SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

WINSTON HENVILL,

Plaintiff,

Index No.: 162088/2014

-against-

DECISION/ORDER

METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of plaintiff Winston Henvill's claims that he was subject to discrimination, retaliation, hostile work environment and retaliatory hostile work environment in violation of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). Defendant Metropolitan Transportation Authority ("MTA") moves, pursuant to CPLR 3211 (a) (5) and (7), for an order partially dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being terminated in April 2015, plaintiff was employed by the MTA as a police officer. Plaintiff, who is African-American, had been working for the MTA for approximately 14 years prior to his termination. According to plaintiff, during the course of his employment, he was subject to discrimination, a hostile work environment and retaliation, as a result of his race/color, and because he engaged in protected activity. Plaintiff claims that he was treated differently than his Caucasian co-workers, who did not engage in protected

activity, and that the supervisors who participated in the discriminatory conduct were all Caucasian. He provides examples, as set forth below, of the MTA's allegedly unlawful discriminatory practices:

> a) In "late 2008," plaintiff alleges that he was subject to an "unjustified and illegitimate investigation" for not properly documenting summonses. In September 2009, as a result of the investigation, plaintiff was placed on a "base post assignment" (Amended Verified Complaint [the "Amended Complaint"], ¶ 15). According to plaintiff, this is "considered a punishment assignment" (*Id*). Plaintiff was assigned to the base post for approximately one year, during which he was "deprived of overtime, although overtime was given to junior officers" (*Id.*, ¶ 16). Plaintiff alleges that Caucasian officers, who "have committed far worse infractions," had not been involuntarily placed on a base post (*Id.*, ¶ 17).
>
> b) On October 20, 2009, plaintiff received a Notice of Intent to Discipline as a result of failing to properly document vehicle and traffic law summonses. Plaintiff states that in or about May 2010, he was compelled to forfeit sixty hours of accrued vacation time as a result of this disciplinary notice (*Id.*, ¶ 18).
>
> c) On March 25, 2010, plaintiff received another Notice of Intent to Discipline as a result of improperly documenting summonses and failing to notify the Communications Unit while making traffic stops. As a result, plaintiff was subsequently disciplined and surrendered more accrued time. He claims that "this said notice was unfair in that Caucasian officers perform car stops that do not adhere to the Patrol Guide. These Caucasian officers are not disciplined and are not required to account for their actions as was plaintiff." Plaintiff alleges he was disciplined and therefore was "compelled to surrender additional accrued time" (*Id.*, ¶ 19).
>
> d) In October 2010, plaintiff was assigned to the base post again, as a result of issuing moving violations while working at a "fixed post." According to plaintiff, under similar circumstances, Caucasian

officers are not assigned to the base post (*Id.*, ¶ 20).

e) On November 9, 2011, plaintiff received a "Letter of Instruction" as a result of losing a memo book. Plaintiff believes that "[t]here are similar or worse occurrences committed by Caucasian officers and [the MTA] does nothing" (*Id.*, ¶ 21).

f) On November 9, 2011, plaintiff received a "Command Discipline" from his supervisor, Police Lieutenant Lee Dittrich ("Dittrich"), "because he had allegedly accepted two tours of overtime on the same day, in different commands" (*Id.*, ¶ 22). Subsequently, plaintiff was suspended from duty and forfeited overtime duties as a result of this incident. Plaintiff believes that he was targeted for no justifiable reason, stating that Caucasian officers, including Officers Torone, Doscher, Scheck and Pfeiffer, had not appeared for overtime assignments, yet were not given a Command Discipline (*Id.*).

g) On January 9, 2012, as a result of allegedly abandoning his train partner, plaintiff received a Notice of Intent to Discipline. Plaintiff maintains that he did not do anything wrong and that other Caucasian officers, such as Officer Piwowarska, who take the train by themselves in similar circumstances, had not been disciplined (*Id.*, ¶ 24).

h) On February 12, 2012, plaintiff was counseled for not handing in summonses in a timely manner. Plaintiff believes that other officers have not been disciplined for similar behavior (*Id.*, ¶ 25).

