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

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KELVIN DOZIER,

Plaintiff,

- against -

FEDERAL EXPRESS, INC., DAMIEN CHUNG, an individual, and HENRY LEE, an individual,

Defendants.

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Index No.: 161236/2014

Motion Seq. No.: 002

DECISION/ORDER

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

In this employment discrimination action, defendants Federal Express, Inc. ("FedEx"), Damien Chung ("Chung") and Henry Lee ("Lee") (collectively, "defendants") move for summary judgment pursuant to CPLR 3212, dismissing the complaint alleging claims of age, race and disability discrimination,[1] hostile work environment and retaliation in violation of the New York State Human Rights Law, Executive Law § 296 ("NYSHRL") and the New York City Human Rights Law, Administrative Code § 8-107 ("NYCHRL"), in its entirety. Plaintiff Kelvin Dozier ("Dozier" or "plaintiff") opposes the motion.

BACKGROUND

In August 1996, plaintiff, a black male born on March 16, 1964, was hired by FedEx as a Department of Transportation ("DOT") courier, operating FedEx vehicles for picking up and delivering packages (plaintiff tr at 7, 13-14, 48-49). FedEx is an airline regulated by the DOT (plaintiff tr at 16-18).

[1]Plaintiff has withdrawn his disability discrimination claims (plaintiff's Memorandum of Law in Opposition at 1, n1).

During the last five to six years of plaintiff's employment at FedEx, plaintiff was employed at the facility located at 560 West 42nd Street, New York, NY ("West 42nd Street facility") (*id.* at 12). Chung, plaintiff's supervisor at the time of his termination, was transferred to the West 42nd Street facility in either 2010 or 2011 (Chung tr 13-14; plaintiff tr at 140). Chung, in turn, was supervised by Lee, a senior manager, responsible for overseeing the West 42nd Street facility (Chung tr at 10; Lee tr at 10). Plaintiff was terminated from his employment effective March 6, 2013 (Dozier tr at 12, Exhibit "8"). At the time of his discharge, Dozier was a part-time employee working 15-20 hours a week (plaintiff tr at 10, 181).

Workplace Discipline

According to Chung, there are two forms of written discipline at FedEx, a performance reminder and a warning letter (Chung tr at 26). A warning letter pertains to conduct, and a reminder letter is for a performance issue (*id.* at 27). FedEx also provide counselings which are informal communications to inform an employee of deficiencies they need to correct but are not considered discipline (Lee tr at 33). Company policy mandates termination if an employee receives three written disciplines within a 12-month period (Dozier tr, Exhibit "6" at 4).

Plaintiff admits that he received approximately six disciplinary letters over his seventeen years of employment with FedEx (Dozier tr at 44). Plaintiff received four warning letters from August 2002 through August 2006 (Dozier tr Exhibit "8"). Plaintiff subsequently received another warning letter in June 2012 for failing to follow a directive of management as per Chung (*id.* at 50). In November 2012, Chung issued a warning letter to plaintiff for making an illegal turn, and a second warning letter that month for failure to fill out the Vehicle Inspection Report

("VIR") (*id.* at 51). On March 6, 2013, Chung issued plaintiff's final performance reminder and termination letter resulting from plaintiff's receipt of several written disciplines within a 12-month period (*id.*).

At all relevant times herein, plaintiff's supervisor was Chung, an operations manager (plaintiff tr at 13; Chung tr at 8-9).

Grievance Procedure at FedEx

At FedEx, employees are provided with a "Guaranteed Fair Treatment" ("GFT") policy (plaintiff tr at 80). Under the GFT policy, an employee has the right to challenge an issued discipline (*id.* at 80). If the challenge is issued by an operations manager, then the employee can appeal to the director (*id.*). If the employee does not like the director's determination, then he or she may appeal to the regional vice president. If the employee is still unsatisfied with the regional vice president's determination, then he or she may appeal to the Appeals Board (*id.*).

