SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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MANUEL REYES,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Defendants.

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MOTION SEQ. NO.#002

INDEX NO.: 154722/2017

DECISION AND ORDER

ALEXANDER M. TISCH, J.:

This is an employment retaliation action to recover damages based upon the alleged adverse actions of defendants taken in retaliation of discrimination complaints filed by plaintiff.

Defendants, City of New York (City), New York City Police Department (NYPD), Michael Parente (Parente), and Karen Pisano (Pisano), move pursuant to CPLR 3211 (a) (5) and (7), to dismiss the amended complaint. Plaintiff, Manuel Reyes, opposes the motion and defendants reply.

On May 22, 2017, plaintiff, a retired NYPD detective, filed the instant lawsuit asserting causes of action for retaliation under the Executive Law § 296 (1) (a) (e); also known as the New York State Human Rights Law and hereinafter referred to as "NYSHRL", and the New York City Administrative Code § 8-107, also known as the New York City Human Rights Law and hereinafter referred to as "NYCHRL". The plaintiff also filed a cause of action for Aiding and Abetting in violation of Administrative Code § 8-107 (6).

Plaintiff's claims stem from allegations that he was subjected to disparate treatment and sexual and racial discrimination by defendants (amended complaint, ¶¶ 26, 27, 41). Plaintiff believes that defendants retaliated against him as a result of his filing complaints with the NYPD's Office of Equal Employment Opportunity (OEEO) (*id.* ¶¶ 64, 65).

BACKGROUND

Plaintiff's complaint alleges that he engaged in the protected activity of making complaints of discrimination against his employer and that defendants retaliated against him in violation of NYSHRL and NYCHRL, by taking adverse action against him.

In moving to dismiss, defendants contend that plaintiff's amended complaint is time-barred, in part; and fails to state a cause of action. Specifically, defendants submit that pursuant to CPLR 3211 (a) (5), plaintiff's complaint is time barred as to all allegations taking place prior to May 22, 2014. It is undisputed that plaintiff commenced his action on May 22, 2017. Defendants argue that the statute of limitations for claims under NYSHRL and NYCHRL Executive Law is three years (*see* Executive Law § 296 *et seq.*; Administrative Code § 8-502 [d]).

Next, defendants claim that plaintiff's alleged minor disputes with his supervisor do not amount to adverse action as required by statute, therefore, the complaint must be dismissed for failing to state a cause of action pursuant to CPLR 3211 (a) (7). Defendants also argue that plaintiff has not alleged any facts that indicate any of the conduct complained of was caused by plaintiff's protected activity.

In opposition, plaintiff argues he adequately pled allegations which occurred prior to May 22, 2014 and those claims are actionable based upon the continuing violation doctrine. In the alternative, plaintiff argues that even if the Court were to find certain allegations to be time barred, the Court may still consider those facts as evidence supporting plaintiff's timely claims.

Plaintiff further contends that he has alleged a material adverse action, i.e. denial of promotion and receiving low performance evaluations, which could dissuade a reasonable worker from making or supporting a charge of discrimination. Moreover, plaintiff claims that within days of filing his first complaint he was subjected to increased drug testing and scrutiny (plaintiff's opp. p. 25). Accordingly, plaintiff claims causation between the adverse acts occurring within days and weeks of the protected activity of filing a complaint can be inferred by the court.

Factual Allegations

On or about October 15, 1990, plaintiff was hired by the NYPD as a probationary police officer and was assigned to the Patrol Bureau. Plaintiff eventually transferred to the Intake Unit in the Command Center of the NYPD's Internal Affairs Bureau (IAB) and was promoted to the position of Detective Third Grade in 2005 (*id.* ¶¶ 9, 10). In August 2006, plaintiff was transferred to the Records Unit of the IAB. In plaintiff's 2010-2011 performance review, he received the highest overall rating, a five on a scale from one to five. In 2010, plaintiff's supervisor, Sergeant Detective Michael Aprile, recommended him for promotion to Detective Second Grade (*id.* ¶ 15).[1]

