UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PARNELL VAUGHN,

Plaintiff,

v.

EMPIRE CITY CASINO AT YONKERS RACEWAY, MICHAEL PALMIERE, RYAN MONROE, ROBERT GALTERIO,

Defendants.

No. 14-CV-10297 (KMK)

OPINION & ORDER

Appearances:

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KENNETH M. KARAS, District Judge:

Plaintiff Parnell Vaughn ("Plaintiff") brought this Action against Defendants Empire City Casino at Yonkers Raceway, Michael Palmiere, Ryan Monroe, and Robert Galterio (collectively, "Defendants"), alleging that Defendants unlawfully discriminated against him and retaliated against him during his employment. (*See* Am. Compl. (Dkt. No. 18).) Before the Court is Defendants' Motion for Summary Judgment. (*See* Dkt. No. 79.) For the following reasons, the Motion is granted in part and denied in part.

I. Background

A. Factual Background

The following facts are taken from the documents submitted and the Parties' respective statements pursuant to Local Rule 56.1.

1. The Parties

Defendant Empire City Casino at Yonkers Raceway ("YRC") is a New York corporation based in Yonkers, New York. (*See* Aff. of Robert Galterio ("Galterio Aff.") ¶ 3 (Dkt. No. 81); *see also* Defs.' Local Rule 56.1 Statement of Undisputed Material Facts ("Defs.' 56.1") ¶ 1 (Dkt. No. 85); Pl.'s Counter-Statement of Material Facts Pursuant to Federal Rule 56.1 ("Pl.'s 56.1 Resp.") ¶ 1 (Dkt. No. 96).)[1] Defendant Robert Galterio was the General Manager of YRC from 2008 to 2013, (*see* Aff. of Joseph DeGiuseppe, Jr. ("DeGiuseppe Aff.") Ex. C ("Galterio I Tr.") 11–13 (Dkt. No. 84); *see also* Defs.' 56.1 ¶ 4; Pl.'s 56.1 Resp. ¶ 4), and was YRC's Chief Operation Officer and Vice President from 2005 to 2008, and has been in that position again since 2013, (*see* Galterio I Tr. 12–13; *see also* Defs.' 56.1 ¶¶ 3–4; Pl.'s 56.1 Resp. ¶¶ 3–4). Defendant Michael Palmieri was the Director of Video Gaming Operations at YRC from July 16, 2007 to November 26, 2013, and was Vice President of Video Gaming Operations from November 27, 2013 to April 7, 2015. (*See* Galterio Aff. Ex. 4; *see also* Defs.' 56.1 ¶ 6; Pl.'s 56.1 Resp. ¶ 6.)[2] Defendant Ryan Munroe was hired by YRC in September 2008 as a Video

[1] Plaintiff's response to Defendants' Local Rule 56.1 Statement of Undisputed Material Facts is riddled with legal arguments. A 56.1 statement is not an opportunity to present arguments that do not fit in the briefing; it is an opportunity to establish the factual fault lines on a motion for summary judgment. Plaintiff's counsel is advised to adhere to this guideline in the future.

[2] Michael Palmieri's name is misspelled as "Palmiere" in the Amended Complaint.

Gaming Machines ("VGM") Manager and was promoted in August 2015 to his current position of Director of Video Gaming Operations. (*See* DeGiuseppe Aff. Ex. D ("Munroe I Tr.") 14; *see also* Defs.' 56.1 ¶¶ 7–8; Pl.'s 56.1 Resp. ¶¶ 7–8.)[3] Non-party Cheri Czerniowski was hired by YRC in July 2006 as a VGM Manager, became Assistant Director of the VGM Department in 2007, served temporarily as the Interim Director of the VGM Department, and resumed her duties as Assistant Director of the VGM Department after Munroe became the Director of Video Operations. (*See* DeGiuseppe Aff. Ex. E ("Czerniowski I Tr.") 12; *see also* Defs.' 56.1 ¶¶ 9–10; Pl.'s 56.1 Resp. ¶¶ 9–10.)

Plaintiff, a Black male, was hired by YRC on or about December 7, 2006 as a VGM Attendant and remained in that position until the effective date of his dismissal on October 5, 2013. (*See* DeGiuseppe Aff. Ex. B ("Vaughn I Tr."), at 11; Aff. of Parnell Vaughn ("Vaughn Aff.") ¶ 1 (Dkt. No. 92); *see also* Defs.' 56.1 ¶ 11; Pl.'s 56.1 Resp. ¶ 11.) Plaintiff and all other regular full-time and part-time VGM Attendants and Promotion Booth Representatives employed by YRC are represented by Local 1105, Communications Workers of America, AFL/CIO ("Local 1105"). (*See* Vaughn I Tr. 10; Decl. of Robert Shannon in Supp. of the Summ. J. Mot. ("Shannon Decl.") Ex. 1 (Dkt. No. 80); *see also* Defs.' 56.1 ¶ 13; Pl.'s 56.1 Resp. ¶ 13.)[4] Throughout Plaintiff's employment, Local 1105 and YRC were parties to a collective bargaining agreement. (*See* Shannon Decl. Ex. 1.) Article 6 of that collective bargaining agreement sets forth the grievance and arbitration provisions relating to disciplinary and termination issues, and

[3] Ryan Munroe's name is misspelled as "Monroe" in the Amended Complaint.

[4] To the extent there are specific allegations in Shannon's declaration that Plaintiff disputes, the Court will take those into consideration. The Court will not, however, disregard the entirety of Shannon's declaration on this Motion simply because Plaintiff has speculated that Shannon may have received some incentive from YRC for providing the declaration, (*see* Pl.'s 56.1 Resp. ¶ 69), or because Plaintiff finds Shannon's explanations "unlikely," "incredible," or "unbelievable," (*see* Vaughn Aff. ¶¶ 12–14).

Article 7 provides that employees may be discharged only for "just cause" and gives Local 1105 the right to grieve any discharge "that it believes is not for just cause." (*Id.* at 9–13.)

2. Casino Rules and Policies

YRC is subject to Section 5117.1 of the Gaming Commission Rules, which provides:

> No video lottery gaming agent, representative, licensed employee or contractor thereof, shall allow, permit or suffer any person under the age of 18 years (*underage person*) to: . . . (3) loiter or remain on the gaming floor longer than reasonably necessary for a legitimate non-gaming purpose or to reach a destination that is not on the gaming floor."

(DeGiuseppe Aff. Ex. NN; *see also* Defs.' 56.1 ¶ 16; Pl.'s 56.1 Resp. ¶ 16.) Section 5113 of the Gaming Commission Rules sets forth the various penalties that may be imposed for violations of the rules, which include, among other things, revocation or suspension of the casino's Video Lottery Gaming License. (*See* DeGiuseppe Aff. Ex. OO; *see also* Defs.' 56.1 ¶ 17; Pl.'s 56.1 Resp. ¶ 17.) YRC's VGM Departmental Policy VGM-GA011 instructs VGM Attendants to "[c]ontinuously scan [the] area to observe underage patrons," and to "[i]mmediately notify a VGM Manager/Assistant Manager (VGM Ops 1) or Security (Security Ops 1) by two-way radio for assistance." (*See* DeGiuseppe Aff. Ex. I; *see also* Defs.' 56.1 ¶ 18; Pl.'s 56.1 Resp. ¶ 18.) Plaintiff is familiar with this provision. (*See* Vaughn I Tr. 30–33; *see also* Defs.' 56.1 ¶ 21; Pl.'s 56.1 Resp. ¶ 21.)

YRC's Employee Handbook sets forth additional information regarding the monitoring of underage gambling, saying that "[a]ny employee observing an individual gambling who may be under the age of eighteen (18) should notify Security or their immediate supervisor," and that "[s]ecurity shall make routine checks of identification and maintain a log of such requests." (DeGiuseppe Aff. Ex. F, 41; *see also* Defs.' 56.1 ¶ 25; Pl.'s 56.1 Resp. ¶ 25.) Plaintiff has

acknowledged that he has read those portions of the Employee Handbook. (*See* Vaughn I Tr. 28–30; *see also* Defs.' 56.1 ¶ 26; Pl.'s 56.1 Resp. ¶ 26.)

3. Munroe's Treatment of Plaintiff

Plaintiff alleges that beginning in 2009, Munroe, one of his supervisors, began to use abusive and racist language toward him.[5] Specifically, Plaintiff alleges that in 2009, Munroe became angry at Plaintiff and used the "N-word" for the first time. (*See* Decl. of Eileen M. Burger ("Burger Decl.") Ex. 3 ("Vaughn II Tr."), at 75–76 (Dkt. No. 91); *see also* Pl.'s 56.1 Resp. ¶ 114.)[6] In mid-2010, while Plaintiff was fixing a video gaming machine, Munroe walked by and told Plaintiff, "[y]ou know why I put you in the N section, because that is where all the Ns need to be," an apparent reference to Section N on the casino floor. (Vaughn II Tr. 81–82; *see also* Pl.'s 56.1 Resp. ¶ 116.) In 2011, Chancy Marsh, a "cage supervisor," heard Munroe tell Plaintiff, in response to a suggestion by Plaintiff that a gaming machine be moved, to "[s]tay in your place, that's our job," and "you need to stay in your place, nigger." (Vaughn II Tr. 72–74; Aff. of Chancy Marsh IV ("Marsh Aff.") ¶¶ 4–5 (Dkt. No. 93); *see also* Pl.'s 56.1 Resp. ¶ 117.) In April 2012, Marsh witnessed another incident in which Munroe referred to Plaintiff and Marsh as "Obama Niggers." (*See* Vaughn II Tr. 77–78; Marsh Aff. ¶ 6; *see also* Pl.'s 56.1 Resp. ¶ 118.) Marsh told Galterio about Munroe referring to Plaintiff and Marsh as "Obama Niggers,"

[5] Because Plaintiff included these allegations in his statement of additional material facts and Defendants did not respond to those statements, the Court cannot discern whether Defendants deny that Munroe used the language described. However, as Plaintiff is the non-movant, the Court will assume all factual allegations supported by the record, even if disputed, in Plaintiff's favor for the purpose of this Motion.

[6] The transcript of Plaintiff's deposition testimony is divided into two sets of citations (Vaughn I Tr. and Vaughn II Tr.) because the Parties have not provided the complete transcript of Plaintiff's deposition and have instead cited to the limited excerpts provided by each Party on this Motion. Other deposition transcripts are similarly cited.

but Galterio merely responded, "listen, I don't feel like dealing with you people, report it to HR." (Marsh Aff. ¶ 7; *see also* Pl.'s 56.1 Resp. ¶ 119.) In 2013, Munroe told Plaintiff "to be a good little black monkey and start moving faster to [his] machine." (Vaughn II Tr. 85; *see also* Pl.'s 56.1 Resp. ¶ 120.) Munroe continued to use the "N-word" at least once a week throughout 2013, and Plaintiff estimates that Munroe used the word more than 100 times during Plaintiff's time with YRC. (*See* Vaughn II Tr. 76, 83; *see also* Pl.'s 56.1 Resp. ¶ 121.)[7]

In accordance with the instructions in the Employee Handbook regarding harassment and discrimination, (*see* DeGiuseppe Aff. Ex. F, at 35; *see also* Pl.'s 56.1 Resp. ¶ 104), Plaintiff made complaints about Munroe's behavior to Palmieri, the VGM Director, on at least two occasions, (*see* Vaughn Aff. ¶ 18; *see also* Pl.'s 56.1 Resp. ¶ 105). No action was taken by Palmieri in response to those complaints, (*see* Vaughn Aff. ¶ 18), although Czerniowski's 2009 Performance Review of Munroe noted disapproval of Munroe's use of "lingo," (*see* Burger Decl. Ex. 8; *see also* Pl.'s 56.1 Resp. ¶ 122). After Plaintiff complained to Palmieri about Munroe, Munroe confronted Plaintiff and warned him that if he continued to complain about Munroe's behavior, Plaintiff could be terminated. (*See* Vaughn II Tr. 79–80; *see also* Pl.'s 56.1 Resp. ¶ 106.) After this encounter sometime in or before 2010, Plaintiff stopped complaining about Munroe's behavior because he was "too afraid to speak up." (*See* Vaughn II Tr. 79–82; *see also* Pl.'s 56.1 Resp. ¶ 107.)

[7] There are other allegations of instances where Munroe used racial epithets or other offensive language, (*see, e.g.*, Pl's 56.1 Resp. ¶¶ 103, 115), but those allegations are not set forth in a sworn declaration or affidavit, and instead appear only either in the Amended Complaint or the transcript of court proceedings. The Court does not consider these allegations in this Motion because "with a motion for summary judgment adequately supported by affidavits, the party opposing the motion cannot rely on allegations in the complaint, but must counter the movant's affidavits with specific facts showing the existence of genuine issues warranting a trial." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004).