i) On February 25, 2012, plaintiff was required to write a memo as to why he was one hour late for the beginning of overtime. Plaintiff claims that Caucasian officers regularly report late for overtime with no consequences (*Id.*, ¶ 27).

j) On February 28, 2012, plaintiff issued three summonses to a wheel-chair bound individual. Plaintiff was required to write a memo explaining why he issued the summonses. According to plaintiff, the summonses were valid, and he knows of no other officer who had to write a memo explaining why summonses were issued. Plaintiff was issued a Command Discipline for this incident (*Id.*, ¶ 26).

k) On February 27, 2012, plaintiff was told to report to Internal Affairs in his civilian clothes. Plaintiff claims that this is "highly irregular," and as a result he had to "change his tour" (*Id.*, ¶ 28).

l) On March 12, 2012, plaintiff was advised that he no longer was allowed to issue summonses. He is unaware of any officer having these duties taken away (*Id.*, ¶ 29).

m) According to plaintiff, although at least six other Caucasian officers received DWI, standard field sobriety testing and MP-5 training, he was denied this training that he should have received in 2011 (*Id.*, ¶ 31).

In addition, plaintiff alleges that he was subject to a hostile work environment. He provides an example of how, in "2011," he was required to write a memo about an incident that occurred months earlier and then asked by a supervisor to provide more information about the incident. Plaintiff's supervisor then "threatened plaintiff with insubordination" and did not allow him to speak to his union representative prior to signing the memo (*Id.*, ¶ 30).

In January 2012, plaintiff filed a discrimination claim with the U.S. Equal Employment Opportunity Commission ("EEOC") and served a Notice of Claim on the MTA.[1] On or about May 4, 2012, plaintiff filed a supplemental charge of discrimination with the EEOC and served a supplemental Notice of Claim on the MTA

[1] The MTA advises that plaintiff filed a written charge of discrimination with the EEOC on January 11, 2012 and served a Notice of Claim on the MTA on January 10, 2012. It states that plaintiff misidentifies these dates as January 9, 2012.

(Affirmation in Opposition, ¶¶ 13-14; Notice of Motion, Affirmation of Counsel, at 9, fnt 3).

On June 17, 2013, plaintiff received a Notice of Intent to Discipline. Such notice set forth, in pertinent part, that the MTA sought to terminate plaintiff as a result of his behavior in relation to the disappearance of a supervisor's memo book. Plaintiff denies the allegations, stating that there was no just cause for dismissal and that dismissal was excessive (Amended Complaint, ¶ 34). An arbitration hearing was held and, in an award dated April 24, 2015, plaintiff's termination was upheld (*Id.*, ¶ 35).

Plaintiff believes that his dismissal was discriminatory and retaliatory, and that defendant, by its actions created a hostile work environment (*Id.*, ¶¶ 42, 44). He states that many Caucasian police officers, who had committed far more egregious acts, or who had not engaged in protected activity, were not terminated (*Id.*, ¶ 43).

In plaintiff's first cause of action, he contends that the MTA's actions were in violation of the NYSHRL, in that he was discriminated against and subject to a hostile work environment, based on his race/color. He states that he was treated differently than other employees on account of his race/color (*Id.*, ¶¶ 42-43). Plaintiff alleges that defendant discriminated against him with respect to compensation, terms, conditions and

privileges of employment (*Id.*, ¶ 42).[2]

Plaintiff's second cause of action claims that, similar to the allegations set forth in the first cause of action, the MTA's also violated the NYCHRL by engaging in unlawful discriminatory practices and subjected plaintiff to a hostile work environment due to plaintiff's race/color (*Id.*, ¶¶ 50-56).

The third cause of action claims that the actions taken by the MTA against him after January 2012, constitute an unlawful employment practice due to plaintiff's protected activity in violation of the NYSHRL. Plaintiff also alleges that he has been subjected to a hostile work environment because of this protected activity (*Id.*, ¶¶ 58-65).

Plaintiff's fourth cause of action based on the same allegations as set forth in the third cause of action, alleges violations of the NYCHRL.

