Valentin v Fox Bus. Network
2016 NY Slip Op 30372(U)
March 3, 2016
Supreme Court, New York County
Docket Number: 156352/2014
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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PEDRO VALENTIN,

Plaintiff,

- against -

FOX BUSINESS NETWORK and
FOX NEWS NETWORK, LLC,

Defendants.

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Index Number: 156352/2014

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendants' motion, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavits - Exhibits 1
Notice of Cross-Motion - Affirmation - Affidavits - Exhibits 2
Affirmation in Opposition to Cross-Motion 3
Reply Affirmation 4

Facts

In this action, plaintiff, Pedro Valentin, sues defendants, his former employer, for discrimination and retaliation under the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"). Defendant Fox Business Network ("FBN") is a shell corporation owned and operated by Fox News Network, LLC ("Fox") (collectively, "defendant"). FBN is not a stand-alone corporation; rather, it is simply the name used to distinguish between Fox's two cable television channels–the Fox News Channel and the FBN. The parties agree on the following facts unless otherwise indicated.

On July 30, 2007, the Co-Heads of FBN's Technical Operations Department, Stephen Carey and Billy Toth, approved the hire of plaintiff as a part-time, freelance Camera Operator for FBN. Plaintiff earned $31.25 per hour, did not receive any fringe benefits (e.g. medical insurance coverage), and was allowed to work for other news organizations. On September 1, 2008, Mr. Carey approved plaintiff's transfer to a full-time staff position as a Camera Operator. Plaintiff received a base salary of $60,000, was entitled to fringe benefits, and was subject to defendant's Employee Handbook, which contains an "Outside Employment" policy forbidding full-time staff employees from freelancing at competitive news organizations, such as ABC, NBC, CBS, CNN, MSCNBC, Headline News, Bloomberg, Telemundo, New York 1, and News 12 NY. The

purpose of this policy is to prevent conflicts of interest from arising in the following situations, among others: (1) defendant's best Camera Operators should not provide their talents to competitors; (2) defendant's competitors should not learn about stories at Fox that are in production but have not yet aired; and (3) defendant's competitors should not learn about new technology that is being used or will be used by defendant. Defendant's full-time staff employees may freelance at organizations that do not compete with defendant, such as ESPN Sports and ABC Sports. However, if such part-time employment elsewhere conflicts with employees' full-time employment with defendant, employees cannot freelance even if they are not working for defendant's competition.

According to plaintiff, on October 9, 2009, he experienced his first racially-charged harassment during his employment with defendant. Plaintiff was on vacation in Seattle when defendant changed his schedule on him without notice. Plaintiff alleges that when he returned to work in accordance with his old schedule, Florence Brown, his supervisor from the Scheduling Department, deemed him 30 minutes late, reprimanded him, and allegedly called him "a liar." Plaintiff alleges that he was disciplined because he is Hispanic and Puerto Rican. At plaintiff's deposition, plaintiff testified that he was unreachable during his vacation because his cell phone had run out of battery and he left his charger in New York. Defendant did not give plaintiff an official oral or written warning about this incident.

Plaintiff received his first performance review on December 18, 2009. Mr. Toth, Mr. Carey, and plaintiff's direct supervisor, Mr. Don Presutti, were present and complimented plaintiff on his solid technical skills and rated his overall performance "satisfactory." Plaintiff was given a 3% raise. During the performance review, Mr. Toth, Mr. Carey, and Mr. Presutti commented, "An area of [improvement] would be increased flexibility of schedule to include extended shifts, additional overtime shifts, and generally accommodating the Scheduling Department when the need arises." According to defendant, to be rated above "satisfactory" and receive a larger raise, an employee must generally be available to report to work early, work late and work overtime when requested, continually broaden and improve his or her skill sets, work well within a team environment, and generally have a positive and cooperative attitude.