Plaintiff's allegations

Plaintiff alleges in his deposition testimony that from the beginning of Chung's tenure at the West 42nd Street facility, Chung was hostile and discriminatory towards plaintiff. Plaintiff contends that Chung favored a younger black employee, Jonathan Maple ("Maple"), who was then in his twenties by allowing Maple to eat in in his vehicle when a sort operation was occurring, avoid FedEx's mandatory "Stretch and Flex Program" and use his "Blue Tooth" headphones and listen to music when sorting packages, in violation of company policy (plaintiff tr at 54, 118-119, 122; Chung at 18). Plaintiff stated that Chung talked down to plaintiff and belittled and degraded him (plaintiff tr at 121). Plaintiff testified that "every chance [Chung] received he wanted to document" plaintiff (*id.* at 118, 120).

By email, dated February 7, 2011, from plaintiff to FedEx managers, plaintiff complained of Chung's conduct (plaintiff's Exhibit "D"). In April 2011, plaintiff testified that he filed a workplace violence claim against Chung, after Chung allegedly grabbed a box out of plaintiff's hand almost causing plaintiff to fall. Plaintiff claims Chung himself investigated the claim and deemed the allegations unfounded (plaintiff aff, ¶ 3; plaintiff tr at 18, 126). Plaintiff filed two other workplace violence complaints against Chung (*id.* at 126-127). The claims were investigated by human resources and were found to be without merit.

In April 2011, plaintiff was involved in a disagreement with a co-worker, Giovanna D'Amato, who he claims was interjecting and interrupting a conversation he was having with another employee. Plaintiff avers that Chung encouraged D'Amato to file a workplace violence claim against plaintiff, in retaliation for plaintiff's prior alleged complaints of discrimination and workplace violence against Chung (plaintiff aff, ¶¶ 4,5).

In June 2012, plaintiff was suspended with pay for failing to follow through with a directive from Chung (plaintiff tr at 116-117). Plaintiff claims that while sorting packages, he placed one to the side, and that when Chung saw this he reprimanded plaintiff for doing so (plaintiff aff, ¶ 6). When plaintiff attempted to explain why he put the package to the side, which he claims was due to a safety issue, Chung called over another supervisor and stated that plaintiff was being insubordinate (*id.*; plaintiff tr at 53). On August 21, 2012, plaintiff raised six separate allegations against Chung as evidence that plaintiff was being harassed and bullied by Chung (Davis declaration, Exhibit "G"). Nanette Malebranche ("Malebranche"), managing director, along with Corey Davis ("Davis"), a human resources employee, investigated each claim by questioning Chung, co-workers named by plaintiff as having knowledge and by security

personnel in order to determine the legitimacy of the allegations (*id.*; Lee tr at 20-21). The report concluded that there was "no substantiation to the allegation of harassment and being bullied as stated by [plaintiff]" (Davis declaration, Exhibit "G").

By letter, dated October 9, 2012, Malebranche notified plaintiff that through the company's EEO complaint process, his allegations of alleged unlawful discrimination and/or harassment were investigated and were unable to be confirmed (Davis declaration, Exhibit "F").[2] In November 2012, Chung issued a warning letter to plaintiff for an alleged illegal turn in a FedEx vehicle (plaintiff tr at 50-51). Plaintiff claims that he had permission to make the turn from a traffic officer (*id.* at 42).

Plaintiff alleges that Chung favored younger employees by not forcing or ordering them to follow his directives. Plaintiff claims Chung engaged in discussions with younger employees about following such directives rather than accusing them of being insubordinate, as was done to plaintiff (plaintiff tr at 52, 54). In addition, he alleges that Chung favored non-black employees over black employees (*id.* at 61-62). Plaintiff admits that Chung never made any comments about plaintiff's age or race. He claims however that he did overhear Chung use the "N-word" in front of other employees on one occasion, which plaintiff verbally reported to Davis (id. at 71-72, 74).

Plaintiff testified that Chung would not give plaintiff assistance with recycled packages,

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[2]The cover of the internal EEO complaint form, dated July 18, 2012 (the "EEO Complaint") requests an employee to "mark the box that describes the action you believe was discriminatory. Please indicate the date of event(s)." Plaintiff checked off boxes indicating retaliation, harassment and 'other' (specifying bullying). Plaintiff failed to provide any dates. The attached narrative of plaintiff's complaint, however, did not set forth any allegations of discrimination (plaintiff's opposition, Exhibit "E").

but would assist other FedEx employees. In addition, plaintiff alleges that Chung belittled him, spoke to plaintiff in a loud, aggressive and confrontational manner, and constantly yelled at him (*id.* at 67, 119-121, 126-127). Plaintiff also claims that plaintiff complained to Lee about the repeated use of the "N-word" being used in the workplace and that nothing was done about it (*id.* at 66). Lee denies this (Lee tr at 23). In June 2012 and again in January 2013, plaintiff asked Lee if plaintiff could be moved out of Chung's location. Lee told plaintiff he was not going to move plaintiff (plaintiff tr at 66-67). Plaintiff sought a leave of absence from FedEx in December 2012 (plaintiff tr at 56). His request was denied.