Procedural History

On October 24, 2013, prior to commencing this action, plaintiff filed an action (the "Federal Action") in the United States District Court for the Southern District of New York ("District Court") against the MTA and nine individual defendants, alleging federal and state claims of race-based discrimination, hostile work environment and retaliation. On

[2]The Amended Complaint alleges that plaintiff engaged in protected activity by filing the EEOC charge and the Notices of Claim (*Id.*, ¶ 9)

July 9, 2014, following oral argument, the District Court granted the defendants' motion to dismiss, but permitted plaintiff to request leave to amend his complaint (Notice of Motion, Exhibit "C"). Plaintiff subsequently sought leave to amend his federal complaint, attaching a proposed amended complaint ("PAC"), asserting claims against the MTA only for violations of Title VII of the Civil Rights Act of 1964, 42 USC § 2000 *et seq.* (Title VII), the NYSHRL and NYCHRL.[3]

By Order, dated October 10, 2014, the District Court denied plaintiff's leave to amend his complaint as futile on grounds that the PAC failed to state a claim (Notice of Motion, Exhibit "E"). The District Court dismissed the Title VII claims but it declined to exercise supplemental jurisdiction over plaintiff's NYSHRL and NYCHRL claims. The District Court held that the discrimination claim must be dismissed "given the absence of factual allegations in support of an adverse employment action and an inference of discriminatory intent" (*Id.*, *Henvill v Metropolitan Transp. Auth.*, 2014 WL 5375115, *2, 2014 US Dist LEXIS 149066, *3 (SD NY 2014). The District Court identified the complained-of actions, namely "[plaintiff's] reassignments to a

---

The claims and alleged occurrences of discriminatory practices in the federal action are identical to the ones alleged in plaintiff's amended State Court complaint. However, the federal action does not contain allegations related to plaintiff's termination, as that occurred in April 2015, which was after the federal action was commenced in October 2013.

base post position; his receipt of various disciplinary actions in November 2011 and January 2012; the determination in March 2012 that he could no longer issue summonses; and the denial of training in 2011" and found that such fail to constitute "adverse employment actions" (*Id.* at *2). The District Court noted that plaintiff failed to show how these alleged actions by defendant "materially changed his terms of employment or job responsibilities" (*Id.* at *2). With respect to the discrimination claims, the District Court concluded,

> "Plaintiff fails to link the purported adverse employment actions to any race-based discriminatory motive. Plaintiff's proposed Amended Complaint continues to rely on the mere conclusory allegation that, because Plaintiff believes that he was treated differently than some of his Caucasian colleagues, his employer must have discriminated against him on the basis of his race—despite this Court's repeated warnings during oral argument that such an argument was by itself inadequate to show an inference of discriminatory intent. (*See, e.g.*, July 9, 2014 Tr. 48:16-24, 49:9-18, 50:2-7.) In fact, Plaintiff's unsupported pleading does not explain how these actions were racially motivated, as opposed to legitimate consequences following regular workplace monitoring and review". (*Id.* at *2, [footnotes omitted]).

In addition, the District Court found that plaintiff could not sustain a cause of action for hostile work environment. It held, among other things, that "nowhere in the Amended Complaint does Plaintiff demonstrate—although he is required to do so—that the incidents of which he complains were the result of racial bias or discrimination on Defendant's part" (*Id.* at *3). The District Court noted that the conduct was neither severe nor

pervasive, consisting largely of reprimands in isolated incidents over four years. The District Court stated "[p]laintiff's sweeping assertions that he suffered a hostile work environment because of his race, without more, are insufficient to show a workplace 'permeated with discriminatory intimidation" (*Id.*). It further dismissed the retaliatory hostile work environment claims, stating that this claim is governed by the same standard as the hostile work environment claim.

With respect to plaintiff's proposed retaliation claim, the District Court stated that, for purposes of a retaliation claim, "actions are deemed adverse if they are harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination" (*Id.* at *3) (internal quotation marks and citation omitted).