In October 2011, Sergeant Detective Karen Pisano became the Commanding Officer of the Records Unit and plaintiff's direct supervisor. Plaintiff claims he trained Pisano with respect to her supervisory duties (*id.* ¶16). In 2012, Pisano issued plaintiff his 2011-2012 performance review and rated him a five, the highest overall ranking (*id.* ¶ 17). Pisano also recommended plaintiff be considered for promotion to Detective Second Grade.[2]

In the fall of 2012, plaintiff claims Pisano's treatment of him changed dramatically after Pisano became involved in a divorce proceeding. Plaintiff alleges that Pisano began (1) refusing to authorize him overtime; (2) assigning him supervisory tasks and responsibilities; and (3) assigning herself overtime that was typically assigned to plaintiff (*id.* ¶¶ 19, 20, 21).
Plaintiff alleges that Pisano told him that he reminded her of her husband (*id.* ¶ 19).

Plaintiff also alleges that Pisano accused him of taking excessive overtime and that Pisano forced him to work on Thanksgiving Day in 2012 because "he did not have a family" (*id.* ¶¶ 24, 25, 26). Plaintiff contends that Pisano was disrespectful and unprofessional toward him because she cursed at him and called him vulgar names in front of his colleagues (*id.* ¶ 27). Pisano also allegedly denied

[1] While the plaintiff does not specifically state that he was denied the promotion, it can be assumed that he did not advance to the position of Detective Second Grade, as the plaintiff continued to apply for this position, and in fact, retired as Detective Third Grade.
[2] Again, it is assumed did not receive the promotion.

plaintiff's requests to work different hours while she approved those same requests from non-Hispanic males and non- Hispanic females (*id.*).

In early March 2013, plaintiff complained to Pisano about his inability to complete his normal duties during his regular work hours, yet his requests for overtime were denied (*id.* ¶ 28). Plaintiff pointed out to Pisano that she was the one taking excessive overtime (*id.* ¶ 29). As a result of this conversation, plaintiff claims Pisano responded to him in an offensive manner by saying "you wouldn't have the balls to talk like that to a male supervisor." (*id.* ¶ 30). Plaintiff claims this comment was sexually based and was a reference to his genitals (*id.*). Around May 2013, Pisano requested plaintiff sign a document entitled "Duties and Responsibilities". Plaintiff refused to sign the same and when threatened with disciplinary action, plaintiff consulted his union delegate on the issue (*id.* ¶¶ 33, 34, 35, 36). Plaintiff was advised that he should not sign the document (*id.* ¶ 38). In June 2013, plaintiff received his 2012-2013 performance review from Pisano who gave plaintiff a four on a scale from one to five. Plaintiff received a three out of five for commitment, drive and initiative. Plaintiff claims this low evaluation "hurt his chances of transferring to other units." *(id.* ¶ 42).

Plaintiff claims Pisano stated that lunch was a privilege and that he felt pressured by Pisano to forgo lunch in order to complete his daily duties. On August 1, 2013, plaintiff took lunch and was later informed that Pisano had complained to others about plaintiff taking lunch and disappearing for hours during the work-day, and that Pisano had mentioned that plaintiff's insistence on taking lunch would cause other employees to complete work that was initially assigned to plaintiff (*id.* ¶¶ 51, 52, 53, 54).

On August 6, 2013, plaintiff met with Lieutenant Diana Ramirez and Inspector Joseph Pfister regarding the appeal of his performance review and Pisano's disparate treatment of him, including the inappropriate sexual remarks pertaining to his male genitals (*id.* ¶ 56). Inspector Pfister refused to change plaintiff's rating in his 2012-2013 performance review (*id.* ¶ 57). At that time, plaintiff filed a complaint of discrimination with the OEEO (*id.* ¶ 55). On August 7, 2013, Pisano asked plaintiff for a list of all his investigations, the due dates, and whether he had uncovered any problems with his

assignments (*id.* ¶ 62). Plaintiff argues that this was retaliatory conduct (*id.* ¶ 64). Later that same day, plaintiff was also randomly drug tested (*id.* ¶ 63). Plaintiff submits that over the course of his 23-year career, he had been drug tested only eight times. However, after filing his OEEO complaint in August 2013, he was randomly drug tested four times within a one-year period (*id.* ¶ 77). Plaintiff contends that the increased drug testing was done in retaliation for filing a complaint against Pisano. On August 21, 2013, plaintiff claims Pisano asked plaintiff to re-write the same memorandum four times (*id.* ¶ 65). In September 2013, plaintiff claims Pisano accused him of violating an unidentified Interim Order (*id.* ¶ 66).