Plaintiff sought a GFT for the June 11, 2012 warning letter (for failing to follow directives of management as per Chung), but the decision was upheld. On July 2, 2012, plaintiff was given a counseling memo about forgetting to put his employee number on a VIR, and was warned that if it happened again he would get a reminder letter (plaintiff tr at 83).[3]

Plaintiff received three disciplinary letters in a 12-month period the last of which was issued on November 29, 2012. It is undisputed that the issuance of three disciplinary letters in a 12-month period is grounds for termination of a FedEx employee. In this case however, management, in its discretion, chose to extend plaintiff another chance (Davis declaration,

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[3]The VIRs are federal DOT reports that are written to show that a particular FedEx vehicle is acceptable to drive (Lee tr at 26). The VIR is located in a form book with blank spaces for employees to complete (plaintiff tr at 19-20). An employee must check various items on the vehicle before the vehicle is driven for the day, which the employee must reflect on the VIR (*id.* at 20-25). A VIR must be completed each time a courier operates a FedEx vehicle and again when returning the vehicle (*id.* at 28-29).

Lee testified that when an employee skips a page in a VIR book, the employee is not necessarily disciplined. Rather the employee receives a "communication of what the proper procedure is" (Lee tr at 49-50), and a written letter is issued as a result of skipping a page in the VIR book if an employee has a repetitive issue (*id.* at 50).

Exhibit "E").

On March 6, 2013, plaintiff was called in to speak to Chung in Chung's office. Another manager was also present (plaintiff tr at 105). A decision had been made by Chung, Lee, Davis and Malebranche to terminate plaintiff for improperly filling out the VIR, after repeated counseling (Chung tr at 65; Lee tr at 38-39). Plaintiff testified that Chung explained that plaintiff had skipped a page in the VIR book and that he was being terminated as a result thereof (plaintiff tr at 105-106, 108). The March 6, 2013 termination letter from Chung to plaintiff provides in pertinent part:

> "As you recall, we met and discussed your failure to properly fill out your vehicle inspection report on 12/5/2012 and again on 6/21/2012 and on 6/28/2012. You were issued a performance reminder on 11/29/2012 and a performance reminder/decision day on 11/30/2012. Once again, on 2/19/2013, you failed to properly fill out your vehicle inspection report. I am therefore issuing this written performance reminder. Your consistent failure to meet established standards is in violation of [a FedEx improvement policy] (copy attached).
>
> A review of you disciplinary history indicates you have received three letters within the last twelve months:
>
> 1. 11/29/2012 [A]dmin/paperwork fail
> 2. 11/09/2012 [S]erious traffic violation
> 3. 6/11/2012 [F]ail to work as directed
>
> Both the Performance Improvement Policy [a]nd the Acceptable Conduct Policy [p]rovide that three notifications of deficiency within a twelve-month period normally result in termination. Therefore, your employment is terminated effective today" (Dozier tr Exhibit "8").[4]

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[4]By letter, dated March 18, 2013, from Chung to plaintiff, Chung provided plaintiff with a Management Rationale letter outlining the reasons for his termination, namely the multiple VIR errors and the counseling plaintiff received in connection therewith, and the fact that plaintiff had three notices of deficiency in twelve months. Chung also noted that subsequent to plaintiff's termination, FedEx discovered that plaintiff made another VIR error on February 28, 2013.

Plaintiff challenged the termination decision through the GFT process. Plaintiff met with Malebranche, Chung, Lee and Davis after his termination, wherein plaintiff was told that the decision was being upheld (*id.* at 112). The decision to terminate plaintiff was ultimately upheld by vice president of the Eastern region, Samuel L. Nesbit, Jr. by letter, dated November 20, 2013 (Lee tr at 45-46; Davis declaration, Exhibit "E").