4. Incident With Hassan

Plaintiff alleges that on July 27, 2013, he reported an incident to Czerniowski wherein his supervisor, Adeel Hassan, failed to promptly respond to Plaintiff's call for a supervisor after a customer hit a jackpot. (*See* Vaughn II Tr. 89–90; *see also* Pl.'s 56.1 Resp. ¶ 125.) The next day, on July 28, 2013, Vaughn and Hassan were involved in an incident with one another, the details of which are the subject of some dispute. At some point, someone at YRC viewed the surveillance footage of the incident and put together a surveillance log of that footage. (*See* Defs.' 56.1 ¶ 32; Pl.'s 56.1 Resp. ¶ 32.) That summary, the Video Review Request surveillance summary (the "VRR"), relays the following information:

> -On July 28, 2013, Plaintiff clocked in for work at approximately 17:04 (according to the timer on the footage);
>
> -After clocking in at the VGM office, he left the office at 17:06 with VGM Assistant Manager LaMont Brown;
>
> -At 17:07, Plaintiff reentered the VGM office;
>
> -At 17:10, he left the VGM office with VGM Attendant John Francesconi;
>
> -At 17:12, Plaintiff entered the VGM office again as Francesconi walked out onto the casino floor;
>
> -At 17:14, Plaintiff exited the VGM office and spoke with VGM Attendant Shaun Saldivia outside the employee bank;
>
> -At 17:17, Hassan walked up to Plaintiff and pointed to his own wrist;
>
> -After the two spoke for a moment, Plaintiff entered the employee bank at 17:17.

(*See* Aff. of Caralyn Taromina Ex. 1 ("July 28 VRR") (Dkt. No. 83).) The VRR indicates that it was prepared at the request of Palmieri, (*see id.*), but Plaintiff disputes that this is accurate, (*see* Pl.'s 56.1 Resp. ¶ 32). The Parties also dispute who put together the VRR, with Defendants claiming it was Caralyn Taromina and Plaintiff arguing that the evidence is inconclusive on this

issue and pointing out that none of Defendants could recall during their depositions who drafted the VRR, (*see* Defs.' 56.1 ¶ 32; Pl.'s 56.1 Resp. ¶ 32), but there appears to be no disagreement that the VRR is a generally accurate summary of the events that took place, other than some ambiguity as to whether the timestamp on the footage aligns perfectly with YRC's time clock records, (*see* Defs.' 56.1 ¶ 33; Pl.'s 56.1 Resp. ¶ 33; *see also* Burger Decl. Ex. 4 ("Munroe II Tr."), at 136). The surveillance footage that the VRR purports to summarize has not been produced in this litigation.

Whatever the circumstances of the encounter, Plaintiff, believing Hassan's behavior to be retaliation for Plaintiff's complaint about his job performance the night before, thereafter sought to make a complaint to Czerniowski about Hassan's alleged harassment, (*see* Vaughn II Tr. 96; Munroe II Tr. 89; Vaughn Aff. ¶¶ 19–20; *see also* Pl.'s 56.1 Resp. ¶ 127), but on his way to the VGM office was intercepted by Munroe, (*see* Vaughn II Tr. 96; Munroe II Tr. 89–90; *see also* Pl.'s 56.1 Resp. ¶ 128). The two stepped into the VGM office where Plaintiff relayed to Munroe that he felt he was being harassed by Hassan in retaliation for his comments to Czerniowski the day before. (*See* Munroe II Tr. 89–91; *see also* Defs.' 56.1 ¶ 28; Pl.'s 56.1 Resp. ¶ 28.) According to Munroe, he told Plaintiff that he would investigate the matter and instructed Plaintiff to return to the casino floor. (*See* Munroe II Tr. 90.)

Following this exchange, Defendants aver that Hassan met with Munroe the same day and told him that Plaintiff had twice failed to follow Hassan's directive to proceed to his assigned work area and was disrespectful to Hassan, asking Hassan, "What are you going to do about it?" (Munroe I Tr. 91–92; *see also* Defs.' 56.1 ¶ 31.) Although Plaintiff does not dispute that Munroe met with Hassan after speaking with Plaintiff, (*see* Pl.'s 56.1 Resp. ¶ 31), Plaintiff does dispute Hassan's account, saying that he was engaged only briefly with Shaun Saldivia to

discuss a work issue, that Hassan quickly became agitated and harassing when Plaintiff did not immediately cease his conversation with Saldivia, and that he never told Hassan, "What are you going to do about it?", (*see* Vaughn II Tr. 90–95; Vaughn Aff. ¶¶ 20–21; *see also* Pl.'s 56.1 Resp. ¶ 126).

According to Munroe, he next called surveillance and asked them to inspect the footage to determine how many times Hassan had approached Plaintiff, and also asked them to describe Plaintiff's and Hassan's "general mannerisms." (*See* Munroe II Tr. 93–94; *see also* Defs.' 56.1 ¶ 38; *see also* Pl.'s 56.1 Resp. ¶ 38.) Based on Munroe's conversations with the surveillance team (Munroe testified that he did not himself view the footage), he believed that Plaintiff was the aggressor. (*See* Munroe II Tr. 100–01.) Munroe also checked the time clock software and determined that Plaintiff had punched in at 5:02 (his scheduled shift started at 5:00). (*See id.* at 94–95.)

There is some dispute as to what happened after Munroe spoke with Plaintiff, Hassan, and the surveillance team. Munroe testified that he spoke to Palmieri and reported his basic findings, after which Palmieri instructed him to send Plaintiff home for the day and suspend him pending an investigation. (*See id.* at 102, 105; *see also* Defs.' 56.1 ¶ 39.) Plaintiff avers, however, that an email sent from Munroe to Palmieri on September 12, 2013, which included a summary of the events at issue, suggests that it was Munroe who made the decision to temporarily suspend Plaintiff. (*See* Burger Decl. Ex. 17 ("Summary of Facts"); *see also* Burger Decl. Ex. 5 ("Galterio II Tr."), at 95–96; Pl.'s 56.1 Resp. ¶ 39.) In any event, after the decision was made to send Plaintiff home pending an investigation, Munroe, Hassan, Plaintiff, and Plaintiff's union representative, Colleen Smith, met in Czerniowski's office, wherein Munroe

informed Plaintiff that he was being suspended pending an investigation. (*See* Munroe I Tr. 102–03; *see also* Defs.' 56.1 ¶¶ 42–43; Pl.'s 56.1 Resp. ¶¶ 42–43.)

At some point, Munroe (or, perhaps, someone else) drafted the first Notice of Disciplinary Action, which is dated July 29, 2013 and purports to relay events that transpired on July 29, formally suspending Plaintiff pending an investigation. (*See* Burger Decl. Ex. 11; *see also* Munroe II Tr. 119–20.) Under "Type of Violation," the boxes for "Unsatisfactory Work Quality," "Insubordination," and "Abuse of Company Time" are checked. (*See* Burger Decl. Ex. 11.) The signatures of Munroe and Hassan indicate that the notice was signed on July 28, 2013, notwithstanding that it is otherwise dated July 29, 2013. (*See id.*; *see also* Defs.' 56.1 ¶ 41.) Plaintiff argues, however, that some evidence indicates that the document was actually drafted on July 29 (the day after the incident and suspension) and backdated by Munroe to make it appear as though it had been drafted and signed on July 28. (*See* Burger Decl. Exs. 11, 12; *see also* Pl.'s 56.1 Resp. ¶ 41.) Plaintiff did not sign the first Notice of Disciplinary Action, (*see* Burger Decl. Ex. 11; *see also* Defs.' 56.1 ¶ 44; Pl.'s 56.1 Resp. ¶ 44), though Plaintiff attests that Local 1105 instructs its members not to sign such forms, (*see* Vaughn Aff. ¶ 25; *see also* Pl.'s 56.1 Resp. ¶ 44). It is unclear whether Munroe prepared and presented to Plaintiff the first Notice of Disciplinary Action on July 28, 2013, before he sent Plaintiff home. (*Compare* Munroe II Tr. 120–21 (testifying that he believed he prepared the first Notice of Disciplinary Action on July 28, before the meeting with Plaintiff and Colleen), *with* Vaughn Aff. ¶ 25 (denying that Munroe presented him with the first Notice of Disciplinary Action on July 28, 2013).)

Following the meeting, Munroe instructed Hassan to draft a statement detailing what happened during the incident. (*See* Munroe II Tr. 106, 112; *see also* Defs.' 56.1 ¶ 46; Pl.'s 56.1

Resp. ¶ 46.) Hassan provided that statement in an email message dated July 29, 2013. (*See* DeGiuseppe Aff. Ex. LL; *see also* Defs.' 56.1 ¶ 46; Pl.'s 56.1 Resp. ¶ 46.) Before Munroe received Hassan's statement, however, he drafted his own email message, summarizing the July 28, 2013 incident, which he sent to the VGM management team. (*See* Munroe I Tr. 106–08; Summary of Facts; *see also* Defs.' 56.1 ¶ 45; Pl.'s 56.1 Resp. ¶ 45.) The entirety of Munroe's email was as follows:

> Team….
>
> Parnell has been suspended pending investigation for an incident at the start of his shift today.
>
> At 5:02pm Parnell punched in and proceeded to speak with John F inside and outside of the office until approximately 5:10pm. Christine had to go retrieve him from the vestibule and tell him to get his keys and radio and get on the floor. He then got his belongings and went to the front of satellite at 5:12pm. He talked to Shaun there for 2 minutes and Adeel walked by and asked him to get on the floor. He did not stop his conversation, or move towards satellite. Before Adeel turned the corner to go to Rd. 4 he looked back and saw that Parnell was carrying on. He then turned around and approached him again, he told him to get on the floor again and Parnell's response was "What are you going to do about it?". Based on these facts Parnell was suspended for insubordination and Poor Work Quality.
>
> Thanks.

(Summary of Facts.)

Munroe testified that he had no further involvement in the investigation of the incident between Plaintiff and Hassan. (*See* Munroe I Tr. 110–11; *see also* Defs.' 56.1 ¶ 47.) Plaintiff disputes this, but points out only that the VGM management team relied heavily on Munroe's summary of the facts. (*See* Pl.'s 56.1 Resp. ¶ 47.)[8] The only other involvement by Munroe

[8] Plaintiff also points to testimony from Czerniowski that Munroe "may have" generally investigated grievances, (*see* Pl.'s 56.1 Resp. ¶ 47), but that testimony, which is equivocal at best, does nothing to refute Munroe's testimony that he had no further involvement in *this* dispute.

mentioned by Plaintiff is an email from Munroe to Czerniowski on July 30, 2013, asking Czerniowski to remind whatever manager was on duty when Plaintiff returned from his suspension to give Plaintiff his "First Notice Returned From Suspension." (*See id.* (citing Burger Decl. Exs. 14, 15).) Whatever weight should be given to this communication, the Parties are thus in agreement that Munroe's involvement in the investigation after July 28, 2013 was limited to a one-line email sent on July 30. (*See* Defs.' 56.1 ¶ 47; Pl.'s 56.1 Resp. ¶ 47.)

The events immediately following Plaintiff's suspension are the subject of some ambiguity. Czerniowski was asked by Palmieri to handle Plaintiff's return to work, as Palmieri was off work. (*See* Czerniowski I Tr. 51–52; *see also* Defs.' 56.1 ¶ 48; Pl.'s 56.1 Resp. ¶ 48.) Czerniowski, however, did not conduct any investigation of her own, and accepted the facts in Munroe's Summary of Facts as true. (*See* Burger Decl. Ex. 6 ("Czerniowski II Tr."), at 61–62; *see also* Pl.'s 56.1 Resp. ¶¶ 152–53.) She interpreted Palmieri's instructions to mean that she should coordinate with Danette Jordan-Woods, the director of human resources, to determine what the appropriate disciplinary action should be. (*See* Czerniowski II Tr. 54.) Czerniowski emailed Jordan-Woods, who she believed was already aware of the situation, that she was going to return Plaintiff from his suspension on July 30, but wanted Jordan-Woods's recommendation. (*See id.*; *see also* DeGiuseppe Aff. Ex. T.) Jordan-Woods asked for Hassan's statement, which Czerniowski forwarded to her. (*See* Czerniowski II Tr. 58; DeGiuseppe Aff. Ex. T.) The record does not reflect, however, whether Jordan-Woods ever gave her input on Plaintiff's suspension, nor does it reflect who made the final decision to return Plaintiff from his suspension after two days, although Czerniowski believed that it was Palmieri's decision to suspend Plaintiff for two days without pay. (*See* Czerniowski II Tr. 55, 71.) Moreover, Czerniowski was not sure whether Jordan-Woods or Palmieri, or anyone else for that matter, conducted any further

investigation into the incident, although she believed that someone would have viewed the surveillance footage. (*See id.* at 54–55.) As Palmieri was not deposed, the scope of his investigation and involvement, if any, in Plaintiff's discipline is largely a matter of speculation.

In any event, when Plaintiff returned to work from his suspension on July 30, Czerniowski drafted a second Notice of Disciplinary Action, (*see* Burger Decl. Ex. 15; *see also* Defs.' 56.1 ¶ 53; Pl.'s 56.1 Resp. ¶ 53), which Czerniowski described as the document that puts an employee, like Plaintiff, on notice of the disciplinary incident, (*see* Czerniowski II Tr. 67). Under "Type of Violation," the boxes for "Unsatisfactory Work Quality" and "Insubordination" are checked. (*See* Burger Decl. Ex. 15.) The description of the incident closely matches the description provided by Munroe in the Summary of Facts. (*See id.*) On the second page, the second Notice of Disciplinary Action states that Plaintiff's actions were "in violation of VGM policy VGM003," and references three rules regarding rude behavior and failure to comply with supervisor instructions and departmental rules. (*Id.*) Directly below the three rules are the words "Theft of time," with no other explanation. (*Id.*) The second Notice of Disciplinary Action is signed by Czerniowski. (*See id.*) Where Plaintiff's signature would be, it says "Refused to sign," and below Czerniowski's signature is a notation by Vaunesha Cole, (*id.*), whom Czerniowski identified as the shop steward for Local 1105, (*see* Czerniowski II Tr. 66). Czerniowski testified that if the allegations against Plaintiff were substantiated, he would have lost pay during his two-day suspension. (*See id.* at 67.)