On September 17, 2013, the plaintiff was informed by the OEEO that his complaint against Pisano did not rise to the level of employment discrimination because it was limited to a disparaging remark (*id.* ¶ 67). Plaintiff argues that his complaint to the OEEO was not adequately investigated (*id.* ¶ 68).

In October 2013, plaintiff claims Pisano reassigned him tasks that were less prestigious and did not require overtime (*id.* ¶ 70). In January 2014, Pisano began assigning plaintiff the responsibility of misconduct cases for units outside IAB (*id.* ¶ 72). On February 7, 2014, plaintiff requested to leave work early to make an airplane flight later that day (*id.* ¶ 73). It is alleged Pisano denied plaintiff's request and allegedly stated "I know you write letters" (*id.* ¶ 74).

In late May 2014, plaintiff received his performance evaluation for the 2013-2014 year (*id.* ¶ 78). Pisano gave plaintiff an overall score of four out of five (*id.* ¶ 78). Again, in the category of Drive and Initiative, plaintiff received a rating of three (*id.* ¶ 78). Plaintiff appealed his 2013 evaluation to Pisano's direct supervisor, Captain Michael Parente (*id.* ¶¶ 80, 81). On June 20, 2014, plaintiff, met with Pisano and Parente to discuss his evaluation appeal (*id.* at ¶ 80). Plaintiff believed that Pisano continued to give him poor ratings in retaliation for his OEEO complaint and as a form of continued harassment of him (*id.* ¶79). At the June 20, 2014 meeting, plaintiff informed Parente that Pisano continues to discriminate against him by yelling at him daily and telling lies about him to coworkers,

and that she curses at him in front of peers. (*id.* ¶ 81). Plaintiff contends that neither Parente nor Pisano reported his retaliation complaints to the OEEO (*id.* ¶ 82).

Plaintiff further alleges that Pisano required him to work on July 5, 2014, a day that senior detectives in the unit were typically not required to work this assignment (*id.* ¶ 83). On July 7, 2014, Parente informed plaintiff that he would not be changing the ratings in his 2013 performance evaluation (*id.* ¶ 84). On July 14, 2014, plaintiff filed an appeal regarding Parente's refusal to change his 2013 evaluation (*id.* ¶¶ 86, 87). Plaintiff met with Lieutenant Sophia Demoleas of the personnel office during the appeal process who reported plaintiff's allegation, which included his allegations of discrimination, to OEEO (*id.* ¶¶ 88, 89).

On August 4, 2014, plaintiff met with Inspector Donald Lyons, Commanding Officer of the Internal Review Unit (*id.* ¶ 93). On August 6, 2014, plaintiff filed his second OEEO complaint (*id.* ¶ 94). In this second OEEO complaint, plaintiff claimed that Pisano had given him a four out of five on his overall evaluation, assigned him "less prestigious" job duties, denied his tour change requests, denied a request to leave work early for a medical exam on one occasion, claimed that plaintiff did not understand the IAB computer system, and yelled at him (*id.* ¶ 94). While his complaint was pending, plaintiff claims Pisano changed his shifts which resulted in his loss of a night-shift differential (*id.* ¶ 95). On August 12, 2014, plaintiff was notified that his performance evaluation would not be changed (*id.* ¶ 97).

On September 14, 2014, Pisano was transferred from the Records Unit and replaced by Sergeant Maria Frias-Yasinsky (*id.* ¶ 101). Sergeant Frias-Yasinsky re-assigned plaintiff back to duties related to promotional, transfer, special recognition, retirement, and scholarship lists (*id.* ¶ 105). In September 2014, Parente requested that Sergeant Frias- Yasinsky give him a list of detectives in her unit who she believed should be promoted to Detective Second Grade (*id.* ¶ 106). Sergeant Frias-Yasinsky recommended plaintiff, but Parente purportedly "demanded she provide another name." (*id.* ¶¶ 108,

109). Sergeant Frias-Yasinsky then recommended another IAB Detective, Robert Duran, and Parente submitted Detective Robert Duran for the promotion *(id.* ¶ 110).

On October 14, 2014, OEEO informed plaintiff that "no retaliation had taken place." *(id.* ¶ 112). In January 2015, Parente again asked Sergeant Frias-Yasinsky for a list of any detectives she recommended for promotion to Detective Second Grade *(id.* ¶ 117). Plaintiff claims that Sergeant Frias-Yasinsky was "restricted" by Parente from submitting plaintiff for this promotion (*id.* ¶ 118).

On January 29, 2015, plaintiff asked Sergeant Frias-Yasinsky to recommend him for promotion to Detective Second Grade (*id.* ¶ 119). Sergeant Frias-Yasinsky purportedly refused because she felt Parente would not support the promotion (*id.* ¶ 119). Sergeant Frias-Yasinsky then recommended Robert Duran for a second time for promotion to Detective Second Grade. Parente approved the recommendation (*id.* ¶ 121). Plaintiff believes that Detective Duran was less qualified than him for the promotion and had served less time as a Detective in the IAB. Plaintiff claims Detective Duran was promoted to Detective Second Grade (*id.* ¶ 122).

In August 2016, plaintiff retired from the NYPD as a Detective Third Grade (*id.* ¶ 124). Plaintiff commenced the instant action in May 2017, seeking monetary damages, plus pre-judgment interest, punitive damages, and attorneys' fees, costs, disbursements and expenses.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the "facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply, "whether the facts as alleged fir within any cognizable legal theory" (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2nd Dept 2007]). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. (*Silverman v Nicholson*, 110 Ad3d 1054, 1055 [2nd Dept 2013] [internal quotation marks and citation omitted]). "In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the

proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon v Martinez*, 84 NY2d 83, 88, [1994] [internal citations omitted]). "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

I. Statute of Limitations

Pursuant to CPLR 3211 (a) (5), the Court may dismiss a cause of action as time barred under the applicable statute of limitations. The initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*see Tristan v Tattler*, 24 Misc 3d 1244[A], 2009 NY Slip Op 5/876[A] *2 [Sup Ct Suffolk County 2009]). Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been stopped from asserting a statute of limitations defense (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006]; *Tristan v Tattler*, 24 Misc 3d 1244[A] [2009]).

An action to recover damages for discriminatory practices under NYSHRL and NYCHRL is governed by a three-year statute of limitation (*see* CPLR 214 [2]; Administrative Code 8-502 [d]); *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442, 446 [1984]).

This action was commenced on May 22, 2017. Pursuant to the above reference statutes, only those claims accruing after May 22, 2014 are timely unless, as plaintiff contends, claims accruing prior to May 22, 2014 are actionable as part of a "continuing violation."

Under the continuing violations doctrine, "when a plaintiff experiences a continuous practice and policy of discrimination, ... the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it" *(Dimitracopoulos v City of New York*, 26 F Supp 3d 200 [ED NY 2004], quoting *Gomes v Avco Corp.*, 964 F2d 1330, 1333 [2d Cir 1992]).

Time-barred discrete acts can be considered timely "where there is proof of specific ongoing discriminatory policies or practices, or 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" (*Quinn v Green Tree Credit Corp.*, 159 F3d 759, 766 [2d Cir 1998], *quoting Cornwell v Robinson* , 23 F3d 694, 704 [2d Cir 1994]

Discrete acts also include demotions, transfers, job assignments, and discontinuance of job assignments, as well as false charges and refusal to train (*Crosland v The City of New York,* 140 F Supp 2d 300, 308 [SD NY 2001], *affd* 54 Fed Appx 504 [2d Cir 2007]). Each such discrete "incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice" (*National R.R. Passenger Corp.v Morgan*, 536 US 101 at 114), and "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act" (*id.* at 113). Further, "a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act" (*McPhee v New York City Health and Hosps. Corp.*, No. 07-civ-1053 [PKC][DCP] [SD NY, Aug. 25, 2008, *quoting Harris v City of New York*, 186 F3d 243, 250 [2d Cir 1999]).

After receiving his 2012-2013 performance review, plaintiff filed an appeal of Pisano's evaluation (*id.* ¶ 55). A meeting on the appeal was set for August 6, 2013. During this meeting, plaintiff, for the first time, formally complained of Pisano's treatment (*id.*). Specifically, plaintiff complained of how Pisano on two occasions referred inappropriately to his male genitals, how she yelled at him on a daily basis, called him names, denied him overtime, and forced him to work on a holiday (*id.* ¶ 56). Although Inspector Pfister refused to change plaintiff's performance review rating, Lt. Ramirez notified the OEEO with respect to plaintiff's allegations of discrimination (*id.* ¶¶ 57, 58). On August 6, 2013, plaintiff also contacted the OEEO and lodged a complaint against Pisano for her "continued disrespectful, harassing treatment of him" (*id.* ¶ 59).

Plaintiff contends that defendants' retaliation of him began on August 7, 2013, one day after he made his complaint. It is alleged that defendants required plaintiff to submit to a random drug test on August 6, 2013 (*id.* ¶¶ 62-63). It is also alleged that Pisano asked plaintiff for a list of all of his

investigations, the due dates, and whether he had uncovered any problems with his assignments (*id.* ¶ 62).

It is clear that any discrimination and retaliatory actions that occurred prior to May 22, 2014 are outside the three-year statute of limitations. Moreover, the complaint fails to allege any "policy or mechanism" by which plaintiff purportedly suffered retaliatory conduct, and for this reason, the continuing violation doctrine cannot be applied to the instant case (*see Baez v State of New York*, 2010 NY Misc LEXIS 5525, at 11-12 [Sup Ct NY County 2010]; *Hughes v United Parcel Serv., Inc* ., 4 Misc 3d 1023[A], 2004 NY Slip Op 51008[U], [Sup Ct NY County, 2004]).

In the instant case, plaintiff alleges various discrete incidents of purportedly retaliatory conduct, including, among other things, receiving a four out of five on his annual performance evaluation, being asked to provide a list of all his investigations and inform his supervisor of any problems he was having, being tasked with closing out misconduct cases rather than investigating promotional lists, being accused of not being able to upload closed cases on a computer system, and not being recommended for a promotion.

No persistent policy or mechanism of retaliatory conduct is alleged, only episodic incidents that plaintiff believed to be retaliatory. Plaintiff's suggestion that defendants, specifically, the IAB and the NPD have a policy of "always backing the boss even if the boss is wrong," cannot support the application of the continuing violation doctrine.

Here, although plaintiff alleges a number of specific events, and even accepting as true plaintiff's allegations and giving them every favorable inference, the continuing violation exception does not save the amended complaint's untimely claims. Therefore, plaintiff's claims based on alleged retaliatory or discriminatory conduct occurring prior to May 22, 2014 are time-barred. Accordingly, that branch of the motion for an order dismissing the complaint, pursuant to CPLR 3211 (a) (5), as time barred, is granted solely to the extent that plaintiff is barred from asserting any claims accruing prior to May 22, 2014.

II. Motion to Dismiss

Next, defendants move to dismiss the plaintiff's complaint for failing to state a cause of action, pursuant to CPLR 3211 (a) (7). As set forth above, plaintiff's pre-May 2014 disputes are untimely and no longer actionable. For the purposes of determining that portion of defendants' motion for failing to state a cause of action, the court will consider timely post-May 2014 allegations of retaliatory conduct.

a. Plaintiff's First Cause of Action for Retaliation under Executive Law § 296

Executive Law § 296 (1) entitled "Unlawful discriminatory practices," provides, in part, that:

1. It shall be an unlawful discriminatory practice:

(a) **For an employer** or licensing agency, **because of** an individual's age, **race** , creed, color, national origin, sexual orientation, military status, **sex** , disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or **to discriminate against such individual** in compensation or in terms, conditions or privileges of employment [**emphasis added**].

(e) **For any employer**, labor organization or employment agency **to** discharge, expel or otherwise **discriminate against any person** because he or she has opposed any practices forbidden under this article or **because he or she has filed a complaint**, testified or assisted in any proceeding under this article [**emphasis added**].

To make out a *prima facie* claim of retaliation under NYSHRL, a plaintiff must show that (1) he has engaged in a protected activity, (2) his employer was aware of such activity, (3) he suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action (*see Santiago - Mendez v City of New York*, 136 AD3d 428, 428-429 [1st Dept 2016]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 - 313 [2004]).

Protected activity is defined as conduct "opposing or complaining about unlawful discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 314; *see Emmer v Trustees of Columbia Univ. in the City of N.Y.*, 2014 NY Slip Op 31200 [U], [Sup Ct NY County 2014]). In the instant case, plaintiff appealed his 2013 evaluation to Parente and informed him that he believed Pisano continued to give him poor ratings in retaliation for his previous OEEO complaint and used the poor

rating as a form of continued harassment of him. At the June 20, 2014 meeting, plaintiff informed Parente that Pisano continues to discriminate against him, yells at him daily, tells lies about him to coworkers and supervisors, and curses at him in front of peers. Plaintiff contends that Parente and Pisano were required to report his retaliation complaints to the OEEO, but failed to do so. Plaintiff personally filed a retaliation complaint in July 2014.

Here, the parties do not dispute that plaintiff engaged in a protected activity. The second element has been satisfied by plaintiff's allegations that defendants had notice of the protected activity because Pisano stated that she was aware that he "writes letters" (amended complaint ¶ *74*). Moreover, contrary to defendants' assertion that plaintiff did not mention the alleged disparate treatment at his June 20, 2014 meeting with Pisano and Parente, the complaint alleged that the plaintiff informed Parente that Pisano continued to discriminate against him (*id.* ¶ 81).

Next, defendants argue that plaintiff did not suffer an adverse action under either NYSHRL and NYCHRL but rather his allegations amount to nothing more than minor annoyances. As to the third and fourth elements, plaintiff claims he suffered an adverse employment action because he opposed defendants alleged discriminatory actions.

An adverse employment action typically means a "materially adverse change" in the terms and conditions of employment *(Galabya v N.Y.C. Board of Educ.*, 202 F.3d 636, 640 [2d Cir. 2000]; *Richardson v NY State Dept of Correctional Serv.*, 180 F3d 426, 446 [2d Cir 1991]). To be "materially adverse," the change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." (*Galabya*, 202 F3d at 640 [internal quotation marks and citation omitted]). On the other hand, reprimands, threats of disciplinary action, demeaning comments and routine ridicule do not, without more, constitute an adverse employment action for purposes of a retaliation claim (*Rivers v New York City Hous. Auth.*, 176 F Supp 3d 229, 251-252 [ED NY 2016], *affd* 697 Fed Appx 726 [2d Cir 2017]); *Murray v Town of North Hempstead*, 853 F Supp 2d 247, 266 [ED NY 2012]). Verbal abuse might at times be sufficiently severe and chronic to constitute an adverse

employment action if coupled with other behavior (*Brennan v City of White Plains*, 67 F Supp 2d 362, 374 [SD NY 1999]).

In the case at bar, plaintiff has successfully alleged adverse employment action. Plaintiff claims that as a result of his complaint, he suffered adverse action from his employer in the form of negative career consequences. Plaintiff alleges the loss of tangible job benefits, such as night-shift differential and seniority privileges of employment. Plaintiff also alleged his job responsibilities were diminished after engaging in protected activity.

Finally, the Court is satisfied that plaintiff has set forth a causal connection between the act of making complaints and subsequent adverse action. Plaintiff claims that after making this complaint, he was required to work on July 5, 2014, although he had seniority over other detectives was assigned "less prestigious" job duties and Pisano changed his shifts which resulted in his loss of a night-shift differential.

Accordingly, that branch of the motion for an order dismissing the first cause of action for retaliation under NYSHRL, pursuant to CPLR (a) (7), is denied.

b. Plaintiff's Second Cause of Action for Retaliation under Administrative Code § 8- 107 [7]

Plaintiff's second cause of action is a claim for retaliation, pursuant to New York City Administrative Code § 8-107.

§ 8-107 provides as follows:

> **"Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has** (i) opposed any practice forbidden under this chapter, (ii) **filed a complaint** , testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. **The retaliation or discrimination complained of under this subdivision need not result in** an ultimate action with respect to employment, housing or a public accommodation or in **a materially adverse change in the terms and conditions of employment,** housing, or a public accommodation, **provided, however, that the retaliatory or discriminatory act or acts**

complained of must be reasonably likely to deter a person from engaging in protected activity." [Emphasis added].

To make out a retaliation claim under NYCHRL, the complaint must allege that: (1) plaintiff 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 (*see Albunio v City of New York*, 67 AD3d 407, 413, [1d 2011], *affd* 16 NY3d 472 [2011]).

Under NYCHRL, "the employer's conduct need not be materially adverse to the plaintiff, but merely "reasonably likely to deter a person from engaging in protected activity" Administrative Code, § 8–107[7]; *Fincher v Depository Trust & Clearing Corp.* 604 F.3d 712, 723 [2d Cir 2010]; *Kolja v RA Cohen & Assoc.*, 2017 NY Slip Op 30873[U], [Sup Ct NY County 2017]) (Being assigned duties outside or beneath one's normal work tasks may deter someone from making a complaint); *Kolja v R.A. Cohen & Assoc.*, 2017 NY Slip Op 30873[U], (Sup Ct. NY County 2017) (retaliatory acts of threatening plaintiff with termination, change in job responsibilities and work schedule and issuing warning letter were materially adverse).

Here, the defendants' alleged retaliatory acts of, *inter alia*, modifying plaintiff's work schedule and terminating his night shift pay differential may constitute action likely to dissuade a reasonable worker from making a charge of discrimination.

Under the circumstances, the temporal proximity between plaintiff's complaint and defendants' adverse action is sufficient to support a claim of retaliatory discharge. Accordingly, that branch of the motion for an order dismissing the second cause of action, pursuant to CPLR (a) (7), is denied.

c. Plaintiff's Third Cause of Action for Aiding and Abetting under Administrative Code § 8-107 [6]

Plaintiff's third cause of action is a claim for aiding and abetting against Parente and Pisano, individually. Plaintiff asserts that Parente and Pisano aided and abetted the racial and sexual discrimination and retaliation in employment against him.

Under both the Executive Law § 296 [6] and the Administrative Code § 8–107 [6], an individual employee may be held liable for aiding and abetting discriminatory conduct. The language of both NYSHRL and NYCHRL is identical, providing that "it 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" (Executive Law § 296 [6]; Administrative Code § 8–107[6]).

However, courts have held that an individual cannot aid and abet his own alleged discriminatory conduct (*Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 [2d Dept 2010] [supervisor whose conduct gave rise to plaintiff's sexual discrimination claim cannot be held liable under Executive Law § 296 for aiding and abetting his own violation of the Human Rights Law]); *Strauss v New York 324 State Dept of Educ.*, 26 AD3d 67, 73 [3d Dept 2005]). In the instant case, since Pisano and Parente's alleged actions give rise to the retaliation and discrimination claims, they cannot be held liable for aiding and abetting, and this claim fails (*see Raneri v McCarey* , 712 F Supp 2d 271, 282 [SD NY 2010]).

Accordingly, that branch of the motion for an order dismissing the third cause of action, pursuant to CPLR 3211 (a) (7), is granted.

CONCLUSION

Accordingly, based upon the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is granted to the extent that plaintiff's discrimination claims based on discrete acts of discrimination occurring prior to May 22, 2014 are time-barred; and it is further

ORDERED that defendants' motion to dismiss the first and second causes of action for failing to state a cause of action is denied; and it is further

ORDERED that defendants' motion to dismiss the third cause of action for failing to state a cause of action is granted and that claim is dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be held at the Supreme Court, **80 Centre Street, New York, New York, Civil Term, I.A.S. Part 52, Room 103** on the 6th day of March, 2019 at 2:15 PM.

The foregoing constitutes the decision and order of the Court.

DATED: February 15, 2019

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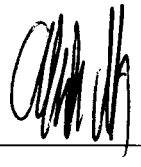

J.S.C.

HON. ALEXANDER M. TISCH