The District Court also found that plaintiff was unable to establish causation, given that he received numerous admonitions "concerning his workplace performance prior to filing the Notice of Claim on January 10, 2012" (*Id.* at *4). It found, in pertinent part:

> "Similar to Plaintiff's discrimination claim, Plaintiff's retaliation claim identifies employment actions that took place after the January 10, 2012 filing of a Notice of Claim which amount to minor disciplinary actions. The remaining incidents in February, March, and May 2012 do not constitute an adverse employment action because Plaintiff has not pleaded sufficient facts concerning the resulting harm he suffered, let alone why these actions would have dissuaded Plaintiff from pursuing his discrimination

claim" (*Id.* at *3).

Shortly thereafter, on December 8, 2014, plaintiff commenced the instant action in State Court. After he was terminated, in April 2015, plaintiff amended his State Court complaint to allege that his termination was an additional act of discrimination and retaliation by the MTA (Amended Complaint, ¶¶ 32-37).

Plaintiff appealed the District Court decision regarding the dismissal. Subsequently, on May 11, 2015, the Second Circuit affirmed the District Court's July 2014 determination granting the defendants' motion to dismiss plaintiff's employment discrimination complaint, and affirmed in part and, vacated and remanded in part, the District Court's October 10, 2014 judgment denying plaintiff's request for leave to amend the complaint (Notice of Motion, Exhibit "G" [*Henvill v Metropolitan Transp. Auth.*, 600 Fed Appx 38 (2d Cir 2015)]. At the outset, the Second Circuit held that plaintiff's claims in the PAC that were based on incidents occurring between 2008 and October 2010 are time-barred and do not allege a "continuous practice and policy of discrimination" (*Id.* at *39). The Court affirmed the denial of plaintiff's motion to amend his claims for a hostile work environment. It further affirmed that the PAC failed to allege any facts that the denial of training, January 2012 Notice of Intent to Discipline and the threat of discipline "created 'a materially adverse change in the terms and conditions of

employment'" (*Id.* [internal citation omitted]). The Second Circuit Court further affirmed that there were no plausible claims for retaliation and held that by verbally counseling plaintiff, requiring him to go to Internal Affairs or write two memoranda, the MTA did not act in a way that "'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'." *Id.* (internal citation omitted).

The Second Circuit Court explained that, with respect to plaintiff's request for leave to amend, "which the District Court denied on the ground that the proposed amended complaint (PAC) would not survive a motion to dismiss, we affirm the ruling as to most of [plaintiff's] Title VII claims" (*Id.*). The Second Circuit Court held, however, that the District Court erred in denying plaintiff's request to amend "as it pertained to the race-based discrimination claim regarding the command discipline issued by Lieutenant Lee Dittrich and the retaliation claim regarding the removal of Henvill's summons-issuing responsibilities" (*Id*). The Second Circuit remanded these two remaining Title VII claims back to the District Court for further proceedings.

The MTA now moves to partially dismiss only plaintiff's NYSHRL and NYCHRL claims alleged in the present action that are based on the same factual allegations that were found to be insufficient to state a cause of action under Title VII in the

Second Circuit, based on collateral estoppel. Except for the allegations related to the Dittrich incident race-based discrimination claim, and the retaliation claim related to the March 2012 removal of summons-issuing responsibilities, the Second Court affirmed the District Court's determination that the allegations in the PAC were insufficient to state a claim for discrimination, hostile work environment or retaliation under Title VII.

The MTA argues that standards for establishing a NYSHRL hostile work environment, discrimination or retaliation claim under the NYSHRL mirror Title VII standards are identical. As a result, according to the MTA, because the issues alleged in the State Court action are identical to the issues that were raised and decided in the federal action, this Court should dismiss the NYSHRL claims that are grounded in the same allegations. The MTA further argues that, although the NYCHRL is to be construed more broadly than the NYSHRL, collateral estoppel should still apply because the claims are based on the same allegations that the Second Circuit already found to be insufficient to sustain Title VII claims.

In the alternative, the MTA argues that the plaintiff's Amended Complaint should be partially dismissed for failure to state a cause of action under the NYSHRL and the NYCHRL. It further alleges that plaintiff's NYSHRL and NYCHRL claims based

on incidents that occurred prior to October 24, 2010 are time-barred, and should be dismissed. Although plaintiff's Amended Complaint was filed in July 2015, except for the new allegations related to plaintiff's termination in April 2015, the MTA maintains that the relevant date for statute of limitations purposes is October 24, 2013.[4]

Plaintiff believes that the MTA has not met its burden to demonstrate the elements of collateral estoppel with respect to his NYSHRL and NYCHRL claims. "Since the issue of the propriety of the State and City claims were [sic] not decided against plaintiff . . . it cannot be said that collateral estoppel applies" (Affirmation in Opposition, ¶ 55). Plaintiff further contends that the federal court's analysis of the plaintiff's Title VII claim cannot be applied to defeat the NYCHRL claim, as the standards are different.

Plaintiff does not dispute the relevant date for determining the statute of limitations, but argues that, based on the continuing violation doctrine, all of his claims should be considered timely. He alleges that the MTA's conduct constitutes "the occurrence of a whole pattern of activity," and that the statute of limitations should be tolled to the date of the last

---

[4] October 24, 2013 is the date that plaintiff commenced his federal action, and then chose to later assert his claims in State Court after the federal court declined to exercise supplemental jurisdiction over the NYSHRL and NYCHRL claims.

wrongful act (*Id.* at ¶ 49).

Plaintiff does not substantiate any of his claims but argues that, as all of his claims allegedly meet the liberal pleading standards, the MTA's motion to dismiss should be denied.

DISCUSSION

Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory" (*Mendelovitz v Cohen,* 37 AD3d 670, 671 [2d Dept 2007]; *see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards. For example under the Federal Rules of Civil Procedure, it has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] [internal citation omitted]).

NYSHRL

The standards for evaluating discrimination, hostile work environment and retaliation claims are identical under Title VII

and the NYSHRL (*see e.g. Kelly v Howard I. Shapiro & Assocs. Consulting Engrs., P.C.*, 716 F3d 10, 14 [2d Cir 2013] ["[t]he standards for evaluating hostile work environment and retaliation claims are identical under Title VII and NYSHRL"]).

Actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations (*see* CPLR 214 (2); Administrative Code of the City of New York § 8-502 (d)). The standard for applying the continuing-violation doctrine to claims under Title VII and NYSHRL is governed by *National R.R. Passenger Corp. v Morgan*, 536 US 101, 117 [2002] (*Sotomayor v City of New York*, 862 F Supp 2d 226, 250 (ED NY 2012), *affd* 713 F3d 163 [2d Cir 2013]).

Collateral Estoppel

"Collateral estoppel is a doctrine based on general notions of fairness involving a practical inquiry into the realities of the litigation; it should never be rigidly or mechanically applied" (*Matter of Halyalkar v Board of Regents of State of N.Y.*, 72 NY2d 261, 268-269 [1988] [internal citation omitted]). Contrary to plaintiff's contentions, even when a federal court declines to exercise jurisdiction over state claims, those state claims can be barred by collateral estoppel when the federal court addresses issues that are identical to those raised in the state claims (*Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 [1st Dept 2013]).

"The doctrine of collateral estoppel applies where '[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue . . . had a full and fair opportunity to contest the prior determination'" (*Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 138 [1st Dept 2014] [internal quotation marks and citation omitted]).

As set forth at length in the facts, the Second Circuit has already determined that, except for a race-based discrimination claim regarding the command discipline involving Dittrich and the retaliation claim regarding the removal of summons-issuing responsibilities, plaintiff's allegations cannot support Title VII claims. The Second Circuit also found that claims based on incidents that occurred outside the statute of limitations were time-barred, and that the continuing violations doctrine was not applicable to those claims.

Plaintiff's allegations in this action are identical to those in the federal action, except for those related to his April 2015 termination, which the MTA is not seeking to dismiss at this time. "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue" (*Matter of Press*, 30 AD3d 154, 156 [1st Dept 2006] [internal quotation marks and citation omitted]).

The MTA has met its burden demonstrating that the issue in question, namely whether or not plaintiff can set forth claims under the NYSHRL, is identical and decisive to plaintiff's ability to plausibly state a cause of action under Title VII. In opposition, plaintiff is unable to establish that he lacked a full and fair opportunity to litigate the issue, based on the record. Therefore, the MTA's motion to partially dismiss plaintiff's NYSHRL claims on the ground of collateral estoppel is granted.

NYCHRL

The doctrine of collateral estoppel also bars and precludes plaintiff from relitigating those NYCHRL claims that did not survive Title VII, in this state court action. As the identical issue has already been decided in the federal action, plaintiff is precluded from maintaining his NYCHRL claims based on those same allegations (*see e.g. Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept 2016] (Court held that collateral estoppel precluded plaintiffs from "relitigating many 'strictly factual' issues underlying their [NYCHRL] claims," after federal court dismissed plaintiffs' federal and state discrimination claims and refused to exercise supplemental jurisdiction over plaintiff's NYCHRL claims).

Continuing Violations

For purposes of determining a continuing violation under the

NYCHRL, "[o]therwise time-barred discrete acts can be considered timely where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" (*Sotomayor v City of New York*, 862 F Supp 2d at 250 [internal quotation marks and citations omitted]).

The Second Circuit found that the claims alleged between 2008 and 2010 were time-barred, as they fail to plausibly allege a continuous practice or policy of discrimination, and as such, these claims as presented in the instant action are dismissed based on collateral estoppel (*See e.g. Peterkin v Episcopal Social Servs. of N.Y., Inc.*, 24 AD3d 306, 308 [1st Dept 2005] [NYSHRL and NYCHRL age discrimination claims dismissed as they had already been "actually litigated, squarely addressed and specifically decided," by the District Court's decision]).

Even if this issue was not precluded by collateral estoppel, the MTA's motion for dismissal would be granted with respect to the incidents alleged prior to October 24, 2010. Plaintiff fails to plead any facts to allege that the disciplinary actions prior to 2010 were part of a discriminatory practice or policy, and not merely legitimate consequences of his behavior. In addition, courts have found that negative performance evaluations are discrete acts that do not trigger the continuing violations policy exception (*see e.g. Dimitracopoulos v City of New York*, 26

F Supp 3d 200, 212 [ED NY 2014]). Moreover, the disciplinary actions were given by at least two different supervisors, making each action a discrete act (*Id.* at 212)("Later evaluations and letters to file by separate individuals are not part of the same continuing pattern of discriminatory conduct by a prior principal").

Discrimination

Pursuant to the NYCHRL, as stated in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's race or color.

The NYCHRL is to be construed more liberally than its state or federal counterparts. The court must evaluate the claims with regard for the NYCHRL's "*uniquely broad and remedial purposes*" . . . ." (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009] (emphasis in original)). "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his protected status]" (*Id.* at 78).

Under the NYCHRL, when analyzing employment discrimination

claims, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), in addition to the mixed-motive analysis (*See Hudson v Merrill Lynch & Co., Inc.* (138 AD3d at 514) [1st Dept 2016] (internal quotation marks and citation omitted) ["A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework"]).[5]

In the burden-shifting analysis, the plaintiff must set forth that he or she "is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for

---

[5] Although this motion is one for dismissal and not for summary judgment, the same burden shifting standards apply when analyzing claims made under NYCHRL. *See e.g. Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP* (116 AD3d at 141) ("Although defendant's motion is not for summary judgment, once defendant established its nonretaliatory reason in the federal action, plaintiff was required to identify an issue of fact").

its employment actions (*Id.* at 965). If the employer meets this burden, the plaintiff must "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination" (*Id.* [internal quotation marks and citation omitted]).

Under the mixed-motive analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012] [internal quotation marks and citations omitted]).

In considering plaintiff's allegations that he was subject to discrimination, the District Court found that plaintiff failed to link the alleged adverse employment actions to any race-based discriminatory motive. Affirming all but one incident, the Second Circuit found that there were no facts alleged that would give rise to a plausible claim that plaintiff was disciplined in the remaining three instances, because of his race and color.

Although the pleading standard is more permissive under the NYCHRL, plaintiff must still adequately plead that the "conduct is caused at least in part by discriminatory or retaliatory motives . . . ." (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 [2d Cir 2013]; *see also Llanos v City of*

New York, 129 AD3d 620, 620 [1st Dept 2015] ["Plaintiff has not made any factual allegations that she was adversely treated under circumstances giving rise to an inference of discrimination, as required to state a claim for discrimination under the New York State and City Human Rights Laws"]).

This Court is aware that "courts must analyze NYCHRL claims separately and independently from any federal and state law claims, construing [its] provisions broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible" (*Ya-Chen Chen v City Univ. of N.Y.*, 805 F3d 59, 75 [2d Cir 2015] [internal quotation marks and citation omitted]). However, collateral estoppel may still be applied in certain circumstances. For example, in *Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP* (116 AD3d at 140-141), the plaintiff was collaterally estopped from litigating NYCHRL claims in state court after federal court granted summary judgment in favor of the defendant as to the Title VII discrimination claims. The Court held, among other things, that

> "in opposition to defendant's collateral estoppel motion, plaintiff has not identified any evidence on the relevant issue that the court in the previous litigation overlooked. Thus, the frequent risk that evidence winds up being undervalued for City HRL purposes because it has been filtered through a title VII lens is not present here."

In addition, as one court recently noted, "as to the

standards of liability, in certain areas, courts have recognized that city law is more plaintiff-friendly than federal law. But the Restoration Act did not provide that federal and city law may *never* be construed as coextensive" (*Bivens v Institute for Community Living*, 2016 US Dist LEXIS 13538, *3 [SD NY 2016][internal citation omitted]).

Nonetheless, the dispositive issues relevant to plaintiff's NYSHRL and NYCHRL claims are identical to the dispositive issues in plaintiff's federal action: whether or not plaintiff has pled that his treatment was the result of a discriminatory animus. As these issues were resolved, and plaintiff had a full and fair opportunity to litigate and contest them in the federal action, plaintiff is precluded from asserting them again.

Even if collateral estoppel did not apply, the remaining NYCHRL discrimination claims would be dismissed pursuant to CPLR 3211 (a) (7). Plaintiff claims that he was disciplined, or subjected to adverse actions, while other Caucasian police officers were not. However, mere conclusory allegations that plaintiff was treated differently than other employees fail to demonstrate that the MTA's actions were motivated by race. Even construing the complaint liberally, plaintiff does not adequately plead that he was treated less well due to his race (*see e.g. Matter of Khan v New York City Health & Hosps. Corp.*, 144 AD3d 600, 601 [1st Dept 2016] [Court granted defendant's motion

pursuant to CPLR 3211 (a) (5) dismissing the complaint as plaintiff "failed to support his contention that he was discriminated against on account of his race, religion, and national origin with evidence of discriminatory animus on the part of any [defendant]"]); *see also Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014] ("Even under the mixed-motive analysis applicable to City Human Rights Law claims, plaintiff's claim fails, because there is no evidence from which a reasonable factfinder could infer that [protected status] played any role in defendant's [actions]").

Hostile Work Environment

Under the NYSHRL, a hostile work environment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004] [internal quotation marks and citation omitted]).

Under the NYCHRL, "the conduct's severity and pervasiveness are relevant only to the issue of damages. To prevail on liability, the plaintiff need only show differential treatment -- that she is treated 'less well' -- because of a discriminatory intent" (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*,715 F3d at 110) [internal citation omitted]). "In order to establish a

retaliatory hostile work environment, a plaintiff must satisfy the same standard that is applied generally to hostile work environment claims regarding the severity of the alleged conduct" (*Sclafani v PC Richard & Son*, 668 F Supp 2d 423, 438 [ED NY 2009]).

The District Court (*Henvill v Metropolitan Transp. Auth.*, 2014 WL 5375115 at *3) found that plaintiff had not demonstrated, although required to do so, that the incidents allegedly causing a hostile work environment, "were the result of racial bias or discrimination" on the part of the MTA. Again, even though the standard for pleading and proving a hostile work environment is broader under the NYCHRL, the prior action's explicit finding that there was no discriminatory animus, precludes and collaterally estops plaintiff from asserting his claims for hostile work environment and retaliatory hostile work environment under the NYCHRL. "The broader remediation available under the City law does not allow the Plaintiff to dispense with linking his claim of hostility to some attitude that the law forbids" (*Williams v Metro-North Commuter R.R. Co.*, 2012 WL 2367049, *13, [SD NY 2012]; *see also Llanos v City of New York*, 129 AD3d at 620 ["Furthermore, plaintiff's failure to adequately plead discriminatory animus is fatal to her claim of hostile work environment"]).

In any event, even if plaintiff's hostile work environment

claims that are the subject of this dismissal motion were not collaterally estopped, they would be dismissed for the same reasons. Plaintiff has failed to demonstrate how "discrimination was one of the motivating factors for the defendant's conduct" (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]). Although plaintiff speculates that he was treated less well than Caucasian officers, during a time in 2011 when he was threatened with a charge of insubordination, and after he filed his complaint with the EEOC, he has not adequately pled any discriminatory animus[6] (*see e.g. Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 [1st Dept 2014] [internal citations omitted] ["Plaintiff failed to adequately plead discriminatory animus, which is fatal to both her age discrimination and hostile work environment claims under the State and City Human Rights Laws (HRL). Indeed, her allegations that she was 51 years old and was treated less well than younger teachers are insufficient to support her claims"]).

Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices (Administrative Code § 8-107 (7)).

---

[6] Moreover, plaintiff's claims that he was subject to a retaliatory hostile work environment as a result of filing his charge with the EEOC are wholly unsupported in his complaint.

"[T]o make out a retaliation claim under the City HRL, the complaint must allege that: (1) [plaintiff] participated in a protected activity known to defendants; (2) [the MTA] took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

The Second Circuit already raised and addressed the issue of whether or not the MTA's actions would dissuade a reasonable worker from making a charge of discrimination. It also explicitly noted that causation would be unfounded, given the numerous instances of discipline plaintiff received prior to commencing any protected activity. As plaintiff was given a full opportunity to litigate, including the oral argument, and many subsequent federal court determinations, the MTA is granted collateral estoppel partially dismissing the remaining claims of retaliation.

In any event, even if plaintiff's claims for retaliation were not precluded by collateral estoppel, the MTA would be granted dismissal of the remaining claims for the reasons already

specified. In pertinent part, plaintiff cannot establish any connection between the EEOC complaint and any alleged adverse actions. Plaintiff had been receiving progressive discipline from 2008, well before he filed a charge with the EEOC (*see e.g. Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206-207 [1st Dept 2015] [Plaintiff had no claim for retaliation under NYCHRL where there was "no evidence of a causal connection . . . all the discord – in scope, kind, and frequency – preexisted her internal complaint. The discharge that was effected in 2009 was the culmination of continuous progressive discipline"]).

Accordingly, the MTA's motion for partial dismissal is granted and plaintiff is precluded and estopped from maintaining his NYSHRL and NYCHRL claims that are based on allegations that the Second Circuit has already found to be insufficient to state a cause of action for race-based discrimination, hostile work environment, retaliation and retaliatory hostile work environment under Title VII.

CONCLUSION

Accordingly, it is

ORDERED, that the Metropolitan Transportation Authority's motion to dismiss Winston Henvill's NYSHRL and NYCHRL discrimination, retaliation, retaliatory hostile work environment and hostile work environment claims alleged in the present action

that are based on the same factual allegations that were found to be insufficient to state a cause of action under Title VII in the Second Circuit, is granted[7]; and it is further

ORDERED, that the remaining claims shall continue.

Dated: July 21, 2017

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.

[7] Again, at this time, the MTA is not seeking to dismiss the claims based on plaintiff's ultimate termination in April 2015, the race-based Dittrich discipline incident discrimination claim or the retaliation claim involving the March 2012 removal of summons-issuing responsibilities.