Plaintiff's and Local 1105's response to the suspension is somewhat unclear. At some point after the incident, Plaintiff filed a "Statement of Occurrence" with the union, setting forth his version of the events. (*See* Vaughn II Tr. 117; Burger Decl. Ex. 16; *see also* Defs.' 56.1 ¶ 57; Pl.'s 56.1 Resp. ¶ 57.) Although not sworn to, and thus of questionable value on this Motion, the

Statement of Occurrence sets forth some of the missing details in the record. Namely, Plaintiff states that he was never given an opportunity to give his side of the story to a union representative; that after being sent home, he received a call from Munroe the next day telling him that he was suspended that day as well; and that he did not receive a Notice of Disciplinary Action until he returned to work and met with Czerniowski and Cole on July 30. (*See* Burger Decl. Ex. 16.) On September 11, 2013, Jordan-Woods wrote Palmieri, copying Czerniowski, saying that human resources had met with the union that day to discuss Plaintiff's suspension and asking Palmieri to give her a call to discuss, as she was "[n]ot sure what led to [his] suspension and was hoping [Palmieri] could provide some insight." (Burger Decl. Ex. 21.) Presumably as a reaction to that request, Palmieri emailed Munroe the next morning asking him to a write up a summary of the incident. (*See* Summary of Facts.) Munroe promptly responded, forwarding the Summary of Facts he had sent the management team in July and alerting Palmieri that before Hassan had spoken to Munroe about the incident, Plaintiff had come off the floor to discuss the incident with Munroe. (*See id.*) The Court has no information as to whether Palmieri and Jordan-Woods spoke after that (neither was deposed), nor can it discern whether Jordan-Woods spoke again to Local 1105 about the incident. On September 17, 2013, however, the union wrote Jordan-Woods with a list of the grievances it intended to discuss at an upcoming meeting, and Plaintiff's suspension was among them. (*See* Burger Decl. Ex. 19.)

Although Galterio testified that a proper investigation of the incident between Plaintiff and Hassan would have included an interview of Saldivia, (*see* Galterio II Tr. 86–87), Munroe did not interview Saldivia, (*see* Munroe II Tr. 92; *see also* Czerniowski II Tr. 72). Saldivia was not disciplined for congregating while on duty or for "theft of time." (*See* Vaughn II Tr. 103; Czerniowski II Tr. 73; *see also* Pl.'s 56.1 Resp. ¶ 133.)

5. Underage Gambling Incident

On September 22, 2013, an underage youth was spotted on the floor at YRC. Many of the youth's movements and interactions with staff members were captured on surveillance footage, which has been both summarized and provided to the Court for review. As with the footage relating to the incident between Plaintiff and Hassan, there is some argument from Plaintiff about whether Jennifer Monaco, who purports to have drafted the summary of the footage, (*see* Aff. of Jennifer Monaco (Dkt. No. 82)), actually did so. More specifically, Plaintiff complains that he was not aware until summary judgment that Monaco is alleged to have drafted the summary, and believes he is entitled to cross-examine Monaco regarding the authenticity of the summary on that basis alone. (*See* Pl.'s 56.1 Resp. ¶ 59.) Notably, despite contesting the authenticity of the summary, Plaintiff has cited it and relied on it in his statement of additional material facts. (*See, e.g.*, Pl.'s 56.1 Resp. ¶¶ 157, 159, 166–69.) Whatever the merits of Plaintiff's argument, however, the Court is in possession of the actual surveillance footage, and therefore sees no need to resolve the debate as to the authenticity of or the identity of the author of the summary.

The minor, wearing a dark hoodie with the hood up, and three adults (one of whom was in a wheelchair) entered the casino at approximately 3:48 PM. (*See* Burger Decl. Ex. 25 ("September 22 Footage"), at 15:48:00.) There is no indication that a security guard was present at the entrance. At 4:03 PM, the group sat down at several adjacent gaming machines. (*See id.* at 16:03:07.) It is not clear whether the minor was engaged in any gambling at that time. At approximately 4:04 PM, Suszan Oswald, the white, female, VGM attendant assigned to Section B on September 22, (*see* Burger Decl. Ex. 22), walked through the gambling area where the minor and the other adults were seated, (*see* September 22 Footage at 16:04:26). At 4:07 PM,

Oswald returned and assisted one of the minor's companions. (*See id.* at 16:07:08.) The minor was seated at the machine next to the one where the companion being assisted by Oswald was seated. (*See id.*) The minor and his companion got up and moved to converse with the two other adults at approximately 4:11 PM. (*See id.* at 16:11:00.) At 4:12 PM, the minor and the adult he had been sitting with sat down at two new gaming machines across from the other two members of the group. (*See id.* at 16:12:03.) Shortly thereafter, at 4:14 PM, the minor moved across the aisle and took the place of one of his companions who had gotten up. (*See id.* at 16:14:36.) It is again unclear whether the minor was engaged in any gambling at this time. At 4:22 PM, after milling about for a few moments, the minor changed seats again, returning to his seat across the aisle. (*See id.* at 16:22:11.) At 4:23 PM, both the minor and his companion got up and spent the next few minutes talking and watching other members of the group play. (*See id.* at 16:23:14.)

At 4:26 PM, the group arrived at a new set of slot machines, (*see id.* at 16:26:32), where, after some other patrons got up, the minor and one of his companions sat down at two adjacent gaming machines, (*see id.* at 16:27:49). The footage does not indicate that the minor was gambling. At 4:39 PM, Tahlaya Alston, another VGM attendant, walked through the area where the minor was seated. (*See id.* at 16:39:21.) The minor's companion got up to assist the member in the wheelchair at approximately 4:53 PM, (*see id.* at 16:53:53), after which the minor moved one seat over and began playing on a handheld video game device, (*see id.* at 16:54:09). Moments later, Oswald entered the area and sat down to service the gaming machine two seats away from the minor. (*See id.* at 16:54:18.) There was no one seated at the gaming machine between the minor and Oswald. A few moments later, the minor's companion returned, and the minor moved one seat over to make room, then sitting directly next to Oswald. (*See id.* at 16:54:38.) At 4:55 PM, the minor got up and crossed the aisle to assist the companion in a

wheelchair with his gaming machine. (*See id.* at 16:55:03.) Oswald completed servicing the gaming machine and left the area at approximately 4:55 PM. (*See id.* at 16:55:46.) At 4:57 PM, Oswald returned to service another gaming machine (one that the minor had been seated at earlier) on the opposite side of the aisle where the minor was seated, (*see id.* at 16:57:17), departing the area at 4:58 PM, (*see id.* at 16:58:54). At 5:14 PM, after helping his companion in the wheelchair to another gaming machine, the minor appeared to insert a gambling card into the gaming machine at the request of his companion. (*See id.* at 17:14:33.)

The minor and his companions thereafter moved to a new area of the casino. At 5:19 PM, the minor took his hood down, which had been up during the rest of his time in the casino. (*See id.* at 17:19:10.) Between 5:26 and 5:27 PM, an unidentified housekeeper passed through the area where the minor was standing. (*See id.* at 17:26:48.) No gambling from the minor was observed in this area. Here, the video surveillance provided by Plaintiff skips approximately 30 minutes of footage. The video summary indicates that during this period, the minor was observed touching the screen of a gaming machine, but does not indicate that any other staff members were in the area. (*See* Burger Decl. Ex. 24.)

At 6:00 PM, the minor and two of his companions arrived at a new set of gaming machines. (*See* September 22 Footage at 18:00:41.) The minor was no longer wearing his hood at this point. At 6:08 PM, the minor sat down at a gaming machine next to one of his companions. (*See id.* at 18:08:25.) At 6:17 PM, Plaintiff began to walk through the area, where the minor and his two companions were seated, before turning around and leaving the area. (*See id.* at 18:17:18.) A few minutes later, at 6:24 PM, Plaintiff and VGM attendant Philjo Phillip walked through the area where the minor and his companions were seated (by this time, the minor's third companion had rejoined the group). (*See id.* at 18:24:35.) Phillip walked through

the same area again at around 6:32 PM. (*See id.* at 18:32:31.) At 6:38 PM, the minor began assisting his companion in a wheelchair playing a gaming machine. (*See id.* at 18:38:28.) The minor interacted with the gaming machine several times, and at 6:41 PM, the minor cashed out the credits earned while playing the gaming machine. (*See id.* at 18:41:47.) At 6:53 PM, Plaintiff and Phillip again walked through the area where the minor was seated. (*See id.* at 18:53:29.) At 7:04 PM, the minor and his companions were escorted out of the casino by security. (*See id.* at 19:04:44.) Plaintiff denies ever seeing a minor on the casino floor that day. (*See* Vaughn I Tr. 36; *see also* Pl.'s 56.1 Resp. ¶ 160.)

The record is not entirely clear on how the matter proceeded from there. Regardless of which employee put together the video summary and forwarded it to security, Galterio suggested that it was his belief that either the security or the surveillance team reported the incident to both him and the New York State Gaming Commission (the "NYSGC") either that evening or the next morning. (*See* Galterio II Tr. 119–20.) On September 24, 2013, YRC received a notice of violation from the NYSGC, describing the incident and reprimanding YRC for allowing a minor to remain on the gambling floor in violation of the Gaming Commission Rules. (*See id.* at 120; Burger Decl. Ex. 23.) The notice identified four issues: (1) there was no guard stationed at the food court outside of the casino to prevent minors from entering; (2) the minor was allowed to keep his hood on for an extended period time in violation of gaming rules; (3) a floor attendant (presumably Oswald) assisted one of the minor's companions while the minor sat right next to her; and (4) several employees walked by the minor without asking him to remove his hood or noting that he was a minor. (*See* Burger Decl. Ex. 23.) With respect to Oswald, the NYSGC stated that "unless some compelling reason [could] be provided [they] expect[ed] this employee to be given a final warning." (*See id.*; *see also* Pl.'s 56.1 Resp. ¶ 162.)

Following receipt of the notice from the NYSGC, both Plaintiff and Oswald were suspended pending an investigation. (*See* DeGiuseppe Exs. X; *see also* Defs.' 56.1 ¶¶ 67–68; Pl.'s 56.1 Resp. ¶¶ 67–68.) On October 5, 2013, Plaintiff and Oswald were terminated. (*See* Shannon Decl. ¶ 10; *see also* Shannon Decl. Exs. 2A, 2B.) Although Galterio was not positive, he believed that Palmieri made the decision to ultimately terminate Plaintiff, though he acknowledged that the matter was discussed among himself, Palmieri, and Jordan-Woods. (*See* Galterio I Tr. 163; *see also* Defs.' 56.1 ¶ 65; Pl.'s 56.1 Resp. ¶ 65.) Notwithstanding Plaintiff's unfounded speculation to the contrary, there is no evidence that Munroe played any role in the termination of Plaintiff or was in any way involved with the investigation or grievance process. (*See* Munroe I Tr. 163–66.)

6. Grievance, Arbitration, and EEOC Proceedings

Local 1105 filed a grievance on behalf of both Plaintiff and Oswald challenging their terminations. (*See* Shannon Decl. ¶ 10; *see also* Defs.' 56.1 ¶ 69; Pl.'s 56.1 Resp. ¶ 69.) For reasons that the Parties cannot agree on, but are not material, Plaintiff's and Oswald's grievances skipped Step I of the grievance protocol and proceeded directly to Step II. (*See* Shannon Decl. ¶ 10; Galterio II Tr. 70–72; Czerniowski II Tr. 76; *see also* Defs.' 56.1 ¶ 69; Pl.'s 56.1 Resp. ¶ 69.) On October 9, 2013, the union and management met to discuss the grievances, but both grievances were denied at Step II. (*See* Shannon Decl. ¶ 10; *see also* Defs.' 56.1 ¶¶ 69–70; Pl.'s 56.1 Resp. ¶¶ 69–70.) Local 1105 appealed both grievance denials to Step III, the final step of the grievance procedure, and the parties met on November 4, 2013 to discuss the grievances. (*See* Shannon Decl. ¶ 10; *see also* Defs.' 56.1 ¶ 72; Pl.'s 56.1 Resp. ¶ 72.) Plaintiff's suspension arising from the incident with Hassan was also heard on the same day. (*See* Burger Decl. Ex. 26; *see also* Pl.'s 56.1 Resp. ¶ 182.)

Following the November meeting, YRC agreed to reinstate Oswald under a "Last Chance" settlement agreement. (*See* Shannon Decl. ¶ 10; *see also* Defs.' 56.1 ¶ 73; Pl.'s 56.1 Resp. ¶ 73.) The purported basis for YRC's decision to reinstate Oswald was YRC's belief that mitigating circumstances, such as the fact that Oswald did not have a robust disciplinary record and only passed by the minor a couple of times, warranted a sanction lighter than termination. (*See* Galterio II Tr. 127–28.) Plaintiff questions this basis, saying that the surveillance footage does not support this evaluation of Oswald's conduct and that the NYSGC specifically called out Oswald's negligence, but no one else's. (*See* Pl.'s 56.1 Resp. ¶ 73.) Plaintiff also points out that Oswald was reprimanded in February 2013 for poor customer service. (*See* Burger Decl. Ex. 27; *see also* Pl.'s 56.1 Resp. ¶ 186.)