DISCUSSION

Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

NYSHRL and NYCHRL standards

Pursuant to the NYSHRL, as set forth in Executive Law § 296 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to bar or to discharge from employment or to discriminate against an individual in the terms, conditions or privileges of employment because of, as is pertinent here, the individual's age, race, or color.

Pursuant to the NYCHRL, as set forth 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, as is pertinent here, the individual's age, race or color.

When analyzing discrimination claims under both the NYSHRL and the NYCHRL, courts apply the burden shifting analysis developed in *McDonnell Douglas Corp. v Green*, 411 US 792 [1973]. In the burden-shifting analysis, the plaintiff has the initial burden to establish a prima facie case of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). "Under the *McDonnell Douglas* framework, a plaintiff asserting a claim of employment discrimination bears the initial burden of establishing a prima facie case, by showing that [he] is a member of a protected class, [he] was qualified to hold the position, and that [he] suffered adverse employment action under circumstances giving rise to an inference of discrimination. If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514-515 [1st Dept 2016] [internal citations omitted]).

In evaluating claims under the NYCHRL, the court must also evaluate said claims with regard to the NYCHRL's "uniquely broad and remedial purposes" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009] [internal quotation marks and citation omitted]. The NYCHRL "explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language" (*id.* at 66).

When reviewing discrimination claims under the NYCHRL, courts have held that "[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]" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514 *citing Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012] [internal quotation marks and citations omitted]. "Under the 'mixed-motive' framework, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Thus under this 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 [adverse employment] action was motivated at least in part by . . . discrimination" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514-515 [internal quotation marks and citations omitted]). Where the plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false, . . . such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107 at 127 [plaintiff "should prevail in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision"]).

In this case, plaintiff has demonstrated that he is a member of a protected class, he was qualified to hold the position and that he suffered adverse employment action (termination) under circumstances giving rise to an inference of discrimination.[5] As such, the burden shifts to

[5]Defendants do not concede that plaintiff has made a prima facie case. However, as a plaintiff's burden to establish a prima facie case is "de minimis," this Court will assume that, for purposes of this motion, plaintiff has satisfied the standard (*see e.g. Hamburg v New York Univ. Sch. of Medicine,* 155 AD3d 66, 68 [1st Dept 2017]). "The granting of a motion based on the absence of a prima facie showing of circumstances giving rise to an inference of discrimination would be. . . rare, given . . .the limited evidence required for that purpose" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d at 42 [fnt 11] [internal quotation marks omitted]).

defendants to show a legitimate, non discriminatory reason for terminating plaintiff's employment with FedEx.

Here, defendants offer legitimate, nondiscriminatory reasons for the termination, namely, that plaintiff was found to have repeatedly been in violation of the company's policy regarding the VIR forms, having received multiple counseling regarding the VIR forms, and received more than three disciplinary letters within a 12-month period (two of which involved conduct other than failure to properly fill out VIR forms) (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d at 45-46 [unsatisfactory work performance is a nondiscriminatory motivation]; *Jordan v American Intl. Group*, 283 AD2d 611, 612 [2d Dept 2001] ["there was ample evidence that the plaintiff was discharged, not because of unlawful discrimination, but because of unsatisfactory job performance"]). Specifically, defendant was issued the following letters in a 12-month period: (1) a warning letter with a five day suspension, dated June 11, 2012, for failure to work as directed; (2) warning letter, dated November 9, 2012, for a serious safety violation arising out of plaintiff's illegal turn in a FedEx vehicle; (3) a performance reminder letter, dated November 29, 2012 as a result of plaintiff's failure to properly fill out the VIR.[6] Although plaintiff could have been terminated after the November 29, 2012 letter as it was his third disciplinary letter in a 12-month period, plaintiff was given another chance. In the termination letter, dated March 6, 2013, plaintiff was notified that on February 19, 2013, he again failed to properly fill out the VIR. Given the history of plaintiff's performance issues, particularly those issues concerning FedEx's VIR policy, defendants offer a legitimate reason for plaintiff's termination.

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[6]The letter also provides that FedEx discussed with plaintiff his failure to properly fill out VIRs on June 21, 2012, June 29, 2012 and July 5, 2012.

Under the *McDonnell Douglas* framework, applicable to discrimination actions brought under both the NYSHRL and the NYCHRL, the burden shifts back to plaintiff to prove that the reason proffered by FedEx for terminating him was merely a pretext for discrimination. Further under the mixed-motive framework, applicable to discrimination actions brought under the NYCHRL, the Court must consider whether there exist triable issues of fact that discrimination was one of the motivating factors for FedEx's termination of plaintiff as an employee.

Plaintiff's burden on his age discrimination claim

With respect to his age discrimination claim, under both the NYSHRL and NYCHRL, plaintiff has not met this burden. Plaintiff offers no evidence of any age-based comments, but rather claims that an employee in his 20's, Maple, was treated differently in that he was allowed to use his Bluetooth headphones on one occasion and that younger employees were not reprimanded as plaintiff allegedly was. However, plaintiff offers nothing more than his self-serving testimony in this regard (*Stephenson v Hotel Empl. & Rest. Empl. Union Local 100, AFL-CIO*, 14 AD3d 325, 331 [1st Dept 2005] [self-serving statements insufficient to support claim], *affd* 6 NY3d 265 [2006]). Plaintiff's allegation that Maple was not disciplined for eating breakfast in his vehicle during the sorting operation, using his Blue Tooth and listening to music when he was participating in the morning sort, is unavailing. Although plaintiff claims that he was told by Chung it was against company policy to use a Blue Tooth (Plaintiff's Exhibit "D" [Email from plaintiff to FedEx, dated February 7, 2011]), plaintiff himself was never issued any discipline for this conduct. "Absent evidence that younger [workers] of equal or lesser qualification than plaintiff's received more favorable treatment than [he] did", and evidence that younger employees were terminated after receiving three disciplinary letters within a 12-month

period (rather than four letters), "negates any possible inference that [plaintiff's termination] was based, in whole or in part, on bias against people of [his] age" (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 77 [1st Dept 2017]). As such, plaintiff has failed to present any evidence even under the more liberal mixed-motive standard of the NYCHRL that discrimination based on age was even a partial motive for his termination (*id.* at 68).[7]

Accordingly, that branch of defendants' motion for summary judgment seeking to dismiss plaintiff's NYSHRL and NYCHRL age discrimination claims is granted.

Plaintiff's burden on his race discrimination claim

Similarly, with respect to his race discrimination claim, under both the NYSHRL and NYCHRL, plaintiff has not met his burden. When plaintiff was asked to give names of specific individuals who discriminated against plaintiff based on his race, he was unable to provide any names. As such, plaintiff's claims of race discrimination are based solely on allegations that the "N-word" was used in the workplace. Plaintiff could identify by name four employees who possibly used the "N-word", two of whom (Chung and Maple), used the slur one time. Chung's one time use of the "N-word" was directed to an unnamed employee (plaintiff's tr at 72, 75) and related to a sports event (plaintiff tr at 75).[8] Plaintiff only identifies one time that Maple used the word, namely when Chung asked Maple to do something. After Chung walked away, Maple uttered [N-word], I ain't doing that" (plaintiff tr at 158). However, plaintiff also testified that

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[7]There is no allegation or evidence in the record that plaintiff was replaced by a younger employee or that there were any remarks made to plaintiff about his age (*see Sass v Hewlett-Packard*, 153 AD3d 1185, 1185-1186 [1st Dept 2017]).

[8]Plaintiff testified that Chung said to that employee "[N-word], you don't know what you're talking about" (Plaintiff tr at 75).

Chung immediately spoke with Maple "on the side" (plaintiff tr at 158-159).

Plaintiff is only able to identify two other employees by name whom he spoke with about the "N-word." However, his testimony fails to reveal whether or not these employees even used the "N-word" themselves, or if so, how often. In fact, in one discussion plaintiff told an employee named Gabe Santana that the "N-word" was offensive to plaintiff and Santana replied that he respected that (plaintiff tr at 162). Plaintiff's testimony that he told Malebranche that the "entire station" was using the "N-word" is vague and devoid of details (plaintiff tr at 161).[9] Most significantly, plaintiff admitted that he never included in written documentation to FedEx any complaints about the use of racial slurs, including in his internal EEO Complaint (plaintiff tr at 77, 171, 173; plaintiff's opposition, Exhibit "E").

Here, plaintiff's allegations regarding his coworkers' use of the "N-word," while offensive, does not establish discriminatory intent (*Fruchtman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015]). Chung's one time use of the "N-word", while highly inappropriate, does not give rise to an inference of discrimination under the NYSHRL. "Stray remarks such as [this], even if made by a decision maker, do not, without more, constitute evidence of discrimination" (*Melman v Montefiore Med. Ctr.*, 98 AD3d at 125; *see Breitstein v Michael C. Fina Co.*, 156 AD3d 536, 537 [1st Dept 2017]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016]). Further, plaintiff has not shown "a nexus between the employee's [of the defendant employer] remark and the decision to terminate him" (*Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014], *lv. denied* 24 NY 3d 901 [2014]).

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[9]Plaintiff also testified that he told Lee about the "constant" use of the "N-word" without providing details as to when the word was used and by whom (plaintiff tr at 66, 155).

As such, plaintiff fails to satisfy his burden to show that defendants proffered reason was pretextual as required under the NYSHRL. Even under the more lenient mixed-motive framework of the NYCHRL, such alleged stray remarks by themselves fail to establish that discrimination was even a motivating factor for the subject termination of plaintiff's employment (*see id.* at 494-495).

Accordingly, that branch of defendants' motion for summary judgment seeking to dismiss plaintiff's NYSHRL and NYCHRL race discrimination claims is granted.

Hostile Work Environment

Plaintiff's hostile work environment allegations include Chung and his coworkers using the "N-word" as discussed above, Chung allegedly encouraging a co-worker to file a workplace violence claim against him, Chung grabbing a package from him, and Chung constantly yelling at him. Plaintiff also alleges that he was disciplined for violating unwritten rules, such as using an "X" mark on a VIR, or skipping a page. Further, plaintiff requested a medical leave of absence in December 2012 and requested to change his work location in January 2013, both of which were undisputably denied (Dozier tr at 56-58, 67).

Under the NYSHRL, "a racially hostile work environment exists 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]). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and

whether it unreasonably interferes with an employee's work performance" (*Id.* at 310-311). "Isolated remarks or occasional episodes of harassment will not support a finding of a hostile work environment" (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 [1st Dept 2011] *quoting Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 [4th Dept 1996]).

Defendants' alleged discriminatory conduct, namely the use of the "N-word" as described above, is not by itself proof of a hostile work environment. Such comments were not directed at plaintiff and even though the comments are offensive, the alleged discriminatory remarks do not rise to the level of "severe or pervasive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 310; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 920 [2d Dept 2015]). "A hostile work environment requires more than a few isolated incidents of racial enmity" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 310, 311 [internal quotation marks and citation omitted]).

"Under the NYCHRL, there are not separate standards for discrimination and harasment claims" (*Johnson v Strive East Harlem Employment Group*, 990 FSupp2d 435, 445 [SDNY 2014] [internal quotation marks omitted]). To establish a discrimination claim under the NYCHRL, "plaintiff must prove by a preponderance of evidence that [he] has been treated less well than other employees because of [his age and race]" (*Williams v New York City Housing Auth.*, 61 AD3d 62, 78 [1st Dept 2009]).

Despite the broader application of the NYCHRL, *Williams* also recognized that the law does "not operate as a general civility code" (*id.* at 79). Defendants can still avoid liability if they can demonstrate that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'"

(*Id.* at 80). However, it is the employer's burden to prove the conduct's triviality (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 111 [2d Cir. 2013]).

Here, the facts as alleged fail to establish that plaintiff was subjected to a hostile work environment due to his age or race under the NYCHRL. Morever "[his] hostile work environment claims [f]ail because defendant's alleged behavior amounts to no more than petty slights or inconveniences" (*Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 [1st Dept 2014] [internal quotation marks and citations omitted]).

Accordingly, that branch of defendants' motion for summary judgment seeking to dismiss plaintiff's hostile work environment claims is granted.

Retaliation

When analyzing claims for retaliation, courts apply the burden shifting test set forth in *McDonnell Douglas*, [w]hich places the "initial burden" for establishing a *prima facie* case of retaliation on the plaintiff. "Under both the [NYSHRL] and [NYCHRL], it is unlawful to retaliate against an employee for opposing discriminatory practices. In order to make out the claim, plaintiff must show that (1) [he] has engaged in protected activity, (2) [his] employer was aware that [he] participated in such activity, (3) [he] suffered an adverse employment action based upon [his] activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004] [internal citations omitted]).[10] Under the NYCHRL, "the retaliation . . . need not result in an ultimate

[10]To make out a retaliation claim under the NYCHRL, plaintiff is required to demonstrate that "(1) [he] participated in a protected activity known to defendants; (2) defendants 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]).

action . . . [but] must be reasonably likely to defer a person from engaging in a protected activity" ([Administrative Code § 8-107[7]).