Plaintiff alleges that on July 9, 2010 he was singled out for discipline for watching an online video. One of plaintiff's co-workers, Diane Hampton Berntson, logged into her computer console using her log-in credentials, loaded the video in question, and inadvertently left it on. Plaintiff claims he returned his focus to his work station when his supervisor, Matthew Block, entered the room and yelled solely at plaintiff, the only Hispanic person in the room. Plaintiff alleges that none of the other employees in the room, including Ms. Berntson, were subject to discipline and did not receive negative performance reviews due to the video incident.

Plaintiff received his second performance review in July of 2010. Mr. Toth, Mr. Carey, and plaintiff's new supervisor, Ms. Jena Mihalovic, again rated his overall performance as "satisfactory" and plaintiff received a 3% raise. Mr. Carey claims plaintiff did not receive a more substantial salary increase because "he was generally unavailable for overtime and the

Scheduling Department often had difficulty locating him. Ms. Mihalovic initially included the following statement in her review: "Once a TPM [Technical Production Manager Matt Block] had to turn off a movie that Pedro was watching on full blast when he was doing Robo for the Noon Show." Plaintiff objected to including this statement in his review. Mr. Toth deleted the statement from the review because Mr. Toth was not sure if plaintiff was at fault and considered the statement insignificant in terms of the overall review. On August 23, 2010, plaintiff was given a revised performance review without the statement at issue, at which point plaintiff signed off on the review.

Plaintiff received his third performance review in July of 2011. Mr. Toth, Mr. Carey, and Ms. Mihalovic gave plaintiff a "satisfactory" rating and a 2% raise because of his strong technical skills. However, plaintiff also received an "Improvement Needed" rating in the "Behavioral/Attitudinal Criteria" section, which accounted for 60% of the review. The following comment was included in plaintiff's review: "[Pedro] does not respond to requests from Scheduling. He has also been unresponsive to emails from his tech managers . . . Pedro needs to be aware that this lack of communication can be perceived as uncooperative and disrespectful." Plaintiff alleges Ms. Mihalovic convinced him that defendant was only offering 3% raises "because of the economy" and that 2% was the average raise given; meanwhile, other non-Hispanic employees were not told that there was a lower raise amount and, upon information and belief, were given higher raises.

On July 26 and July 28, 2011, Mr. Toth informed Mr. Carey that he observed plaintiff freelancing on ABC's *Good Morning America*. Defendant contends, to which plaintiff disagrees, that *Good Morning America* directly competes with defendant's morning show, *Fox & Friends*; the two shows are telecast at the same time, have the same format, cover a mix of news, business, health, fashion and cooking segments, among others, and host live concerts. On or about July 29, 2011, a week after plaintiff submitted his letter of complaint ("Letter"), Mr. Toth confronted plaintiff about his violation of defendant's "Outside Employment" policy, and plaintiff admitted that he was indeed freelancing on *Good Morning America*. Mr. Toth emphasized that plaintiff could not work at *Good Morning America* again or at any news organization that created a conflict of interest with defendant. Plaintiff alleges that during this conversation, Mr. Toth confronted him with two options: (1) resign, or (2) write a letter stating that he would not work for any other network, and subsequently made a comment that "maybe [plaintiff] should just work for Telemundo." Mr. Toth claims he never made such a statement. Mr. Toth states that he cannot conceive of making such a statement because he considers Telemundo one of defendant's competitors, and working at Telemundo would be considered a violation of the "Outside Employment" policy.

On August 5, 2011, Mr. Toth and Mr. Carey gave plaintiff a written final warning, and made it clear to plaintiff that if he violated the "Outside Employment" policy again, he would be terminated. At his deposition, plaintiff testified, incongruously, that despite the final warning, he continued to work at ABC because he thought that freelancing at ABC would not affect his employment with defendant. On August 12, 2011, Mr. Toth faulted plaintiff for a technical

problem in the studio. Plaintiff alleges that Mr. Toth stated he was not a "team player" because he did not try to remedy the problem. Mr. Toth alleges he has no recollection of this incident; Mr. Toth claims that if it had occurred, he would have considered the technical malfunction a "routine, rather than typical issue."