YRC, however, did not reinstate Plaintiff. (*See* Shannon Decl. ¶ 10; *see also* Defs.' 56.1 ¶ 74; Pl.'s 56.1 Resp. ¶ 74.) Galterio testified that the decision not to reinstate Plaintiff was based on the fact that his "file wasn't as clean as Sus[z]an Oswald's," pointing to his suspension in July for insubordination. (*See* Galterio II Tr. 153.) Galterio testified that he would have considered anything in Plaintiff's file, including any incidents that took place more than a year prior, but could not recall whether any such incidents were in Plaintiff's file. (*See id.* at 153–55.)[9] The decision not to reinstate Plaintiff was made by Galterio, Jordan-Woods, and possibly Michael Taylor, YRC's General Manager. (*See* Galterio I. Tr. 188–89; *see also* Defs.' 56.1 ¶ 75; Pl.'s 56.1 Resp. ¶ 75.) In a letter dated November 18, 2013, Galterio informed the NYSGC of the terminations of Plaintiff and Oswald and the reinstatement of Oswald. (*See* Galterio Aff. Ex.

[9] Plaintiff contends that Galterio violated the Employee Handbook and the collective bargaining agreement when he considered disciplinary actions more than 12 months prior to the underage gambling incident, (*see* Pl.'s 56.1 Resp. ¶ 185 (citing DeGiuseppe Exs. F, at 28, G, at 46)), but does not suggest or point to any evidence indicating that there were any prior disciplinary actions more than 12 months removed that could have been considered.

3; *see also* Defs.' 56.1 ¶ 76; Pl.'s 56.1 Resp. ¶ 76.) In a letter dated December 16, 2013, Local 1105 sent Plaintiff a letter informing him that his grievance had been denied by YRC. (*See* Shannon Decl. Ex. 4; *see also* Defs.' 56.1 ¶ 77; Pl.'s 56.1 Resp. ¶ 77.) The letter stated, somewhat confusingly, that YRC provided the following response to the grievance:

> As discussed at our meeting, Mr. Vaughn had no interaction with a 12 year old underage patron gambling from 3:48 to 7:03 in Section AB&F; the discipline was warranted.
>
> Therefore, this grievance is denied.

(Shannon Decl. Ex. 4.)

The next sequence of events is the source of some dispute and confusion, as Plaintiff filed a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") at the same time that, allegedly unbeknownst to him, Local 1105 was arbitrating his grievance on his behalf; the chronology is therefore significant. Between November 6, 2013 and January 24, 2014, Plaintiff exchanged text messages with a union representative to discuss the possibility and timing of arbitration. (*See* Vaughn II Tr. 140–42; DeGiuseppe Aff. Ex. CC; *see also* Defs.' 56.1 ¶ 78; Pl.'s 56.1 Resp. ¶ 78.) On February 10, 2014, Local 1105 informed YRC that it intended to proceed to arbitration on Plaintiff's grievance and filed a Demand for Arbitration on Plaintiff's behalf. (*See* Shannon Decl. ¶ 11; Shannon Decl. Exs. 5, 6; *see also* Defs.' 56.1 ¶ 79; Pl.'s 56.1 Resp. ¶ 79.) On or about April 1, 2014, Local 1105 received a letter from Plaintiff requesting information about the status of his grievance and arbitration. (*See* Shannon Decl. ¶ 12; Shannon Decl. Ex. 7.) Although Defendants have produced a copy of a response letter drafted by Local 1105 that was allegedly sent to Plaintiff's address in the Bronx, (*see* Shannon Decl. Ex. 8; *see also* Shannon Decl. ¶ 12), Plaintiff claims to have never received the response, (*see* Vaughn Aff. ¶ 7).

On May 13, 2014, Plaintiff filed a Charge of Discrimination (the "Charge") with the EEOC, alleging that he had been falsely accused of insubordination and punished after a biased investigation, and that he had been unlawfully terminated (and not reinstated, unlike his white co-worker) for his involvement in the underage gambling incident. (*See* DeGiuseppe Aff. Ex. JJ ("EEOC Charge"); *see also* Defs.' 56.1 ¶ 80; Pl.'s 56.1 Resp. ¶ 80.) The Charge indicates that Plaintiff believed he was the victim of race and sex discrimination, and also the victim of retaliation, but does not include any allegations about racist comments made by Munroe or anyone else. (*See* EEOC Charge.)[10] The Charge was cross-filed with the New York State Division of Human Rights, and Plaintiff averred at the end of the document that he believed he "was discriminated against in violation of Title VII of Civil Rights Act of 1964, as amended, and other applicable Federal, state, and local anti-discrimination statutes." (*Id.*)

On July 29, 2014, the American Arbitration Association (the "AAA"), which was overseeing the arbitration, provided written notice to YRC and Local 1105 that it was offering October 3 and October 30, 2014 as arbitration dates. (*See* DeGiuseppe Aff. Ex. FF; *see* Defs.' 56.1 ¶ 83; Pl.'s 56.1 Resp. ¶ 83.) On August 11, 2014, YRC filed a statement with the EEOC responding to the Charge. (*See* DeGiuseppe Aff. Ex. II; *see also* Defs.' 56.1 ¶ 84; Pl.'s 56.1 Resp. ¶ 84.) In the statement, YRC indicated that Plaintiff's arbitration had been tentatively

[10] Plaintiff claims that this fact is "Disputed," but instead of pointing to any language in the Charge that contradicts this assertion, Plaintiff argues that he filed the Charge pro se, that the EEOC intake representative improperly instructed him not to include any information about incidents more than 300 days past, and that his rebuttal statement in the EEOC proceeding included information about Munroe's past behavior. (*See* Pl.'s 56.1 Resp. ¶ 81.) This is but one of many places where instead of assisting the Court in determining which facts are undisputed, Plaintiff has improperly used the 56.1 statement process to make additional argument. Nothing in Plaintiff's response undercuts the fact that the original Charge did not include any information about Munroe's racial comments. That Plaintiff believes that other circumstances either excuse this failure or indicate that Defendants were on notice of the full scope of Plaintiff's claims does not make this statement of fact, which is incontrovertibly true, disputed.

scheduled for October 2014. (*See* DeGiuseppe Aff. Ex. II, at 1.) In discussing Plaintiff's prior discipline for insubordination, the statement incorrectly asserts that Plaintiff was disciplined for insubordination on both July 28, 2013 and "the very next day," July 29, when, in fact, Plaintiff was out of work on July 29, having been sent home by Munroe the day before. (*See id.* at 4.) On the same day, August 11, 2014, the AAA provided written notice to both YRC and Local 1105 that Plaintiff's grievance would be heard on October 3, 2014. (*See* DeGiuseppe Aff. Ex. GG; *see also* Defs.' 56.1 ¶ 85; Pl.'s 56.1 Resp. ¶ 85.)

On August 28, 2014, Plaintiff filed his rebuttal in the EEOC proceeding. (*See* Burger Decl. Ex. 30; *see also* Pl.'s 56.1 Resp. ¶ 188.) In his rebuttal statement, Plaintiff mentioned that he was "subjected to name calling in prior instances in the past such as being called the N-word by Mr. Munroe." (Burger Decl. Ex. 30, at 2.) Plaintiff also stated that after the union did not respond to his letter, he no longer considered Local 1105 his representative. (*See id.* at 4–5.)

Defendants claim that they attempted to notify Plaintiff of the arbitration date via telephone and overnight delivery service on September 23, 2014, (*see* Shannon Decl. ¶ 14; Shannon Decl. Ex. 9), but Plaintiff was no longer living at the Bronx address to which the notification was addressed, and the landlord of the building denies ever receiving any mail addressed to Plaintiff from YRC or Local 1105, (*see* Aff. of Andrea Pena Martinez ¶ 8 (Dkt. No. 94)). On September 27, 2014, Plaintiff informed the EEOC of his change in address, giving the EEOC his new address at a shelter in Mount Vernon, New York. (*See* Burger Decl. Ex. 34.) Sometime thereafter, the EEOC mailed its decision on the Charge, dated September 25, 2014, notifying Plaintiff that it was unable to conclude that the evidence established unlawful discrimination and informing Plaintiff of his right to sue. (*See id.*; *see also* Defs.' 56.1 ¶ 87; Pl.'s 56.1 Resp. ¶ 87.)

On October 3, 2014, the arbitration was held in Plaintiff's absence. (*See* Shannon Decl. ¶ 15; *see also* Defs.' 56.1 ¶¶ 88–89; Pl.'s 56.1 Resp. ¶¶ 88–89.) The union and YRC formulated a consent award at the arbitration whereby Plaintiff would be offered unconditional reinstatement and 13 weeks of back pay. (*See* Shannon Decl. ¶ 15; *see also* Defs.' 56.1 ¶ 90; Pl.'s 56.1 Resp. ¶ 90.) The arbitration was thereafter adjourned to allow Local 1105 sufficient time to contact Plaintiff to discuss the terms of the consent award. (*See* Shannon Decl. ¶ 15; Shannon Decl. Ex. 10; *see also* Defs.' 56.1 ¶ 91; Pl.'s 56.1 Resp. ¶ 91.) The letter memorializing the adjournment indicated that the matter would be held in abeyance for up to one year. (*See* Shannon Decl. Ex. 10.)

Defendants aver that they made numerous attempts to contact Plaintiff to discuss the proposed consent award, with the vice president of Local 1105 claiming that he visited Plaintiff's last known address in the Bronx and that he also visited a homeless shelter in Yonkers where a coworker had indicated Plaintiff may have been staying. (*See* Shannon Decl. ¶ 16.) Defendants state that they also sent a letter to Plaintiff's old address on file with the union, but the letter was returned as unclaimed. (*See id.*) Plaintiff disputes this account, claiming it is implausible that the vice president of Local 1105 would have taken it upon himself to visit Plaintiff's former home in the Bronx or a homeless shelter in Yonkers. (*See* Vaughn Aff. ¶ 12.) Plaintiff's former landlord also contends she never received any visitors asking about Plaintiff's whereabouts. (*See* Aff. of Andrea Pena Martinez ¶ 7.) Plaintiff additionally points out that by December 2014, when this Action was filed, Defendants were aware of Plaintiff's new address, which was included in the Complaint, and Local 1105 could have obtained Plaintiff's address through Defendants. (*See* Dkt. No. 2; Vaughn Aff. ¶¶ 13–14.) In any event, Plaintiff claims he never

received notice of the proposed consent award until it was mentioned during his deposition in January of 2016. (*See* Vaughn Aff. ¶ 14.)

Without Plaintiff present, the consent award was entered into by YRC and Local 1105 on May 8, 2015. (*See* DeGiuseppe Aff. Ex. HH.)

B. Procedural History

Plaintiff filed his Complaint pro se on December 30, 2014. (*See* Dkt. No. 2.) On the first page of the form Complaint, there are instructions directing the litigant to check all claims for discrimination that are being brought. (*See id.* at 1.) Plaintiff checked only the line for Title VII of the Civil Rights Act of 1964, and did not check the line relating to New York State Human Rights Law. (*See id.*) Defendants filed their Answer on May 7, 2015, (*see* Dkt. No. 14), and Plaintiff filed an Amended Complaint on May 22, 2015, (*see* Dkt. No. 18). The Amended Complaint also did not check the line relating to New York State Human Rights Law. (*See id.*) After mediation failed, (*see* Dkt. No. 21), a discovery schedule was entered, (*see* Dkt. No. 22). Defendants filed their Answer to the Amended Complaint on October 29, 2015. (*See* Dkt. No. 27.) On June 3, 2016, counsel entered an appearance on behalf of Plaintiff, (*see* Dkt. No. 56), and discovery was thereafter extended and completed. After a conference before the Court, (*see* Dkt. (minute entry for Nov. 7, 2016)), the Court entered a briefing schedule on Defendants' proposed Motion for Summary Judgment, (*see* Mot. Scheduling Order (Dkt. No. 77)). Defendants filed their Motion on January 13, 2017. (*See* Dkt. No. 79.) Plaintiff responded on February 16, 2017, (*see* Dkt. Nos. 91–97), and Defendants replied on March 10, 2017, (*see* Dkt. Nos. 100–01).

II. Discussion

A. Standard of Review

Summary judgment is appropriate where 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." Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123–24 (2d Cir. 2014) (same). "In determining whether summary judgment is appropriate," a court must "construe the facts in the light most favorable to the non-moving party and . . . resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted); *see also Borough of Upper Saddle River v. Rockland Cty. Sewer Dist. No. 1*, 16 F. Supp. 3d 294, 314 (S.D.N.Y. 2014) (same). "It is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 521 (S.D.N.Y. 2015) (same).

"However, when 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 to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alteration and internal quotation marks omitted). Further, "[t]o survive a [summary judgment] motion . . . , [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,'" *Wrobel v. County of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 586–87 (1986)), "and cannot rely on the mere allegations or denials contained in the pleadings," *Guardian Life Ins. Co. v. Gilmore*, 45 F. Supp. 3d 310, 322 (S.D.N.Y. 2014) (internal quotation marks omitted); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading . . . .").

"On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 544 (2d Cir. 2014) (internal quotation marks omitted). At this stage, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod*, 653 F.3d at 164 (internal quotation marks omitted). Thus, a court's goal should be "to isolate and dispose of factually unsupported claims." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (internal quotation marks omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986)).

When ruling on a motion for summary judgment, a district court should consider only evidence that would be admissible at trial. *See Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998). "[W]here a party relies on affidavits . . . to establish facts, the statements 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated.'" *DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(c)(4)); *see also Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) ("Rule 56 requires a motion for summary judgment to be supported with affidavits based on personal knowledge . . . ."); *Baity v. Kralik*, 51 F. Supp. 3d 414, 419 (S.D.N.Y. 2014) (disregarding "statements not

based on [the] [p]laintiff's personal knowledge"); *Flaherty v. Filardi*, No. 03-CV-2167, 2007 WL 163112, at *5 (S.D.N.Y. Jan. 24, 2007) ("The test for admissibility is whether a reasonable trier of fact could believe the witness had personal knowledge." (internal quotation marks omitted)).

