under the *McDonnell Douglas* test, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions.¹⁹³

1. Verizon’s Business Justifications

Verizon has provided legitimate business justifications for its decisions to place Campbell on the NPS PIP, the 30-day Overall PIP, and the Final PIP, and to terminate his employment. To satisfy its burden, “the defendant must simply present clear and specific non-discriminatory reasons for its actions.”¹⁹⁴ Plaintiff was placed on the NPS PIP after a surprise visit to one of his stores by Devlin and Small revealed that one of plaintiff’s employees was unfamiliar with

¹⁹¹ *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

¹⁹² *Bennett*, 2011 WL 6347918, at *5 (quoting *Aikens*, 460 U.S. at 715).

¹⁹³ *See Parrilla v. City of New York*, No. 09 Civ. 8314, 2011 WL 611849, at *11 (S.D.N.Y. Feb. 16, 2011).

¹⁹⁴ *Bernard v. J.P. Morgan Chase Bank, N.A.*, No. 08 Civ. 4784, 2010 WL 423102, at *6 (S.D.N.Y. Feb. 5, 2010).

NPS.¹⁹⁵ After a meeting with plaintiff, Devlin was unimpressed with plaintiff's understanding of NPS¹⁹⁶ and Devlin instructed Scribner to "look into it."¹⁹⁷ NPS reflects customer satisfaction and is "[g]iven high importance"¹⁹⁸ at Verizon. Therefore, placing plaintiff on an NPS-specific PIP was a legitimate response.

The primary mechanism for evaluating a DM's performance was the score card.¹⁹⁹ Thus, plaintiff's steadily poor performance in 2009²⁰⁰ was a legitimate basis for placing him on the 30-day Overall and Final PIPs. After plaintiff failed to meet the goals established in the Final PIP, he was terminated.²⁰¹ Because Verizon had legitimate business reasons for each of these actions, the burden shifts back to the plaintiff to show that the reasons offered are pretextual.

2. Evidence of Pretext

Pretext can be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing

¹⁹⁵ See Def. 56.1 ¶¶ 87, 89.

¹⁹⁶ See *id.* ¶ 90.

¹⁹⁷ Devlin Dep. at 243:18-19.

¹⁹⁸ Def. 56.1 ¶ 91.

¹⁹⁹ See McCarthy Aff. ¶ 29.

²⁰⁰ See Def. 56.1 ¶ 69.

²⁰¹ See *id.* ¶ 125.

that the employer's proffered explanation is unworthy of credence."²⁰² Plaintiff has not provided any evidence to support his contention that Verizon's decision to terminate him was "more likely motivated by discrimination" rather than by his failure to meet the sales quotas.

Plaintiff counters defendant's reason with evidence that he received bonuses for his performance under the MBO rubric, which could cast doubt over defendant's explanation. However, defendant offered evidence that the MBO metric compares plaintiff only to his own prior performance, making it possible to receive MBO bonus payments while still failing to meet the sales quotas.²⁰³

Additionally, "plaintiff offers no evidence of a causal connection to race, and [his] conclusory statements are not enough to overcome the defendant's non-discriminatory explanation"²⁰⁴ that plaintiff's placement on PIPs and his ultimate termination resulted from his failure to meet his sales quotas. Plaintiff's argument that the sales quotas were formulated unfairly to discriminate against him based on his race is similarly unavailing. Campbell provides no evidence to support the allegation that Devlin adjusted the sales quotas to ensure that plaintiff

²⁰² *Burdine*, 450 U.S. at 256.

²⁰³ *See* Def. Reply at 9 (citing *McCarthy Aff.*, ¶ 6).

²⁰⁴ *Jenkins*, 2010 WL 2382417, at *8.

would not meet them. By contrast, defendant provides two affidavits from employees who were involved in the quota-setting process, explaining the process by which quotas are established and stating that Devlin took no part in it.²⁰⁵

The record provides no evidence that African-American employees were treated differently than others.²⁰⁶ While plaintiff claims that he was the only DM in the New York Metro Area to have been placed on a PIP, Verizon provided evidence that Betty Simon (a Caucasian) was also placed on a PIP in 2004.²⁰⁷

Plaintiff's argument, therefore, is unavailing.

Plaintiff states that other DM's ranked lower than he did in any given month, but defendant provides evidence that Campbell's DM score card ranking was tenth or lower for eleven months in 2009, more often than any other DM in the same region.²⁰⁸ Given that plaintiff was placed on a series of PIPs outlining

²⁰⁵ See Simon Aff. ¶ 16; Herman Aff. ¶ 16

²⁰⁶ See *Ochei*, 450 F. Supp. 2d at 284 (where plaintiff did not allege differential treatment of black nurses, the court held "the conclusory allegations set forth in the complaint of race discrimination are insufficient to support a finding of race discrimination").

²⁰⁷ See Def. 56.1 ¶ 105. Because Simon's PIP was not signed, plaintiff argues that there is no proof that the PIP was actually implemented, but plaintiff was placed on three separate PIPs, none of which he signed. See Exs. 9, 14, 11 to Dayan Decl.

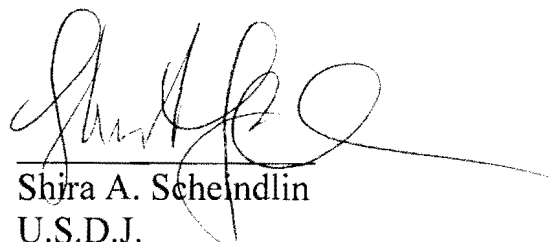
²⁰⁸ See Def. Reply at 7.

performance goals, which he failed to meet, plaintiff's claim of discriminatory discharge is not persuasive. "In the absence of evidence of disparate treatment, plaintiff must submit some evidence that creates a genuine issue as to whether plaintiff's termination was motivated by racial bias or animus."²⁰⁹ Plaintiff has offered no such evidence.

V. CONCLUSION

For the foregoing reasons, defendant's motion for partial summary judgment is granted. The Clerk of the Court is directed to close this motion [docket # 33]. A conference is scheduled for February 15 at 4:00 pm in Courtroom 15C.

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
February 7, 2012

²⁰⁹ *Woods*, 473 F. Supp. 2d at 525-26.

Appearances

For Plaintiff:

Derek S. Sells, Esq.
The Cochran Firm
233 Broadway, 5th Floor
New York, NY 10279
(212) 553-9120

For Defendant:

Raymond G. McGuire, Esq.
Lisa E. Dayan, Esq.
Kauff, McGuire & Margolis, LLP
950 Third Avenue, 14th Floor
New York, NY 10022
(212) 644-1010