On May 1, 2012, Mr. Toth observed plaintiff working at ABC's *Good Morning America*, again. Later that day, Mr. Toth and Mr. Carey terminated plaintiff's employment because, they claimed, he ignored the final warning and violated defendant's "Outside Employment" policy.

The Instant Action

On October 11, 2012, plaintiff challenged his termination by filing a charge with the United States Equal Employment Opportunity Commission ("EEOC") on the grounds that defendant discriminated against him on the basis of his race and national origin (Hispanic and Puerto Rican) and retaliated against him for complaining about discrimination. The EEOC dismissed plaintiff's claims as lacking merit.

On June 30, 2014, plaintiff e-filed a summons and complaint with this Court pursuant to the NYSHRL and NYCHRL, alleging the same discrimination, retaliation, and hostile work environment claims. On August 4, 2014, defendant e-filed a verified answer denying the allegations set forth in the complaint and raising several defenses. The parties engaged in, and apparently completed, discovery, and plaintiff filed a note of issue May 1, 2015. Defendant now moves for summary judgment dismissing the complaint. In support of the motion defendant submits, inter alia, deposition transcripts, affidavits, and affirmations. Plaintiff opposes the motion, submitting, inter alia, affidavits and affirmations.

Discussion

I. The Complaint as to FBN is Subject to Dismissal

This Court grants defendant's request to dismiss FBN as a defendant in the instant action as a matter of law. FBN is simply the trade name used to help distinguish between defendant's two cable television channels–the Fox News Channel and the FBN. FBN is merely a trade name and thus not a legal entity or stand-alone corporation. See Art & Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436, 439 (1st Dept 2014) (court found that complaint against one defendant was properly dismissed because it was merely trade name and thus not legal entity).

II. Defendant is Entitled to Summary Judgment Dismissing Plaintiff's Salary and Discrimination Claims

This Court finds that plaintiff's 2010 salary claim, pursuant to the NYSHRL and NYCHRL, is time-barred. The parties agree that plaintiff's salary claim dates back to August of 2010, and plaintiff did not file a complaint with this Court until June 30, 2014. The applicable Statute of Limitations under the NYSHRL and NYCHRL is three years, meaning plaintiff had to have filed his complaint by August of 2013, which he failed to do. See Mejia v Roosevelt Is. Med. Assoc.,

95 AD3d 570, 571 (1st Dept 2012) ("employment discrimination claims under the [NYSHRL] are governed by a three-year statute of limitations"). Plaintiff's 2011 salary claim has been withdrawn and needs no further discussion.

Plaintiff's employment discrimination claims must be evaluated under a burden-shifting analysis. See Woodie v Azteca Intern Corp., 60 AD3d 535, 535 (1st Dept 2009) ("A three-part analysis is required . . . Employee must first establish a prima facie case of discrimination. The burden then shifts to the employer to rebut the prima facie case with a legitimate reason, in which case the burden shifts back to the employee to show that the proffered reasons are pretextual"). Plaintiff possesses the initial burden to establish a *prima facie* case of discrimination by showing that: (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment; and (4) the termination occurred under circumstances giving rise to an inference of discrimination. See Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 (2004) (for plaintiff to meet initial burden of establishing *prima facie* case of discrimination, plaintiff must show that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination"). If plaintiff satisfies this burden, the burden shifts to defendant to set forth a legitimate, nondiscriminatory reason to support its employment decision. If defendant does so, plaintiff must then show that defendant's alleged reasons were merely a pretext for discrimination by demonstrating "both that the stated reasons were false and that discrimination was the real reason." See Forrest v Jewish Guild for the Blind, supra at 305 ("To prevail on [defendant's] summary judgment motion, defendant must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual").