B. Analysis

A number of issues and arguments are presented by Defendants on this Motion. The Court will endeavor to address those issues in the most logical sequence.

1. Hostile Work Environment Claim

Defendants first argue that Plaintiff's claim for a hostile work environment, arising out of Munroe's use of racial slurs over a period of time, must be dismissed because Plaintiff did not present the claim in the Charge to the EEOC. (*See* Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Mem.") 20 (Dkt. No. 86).)

To the extent Plaintiff's claims arise under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq., those claims require Plaintiff to exhaust his administrative remedies before filing suit in federal court. *See Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015). Thus, "[b]efore bringing a Title VII suit in federal court, an individual must first present the claims forming the basis of such a suit in a complaint to the EEOC or the equivalent state agency." *Littlejohn v. City of New York*, 795 F.3d 297, 322 (2d Cir. 2015) (alteration and internal quotation marks omitted). This requirement, which "applies to pro se and counseled plaintiffs alike," *Fowlkes*, 790 F.3d at 384 (italics omitted), is "not a *jurisdictional* requirement; rather, it is merely a precondition of suit and, accordingly, it is subject to equitable defenses," *id.*

Claims not raised in an EEOC charge may, however, nonetheless be heard in federal court if those claims "are reasonably related to the claim filed with the agency." *Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (internal quotation marks omitted). A claim "is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Id.* (internal quotation marks omitted). "The central question is whether the complaint filed with the EEOC gave that agency adequate notice to investigate discrimination on both bases." *Id.* (internal quotation marks omitted).

Plaintiff offers three arguments for why the Charge, which makes no mention of Munroe's racial slurs or harassing behavior, should be deemed sufficient to exhaust Plaintiff's claim for a hostile work environment. Plaintiff first points out that he "specifically marked 'race' in the Charge, noting that he was 'discriminated against because of [his] race,'" and that such a notation is sufficient to put Defendants and the EEOC on notice. (The Pl.'s Mem. of Law in Opp'n to the Defs.' Mot. for Summ. J. ("Pl.'s Opp'n") 21 (Dkt. No. 95).) This argument has no basis in the law—the Second Circuit has held that an EEOC charge alleging a single act of discrimination is not sufficient to exhaust a plaintiff's remedies for a hostile work environment claim. *See Mathirampuzha v. Potter*, 548 F.3d 70, 77 (2d Cir. 2008) (holding that a charge that "recount[ed] nothing more than a single act of physical and verbal abuse" did not serve to exhaust a hostile work environment claim); *see also Gomez v. N.Y.C. Police Dep't*, 191 F. Supp. 3d 293, 300–01 (S.D.N.Y. 2016) (holding that a hostile work environment claim was not exhausted where the EEOC charge alleged only that the plaintiff was threatened with suspension and ultimately terminated because of her disability); *Little v. Nat'l Broad. Co.*, 210 F. Supp. 2d 330, 375 (S.D.N.Y. 2002) (holding that a hostile work environment claim was not exhausted

where the plaintiff's charge stated only that she had "been demoted, denied upgrades and overtime, and [had] suffered diminished opportunities for professional growth" (internal quotation marks omitted)); *cf. Morris v. David Lerner Assocs.*, 680 F. Supp. 2d 430, 437 (E.D.N.Y. 2010) ("To give the EEOC adequate notice of a hostile work environment claim, the EEOC charge must reference 'repeated conduct or the cumulative effect of individual acts' directed toward the plaintiff." (quoting *Mathirampuzha*, 548 F.3d at 77)). While the Court acknowledges that Plaintiff alleged two instances of discrimination in the Charge, there is no indication or suggestion in the Charge itself that Plaintiff was subject to repeated harassment.

Plaintiff next argues that his claim has been exhausted because in his rebuttal statement to the EEOC, he alleged that he "was also subjected to name calling in prior instances in the past such as being called the N-word by Mr. Munroe while [he] was servicing the video gaming machines in which [he] did not report because [he] was in fear of retaliation and losing [his] job." (Burger Decl. Ex. 30.) The Second Circuit has twice rejected similar attempts to amend an EEOC charge by way of subsequent filings. In *Holtz v. Rockefeller & Co.*, 258 F.3d 62 (2d Cir. 2001), the court held that an affidavit sent to the EEOC after the original charge "could not enlarge the scope of the charge to encompass new unlawful employment practices or bases of discrimination," and could only serve to "clarify and amplify allegations made in the original charge or allege additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." *Id.* at 83 (alteration and internal quotation marks omitted). In *Littlejohn*, the Second Circuit similarly held that a letter sent to the EEOC including new allegations of a hostile work environment was insufficient to exhaust the plaintiff's administrative remedies, saying that "unsworn letters sent to the EEOC describing additional claims of discrimination unrelated to the claims described in the EEOC charge cannot

enlarge the scope of the original charge to include new claims." 795 F.3d at 323 (alterations and internal quotation marks omitted).

While the allegations of a hostile work environment obliquely referenced in Plaintiff's rebuttal statement are not wholly unrelated to the claims in the Charge insofar as they both allege discrimination on the basis of race, they are unrelated in the sense that they relate to a different time period and involve unrelated acts of discrimination which have no meaningful relationship to the discrimination described in the Charge. Although Munroe, the supervisor allegedly responsible for Plaintiff's suspension and termination, is also the individual alleged to have created a hostile work environment, Plaintiff has offered no authority suggesting that the mere fact that the new allegations relate to the same individual is sufficient to make them reasonably related to the original charge, and a supplemental submission is not an appropriate vehicle to expand the scope of the claim to the EEOC. *See Crespo v. N.Y.C. Transit Auth.*, No. 01-CV-671, 2002 WL 398805, at *9 (E.D.N.Y. Jan. 7, 2002) ("[E]ven if [the plaintiff's] letters to the investigator had adequately detailed the alleged harassment and hostile work environment, those letters could not have expanded the scope of that charge as a matter of law."). Even assuming, however, that the rebuttal statement could have served to amend Plaintiff's charge, a single line about the use of racial slurs, which contained no further details about the alleged harassment and which was invoked only as evidence for the claim for an unlawful suspension, cannot be said to have given the EEOC "adequate notice to investigate discrimination on [that] bas[is]." *Williams*, 458 F.3d at 70 (internal quotation marks omitted); *see also Butts v. City of N.Y. Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1403 (2d Cir. 1993) (holding that an allegation to the EEOC that the plaintiff "was denied promotional opportunities and consideration based on [her] race and sex" was impermissibly vague because were the court "to permit such vague, general

allegations, quite incapable of inviting a meaningful EEOC response, to define the scope of the EEOC investigation and thereby predicate subsequent claims in the federal lawsuit, such allegations would become routine boilerplate and Title VII's investigatory and mediation goals would be defeated" (internal quotation marks omitted)), *superseded by statute on other grounds as recognized in Carter v. New Venture Gear, Inc.*, 310 F. App'x 454 (2d Cir. 2009); *Zito v. Fried, Frank, Harris, Shriver & Jacobson, LLP*, 869 F. Supp. 2d 378, 392 (S.D.N.Y. 2012) ("Courts in [the Second Circuit] have considered and refused to recognize allegations that lacked factual specificity because the EEOC cannot be expected to investigate mere generalizations of misconduct, nor can defendants adequately respond to them." (internal quotation marks omitted)); *Crespo*, 2002 WL 398805, at *9 (holding that "vague allegations," such as the employer "made [the plaintiff's] life difficult in the way they treated [her]" and the employer was "very uncooperative and subjected [her] to a hostile environment," were insufficient to state a claim of harassment or a hostile work environment).

Finally, Plaintiff argues that he limited the scope of the Charge on the basis of the advice he received from an EEOC employee, and that he should not be penalized for the misinformation received from the EEOC employee. (*See* Pl.'s Opp'n 21–22.) Specifically, Plaintiff attests that he was told by an EEOC intake representative that he could not include any discriminatory practices that occurred more than 300 days prior to the filing of the Charge because such claims would be untimely. (*See* Vaughn Aff. ¶ 16.) It was not until he retained counsel in this case that Plaintiff learned that certain claims may be brought outside the 300-day window where a plaintiff alleges continuing harassment. (*See id.* ¶ 17.) Although Plaintiff cites cases generally holding that "courts do not penalize litigants for [the] EEOC's mistakes and misinformation," *see Harris v. City of New York*, 186 F.3d 243, 248 n.3 (2d Cir. 1999), none of those cases involves a

court excusing the failure of a plaintiff to raise a claim in his or her EEOC charge, and instead all involve the timeliness of the claims, *see id.* (holding that the plaintiff's charge was timely submitted based on advice from an EEOC supervisor's erroneous advice that his claims would be deemed retroactive to the earliest filing); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 312 (2d Cir. 1996) (holding that the timeliness of a plaintiff's charge was not dependent on whether the EEOC followed through on a worksharing agreement with a state agency); *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409, 410–11 (2d Cir. 1975) (holding that a claim was not untimely to the extent the plaintiff "was misled by the [EEOC] into filing an untimely action"); *Shumway v. Hendricks*, No. 93-CV-485, 1994 WL 672656, at *3 (N.D.N.Y. Nov. 28, 1994) (holding, in line with *Ford*, that the timeliness of the plaintiff's charge was not dependent on whether the EEOC honored its obligations in a worksharing agreement). Extending this limited line of cases to situations where the substantive adequacy of an EEOC charge is at issue would open the doors to wide-ranging claims of misinformation that would undermine the very purpose of the exhaustion requirement: to permit the EEOC to investigate claims for unlawful employment practices before those claims are brought in federal court.

Moreover, Plaintiff offers no explanation for why he did not include any allegations in the Charge of Munroe's weekly racial insults throughout 2013, despite the fact that at least some of those slurs and insults occurred within the 300-day window described by the EEOC representative. (*See* Vaughn II Tr. 83.) There is thus no case law in support of Plaintiff's argument on this point, and the facts themselves belie Plaintiff's claim. Accordingly, because

Plaintiff has failed to exhaust his administrative remedies with respect to his hostile work environment claim, that claim must be dismissed.[11]

2. Discrimination and Retaliation Claims

Defendants argue that Plaintiff's claim for discrimination and retaliation with respect to his suspension and subsequent termination are legally insufficient, even construing all disputed facts in Plaintiff's favor. (*See* Defs.' Mem. 11.) The Court will examine first the claims for discrimination, and then those claims for retaliation.

a. Discrimination

At the summary judgment phase, Title VII discrimination claims are subject to the three-part burden-shifting test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005). Under this paradigm,

> a plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.

Id. If the plaintiff succeeds in making out a prima facie a case, "a presumption of discrimination arises and the burden shifts to the defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action." *Id.* If the defendant is able to proffer such a reason, "the presumption of discrimination created by the prima facie case drops out of the analysis," and the defendant "will be entitled to summary judgment unless the plaintiff can point to evidence that

[11] Plaintiff is correct, however, that the Court may consider Munroe's racial comments to the extent they are relevant to show that Plaintiff's suspension and termination were racially motivated. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("Nor does the [180- or 300-day time limitation] bar an employee from using . . . prior acts as background evidence in support of a timely claim.").

reasonably supports a finding of prohibited discrimination." *Id.* (alteration and internal quotation marks omitted).

Although a plaintiff may carry his burden at the third step "by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence," the burden "may often be carried by reliance on the evidence comprising the prima facie case, without more." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995) (internal quotation marks omitted). Thus, "unless the employer has come forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject," the case presents "a question of fact to be resolved by the factfinder after trial." *Id.* Unlike some types of discrimination, a plaintiff alleging discrimination on the basis of race under Title VII need only "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race . . . was a motivating factor for any employment practice." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (internal quotation marks omitted). Thus, "a plaintiff in a Title VII case need not allege 'but-for' causation." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015).

There is no apparent dispute that Plaintiff is a member of a protected class, that he is and was generally competent to perform his job duties, and that he suffered an adverse employment action (the suspension and subsequent termination). (*See* Defs.' Mem. 12.) Defendants argue, however, that Plaintiff has not established that his suspension or termination "occurred under circumstances that give rise to an inference of discrimination." (*Id.* (internal quotation marks omitted).) Although Defendants focus largely on the termination, the Court construes Plaintiff's Amended Complaint as raising claims for discrimination with respect to both the suspension and

the termination. Accordingly, the Court will first examine whether Plaintiff's claim for discrimination arising out of his suspension may survive summary judgment.

A plaintiff may raise an inference of discrimination "by showing that the employer subjected him to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000). "To be 'similarly situated,' the individuals with whom [a plaintiff] attempts to compare herself must be similarly situated in all material respects." *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Accordingly, the comparator "must have engaged in conduct similar to the plaintiff's without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it." *Desir v. Board of Coop. Educ. Servs. (BOCES) Nassau Cty.*, 803 F. Supp. 2d 168, 180 (E.D.N.Y. 2011) (internal quotation marks omitted), *aff'd*, 469 F. App'x 66 (2d Cir. 2012); *see also Ruiz v. County of Rockland*, 609 F.3d 486, 493–94 (2d Cir. 2010) ("An employee is similarly situated to co-employees if they were (1) subject to the same performance evaluation and discipline standards and (2) engaged in comparable conduct." (internal quotation marks omitted)). "Ordinarily, the question whether two employees are similarly situated is a question of fact for the jury." *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003). Still, "a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met." *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 499 n.2 (2d Cir. 2001).

