SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 52

JEROME JONES,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

Index No.: 150316/12

DECISION/ORDER

TISCH, ALEXANDER, J.:

In this action, plaintiff Jerome Jones (Jones) sues his former employer, the City of New York (City), for sexual harassment and retaliation, in violation of the New York State Human Rights Law (Executive Law § 296 [1]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 [1])(NYCHRL). Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Jones was employed by the City at its 311 Call Center (Call Center), a division of the City's Department of Information Technology and Telecommunications (DoITT), as an Associate Call Center Representative II (ACCRII), from December 2004 until his employment was terminated in July 2011. The 311 Call Center provides information to the public about City government services, and employs hundreds of call center representatives (CCRs) to answer telephones 24 hours a day and respond to

callers' questions and complaints. Chaudry Dep., Ex. G to Guyette Affirmation in Support of Defendant's Motion (Guyette Aff.), at 11-12, 13; Morrisroe Dep., Ex. H to Guyette Aff., at 17-18.[1] The CCRs report to Associate Call Center Representatives (ACCRs), who report to Call Center Managers (CCMs); the CCMs report to a Senior Call Center Manager, who reports to the Director of the Call Center, who reports to the Executive Director. Chaudry Dep., Ex. G, at 12; Morrisroe Dep., Ex. H, at 18. Saida Chaudry (Chaudry) was Director of the Call Center from 2009 to 2012, and Joe Morrisroe (Morrisroe) was Executive Director from 2008 to the present. Chaudry Dep., Ex. G, at 10-11; Morrisroe Dep., Ex. H, at 17.

Plaintiff was hired for the ACCRII position as a provisional employee; he did not take a civil service exam and held the ACCRII position as a provisional employee for the duration of his employment at the Call Center. Pl. Dep., Ex. E, at 32. His responsibilities as an ACCRII included coaching and developing staff, monitoring call volume, monitoring employees' time sheets, and taking disciplinary action, if needed. *Id.* He supervised, on average, about 20 employees, including CCRs and ACCRIs who were considered "team leaders." Pl. Dep., Ex. F at 6. He was

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[1]All lettered exhibits (e.g., Ex. G) referred to herein are annexed to Guyette Aff.; all numbered exhibits (e.g., Ex. 1) are annexed to Kapotinova Affirmation in Opposition to Defendant's Motion.

supervised by various CCMs over the years, and when his immediate supervisor was not at work, he reported to the CCM on duty. Pl. Dep., Ex. E at 34, 35. As relevant to the complaint, Michelle Wickham (Wickham) was a CCM who was plaintiff's direct supervisor for approximately three months starting in or around May 2009. *Id.* at 48.

Plaintiff testified that in May 2009, Wickham approached him at work, in front of several colleagues, and asked him to go out with her; and when he said no, she looked unhappy and walked away. *Id.* at 37. At his deposition, plaintiff did not remember when Wickham became his supervisor (*id.* at 47), and testified that when she asked him to go out in May 2009, she was not his supervisor (*id.* at 40), although records submitted by defendant indicate that she was his supervisor at least as of May 4, 2009, and during June 2009. *See* Email/Chart, Ex. Z.

Plaintiff further testified that Wickham asked him out at other times as well, including during private one-on-one weekly coaching sessions. Pl. Dep., Ex. E, at 37. According to plaintiff, Wickham asked him out for drinks four times a week for about twelve weeks. *Id.* at 38. He stated that he said no every time, and Wickham reacted with frustration and explicit sexual comments, such as "you're gonna fuck me one day" and "you're gonna stop refusing me." *Id.* at 38-39, 48. He also stated that she asked him "why don't you want me" at every coaching session,

which took place once a week during the approximately three months that she was his supervisor. *Id.* at 46-47. He also stated that no one else was present during these private sessions, but a colleague overheard Wickham's comments on another occasion. *Id.* at 39; Pl. Dep., Ex. F, at 9.

Plaintiff claims that he complained about Wickham to John Galvez, a CCM at the time, but did not go into details about the alleged harassing conduct. Pl. Dep., Ex. E, at 40-41. In June 2009, plaintiff filed a complaint against Wickham with DoITT's EEO office. Pl. Dep., Ex. F at 13; *see* EEO Complaint, Ex. J. At about the same time, to avoid working with Wickham, plaintiff requested and was granted a change in his work schedule from a daytime shift to a night shift. Pl. Dep., Ex. F, at 17. Plaintiff claims that his schedule was changed to "protect" him during the investigation of his complaint, and that the EEO office promised him that he would be returned to his daytime shift after the investigation was concluded. Plaintiff does not allege that he experienced harassment or had any interactions with Wickham after his shift was changed and she was no longer his supervisor.

Wickham's employment was terminated in or around November 2009. *Id.* at 13-14; *see* DoITT Letter to EEOC, Ex. O, at 3-4. The City claims that Wickham was terminated for reasons unrelated to plaintiff's complaint against her, that is, because her

position became subject to a civil service list, which she was not on. Morrisroe Dep. at 30. In January 2010, DoITT's EEO office sent a letter to plaintiff, advising him that the investigation into his complaint against Wickham was completed, and that the EEO office found that evidence was insufficient to support his complaint. *See* Letter dated January 12, 2010, Ex. K.

After Wickham left, plaintiff requested, in or around December 2009, that his schedule be changed to the Monday-Friday daytime schedule that he previously had. Pl. Dep., Ex. F, at 19. His request for a Monday-Friday 11:00 a.m. to 7:00 p.m. shift was denied, but, in or around February 2010, Chaudry offered him a Sunday-Thursday 11:00 a.m. to 7:00 p.m. shift, which he accepted. *See* Emails, Ex. M. He subsequently made requests in August 2010 and in March 2011 for a Monday-Friday or a four-day-a-week schedule, which were denied based on business needs of the Call Center. *See* Schedule Change Denials, Exs. N, P. Plaintiff remained on a Sunday-Thursday daytime schedule until his employment was terminated, and claims that he was denied requested schedule changes in retaliation for filing a sexual harassment complaint against Wickham.[2] Pl. Dep., Ex. F, at 19-

[2]Defendant submits evidence that plaintiff also made a request in September 2009 to change his night shift from "Fri - Tues 2300 - 0700" to "Sat - Wed 2300 to 0700." *See* Request, Ex. L. This request, which was denied, is not addressed by plaintiff and appears not be part of his retaliation claim.

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Plaintiff also claims that Chaudry and Morrisroe retaliated against him by denying him promotions to a position as a trainer, and, on three occasions, to a CCM position. *Id.* at 22, 28-29. Plaintiff did not remember when he applied for the trainer position (*id.* at 23), but evidence submitted by defendant indicates that plaintiff applied for the trainer position in 2007. *See* Letter dated September 14, 2007, Ex. S. Plaintiff also does not remember when he applied for a CCM position (Pl. Dep., Ex. F, at 25), but testified that at the time he applied, one of the people hired as a CCM was Wickham. *Id.* at 26.

Plaintiff further claims that, beginning in August 2010, he was disciplined more harshly than other employees for minor rule violations. *Id.* at 29-31, 32, 33. Disciplinary charges were brought against plaintiff in August 2010 for insubordination and violating the dress code, following an incident on August 19, 2010, in which his supervisor, Lisa Ross (Ross), told him to tuck his shirt in, and when he did not comply, his supervisor told him to leave for the rest of the day. *Id.* at 32; *see* Discipline Action, Ex. U. Shortly after the August 19, 2010 incident, plaintiff filed another complaint with the DoITT EEO office, and with the EEOC, claiming that he was "walked out" of the building by Chaudry and Ross on August 19, that it was not DoITT policy to have employees leave for a dress code violation, and that, by

walking him out in front of his co-workers, Chaudry and Ross created a hostile environment. *See* EEO Complaint, Ex. Q; EEOC Complaint, Ex. O.

In January 2011, plaintiff was charged with being absent without leave during a snowstorm in December 2010, when, plaintiff claims, he could not get through to the Call Center to notify someone that he would be out. Pl. Dep., Ex. F, at 33. At the same time, he also was charged with submitting false documentation for sick leave. *Id.* Plaintiff filed grievances challenging these charges, as well as the charges arising from the August 2010 incident, which were resolved before any hearing was held. *See* Penalty Recommended Form, Exs. V, X.

Plaintiff's employment was terminated in July 2011, as a result of mandatory budget cuts. Morrisroe Dep., Ex. H, at 13, 46-47; Chaudry Dep., Ex. G, at 22; Pl. Dep., Ex. E, at 35; *see* Letters, Ex. I, at NYC000896. According to Chaudry and Morrisroe, the budget cuts were the only reason plaintiff was let go, and the lay-offs were not based on seniority or performance, as provisional employees did not have the protections that employees with civil service titles had. Chaudry Dep., Ex. G, at 26; Morrisroe Dep., Ex. H, at 52, 58, 50-51.

DISCUSSION

It is well settled that, on a motion for summary judgment, the moving party must make a prima facie showing of its

entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If such showing is made, to defeat summary judgment, the opposing party must demonstrate, also by producing admissible evidence, that genuine material issues of fact exist which require a trial of the action. *See Jacobsen*, 22 NY3d at 833; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is even arguable. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968). The nonmoving party must show, however, "the existence of a bona fide issue raised by evidentiary facts." *Rotuba Extruders, Inc.*, 46 NY2d at 231; *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact.

Zuckerman, 49 NY2d at 562; *see Iselin & Co. v Mann Judd Landau*, 71 NY2d 420, 425-426 (1988).

In employment discrimination cases, because direct evidence of an employer's discriminatory intent is rarely available, courts urge caution in granting summary judgment. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). "'[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Sibilla v Follett Corp.*, 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), quoting *Gallo v Prudential Residential Servs., Ltd. Partnership*, 22 F3d 1219, 1223 (2d Cir 1994); *see Desir v City of New York*, 453 Fed Appx 30, 33 (2d Cir 2011). While summary judgment remains available in discrimination cases, it is appropriate only when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v International Shoppes, Inc.*, 2010 WL 1270173, *5, 2010 US Dist LEXIS 30912, *15 (ED NY 2010) (internal quotation marks and citation omitted); *see e.g. Fruchtman v City of New York*, 129 AD3d 500 (1st Dept 2015); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 (1st Dept 2012); *Bennett*, 92 AD3d at 45-46.

NYSHRL and NYCHRL

Under the NYSHRL and the NYCHRL, it is unlawful for an

employer to discriminate in the terms, conditions and privileges of employment on the basis of sex or gender. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discrimination. Executive Law § 296 (7); Administrative Code § 8-107 (7).

Both statutes require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Sanders v Winship*, 57 NY2d 391, 395 (1982). The NYCHRL further explicitly requires courts to conduct a liberal and independent analysis of claims brought under it, in light of its "'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights law." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009); *see* Administrative Code § 8-130; *Albunio*, 16 NY3d at 477-478 (2011); *Melman*, 98 AD3d at 112; *Bennett*, 92 AD3d at 34.

Generally, employment discrimination claims brought under the NYSHRL and the NYCHRL, including retaliation claims, are analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII). *See Stephenson v Hotel Empls.*

& Rest. Empls. Union Local 100 of AFL-CIO, 6 NY3d 265, 270 (2006); *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Melman*, 98 AD3d at 113. Claims under the NYCHRL must "be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Id.*, 98 AD3d at 113; *see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 (1st Dept 2014); *Bennett*, 92 AD3d at 45.

Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of employment discrimination, that is, to show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. *See Stephenson*, 6 NY3d at 270-271; *Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003); *Melman*, 98 AD3d at 113-114. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to rebut the presumption of discrimination by demonstrating that there was a legitimate, nondiscriminatory reason for its employment decision. If the defendant makes such a showing, the plaintiff then must produce evidence of pretext or, under the NYCHRL, show that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the employer's

actions. *Melman*, 98 AD3d at 127; *see Bennett*, 92 AD3d at 39; *Williams*, 61 AD3d at 78 n 27.

SEXUAL HARASSMENT

Despite the reflection in the parties' arguments here of "the popular notion that 'sex discrimination' and 'sexual harassment' are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination." *Williams*, 61 AD3d at 75; *see O'Neill v Roman Catholic Diocese of Brooklyn*, 98 AD3d 485, 487 (2d Dept 2011). Sexual harassment which results in a hostile or abusive work environment constitutes a violation of the human rights laws. *See Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 64-65 (1986); *Williams*, 61 AD3d at 75.

To prevail on a claim of sexual harassment/hostile work environment under the NYSHRL, a plaintiff must show that 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.'" *Harris v Forklift Sys., Inc.*, 510 US 17, 21 (1993), quoting *Meritor Sav. Bank*, 477 US at 65, 67; *see Forrest*, 3 NY2d at 310. To be actionable, the incidents of harassment "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992); *see Ferrer*

v New York State Div. of Human Rights, 82 AD3d 431, 431 (1st Dept 2011); *Thompson v Lamprecht Transp.*, 39 AD3d 846, 847 (2d Dept 2007); *Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996). In addition, under the NYSHRL, an "'employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.'" *Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 (1985) (citation omitted); *see Forrest*, 3 NY3d at 311; *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 737-738 (2d Dept 2009); *Beharry v Guzman*, 33 AD3d 742, 743 (2d Dept 2006).

Under the more protective NYCHRL, a plaintiff need not prove that the harassment was severe or pervasive, only that she or he was subjected to conduct that was "more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" *Williams*, 61 AD3d at 80; *see Gonzales v EVG, Inc.*, 123 AD3d 486, 487 (1st Dept 2014); *Hernandez v Kaisman*, 103 AD3d 106, 114-115 (1st Dept 2012); *see also Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013). "[Q]uestions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." *Williams*, 61 AD3d at 76; *see Nelson v HSBC Bank USA*, 87 AD3d 995, 999 (2d Dept 2011). The primary focus in harassment cases brought under the

NYCHRL, as it is in other terms and conditions cases, is whether plaintiff was subjected to "inferior terms and conditions based on gender." *Williams*, 61 AD3d at 75; *see Hernandez*, 103 AD3d at 114-115; *see generally Mihalik*, 715 F3d at 110. "[S]uch a determination is ordinarily one for the trier of fact." *Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 506 (1st Dept 2010), citing *Williams*, 61 AD3d at 78. In addition, the NYCHRL, unlike the NYSHRL, imposes strict liability on the employer where "the offending employee 'exercised managerial or supervisory responsibility.'" *Zakrzewska v New School*, 14 NY3d 469, 479, 480 (2010), quoting Administrative Code § 8-107 (13) (b) (1); *see McRedmond v Sutton Pl. Rest. & Bar, Inc.*, 95 AD3d 671, 673 (1st Dept 2012).

In this case, plaintiff testified that Wickham sexually harassed him, for about three months, during the time that she was his supervisor, by repeatedly asking him out after he repeatedly said no, and by making explicit sexual comments in private meetings and in front of co-workers, which caused him to file a complaint and request a schedule change. Although plaintiff testified that Wickham was not his supervisor in May 2009, documents indicate that she was; and it is not disputed that Wickham was his supervisor when he filed a complaint in June 2009. Defendant does not argue that Wickham was not plaintiff's supervisor at the time of the alleged harassment, but to the

extent that it is contested, there is at least a question of fact as to when Wickham was his supervisor.

Defendant moves to dismiss the sexual harassment claim on the grounds that the alleged conduct was not severe and pervasive for purposes of the NYSHRL claim, and amounted to no more than "petty slights and trivial inconveniences" under the NYCHRL. Defendant also contends that plaintiff has not shown that he was treated less well than other employees because of his gender.

At the outset, although plaintiff asserts that neither the NYSHRL nor the NYCHRL claims should be dismissed, his argument focuses on the difference between the standards for sexual harassment claims under the NYCHRL and under the NYSHRL. *See* Memorandum of Law in Opposition, at 12-15. As plaintiff makes no real argument, and offers no legal authority to support finding that the alleged conduct met the severe and pervasive standard under the NYSHRL, his sexual harassment claim brought under the NYSHRL is dismissed.

However, contrary to defendant's contention, plaintiff's sworn testimony that Wickham's conduct included repeated sexually explicit comments and invitations, such as "one day you're gonna fuck me," "you're gonna go out with me," and "why don't you want me," which plaintiff testified occurred on a regular basis over three months, is sufficient to raise a question of fact as to whether such conduct was more than what a reasonable person would

consider petty slights and trivial inconveniences. *See Anderson v Edmiston & Co.*, 131 AD3d 416, 417 (1st Dept 2015); *Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 595 (1st Dept 2012), *affd* 22 NY3d 914 (2013); *Poolt v Brooks*, 38 Misc 3d 1216(A), 2013 WL 323253, *5, 2013 NY Misc LEXIS 265, ***14 (Sup Ct, NY County 2013); *Hwang v DQ Mktg. & Pub. Relations Group*, 2009 WL 3696604, 2009 NY Misc LEXIS 5581, *15, 2009 NY Slip Op 32387(U) (Sup Ct, NY County 2009); *see also Sletten v LiquidHub, Inc.*, 2014 WL 3388866, *8, 2014 US Dist LEXIS 94697, *24-25 (SD NY 2014). "How credible that evidence is is irrelevant at this juncture." *Poolt*, 2013 WL 323253, at *5-6.

Defendant submits no evidence to demonstrate that such conduct did not occur. While Chaudry and Morrisroe claim they had no knowledge of the alleged harassment, there is no dispute that plaintiff filed a claim with his employer's EEO office, and defendant offers no testimony of anyone with personal knowledge of the complaint or the investigation of it. Although defendant argues that the investigation found that plaintiff's complaint was unsubstantiated, defendant submits no evidence to show what the investigation consisted of, who conducted it, whether anyone was interviewed, or otherwise what basis existed for the determination of the EEO office that evidence was insufficient to support plaintiff's complaint. Thus, defendant's conclusory assertion that the complaint was unsubstantiated fails to

eliminate triable issues of fact as to whether the alleged conduct occurred. As to defendant's argument that plaintiff has not shown that the alleged harassment was directed at him because of his gender, defendant fails to meet its initial burden on this motion of showing that Wickham's conduct was not directed at him because of his gender, that, in other words, all employees experienced the same treatment.

The court, moreover, cannot find, as a matter of law, that the alleged conduct, viewed as a whole, "does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams*, 61 AD3d at 80. In such borderline situations and cases where there are triable issues of fact as to whether the alleged discriminatory conduct occurred, summary "judgment should normally be denied." *Id.* at 78, 80; *see Hwang*, 2009 NY Misc LEXIS 5581, at *14-15.

Retaliation

To establish a claim of unlawful retaliation under the NYSHRL (Executive Law § 296 [1] [e]) and the NYCHRL (Administrative Code § 8-107 [7]), a plaintiff must show that (1) she or he engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff, or, under the NYCHRL, the employer's actions were reasonably likely to deter a person from engaging in

protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest*, 3 NY3d at 312-313; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 (2d Dept 2013); *Asabor v Archdiocese of New York*, 102 AD3d 524, 528 (1st Dept 2013); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). A causal connection can be established directly, through evidence of retaliatory animus, such as verbal or written remarks, or indirectly, by showing that the adverse action closely followed in time the protected activity. *See Baez v New York State Ofc. of Temporary & Disability Assistance*, 2010 WL 4682809, 2010 NY Misc LEXIS 5525, *19, 2010 NY Slip Op 33177(U) (Sup Ct, NY County 2010); *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 (2d Cir 2001).

"The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . uniformly hold that the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v Breeden*, 532 US 268, 273-74 (2001) (internal citations omitted); *see Dubois v Brookdale Univ. Hosp. & Med. Ctr.*, 6 Misc 2d 1023(A), 800 NYS2d 345, 2004 NY Slip Op 51819(U), ****12 (Sup Ct, Kings County 2004), *affd* 29 AD3d 731 (2d Dept 2006); *Walder v White Plains Bd. of Educ.*, 2010 WL 3724464, *14, 2010 US Dist LEXIS 100831, *50-51 (SD NY 2010);

Rommage v MTA Long Is. R.R., 2010 WL 4038754, *15, 2010 US Dist LEXIS 104882, *46 (ED NY 2010). As little as a few months between the protected activity and the alleged retaliation have been found to break any causal connection as a matter of law. *See e.g. Del Pozo v Bellevue Hosp. Ctr.*, 2011 WL 797464, *7, 2011 US Dist LEXIS 20986, *27 (SD NY 2011) (five months is "too attenuated" to show causation); *Hollander v American Cyanamid Co.*, 895 F2d 80, 85-86 (2d Cir 1990) (three and a half months too long to establish retaliation); *Garrett v Garden City Hotel, Inc.*, 2007 WL 1174891, *20-21, 2007 US Dist LEXIS 31106, *69 (ED NY 2007) (two and one-half months precludes finding of a causal connection); *Cunningham v Consolidated Edison Inc.*, 2006 WL 842914, *19, 2006 US Dist LEXIS 22482, *55 (ED NY 2006) (passage of two months between the protected activity and the adverse employment action seems to be the dividing line); *Carr v WestLB Admin., Inc.*, 171 F Supp 2d 302, 310 (SD NY 2001) (four month lapse of time insufficient); *Nicastro v Runyon*, 60 F Supp 2d 181, 185 (SD NY 1999) (retaliation claims "routinely dismissed" when as few as three months elapse between protected activity and alleged retaliation); *see also Williams v City of New York*, 38 AD3d 238 (1st Dept 2007) (eighteen month gap defeats claim of causal connection); *Chang v Safe Horizons*, 254 Fed Appx 838 (2d Cir 2007) (gap of almost one year undermines any causal connection); *Stroud v New York City*, 374 F Supp 2d 341, 351 (SD

NY 2005) ("yawning temporal gap" of two years cannot give rise to inference of causation).

In this case, defendant does not dispute that plaintiff engaged in protected activity when he filed a sexual harassment complaint with the DoITT EEO office in June 2009. Defendant argues, however, that Chaudry and Morrisroe, the alleged retaliators, were not aware that plaintiff filed a complaint, that plaintiff does not show a causal connection between his complaint and the alleged retaliation, and that defendant had legitimate non-discriminatory reasons for its actions, including the termination of plaintiff's employment, which plaintiff does not show were pretextual.

Plaintiff submits no evidence that Chaudry and Morrisroe were aware of plaintiff's sexual harassment complaint, other than his testimony that he complained to a CCM who told him he would report it to Chaudry and Morrisroe. Pl. Dep., Ex. F, at 15. Even assuming, without deciding, that there may be questions of fact as to whether Chaudry and Morrisroe knew or should have known about his complaint, plaintiff offers no direct evidence of retaliatory animus on the part of Chaudry and Morrisroe, and the temporal proximity between plaintiff's complaints and the alleged retaliatory acts, including his termination, is insufficient to establish a causal connection.

Plaintiff alleges that Chaudry and Morrisroe retaliated

against him by denying him promotions and requested schedule changes, by charging him with menial rule violations, and by terminating his employment in July 2011. As to his claims that he was denied a promotion to the position of trainer, and was denied a promotion to CCM on three occasions, evidence shows that he applied for a trainer position in 2007, and applied for a CCM position prior to the time Wickham was his supervisor. The evidence thus shows that the alleged denials of promotions occurred prior to his complaint, and cannot show a causal connection. *See Gaffney v City of New York*, 101 AD3d 410, 411 (1st Dept 2012); *Melman*, 98 AD3d at 129.

As to plaintiff's claim that he was denied a schedule change in December 2009 to return to the Monday-Friday daytime schedule he had before he filed his complaint against Wickham, he does not deny that he was, in response to his request, given a Sunday-Thursday daytime schedule, which he accepted without protest. This granting of a schedule change, even if not fully accommodating plaintiff's request, cannot be considered an adverse employment action or even one that would be "reasonably likely to deter" (Administrative Code § 8-107 [7]) plaintiff from making further complaints, and, in fact, it did not. The other alleged denials of requests to change his schedule, in August 2010 and March 2011, even if they could be considered adverse employment actions, are too far removed from plaintiff's

protected activity to show a causal connection. Similarly, the alleged retaliatory disciplinary actions taken against him in August 2010 and December 2010 are too temporally distant to show a causal connection.

With respect to plaintiff's claim that he was again retaliated against after he filed a complaint in August 2010, the alleged retaliatory actions, such as denials of requests for schedule changes and disciplinary actions, were a continuation of the same conduct that caused him to complain, which "does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct." *Melman*, 98 AD3d at 129; *see Gaffney*, 101 AD3d at 411.

Plaintiff's termination in July 2011, more than two years after his sexual harassment complaint, and almost a year after his second complaint, also took place at a "sufficiently distant time after the protected activity" to defeat an inference of causation. *Garrett*, 2007 WL 1174891 at *20; *see Del Pozo*, 2011 WL 797464 at *7 (five months "too attenuated" to show causation); *Miller v Kempthorne*, 357 Fed Appx 384, 386-387 (2d Cir 2009) (one year "well beyond" time frame allowing for inference of causation); *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 766 (2d Cir 1998) (gaps of one or more years between alleged incidents precludes finding a continuing violation).

Plaintiff's retaliatory termination claim also fails because defendant has put forth evidence demonstrating a legitimate, nondiscriminatory reason for his termination, that is, that he was laid off with other ACCRs due to mandatory budget cuts, and that plaintiff, as a provisional employee, was not protected from being laid off by his seniority. Generally, a reduction in work force undertaken for financial reasons is a legitimate and nondiscriminatory reason for employment decisions. *See Matter of Laverack & Haines, Inc. v New York State Div. of Human Rights*, 88 NY2d 734, 738-739 (1996); *Hudson v Merrill Lynch & Co.*, 138 AD3d 511, 515 (1st Dept 2016); *Mirza v HSBC Bank USA, Inc.*, 79 AD3d 434, 435 (1st Dept 2010); *Di Mascio v General Elec. Co.*, 27 AD3d 854, 855 (3d Dept 2006). In opposition, plaintiff has failed to present evidence sufficient to raise a triable issue as to whether defendant's stated reason was pretextual or whether retaliation played any part in defendant's decision. *See Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 (1st Dept 2010) (unsupported assertions insufficient to show pretext); *Elizarov v Martha Stewart Living Omnimedia, Inc.*, 45 AD3d 327, 327 (1st Dept 2007).

Accordingly, defendant's motion for summary judgment is granted in part and denied in part; and it is

ORDERED that the motion is granted to the extent that plaintiff's causes of action for retaliation under the NYSHRL and the NYCHRL are dismissed; and it is further

ORDERED that plaintiff's cause of action for sex discrimination under the NYSHRL is dismissed; and it is further

ORDERED that the remaining claim for sex discrimination under the NYCHRL is severed and shall continue.

Dated: March 8, 2018

ENTER:

HON. ALEXANDER TISCH, J.S.C.

HON. ALEXANDER M. TISCH