Defendant concedes that plaintiff satisfies the first three prongs of his *prima facie* case of discrimination. Plaintiff (1) is a member of a protected class due to his race (Hispanic) and national origin (Puerto Rican); (2) was qualified to hold the position; and (3) was terminated from employment. However, the parties dispute whether the fourth prong of the test – that plaintiff's termination occurred under circumstances giving rise to an inference of discrimination – is satisfied.

When deciding a summary judgment motion, the Court must construe the evidence in the light most favorable to the non-movant. See Russell v A. Barton Hepburn Hosp., 154 AD2d 796, 240 (3d Dept 1989) ("court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court"). Thus, when determining whether a court can infer discrimination to satisfy the fourth prong of the discrimination test, the Court must look to the facts of the case in the light most favorable to plaintiff. Here, in viewing the facts in the light most favorable to plaintiff, plaintiff has produced evidence demonstrating that his termination *could have* occurred under circumstances giving rise to an inference of discrimination. First, defendants terminated plaintiff after discovering his continuous violation

of defendant's "Outside Employment" policy while other non-Hispanic employees, in violation of the policy, were not disciplined until years after. Plaintiff alleges he did not take defendant's "Outside Employment" policy seriously because he was able to identify several non-Hispanic co-workers freelancing at *Good Morning America* who were not immediately disciplined for doing so. Plaintiff also believes that the *Good Morning America* show focuses primarily on "entertainment news," whereas plaintiff worked at FBN, which focuses on business and financial news. Plaintiff alleges he was surprised when he was told that *Good Morning America* was deemed a competitor, despite focusing on completely different news topics. Second, plaintiff alleges that the clear effect of Mr. Toth suggesting that plaintiff go work for a Spanish-language network, Telemundo, was clearly discriminatory. Third, plaintiff alleges that during his third performance review, on July 8, 2011, Ms. Mihalovic convinced him that defendant was not offering raises higher than 3% "because of the economy" and that 2% was the average raise given. Plaintiff claims that other non-Hispanic employees were not told that a lower raise amount was "because of the economy," and, upon information and belief, were given higher raises.

Plaintiff could reasonably have believed that defendant's comments were discriminatory against him when (1) plaintiff's supervisors terminated him for violating the "Outside Employment" policy when they did not discipline his non-Hispanic peers; (2) Mr. Toth made his Telemundo comment; and (3) Ms. Mihalovic told plaintiff, and not his peers, defendant was not offering higher raises than 3% "because of the economy." Defendant's employees discriminated against plaintiff when they subjected him to a distinct set of disciplinary standards in contrast to those imposed on his non-Hispanic coworkers. See Reeves v Sanderson Plumbing Prod., Inc., 530 US 133, 2102 (2000) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"). Given these facts, it is reasonable to find that plaintiff satisfied his burden of demonstrating that his termination occurred under circumstances that give rise to an inference of discrimination.

This shifts the burden to defendant to set forth a legitimate, nondiscriminatory reason to support its employment decision. It is undisputed that defendant has an "Outside Employment" policy for its full-time employees, and that plaintiff, defendant's full-time employee, did indeed violate it by freelancing for a competitor. Plaintiff acknowledges that he had worked on *Good Morning America* and that he knew he could be terminated if he worked for defendant's competitor again. Despite receiving a final warning, plaintiff admittedly continued to freelance at *Good Morning America*. It is not up to plaintiff to decide whether his freelancing at *Good Morning America* was a conflict of interest, especially after he was informed by Mr. Toth and Mr. Carey that doing so was in direct violation of defendant's "Outside Employment" policy. Mr. Toth and Mr. Carey have submitted evidence that ABC's show *Good Morning America* directly competes with defendant's show, *Fox & Friends*; the two shows are telecast at the same time, both have the same formats, both cover a mix of news, business, health, fashion and cooking, and both host live concerts. Moreover, plaintiff further violated the "Outside Employment" policy by letting his work for ABC interfere with his availability to work overtime for defendant. Defendant has