Plaintiff has not identified any similarly-situated comparators with respect to his suspension. Plaintiff alludes to the fact that he was reprimanded for his behavior while Saldivia, with whom he was speaking during the incident, was not. (*See* Pl.'s Opp'n 15.) But there is no credible argument that Plaintiff and Saldivia were similarly situated. Despite Plaintiff's

protestation that YRC's policies permit a seven-minute grace period for lateness, (*see id.*), there is no evidence in the record that Plaintiff's suspension resulted solely or even primarily from his failure to promptly report to the casino floor. Both Notices of Disciplinary Action make clear that Plaintiff was suspended for his insubordination and for his discourteousness toward Hassan. (*See* Burger Decl. Exs. 11, 15.) While Plaintiff disputes the factual basis for his suspension, that issue is unrelated to the question of whether a coworker, who undisputedly did not engage in the same insubordinate conduct of which Plaintiff was accused, is similarly situated to Plaintiff.

But the absence of a similarly-situated comparator does not doom Plaintiff's discrimination claim with respect to the suspension. "Circumstances contributing to an inference of discrimination may include, among other things, invidious comments about people in the protected class . . . ." *Brenner v. City of N.Y. Dep't of Educ.*, 132 F. Supp. 3d 407, 416 (E.D.N.Y. 2015), *aff'd*, 659 F. App'x 52 (2d Cir. 2016); *see also Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("Circumstances contributing to a permissible inference of discriminatory intent may include the employer's . . . invidious comments about others in the employee's protected group . . . ."). However, such remarks "do not themselves give rise to an inference of discrimination under Title VII unless they are accompanied by other evidence of discrimination or a plaintiff demonstrates a 'nexus' between the remark and the adverse employment action." *Brenner*, 132 F. Supp. 3d at 420; *see also Schreiber v. Worldco, LLC*, 324 F. Supp. 2d 512, 518 (S.D.N.Y. 2004) ("Verbal comments constitute evidence of discriminatory motivation when a plaintiff demonstrates that a nexus exists between the allegedly discriminatory statements and a defendant's decision to discharge the plaintiff."). In order to determine whether a comment is probative of an intent to discriminate, a court should consider "(1) who made the remark"; "(2) when the remark was made in relation to the employment

decision at issue"; "(3) the content of the remark"; and "(4) the context in which the remark was made, i.e., whether it was related to the decisionmaking process." *Schreiber*, 324 F. Supp. 2d at 519 (italics omitted); *see also Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 149–50 (2d Cir. 2010) (citing *Schreiber* and holding that "[t]he more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be" (internal quotation marks omitted)).

Plaintiff has offered a number of comments by Munroe that a trier of fact could conclude evidence a discriminatory mindset:

> -In 2010, Munroe told Plaintiff, "[y]ou know why I put you in the N section, because that's where all the Ns need to be," an apparent reference to Section N on the casino floor. (Vaughn II Tr. 81–82);
>
> -In 2011, Munroe told Plaintiff to "[s]tay in your place, that's our job," and "you need to stay in your place, nigger." (*Id.* at 72–74; Marsh Aff. ¶¶ 4–5);
>
> -In 2012, Munroe referred to Plaintiff and another Black co-worker as "Obama Niggers." (*See* Vaughn II Tr. 77–78; Marsh Aff. ¶ 6);
>
> -In 2013, Munroe told Plaintiff "to be a good little black monkey and start moving faster to your machine." (Vaughn II Tr. 85).

In addition to these comments, Plaintiff testified that Munroe continued to use the "N-word" at least once a week throughout 2013. (*See id.* at 83.)

With respect to the first consideration—who made the remark—Defendants argue that these comments are not probative of discriminatory intent because Munroe was not involved in the decision to suspend Plaintiff. (*See* Defs.' Mem. 15.) *See also Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (holding that "'stray' remarks in the workplace by persons who are not involved in the pertinent decisionmaking process" are not sufficient to prove that discriminatory animus was a motivating factor in an adverse employment decision). But as Plaintiff points out, (*see* Pl.'s Opp'n 13), there is a dispute of fact as to whether Munroe was

involved in the decision to suspend Plaintiff. While Munroe testified that Palmieri made the decision to suspend Plaintiff, (*see* Munroe I Tr. 105), the email he sent to Palmieri suggests that Munroe may have made the initial decision to suspend Plaintiff, (*see* Summary of Facts ("After speaking with surveillance and Adeel I figure[d] out what had actually happened and at that point suspended Parnell for his actions with union present.")), and Galterio's testimony indicated the same, (*see* Galterio II Tr. 95–96). Construing these facts in the light most favorable to Plaintiff, the Court concludes that Munroe was at least partially involved in the decision to suspend Plaintiff, and therefore his comments are probative in that respect.

Regarding when the remark was made, there is a significant temporal gap between the comments made in 2010–2012 and the suspension. However, Plaintiff additionally testified not only about a specific comment made in 2013, but also stated that Munroe used the "N-word" throughout 2013. There are therefore a number of derogatory or racist comments or phrases in the time period near the adverse employment action. *See Boakye-Yiadom v. Laria*, No. 09-CV-622, 2012 WL 5866186, at *8 (E.D.N.Y. Nov. 19, 2012) (holding that a remark made "no more than two months before" the adverse employment action provided "some evidence of discriminatory motivation"), *reconsideration denied*, 2013 WL 3094943 (E.D.N.Y. June 18, 2013).

There can be little doubt that the content of the remarks is discriminatory. While it is true that none of the remarks offered by Plaintiff specifically relate to his truthfulness or his behavior toward supervisors, the blatantly racist nature of the comments is striking and troubling. Moreover, Munroe's comment in 2013 that Plaintiff needed to "be a good little black monkey and start moving faster to [his] machine," (Vaughn II Tr. 85), speaks to some of the conduct of which Plaintiff was accused by Hassan, namely, his failure to timely get onto the casino floor. A

finder of fact could conclude that Munroe's comment evinces a discriminatory belief that Plaintiff was more likely to arrive late to the casino floor because of his race.

Finally, the context of the remarks, which were apparently made throughout Plaintiff's employment, but not with respect to any disciplinary action, may not necessarily establish discriminatory intent on the part of Munroe. Nevertheless, the other considerations are sufficient to allow a finder of fact to draw the inference that the remarks demonstrate that Munroe was motivated by discriminatory animus to credit Hassan's account over Plaintiff's, or to impose a harsher sanction on Plaintiff because of his race.

Accordingly, because Plaintiff has made out a prima facie case of discrimination with respect to his suspension, the burden falls on Defendants to offer a legitimate, nondiscriminatory reason for Plaintiff's suspension. Defendants have met that standard, positing that Plaintiff's suspension was a direct result not only of his failure to report to the casino floor for a significant amount of time, but also of his insubordination toward Hassan and his repeated failure to follow Hassan's instructions. (*See* Defs.' Mem. 17.)

Plaintiff, however, has nonetheless created a genuine issue of material fact with respect to whether that explanation is pretextual. First, the comments allegedly made by Munroe through 2013 evince a discriminatory attitude that gives rise to a question about the sincerity of Defendants' proffered explanation. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 142 (2d Cir. 2008) (finding that the plaintiff had produced sufficient evidence of pretext where the evidence indicated that one defendant "was apparently in the habit of making racially questionable remarks" and was "alleged to have made a strikingly racist remark to [the plaintiff] about him and his wife"); *Terry v. Ashcroft*, 336 F.3d 128, 136 n.8 (2d Cir. 2003) (holding that although

derogatory comments are not required to show pretext, "certainly such comments might be evidence of pretext").

Second, there are some inconsistencies between Hassan's account (summarized in Munroe's email) and the VRR. For example, Munroe wrote that Hassan had to approach Plaintiff twice in an effort to get Plaintiff onto the casino floor, (*see* Summary of Facts), but the VRR states only that "Hassan walked up to Vaughn and pointed to his wrist. They spoke for a moment and Vaughn entered the Employee Bank at 17:17," (July 28 VRR).[12] Moreover, while the Summary of Facts states that "Christine had to go retrieve [Plaintiff] from the vestibule to tell him to get his keys and radio and get on the floor," (Summary of Facts), there is no mention of Christine in the VRR, (*see* July 28 VRR), and the record does not reflect where Munroe got the information about Christine. "A plaintiff may demonstrate pretext by demonstrating discrepancies in the employer's story." *Hall v. Family Care Home Visiting Nurse & Home Care Agency, LLC*, 696 F. Supp. 2d 190, 200–01 (D. Conn. 2010), *partial reconsideration granted*, 2010 WL 1487871 (D. Conn. Apr. 12, 2010); *cf. Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013) ("A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action."). A trier of fact could find that Munroe exaggerated the details of the incident to ensure that Plaintiff's suspension was upheld, and that he did so, at least in part, in an effort to discriminate against Plaintiff, as evidenced by his alleged pattern of discriminatory language. This is by no means the only explanation for Plaintiff's suspension, but it is a permissible one, and there are

[12] It bears noting that Defendants have not produced the actual video of this incident.

sufficient facts from which a jury could conclude that discrimination was a motivating factor in Plaintiff's suspension.

Turning next to Plaintiff's termination, Plaintiff has made out a prima facie case by pointing to the disparate treatment of a similarly-situated comparator—Oswald. To be sure, there are some differences between Plaintiff and Oswald, namely, Plaintiff was suspended for insubordination two months prior to the underage gambling incident, (*see* Burger Decl. Ex. 15), whereas the only discipline on record for Oswald is a verbal warning for poor customer service in February 2013, (*see* Burger Decl. Ex. 27). A materially dissimilar disciplinary history may disqualify a peer employee from being deemed similarly situated to a plaintiff. *See, e.g.*, *Rommage v. MTA Long Island R.R.*, No. 08-CV-836, 2010 WL 4038754, at *9 (E.D.N.Y. Sept. 30, 2010 (granting the defendant's summary judgment motion after "considering that [the] plaintiff's disciplinary history [was] far worse than that of the comparators" and collecting cases), *aff'd*, 452 F. App'x 70 (2d Cir. 2012); *McKinney v. Bennett*, No. 06-CV-13486, 2009 WL 2981922, at *7 (S.D.N.Y. Sept. 16, 2009) (holding that "[n]o reasonable jury could find that [the plaintiff] [was] similarly situated to . . . the white troopers he attempts to compare himself to[]" because the plaintiff had "not shown these people to have a comparable disciplinary history to his own or to have any disciplinary history at all"). Plaintiff attempts to avoid this line of cases by arguing that Munroe's discriminatory motive in suspending Plaintiff, which tainted Plaintiff's disciplinary history and led to his termination, may form the basis for his claim regarding the termination. (*See* Pl.'s Opp'n 14.) Plaintiff relies on the "cat's paw" theory of liability, endorsed by the Second Circuit in the Title VII retaliation context, whereby an employer may be held liable for an employee's discrimination where the "employer in effect adopts an employee's unlawful animus by acting *negligently* with respect to the information provided by the employee,

and thereby affords that biased employee an outsize role in its own employment decision." *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 275 (2d Cir. 2016). However, "an employer who, non-negligently and in good faith, relies on a false and malign report of an employee who acted out of unlawful animus cannot, under this 'cat's paw' theory, be held accountable for or said to have been 'motivated' by the employee's animus." *Id.*

It is unclear whether the "cat's paw" theory has any application here. The doctrine is most naturally applied to those situations where a peer employee fabricates or embellishes allegations against the plaintiff, who is thereby negligently disciplined by the employer on the basis of those allegations. But here, the purportedly fabricated allegations against Plaintiff are one step removed from the decision to terminate Plaintiff—Munroe disciplined Plaintiff for his alleged insubordination, and when Plaintiff faced disciplinary action for an unrelated incident two months later, his prior suspension formed part of the basis for YRC's decision not to reinstate Plaintiff. (*See* Galterio II Tr. 153.) An argument could be made, however, that because Munroe's discriminatory suspension served as the but-for causation for Plaintiff's ultimate suspension and because there is at least some evidence that YRC did not adequately investigate the underlying facts of the suspension, (*see id.* at 86–87 (indicating that it would have been "appropriate" to interview Saldivia regarding Plaintiff's dispute with Hassan)), YRC should be held liable for Munroe's discriminatory actions.

But the Court need not resolve the question of whether "cat's paw" liability may attach in these circumstances, because there is a question of fact as to whether Oswald and Plaintiff are similarly situated. Although Plaintiff was suspended for insubordination, whereas Oswald was disciplined only for poor customer service, this difference is not so significant as to preclude a trier of fact from concluding that the two were similarly situated in "all material respects."

While courts do grant summary judgment where a plaintiff seeks to compare himself to a coworker with a materially different disciplinary history, the disparity between the plaintiff and the coworker is typically far more stark than that present here. *See, e.g.*, *Varughese v. Mount Sinai Med. Ctr.*, No. 12-CV-8812, 2015 WL 1499618, at *52 (S.D.N.Y. Mar. 27, 2015) ("[The plaintiff] presents *no* evidence that any other resident had an extensive history of stubborn insubordination and absenteeism without notice, i.e. a history comparable to her."); *Rommage*, 2010 WL 4038754, at *9 ("[The] [p]laintiff has provided several comparators, none of whom are sufficient to demonstrate pretext. The comparators do not have disciplinary histories nearly as long or as severe as [the] plaintiff's . . . ."); *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 514 (S.D.N.Y. 2010) ("Dr. Dimartino-Nardi was also materially different from [the] [p]laintiff because she did not have an extensive disciplinary history, and had not been repeatedly warned that additional misconduct could result in termination."). The slight disparity in disciplinary history here may be persuasive to a jury, but it is not so drastic as to compel summary judgment in favor of Defendants.