Plaintiff claims that he engaged in a protected activity by making complaints about the conduct of his supervisor, Chung. Here however, plaintiff has failed to establish that he engaged in protected activity, namely "opposing or complaining about unlawful discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 313). Although plaintiff filed several complaints, he concedes that he never included in written documentation to FedEx any complaints about the use of racial slurs, including in the internal EEO Complaint (plaintiff tr at 77, 171, 173; plaintiff's opposition, Exhibit "E"). There is no evidence in the record that he made complaints alleging race or age discrimination or that FedEx was aware of any such complaints. "Filing a grievance complaining of conduct other than unlawful discrimination–as plaintiff did here–is simply not a protected activity subject to a retaliation claim under the [NYSHRL or NYCHRL]" (*id.* at 313, fnt 11). As such, plaintiff has failed to meet his initial burden on his claims for retaliation.

Accordingly, that branch of defendants' motion for summary judgment seeking to dismiss plaintiff's retaliation claims is granted.

Individual Liability against Chung and Lee

Plaintiff alleges that both Chung and Lee should be held individually liable under both the NYSHRL and NYCHRL. An individual may be liable for discrimination in violation of the NYSHRL if he is "an 'employer' (i.e., has an ownership interest or the power to do more than carry out personnel decisions made by others) or if the individual has aided and abetted in the discriminatory conduct" (*Graaf v North Shore University Hospital*, 1 FSupp2d 318, 324 [SDNY 1998]; *see* Executive Law § 296 [1], [6]). Here, neither Chung nor Lee has an ownership interest

in FedEx, nor do they have the authority to hire and fire employees, as such decisions are made with the approval of human resources and the managing director. The NYCHRL "provides that it is unlawful for 'an employer or an employee or an agent thereof' to engage in discriminatory employment practices'" (*Murphy v ERA United Realty*, 251 AD2d 469, 471 [2d Dept 1998]).[11]

Further, Executive Law § 296 (6) provides that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." Likewise, under the NYCHRL, Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct.

Having granted summary judgment to FedEx dismissing plaintiff's complaint, including the claims for discrimination under the NYSHRL, no liability can attach to individual co-employees, Chung or Lee as aiders and abetters (*see Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 [1st Dept 2005] ["As the claims against the university were properly dismissed, the court also properly dismissed the claims against the individual defendants for aiding and abetting."]). Similarly, under the NYCHRL, as FedEx is granted summary judgment dismissing the complaint, there can be no viable claim against the individual defendants, Chung and Lee, as employees (*see Priore v New York Yankees*, 307 AD2d 67, 74 n 2 [1st Dept 2003] ["[a] separate

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[11]"In contrast to [the NYSHRL], which in defining those who may be liable for unlawful discriminatory practices speaks of an 'employer' without mention of employees or agents, [the NYCHRL] expressly provides that it is unlawful for 'an employer or employee or an agent thereof' to engage in discriminatory employment practices" (*Murphy v ERA United Realty*, 251 AD2d 469, 471 [2d Dept 1998]). Thus, the NYCHRL "provides for individual liability 'regardless of ownership or decisionmaking power" (*Malena v Victoria's Secret Direct, LLC*, 886 FSupp2d 349, 366). Even under this broader standard, there is insufficient evidence in the record that Chung or Lee discriminated against plaintiff based on age or race.

cause of action against an employee for actively 'aiding and abetting' discriminatory practices [under the NYCHRL] . . . would still require proof initially as to the liability of the employer" (internal citations omitted)]).

Accordingly, that branch of defendants' motion for summary judgment seeking to dismiss plaintiff's complaint against Chung and Lee, individually, is granted.

CONCLUSION

Accordingly, it is

ORDERED, that the motion for summary judgment by defendants Federal Express, Inc., Damien Chung and Henry Lee [Motion Seq. No. 002] dismissing plaintiff's complaint is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: July 12, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.