the right to maintain an "Outside Employment" policy as a business decision and to terminate plaintiff after warning him. Suffice it to say that defendant has met its burden of setting forth a legitimate, nondiscriminatory reason to justify terminating plaintiff. See Baldwin v Cablevision Sys. Corp., 65 AD3d 96, 966 (1st Dept 2009) ("A court in an employment discrimination case should not sit as a super-personnel department that reexamines an entity's business decisions"). Therefore, defendant meets the burden of setting forth a legitimate, nondiscriminatory reason to terminate plaintiff, to wit, defendant's "Outside Employment" policy.

The burden now shifts to plaintiff to demonstrate that defendant's proffered reasons for terminating him were merely a pretext for discriminating against him by demonstrating "both that the stated reasons were false and that discrimination was the real reason." See Melman v Montefiore Med. Ctr., supra 98 AD3d at 113. Plaintiff argues that defendant's articulated reasons for terminating him were merely pretext, mainly based on the July 29, 2011 incident in which Mr. Toth verbally confronted plaintiff and forced him to decide between resigning and writing a letter stating that he would not work for any other network, while no other employee was required to choose between such restrictive terms of employment. The Court finds this argument unpersuasive; plaintiff has not presented sufficient, concrete evidence to support a finding that this treatment was racially motivated, especially in light of the fact that plaintiff admits he was aware of defendant's "Outside Employment" policy and deliberately violated it by continuing to freelance for ABC, defendant's competitor. See Sharpe v MCI Communications Servs, Inc., 684 F Supp 2d 394, 400-01 (SDNY 2010) ("[Plaintiff's] subjective belief, unsupported by any concrete facts or particulars, that Fabitti was 'nasty' and 'mean' when it came to people of color is insufficient . . . The fact that Fabitti did not yell at four white employees . . . proves nothing."); Dickerson v Health Mgmt. Corp. Of Am., 21 AD3d 326, 328 (1st Dept 2005) ("Even assuming that plaintiff was unfairly singled out . . . or that disparaging remarks were made about him, these facts, while offensive, do not negate defendant's evidence concerning his tardiness and absenteeism."). It is difficult for this Court to find that defendant's proffered reasons for termination were merely a pretext when discovery confirmed that even after defendant finally warned plaintiff on August 5, 2011, plaintiff's ABC work schedule shows that, nonetheless, he worked there on November 21, 22, 23 and 24, 2011, December 27 and 28, 2011, April 22, 2012, and May 1, 2012. (Affidavit of David P. Meyer, dated June 22, 2015, Ex. C)

Accordingly, defendant is entitled to summary judgment dismissing plaintiff's discrimination claim.

III. Defendant is Entitled to Summary Judgment Dismissing Plaintiff's Two Retaliation Claims

Under the NYSHRL and NYCHRL, retaliation claims must be evaluated under a burden-shifting analysis as well. Plaintiff must first establish a *prima facie* case by showing: (1) participation in a protected activity; (2) plaintiff's employer was aware of his protected activity; (3) plaintiff suffered an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. If plaintiff satisfies this burden, defendant must set forth a legitimate, non-retaliatory reason for the adverse employment action. If defendant does so, plaintiff can prevail only if he can show that defendant's explanation is merely a pretext for

retaliation. See Williams v New York City Hous. Auth., 61 AD3d 62, 70-71 (1st Dept 2009) ("In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities [and] of the fact that the 'chilling effect' of particular conduct is context-dependent").

The parties agree that plaintiff satisfies the first three prongs of his *prima facie* case of retaliation: (1) plaintiff did in fact participate in a protected activity (submitting the Letter); (2) his employer was aware of his protected activity (plaintiff's supervisors were aware that the Letter was filed); and (3) he suffered an adverse employment action (his termination). The parties dispute whether plaintiff has satisfied the fourth prong of the test: whether a causal connection existed between the protected activity and the adverse employment action.