Defendants point also to the fact that Oswald's reinstatement was purportedly premised on the existence of "mitigating circumstances," (Defs.' Mem. 14), specifically, that the first time Oswald walked by the minor, he was wearing his hood up, and the second time, Oswald was assisting a patron with her casino card, (*see* DeGiuseppe Aff. Ex. II, at 4). In order to rely on a similarly-situated comparator to show circumstances giving rise to an inference of discrimination (or to show pretext), the plaintiff must "show that similarly situated employees who went undisciplined engaged in comparable conduct." *Graham*, 230 F.3d at 40. The conduct, however, "need not be identical." *Id.* Here, the "mitigating circumstances" identified by Defendants do not establish, as a matter of law, that Oswald and Plaintiff are not similarly

situated, as a trier of fact could reasonably find that these mitigating circumstances are insufficient to justify the disparate treatment:

First, it is not clear that the fact that Oswald's view of the minor was potentially obstructed by the hood is a mitigating circumstance in light of the NYSGC's letter to YRC, which specifically instructed YRC that the "entire team need[ed] to be reminded that hoods or other garments that obstruct view of a face are prohibited." (Burger Decl. Ex. 23.) A trier of fact could conclude that Defendants' reliance on this fact, which was cited by the NYSGC as one of several transgressions by YRC's employees, gives rise to an inference of discrimination.

Second, Defendants' letter to the EEOC identifying the mitigating circumstances omits the fact that the "patron" whom Oswald was assisting during her second encounter with the minor was actually one of the adults accompanying the minor, and that the minor was seated next to the adult while Oswald offered assistance. (*Compare* DeGiuseppe Aff. Ex. II, at 3–4, *with* September 22 Footage at 16:07:08.) This omission is particularly striking in light of the fact that the NYSGC made special note of this occurrence in its letter, immediately before recommending disciplinary action against Oswald. (*See* Burger Decl. Ex. 23 ("A floor attendant assisted one of the adults that brought the minor into the facility while the minor sat next to her, apparently looking right at the attendant.").)

Third, in the NYSGC's letter to YRC, the only employee singled out for disciplinary treatment is Oswald. (*See id.* (advising that "unless some compelling reason [could] be provided," the NYSGC "expect[ed] [Oswald] to be given a final warning").) A trier of fact could conclude that Defendants' decision to punish Plaintiff more severely than the employee identified by the NYSGC supports a finding that the termination occurred under circumstances giving rise to an inference of discrimination.

Finally, and most notably, the position statement submitted to the EEOC by Defendants does not even reference the third time in which Oswald had an opportunity to observe the minor, namely, the extended period during which Oswald sat *directly next to* the minor and serviced a machine, (*see* September 22 Footage at 16:54:18), nor does it mention the fourth interaction during which Oswald serviced a different machine across the aisle from the minor, (*see id.* at 16:57:17). These prolonged interactions, which are more sustained and more direct than any interaction Plaintiff had with the minor, are sufficient to create a question of fact as to whether the more favorable treatment Oswald received gives rise to an inference of discrimination.

In light of the above facts, Plaintiff has established a prima facie case. Defendants have rebutted that case by offering a legitimate, nondiscriminatory reason for the disparity—Plaintiff's disciplinary history and purportedly more egregious behavior. But for many of the same reasons discussed above, Plaintiff has raised a triable issue of fact as to whether that reasoning is a pretext for discrimination. *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 173 (2d Cir. 2006) (holding that pretext "may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence comprising the prima facie case, without more" (internal quotation marks omitted)). As noted, in Defendants' statement to the EEOC, they reference only two of the four interactions Oswald had with the minor. (*See* DeGiuseppe Aff. Ex. II, at 3–4.) Moreover, Defendants misrepresented to the EEOC that Plaintiff had been disciplined twice for insubordination, when in fact he had been disciplined only once. (*See id.* at 4.) These are the types of "weaknesses, implausibilities, inconsistencies, or contradictions" that entitle a plaintiff to the opportunity to present to a trier of fact the question of whether a defendant's facially legitimate explanations are merely pretext for discrimination. *Zann Kwan*, 737 F.3d at 846. And although it is not sufficient

merely to present evidence sufficient to allow a factfinder "to disbelieve the employer," *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000) (internal quotation marks omitted), Plaintiff has not simply offered reasons to disbelieve YRC's stated rationale, but has also presented evidence that a similarly situated comparator was treated more favorably than Plaintiff, *see Graham*, 230 F.3d at 43 ("A showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, non-discriminatory reason for the adverse job action was a pretext for racial discrimination."). In such circumstances, summary judgment is not appropriate. *See, e.g.*, *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 2d 167, 188 (E.D.N.Y. 2013) (denying summary judgment where the plaintiff "presented evidence that both he and [a coworker] violated [the] [d]efendant's Sexual Harassment Policy and filed sexual harassment complaints, and that [the] [d]efendant conducted an investigation, after which [the coworker] suffered no disciplinary action, while [the] [p]laintiff was constructively discharged"); *Delia v. Donahoe*, 862 F. Supp. 2d 196, 219 (E.D.N.Y. 2012) (denying summary judgment where the plaintiff "pointed to evidence that could allow a reasonable jury to determine that [the employer] disciplined other non-Italian similarly situated employees in a less severe manner after they committed comparable misconduct," and there were "questions of fact as to whether [the] plaintiff's suspension and ultimate termination . . . were based upon insufficient and unsubstantiated information").

Summary judgment is therefore denied with respect to Plaintiff's claims for discrimination in connection with his suspension and termination.

b. Retaliation

At summary judgment, retaliation claims under Title VII are subject to the same burden-shifting framework as discrimination claims, except that to make out a prima facie case of retaliation, the plaintiff must show: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010) (internal quotation marks omitted). One additional difference between retaliation and discrimination claims is that "a plaintiff alleging retaliation in violation of Title VII must show that retaliation was a 'but-for' cause of the adverse action, and not simply a 'substantial' or 'motivating' factor in the employer's decision." *Zann Kwan*, 737 F.3d at 845. This standard "does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Id.* at 846.

A plaintiff engages in protected activity within the meaning of Title VII when he either "oppose[s] any practice made unlawful by Title VII," or "ma[kes] a charge, testifie[s], assist[s], or participate[s] in any manner in an investigation, proceeding, or hearing under Title VII." *Littlejohn*, 795 F.3d at 316 (internal quotation marks omitted). A plaintiff's complaint qualifies as protected activity so long as the plaintiff had "a good faith, reasonable belief that she was opposing an employment practice made unlawful by Title VII." *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (alteration and internal quotation marks omitted).

Plaintiff identifies three instances in which he engaged in protected activity: (1) his reporting to Palmieri of Munroe's racial comments, (2) his reporting to Czerniowski on July 27,

2013 of Hassan's failure to promptly to respond when a customer hit a jackpot, and (3) his reporting to Munroe on July 28, 2013 of Hassan's harassment of Plaintiff. (*See* Pl.'s Opp'n 12.) The second and third of these are plainly insufficient. With respect to Hassan's failure to respond when a customer hit a jackpot, nothing in Title VII prevents employers or coworkers from simply being poor at their jobs—Hassan's failure to promptly respond when Plaintiff called for assistance was not a violation of Title VII, nor could a reasonable employee think it to be so. With respect to Plaintiff's complaint to Munroe about Hassan's rude and abusive treatment, there is no evidence or even suggestion in the record that Hassan's treatment of Plaintiff was discriminatory or otherwise in violation of Title VII. The mere fact that Hassan was rude, discourteous, or even outright abusive toward Plaintiff does not establish that Hassan was violating Title VII. *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 102 (2d Cir. 2001) ("Although mistreatment by [the] defendants is not irrelevant in assessing the strength of [the] plaintiffs' circumstantial evidence of race-based animus, it is certainly not sufficient to establish it. We can envision many circumstances where markedly hostile treatment . . . would raise no inference of racial animus, but rather it would simply be yet another example of the decline of civility."); *Desir*, 803 F. Supp. 2d at 177 ("Federal employment discrimination laws do not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating." (alteration and internal quotation marks omitted)).

There is no question, however, that Plaintiff's reports to Palmieri about Munroe's racially insensitive comments may qualify as protected activity. *See Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179–80 (2d Cir. 1996) (holding that a jury could conclude that a plaintiff had a good faith and reasonable belief that sexist comments made by a coworker were in violation of Title VII); *Martin v. State Univ. of N.Y.*, 704 F. Supp. 2d 202, 228 (E.D.N.Y. 2010) (holding that a

plaintiff's complaint to a supervisor about a coworker's allegedly discriminatory remarks constituted protected activity). The question is whether those complaints, which were made no later than 2010, (*see* Vaughn II Tr. 77–80), can be said to be causally related to the suspension Plaintiff received, allegedly at the hands of Munroe, and if so, whether Plaintiff has offered sufficient evidence to support a conclusion that Defendants' proffered explanation for Plaintiff's termination is a pretext for retaliation.

"To establish the causation prong of a prima facie case, [the] [p]laintiff must be able to show that the retaliatory actions closely followed the protected activity o[r] that there was a reasonably close temporal proximity between the two." *Figueroa v. Johnson*, 109 F. Supp. 3d 532, 549 (E.D.N.Y. 2015) (italics and internal quotation marks omitted), *aff'd*, 648 F. App'x 130 (2d Cir. 2016); *Laudadio v. Johanns*, 677 F. Supp. 2d 590, 613 (E.D.N.Y. 2010) ("[A] plaintiff can prove causation not only directly, by showing employer's retaliatory animus towards the plaintiff, but also indirectly, either by showing temporal proximity . . . , or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct." (internal quotation marks omitted)); *Uddin v. City of New York*, 427 F. Supp. 2d 414, 426 (S.D.N.Y. 2006) ("[A] close temporal relationship between the protected activity and an employer's adverse actions can be sufficient to establish causation."). "There is no bright-line beyond which a temporal relationship is too attenuated to prove causation," *Laudadio*, 677 F. Supp. 2d at 614, but courts have held that gaps between the protected activity and the adverse employment action as little as three months are sufficient to thwart an inference of causation, *see, e.g.*, *Housel v. Rochester Inst. of Tech.*, 6 F. Supp. 3d 294, 308 (W.D.N.Y. Mar. 17, 2014) ("[T]he lapse of two to three months between [the plaintiff's protected activity] and her unsatisfactory merit review . . . is . . . insufficient temporal proximity in the absence of any other

evidence of causation."); *Chukwueze v. NYCERS*, 891 F. Supp. 2d 443, 457 (S.D.N.Y. 2012) (holding that a lapse "somewhere between three and six months" was "insufficient, standing alone, to establish a causal connection"); *Murray v. Visiting Nurse Servs. of N.Y.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) ("[D]istrict courts within the Second Circuit have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation."); *cf. Wood v. Sophie Davis Sch.*, No. 02-CV-7781, 2003 WL 21507579, at *3 (S.D.N.Y. June 30, 2003) (holding that a gap of one month was sufficient to establish a prima facie case of retaliation).

As discussed above, neither Plaintiff's complaints about Hassan's failure to timely respond to a jackpot nor his complaints about Hassan's abusive behavior is protected activity. With respect to the sole protected activity alleged in this case—Plaintiff's complaints to Palmieri about Munroe's conduct—Plaintiff makes virtually no effort to tie this activity to his suspension or ultimate termination, merely averring, without any case citation or further discussion, that "[t]here are also questions of fact as to whether [Plaintiff] suffered retaliation for reporting . . . Munroe's racial bias to Palmieri, twice." (Pl.'s Opp'n 12.) To the extent Plaintiff's allegation of retaliation is based solely on the temporal proximity between his complaints to Palmieri and the suspension, the claim is deficient. Plaintiff testified that by mid-2010, he had given up complaining about Munroe's behavior, partly in response to comments made by Munroe. (*See* Vaughn II Tr. 77–82.) Such a significant time gap between the protected activity and the adverse employment action—no less than three years—precludes Plaintiff from relying solely on temporal proximity to make out his prima facie case. *See Wojcik v. Brandiss*, 973 F. Supp. 2d 195, 216 (E.D.N.Y. 2013) (holding that a complaint "submitted nearly six months prior" to the plaintiff's suspension and termination was insufficient to "demonstrat[e] that [the] [d]efendants

retaliated against [the plaintiff] for complaining of discrimination"); *Castro v. Local 1199*, 964 F. Supp. 719, 729 (S.D.N.Y. 1997) (holding that a lapse in one year was "insufficient to establish a causal connection").