Plaintiff can establish a *prima facie* case of causation by demonstrating at least one of the following: (a) that the retaliatory action happened close in time to the protected activity, (b) that other similarly situated employees were treated differently, or (c) with direct proof of discriminatory animus. See Jimenez v City of New York, 605 F Supp 2d 485, 528 (SDNY 2009) (plaintiff need not establish that alleged retaliation resulted in termination so long as retaliatory or discriminatory act was reasonably likely to deter person from engaging in protected activity); cf. Williams v New York City Hous. Auth, supra ("[Plaintiff's] assignment to do field work and respond to tenant complaints did not represent a difference in treatment attributable to retaliation, since the record shows that other workers (who did not complain of discrimination) were given similar assignments").

Plaintiff's first retaliation claim – that defendants disciplined him after a technical issue occurred, on August 12, 2011, in defendant's studio because of his race or national origin – does not satisfy the fourth prong of the test. While defendants disciplined plaintiff for a technical malfunction at defendant's studio a mere seven days after his attorney sent the Letter, defendant's decision to reprimand plaintiff verbally does not rise to actual retaliation that caused damage or injury to plaintiff. While plaintiff alleges that he was undeservedly faulted for a technical problem in the studio – that three supervisors reprimanded him for leaving the studio, including a direct comment by Mr. Toth that plaintiff was "not a team player," and that other non-Hispanic employees who had left the studio were not subject to such discipline – plaintiff's testimony tells a different story. At his deposition, plaintiff did not draw any causal connection between the disciplinary action taken and the fact that plaintiff is Hispanic. While the disciplinary action followed shortly after the Letter, there is no evidence that the latter caused the former. This Court has considered plaintiff's other arguments concerning his first retaliation claim and finds them to be factually insufficient and/or legally unavailing.

Plaintiff's second retaliation claim – that plaintiff was terminated because he filed the Letter – fails because he has not demonstrated a causal connection between the protected activity and the adverse employment action. First, nine months passed between plaintiff's Letter and his termination, which is too long to permit an inference that the two events were causally

connected. See Clark County Sch. Dist. v Breeden, 532 US 268, 273 (2001) (temporal proximity must be "very close" for a possible inference of retaliation to arise); see also Parris v New York City Dept. Of Educ., 111 AD3d 528, 529 (1st Dept 2013) ("Five months is not sufficient to establish the requisite causal connection"). Second, defendant submitted evidence indicating that any difference in treatment between plaintiff and other similarly situated employees was not based on discrimination. Plaintiff alleges that two of his former co-workers in the Technical Operations Department freelanced for *Good Morning America* and were not disciplined. When Mr. Carey investigated plaintiff's allegations that two of plaintiff's co-workers, Mr. Jeff Dicuia and Mr. Chris Cimino, also were freelancing, the two gentlemen admitted that they had indeed freelanced at *Good Morning America*, at which point defendant gave them final warnings for violating the "Outside Employment" policy. However, defendant gave plaintiff a similar final warning. Based on these facts, this Court finds that plaintiff has failed to demonstrate a discriminatory animus; defendant investigated other employees who engaged in freelancing for competitors and gave them final warnings, too. Thus, plaintiff has not satisfied his burden to show a causal connection, between the Letter sent in August 2011 and his termination in May 2012, and, therefore, fails to make out a *prima facie* case of retaliation.

Accordingly, defendant is entitled to summary judgment dismissing plaintiff's retaliation claims.

IV. Defendant is Entitled to Summary Judgment Dismissing Plaintiff's Hostile Work Environment Claim

In order to prove a *prima facie* case for a hostile work environment that violates Title VI, plaintiff must prove by a preponderance of the evidence that the complained of conduct: (1) is objectively severe or pervasive, that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of plaintiff's protected characteristic. See Patane v Clark, 508 F3d 106, 113 (2d Cir. 2007) ("Factors that a court might consider in assessing the totality of the circumstances include: (a) the frequency of the discriminatory conduct; (b) its severity; (c) whether it is threatening and humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance."); Chin v New York City Hous. Auth., 106 AD3d 443, 445 (1st Dept 2013) (hostile work environment exists where employee, because of his or her protected status, is "treated less well than other employees" and is subject to more than "petty slights and trivial inconveniences").

Plaintiff has failed to set forth a *prima facie* case for hostile work environment. Even though the complained of incidents, which plaintiff argues created an environment that plaintiff *subjectively* perceives as hostile or abusive, plaintiff has not proffered evidence that defendant's conduct was either objectively severe or pervasive, or created a hostile work environment because of plaintiff's race or national origin.

The NYCHRL standard is whether such conduct amounts to more than "petty slights and trivial inconveniences," which is a more liberal standard than the NYSHRL, which requires "severe and pervasive" conduct. See Williams v New York City Hous. Auth., supra 61 A.D.3d at 80 ("the

'severe or pervasive' test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status"). However, even if this Court were to analyze the instant action pursuant to the NYCHRL's lower standard, plaintiff still must prove that he was treated less well than other employees because of his protected status, and that the hostile conduct was directed at plaintiff because of his race or national origin. See Chin v New York City Hous. Auth., supra (hostile environment under the NYCHRL requires plaintiff being treated less well than other employees because of his protected status); Mahoney v Metro. Tr. Auth., 2014 NY Misc LEXIS 4690, at *16 (Sup Ct, NY County October 22, 2014) ("plaintiff must establish that the hostile conduct was directed at [him] because of [his] membership in a protected class").

Plaintiff alleges five acts over the course of three years that reflect he worked in a racially hostile environment at defendant's studio.

(1) Plaintiff asserts that in October of 2009, defendant changed his schedule without notifying him and that when he resumed work in accordance with his old schedule, his supervisor deemed him 30 minutes late and called him "a liar." However, as defendant argues, during plaintiff's deposition, plaintiff himself admitted that he was unreachable during his vacation and did not check his schedule upon return because he assumed it had not changed. Although plaintiff claims he felt like he was unfairly reprimanded due to his race, plaintiff admitted at his deposition that "it doesn't seem like that." Plaintiff did not receive an oral or written warning about the incident. While it may be true that plaintiff's supervisor was overly harsh in allegedly calling plaintiff a liar, there is no indication that the schedule change or subsequent reprimand had anything to do with plaintiff's race or national origin. In fact, it appears that the reprimand was a direct reaction to plaintiff not showing up in accordance with his new schedule. Furthermore, it is not this Court's job to second-guess an entity's business decisions, including those about schedule changes. See Baldwin v Cablevision Syst. Corp., supra.

(2) Plaintiff asserts that in July of 2010 he was singled out, disciplined, and treated differently from his non-Hispanic co-workers for allegedly watching an online video. Plaintiff claims that out of all the employees in the room, plaintiff, the sole Hispanic person, was the only person at whom the manager yelled. A court cannot find defendant liable unless plaintiff demonstrates that any mistreatment was motivated by defendant's discriminatory animus. See Hill v Rayboy-Brauestein, 467 F Supp 2d 336, 359 (SDNY 2006) ("plaintiff must prove that the hostile conduct occurred because of [his] membership in a protected class"). Plaintiff has not asserted that defendant ever made derogatory comments to him that ridiculed or insulted him because of his race or national origin; in fact, plaintiff could not point to a single instance where defendant said anything related to plaintiff's membership in a protected class. See generally Campbell v Cellco Partnership, 860 F Supp 2d 284, 298 (SDNY 2012) ("the relevant consideration is whether there is a triable issue of fact as to whether the plaintiff has been treated less well than other employees *because* of [his] protected characteristic").

(3) Defendant singled out plaintiff for discipline for the online video incident, which resulted in

a lower performance raise than his co-workers. However, Mr. Toth and Mr. Carey provided evidence documenting that plaintiff's raise was typical of the raises received by other full-time staff Camera Operators in 2010. All staff Camera Operators, except one, were rated "satisfactory" and received raises in the range of 2% to 5%. Of the employees who received 3% raises in 2010, one was Hispanic, two were white, and one was African-American; one Hispanic employee received a 5% raise; and two white employees received 2% raises. Under the NYCHRL's more liberal "different treatment" standard, "liability should be determined by the existence of unequal treatment [based on a protected characteristic] and questions of severity and frequency reserved for consideration of damages." See Davis-Bell v Columbia Univ., 851 F Supp 2d 650, 674 (SDNY 2012). On this record, there is no indication that salary raise decisions made by defendant were done so on the basis of plaintiff's race or national origin.

(4) Plaintiff asserts that on August 12, 2011, when a technical issue arose, three supervisors verbally reprimanded plaintiff for leaving the studio whereas other non-Hispanic employees who had also left the studio were not similarly disciplined. Again, plaintiff has failed to show that he was treated less well *because* of his protected characteristic. See Campbell v Cellco Partnership, supra. Even if plaintiff could show he was subjected to harsher discipline compared to his non-Hispanic co-workers, plaintiff has not presented evidence that this difference in treatment was in any way related to his race or national origin.

(5) Defendant terminated plaintiff for violating defendant's "Outside Employment" policy while other non-Hispanic employees were not punished until two years after plaintiff's departure. Mr. Toth and Mr. Carey claim that before plaintiff's termination, neither one was aware that any other staff employee in the Technical Operators Department had previously or currently freelanced for defendant's competitor. Defendant has proffered sufficient evidence to demonstrate that the decision to terminate plaintiff's employment, and not that of his non-Hispanic co-workers, was because plaintiff's supervisors were not aware of the other employees' violation of the "Outside Employment" policy, and not because of plaintiff's Hispanic or Puerto Rican origin. Moreover, ABC submitted evidence that plaintiff earned more than $38,000 at ABC in 2009 and $25,000 in 2010, demonstrating that plaintiff violated defendant's "Outside Employment" policy to an extensive degree. Given defendant's strict "Outside Employment" policy, it is apparent that defendant had ample legitimate, nondiscriminatory reasons, unrelated to plaintiff's protected status, for terminating his employment.

Thus, plaintiff has failed to make out a *prima facie* case that any of the above five incidents were in any way related to plaintiff's race or national origin. See Ferrer v New York State Div. Of Human Rights, 951 F.2d 59, 62 (2d Cir. 1992) (applying New York law) ("isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment"). Plaintiff has also failed to show that any of his allegations could fairly describe defendant's conduct as more than "petty slights and trivial inconveniences," much less "severe and pervasive." See Davis-Bell v Columbia Univ., supra 851 F Supp 2d 650 at 673 ("no rationale juror could find nine incidents of incivility over a four-year period constituted pervasive harassment"). Whether this Court considers the frequency, severity, offensiveness or

interference with plaintiff's work performance, he has not raised issues of material fact as to whether he was employed in a racially hostile work environment. See Whitfield-Ortiz v Dept. of Educ. of the City of New York, 2012 WL 11045620, at *2 (Sup.Ct. N.Y. County Oct. 23, 2012) ("When a plaintiff fails to support his claims of a hostile work environment with any facts as to how that environment was related to his being a member of a protected class, his hostile environment claim should be dismissed on motion").

Accordingly, defendant is entitled to summary judgment dismissing plaintiff's hostile work environment claim.

Conclusion

Defendant's motion for summary judgment dismissing plaintiff's complaint is hereby granted in all respects and the clerk is hereby directed to enter a judgment of dismissal, with prejudice, accordingly.

Dated: March 3, 2016

Arthur F. Engoron, J.S.C.