But Plaintiff need not rely solely on temporal proximity (or lack thereof), as there is evidence that Munroe told Plaintiff sometime before mid-2010 that if Plaintiff continued to complain about Munroe using offensive and racist language, "basically," Plaintiff could be terminated. (*See* Vaughn II Tr. 79–80.) In some cases, even in the absence of temporal proximity, such evidence of retaliatory intent may be sufficient to establish a claim for retaliation. *See Stajic v. City of New York*, 214 F. Supp. 3d 230, 236 (S.D.N.Y. 2016) (holding that even though the temporal gap between the protected activity and adverse action was at least five and a half months, the plaintiff had "alleged direct evidence of retaliatory animus, independent of any inferences that could or could not be plausibly drawn with respect to the temporal proximity between the protected speech and the adverse action"). Here, however, the evidence does not bear out Plaintiff's claim. Plaintiff has offered no explanation of the link—or possible link—between Munroe's comment and the suspension. Indeed, the record contains no evidence as to the timeframe in which Munroe's comment was made, no evidence indicating that Munroe made retaliatory comments or engaged in conduct that evinced a retaliatory intent at any other time, and no other evidence from which a reasonable trier of fact could draw an inference that Plaintiff's suspension was related to a comment made by Munroe at an indeterminate point in time at least three years prior to the suspension. Tellingly, Plaintiff has made little effort to draw any connection between the comment and the suspension. (*See* Pl.'s Opp'n 13–20.)

Munroe may have been motivated, in part, by discriminatory animus, as set forth above, or he may just have been misguided, ill-informed, or simply a poor supervisor. But the question

on this portion of the claim is whether Plaintiff has adduced evidence sufficient to allow a reasonable trier of fact to conclude that Munroe would not have suspended Plaintiff but for Plaintiff's complaints to Palmieri about Munroe. *See Bowen-Hooks v. City of New York*, 13 F. Supp. 3d 179, 232 (E.D.N.Y. 2014) ("Whether [the] [d]efendants' actions were unreasonable, unfair or even untrue, as [the] [p]laintiff alleges, without any showing of retaliatory motive, they do not support [the] [p]laintiff's retaliation claim."); *Joseph v. Owens & Minor Distrib., Inc.*, 5 F. Supp. 3d 295, 320 (E.D.N.Y. 2014) ("Without any additional evidence that [the] [d]efendant's decision to terminate [the] [p]laintiff was related to the complaints that [a supervisor's] actions of August 30, 2010 were racially-motivated, [the] [p]laintiff cannot show that, but-for those complaints, he would not have been terminated."), *aff'd*, 594 F. App'x 29 (2d Cir. 2015). And the evidence discussed above regarding Plaintiff's discrimination claim is insufficient here, because while Munroe may have been racially motivated in his treatment of Plaintiff, that does not establish that he was also motivated by a retaliatory intent. On that point, Plaintiff's claim is unsupported by the evidence, even construed in the light most favorable to Plaintiff, and therefore summary judgment in favor of Defendants is appropriate.

The analysis with respect to Plaintiff's retaliation claim for his termination is similar. Plaintiff has appeared to offer only a "cat's paw" theory of liability for the retaliation claim arising out of his termination. (*See* Pl.'s Opp'n 13–15.)[13] But as there is no claim that Munroe's suspension of Plaintiff was motivated by a retaliatory intent, there can be no derivative claim that the employer is liable for subsequent disciplinary actions that gave effect to that retaliatory

[13] Plaintiff's argument consists largely of recitations of facts without any explanation as to their significance under existing case law. (*See, e.g.*, Pl.'s Opp'n 13–20.) To the best of the Court's understanding, however, little or none of Plaintiff's arguments actually relate to the retaliation claim arising out of his termination.

animus. *Cf. Vasquez*, 835 F.3d at 272 n.4 (noting, in discussing cat's paw liability, that the parties did "not dispute on appeal whether [the plaintiff] ha[d] adequately pled [her coworker's] retaliatory intent"). Accordingly, both of Plaintiff's claims for retaliation must be dismissed.

3. New York State Human Rights Law

Notwithstanding that Plaintiff's discrimination claims survive summary judgment, Defendants argue that his claims against the individual Defendants must be dismissed because Title VII does not provide for individual liability. (*See* Defs.' Mem. 23–24 (citing *Lore v. City of Syracuse*, 670 F.3d 127, 169 (2d Cir. 2012).) Plaintiff does not dispute this basic legal point, but argues that the Amended Complaint should be liberally construed to include claims under the New York State Human Rights Law ("NYSHRL"), (*see* Pl.'s Opp'n 22–23), which does provide for individual liability in certain circumstances, *see Feingold v. New York*, 366 F.3d 138, 157 (2d Cir. 2004).

As noted, when Plaintiff filed the Amended Complaint, he checked the box for "Title VII of the Civil Rights Act of 1964," but did not check the box for "New York State Human Rights Law, N.Y. Exec. Law §§ 290 to 297." (*See* Am. Compl. 1.) Plaintiff did state, at one point in his Amended Complaint, "[YRC], Robert Galterio, Michael Palmiere [sic], and Ryan Monroe [sic] are guilty of violating laws that include not only discrimination, harassment and defamation of character but also falsifying documents which is illegal under criminal law and also violated these laws on Federal, state, city and local levels," (*id.* at unnumbered 6), but there is no direct reference to NYSHRL in Plaintiff's Amended Complaint.

While Defendants are correct that Plaintiff has not formally pled a violation of NYSHRL in his Amended Complaint, Plaintiff was pro se at the time he filed his Amended Complaint. "[T]he submissions of a pro se litigant must be construed liberally and interpreted to raise the

strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (italics and internal quotation marks omitted). This policy stems from the understanding that there is "an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Id.* at 475 (italics and internal quotation marks omitted). Defendants argue that the Court cannot "'invent' a cause of action that Plaintiff has not pled." (Mem. of Law in Further Supp. of Defs.' Mot. for Summ. J. ("Defs.' Reply") 2 (Dkt. No. 100).) But the cases that they cite do not stand for this proposition. In *Chavis v. Chappius*, 618 F.3d 162 (2d Cir. 2010), the Second Circuit held that a court "cannot invent *factual allegations* that [a plaintiff] has not pled." *Id.* at 170 (emphasis added). And in *Woods v. Empire Health Choice, Inc.*, 574 F.3d 92 (2d Cir. 2009), the court merely held that even construing the plaintiff's complaint liberally, the complaint had "manifestly fail[ed] to establish [the plaintiff's] standing to bring th[e] action." *Id.* at 96. Neither of these cases addresses a situation where, as here, a pro se plaintiff has pled all of the factual allegations underlying a claim, but failed to identify the statutory provision under which the claim was brought.

More apt are those cases where courts have liberally construed a complaint as raising a NYSHRL claim where a plaintiff has only explicitly pled a Title VII claim. *See, e.g., Guardino v. Vill. of Scarsdale Police Dep't*, 815 F. Supp. 2d 643, 646 (S.D.N.Y. 2011) (construing the plaintiff's complaint as including a NYSHRL claim where the plaintiff attached his administrative charge to the complaint); *Grant v. Pathmark Stores, Inc.*, No. 06-CV-5755, 2009 WL 2263795, at *1 (S.D.N.Y. July 29, 2009) (construing the plaintiff's Title VII complaint as including a NYSHRL claim); *cf. Weerahandi v. Time, Inc.*, No. 10-CV-1269, 2010 WL 5129080, at *3 (S.D.N.Y. Nov. 15, 2010) (giving the plaintiff leave to amend to include an unpled cause of

action under NYSHRL), *adopted by* 2010 WL 5158623 (S.D.N.Y. Dec. 16, 2010). Admittedly, none of these cases involves a scenario where, as here, the plaintiff failed to mark a box specifically designated for the claim now sought to be raised and no administrative complaint was brought directly to the New York State Division of Human Rights. *See Guardino*, 815 F. Supp. 2d at 646 (construing liberally where the plaintiff had filed a NYSHRL claim with the New York State Division of Human Rights and had attached that claim to his complaint); *Grant*, 2009 WL 2263795, at *1 n.1 (noting that the form complaint used by the plaintiff did not provide a box to check regarding the NYSHRL, but adding that newer forms did include such a box). Nevertheless, Defendants have offered no reason why they would be unfairly prejudiced by the inclusion of NYSHRL claims, and consideration of those claims would not expand the scope of discovery or increase the amount of damages Plaintiff may receive. Accordingly, the Court liberally construes Plaintiff's Amended Complaint as raising claims under the NYSHRL, and the Court therefore declines to dismiss the Action against the individual Defendants on the basis that Title VII does not provide for individual liability.

Defendants also argue, in their reply brief, that even if Plaintiff's Amended Complaint could be read to include a claim under the NYSHRL, such a claim is barred because Plaintiff has made an "election of remedies" and accordingly, under the statute, may not pursue the NYSHRL claims in federal court. (*See* Defs.' Reply 3.) New York Executive Law § 297, which governs the procedure for filing a claim under the NYSHRL, states that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages," "unless such person had filed a complaint hereunder or with any local commission on human rights." N.Y. Exec. Law § 297(9). Section 297 goes on to state that "[a] complaint filed by the equal employment opportunity commission to comply with

the requirements of 42 [U.S.C.] [§] 2000e-5(c) and 42 [U.S.C.] [§] 12117(a) and 29 [U.S.C.] [§] 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision." *Id.* New York courts have interpreted this provision to "preserve the complainant's right to commence an action in court pursuant to Executive Law § 297(9) even though he or she filed charges or an administrative complaint with the [EEOC] and the EEOC, in turn, forwarded those charges or that administrative complaint to the [State Division of Human Rights] for filing." *Barr v. BJ's Wholesale Club, Inc.*, 879 N.Y.S.2d 558, 559 (App. Div. 2009); *see also Hirsch v. Morgan Stanley & Co.*, 657 N.Y.S.2d 448, 449 (App. Div. 1997) ("The clear intent of [N.Y. Exec. Law § 297(9)] was to preserve the complainant's right to sue in court even though the complaint had been filed with NYSDHR by the EEOC." (internal quotation marks omitted)). Thus, where "[t]here is no indication that the plaintiff filed charges or an administrative complaint directly with the [State Division of Human Rights] and there is no indication that the [Sate Division of Human Rights] ever investigated the charges referred to it by the EEOC or opened a file on behalf of the plaintiff," a charge of discrimination filed with the EEOC does not amount to "an administrative remedy within the meaning of [N.Y. Exec. Law § 297(9)]." *Barr*, 879 N.Y.S.2d at 559.

Here, there is no dispute that when Plaintiff filed the Charge, on the line labeled "State or local Agency, if any," he (or the EEOC intake representative) wrote "New York State Division Of Human Rights." (EEOC Charge.) But aside from Plaintiff's apparent admission that the EEOC charge was "cross-filed" with the New York State Division of Human Rights, (*see* Pl.'s Opp'n 22; *see also* EEOC Charge), the record is entirely silent on what effect, if any, this notation has. Neither Party has explained whether the charge was actually forwarded to the New York State Division of Human Rights, whether the division "ever investigated the charges

referred to it by the EEOC or opened a file on behalf of . . . [P]laintiff," *Barr*, 879 N.Y.S.2d at 559, or whether the division was ever even aware that Plaintiff filed the Charge. The Court thus sees nothing in the record that would compel the conclusion that Plaintiff's claim is barred by the election of remedies, as it is unclear whether any state remedy was pursued, and certainly unclear as to whether any action was ever taken by the state agency.

Because the NYSHRL claims were properly pled and are properly before this Court, dismissal of the claims against the individual Defendants is not appropriate on that basis. To the extent Defendants' papers can be construed as raising an argument as to the merits of Plaintiff's NYSHRL claims, it is well settled that except for the provisions relating to individual liability, "claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII." *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011) (internal quotation marks omitted). Accordingly, Plaintiff's NYSHRL claims for retaliation are dismissed, but his NYSHRL claims for discrimination are not.

4. Effect of Consent Award

Defendants' final argument is that Plaintiff's damages should be limited by virtue of the consent award reached between YRC and Local 1105 during arbitration. (*See* Defs.' Mem. 24–25.) Plaintiff argues that he never received notice of the consent award, notwithstanding that he provided an address in connection with this litigation, until his deposition in January 2016, and thus should not be limited by its offer. (*See* Pl.'s Opp'n 24.)

In a wrongful termination case where the employee has prevailed in establishing the liability of the employer, the "employee is generally entitled to back pay from the date of his wrongful termination to the date the discrimination is rectified." *Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992). "However, back pay will no longer accrue if the employer makes an

unconditional offer to reinstate the employee, and the employee rejects the offer." *Id.* In such circumstances, "the employer's liability for back pay is tolled on the date the employee rejects the offer." *Id.* Moreover, such an unconditional offer "forecloses any claim for future front pay." *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 908 (2d Cir. 1997).

To the extent this issue is even appropriate for consideration at this stage in the litigation, where liability has not yet been determined, "[w]hether the employer made an unconditional offer of reinstatement, and whether the employee rejected that offer, are questions of fact." *Clarke*, 960 F.2d at 1151. Here, given that the record is unclear as to whether Defendants ever actually communicated the offer of employment to Plaintiff, and also as to whether Plaintiff ever rejected that offer, or even had an opportunity to reject it, summary judgment is inappropriate. Defendants will be free to argue for mitigation if and when damages are set by a fact finder, but there is nothing in the record that compels the conclusion, at this stage, that Plaintiff's damages are limited by the consent award obtained during arbitration.

III. Conclusion

The Motion is granted in part and denied in part. Defendants' Motion is granted with respect to Plaintiff's Title VII and NYSHRL claims for hostile work environment and retaliation, but denied with respect to Plaintiff's Title VII and NYSHRL claims for discrimination. Defendants' Motion is denied with respect to its effort to limit damages based on the consent award, without prejudice to raise that argument if and when damages are determined by a fact finder. The Court will hold a conference on July 28, 2017 at 2:30 PM. The Clerk of Court is respectfully requested to terminate the pending Motion. (Dkt. No. 79.)

SO ORDERED.

DATED: July 14, 2017
White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE