SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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GEORGE MCCOURT

Plaintiff,

- v -

FASHION INSTITUTE OF TECHNOLOGY,

Defendant.

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INDEX NO. 162044/2018

MOTION DATE 02/09/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff brings this action, alleging that defendant Fashion Institute of Technology (FIT) terminated his employment because he revealed financial irregularities and/or due to his age. The two-count complaint asserts causes of action for: (1) retaliatory discharge in violation of New York's whistleblower statute, Civil Service Law ("CSL") § 75-b; and (2) age discrimination in violation of the New York State Human Rights Law, Executive Law § 296 (NYSHRL).[1] FIT now moves for summary judgment dismissing the complaint in its entirety.

I. BACKGROUND

It is undisputed that FIT is a community college affiliated with the State University of New York (SUNY) and that in 1995, plaintiff commenced his employment with FIT in its information technology department (IT Department) (NYSCEF Doc No. 100, FIT's statement of material facts [FIT

[1] The NYSHRL was amended in August 2019. Because this action predates the amendment's effective date (*see* L 2019, ch 160, §16), this decision relies on the pre-amendment version of the statute.

SMF], ¶ 1; NYSCEF Doc No. 157, plaintiff's response to FIT SMF [Plaintiff's Response], ¶ 1)[2]. Plaintiff was promoted to Local Area Network Manager in 1997 and remained in that position until March 2015, when he was promoted to Manager of Enterprise Network Services (NYSCEF 155, Affidavit of George McCourt, dated Dec. 20, 2021 [McCourt aff] ¶¶ 7, 9).

In 2015, FIT allegedly discovered that two employees in the IT Department were enriching themselves through improper procurement practices, by falsely claiming that the Systems and Operations (SYS/OPS) team was unable to perform certain work internally and then hiring companies that they owned to perform the work. FIT allegedly retained outside counsel to investigate and these employees were terminated. (*See* NYSCEF Doc No. 2, complaint, ¶¶ 16-22.)

During his deposition, plaintiff testified that he cooperated with the investigation, but he had no personal knowledge of the scheme, the investigation, or its outcome. (*See* NYSCEF Doc No. 110, Plaintiff deposition tr at 71, line 10, through 79, line 2; *see also* complaint, ¶ 23 [stating that plaintiff "learned about the procurement scheme during the course of the investigation"].)

Plaintiff states that in the fall of 2015, Greg Chottiner, FIT's then-Chief Information Officer (CIO), "informed [plaintiff] that the FIT Administration wanted to see a cultural shift, which included removing older employees who had dedicated most of their professional lives to FIT, just for the sake of a refresh" (McCourt aff, ¶ 10). Plaintiff also states that certain "[a]dministrators . . . often referred to [such older employees] as the 'lifers' . . . in a derogatory fashion" (*id.*, ¶ 12). Plaintiff avers that

[2] The court notes that Plaintiff's Response is far from "short and concise" (22 NYCRR 202.8-g). In response to FIT's 25-page statement of material facts, plaintiff submits a response of 125 pages. Aside from the excessive length, the response also contains extensive legal argument and seeks additional relief. This is not the function of a statement of material facts (*see* 22 NYCRR 202.8-g; *see also* 22 NYCRR 202.8 [c] ["(a)ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law"]) and appears to be an attempt to circumvent page limits imposed on "affidavits, affirmations, briefs and memoranda of law in chief" (22 NYCRR 202.8-b). Accordingly, the court disregards these arguments.

Chottiner also told him that "most of the FIT IT staff could not survive anywhere outside of FIT and that many were lucky to have jobs" (*id.*, ¶ 11).

Sometime in late 2015 or early 2016, FIT retained Deloitte, a consulting firm, to conduct an assessment of the IT Department, and Deloitte prepared a report (Report), which plaintiff claims "made several observations about the age, and years of service of employees within the IT department" (*id.*, ¶ 13). Specifically, plaintiff claims that the Report stated that "[t]he median years of service for FIT IT staff . . . [was] nearly 3x the national median and 2x the public sector median," that "[n]early 40% of IT staff [met] the minimum age requirement for retirement" and that "[t]he median age of an FIT IT employee [was] about seven years older than the national median age and about 8 years older than the median age for Technology employees" (*id.*, ¶ 14).

While plaintiff annexes a copy of the Report (*see* NYSCEF Doc No. 125), it contains only one of the alleged statements cited by plaintiff - in a section of the report devoted to "Succession Planning," which the report describes as "a critical tool for maintaining consistency of operations for organizations with much of the workforce nearing retirement (*id.* at 44), under the "Problem Statement/Current State" heading, the report notes that "[n]early 40% of IT staff will be eligible to retire in the next 7-10 years" and that "[m]any IT departments do not have plans or staff identified to assume responsibilities for staff close to retirement" (*id.* at 45).

In May 2016, FIT hired Gregory Fittinghoff as Acting CIO (FIT SMF, ¶ 3; Plaintiff's Response, ¶ 3). According to plaintiff, in late May 2016, he "had an uncomfortable conversation with Fittinghoff where [he] felt [Fittinghoff] was trying to force [him] to retire" (McCourt aff, ¶ 18). He alleges that Fittinghoff asked him his age and how much longer he intended to remain with FIT before retiring (*id.*, ¶ 19). Plaintiff also states that in late spring or early summer of 2016, Fittinghoff held a townhall meeting for the IT Department, during which he "presented the aspects of the Deloitte [R]eport

detailing the advanced age of the IT [D]epartment, and the retirement prospects for employees of that department" (*id.*, ¶ 16).

At some point in late 2016 or early 2017, Fittinghoff reorganized the IT Department (*see* NYSCEF Doc No. 108, Fittinghoff deposition tr at 213, lines 6-13). While the precise timing of this event is unclear, plaintiff states that it occurred after his "uncomfortable conversation" with Fittinghoff (*see* McCourt aff, ¶ 18). As part of this reorganization, Fittinghoff promoted plaintiff to Director of Network/Telecommunications (FIT SMF, ¶ 5; Plaintiff's Response, ¶ 5).

Plaintiff claims that he was not interested in this position and had, instead, sought the position of Executive Director of Enterprise Infrastructure, but Fittinghoff gave this position to Lionel Torres and pressured plaintiff into accepting the Director position, which took plaintiff out of the Collective Bargaining Agreement (CBA). (McCourt aff, ¶¶ 22-24.). In his new position, plaintiff reported directly to Torres, who reported directly to Fittinghoff (FIT SMF, ¶¶ 6, 7; Plaintiff's Response, ¶¶ 6, 7). Among plaintiff's direct reports was Dmitry Master, the Technical Director of Networking (FIT SMF, ¶ 8; Plaintiff's Response, ¶ 8).

Beginning in or about July 2016 and continuing through the timeframe relevant to this action, FIT was in the process of relocating its data center to a new building (Move) (FIT SMF, ¶ 9; Plaintiff's Response, ¶ 9). Angus Dickson, who was then the Director of Enterprise Technology Services, was in charge of the Move (Plaintiff's Response, ¶ 10). According to Fittinghoff, "Dickson proposed that FIT use the Data Center Move as an opportunity to update its equipment by leasing newer, more up-to-date, equipment from Dell," rather than moving its current equipment to the new building (NYSCEF Doc No. 63, Fittinghoff aff, ¶ 27).

Torres testified that the original plan for the Move "was to replace basically everything in the data center with new equipment from Dell" (NYSCEF Doc No. 109, Torres deposition tr at 99, lines 9-

11). He stated that this was Dickson's proposal and that Fittinghoff directed Dickson to get a quote from Dell (*id.* at 140, line 4, through 141, line 15). Torres explained that the IT Department "was being rushed out of the [old] data center" and that Fittinghoff's goal was to "get out," whether it meant "picking up and carrying stuff" or "building brand new," the method did not matter so long as the data center moved (*id.* at 138, lines 5-20).

Dickson obtained a quote from Dell for a lease of new equipment (Quote) (FIT SMF, ¶ 12; Plaintiff's Response, ¶ 12). The precise cost quoted is unclear, but plaintiff alleges that the Quote was for $2.4 million (complaint, ¶ 45), while Torres could not recollect the precise amount and guessed that it was for $1.5 million, $1.8 million, or "2.-something" (Torres deposition tr at 99, line 25; at 113, lines 7-15).

During his deposition, plaintiff testified that he was not involved in procuring the Quote (plaintiff deposition tr at 178, lines 12-14) and that, to his knowledge, Dickson had been the one to initiate the process for seeking the quote (*id.* at 178, lines 8-17). He also testified that he was not aware of anyone who worked for both Dell and FIT (*id.* at 179, lines 1-8).

Plaintiff and Master raised concerns about the Quote, as FIT already owned some of the equipment included therein (*see* NYSCEF Doc No. 110, Plaintiff deposition tr at 185, line 15, through 187, line 4; FIT SMF, ¶ 13). According to Master, Fittinghoff directed him and plaintiff to provide a presentation on the technical and financial advantages of the proposed Move (NYSCEF Doc No. 156, Master aff, ¶ 16) and that, after reviewing Dickson's proposal, he could not understand the rationale for purchasing new products and services from Dell (*id.*, ¶ 17). Master states that Dickson refused to provide an explanation for his proposal (*id.*, ¶ 18).

During his deposition, plaintiff testified that Harold Lederman, an internal auditor with FIT, sought plaintiff's help regarding "a lot of missing inventory" (Plaintiff deposition tr at 117, lines 6-12).

By email dated April 17, 2017, Lederman shared an executive summary of an audit report (Audit) with plaintiff and other FIT employees (NYSCEF Doc No. 151, Perlman affirmation, exhibit 44). The Audit noted, in pertinent part, that FIT had "$5 million of *missing* inventory," which was "likely due to the fact that individual units [did] not always report moves, returns, and disposals to the Office of Operational Services even though they [were] required to do so" (*id.* at GM3214). The random inventory check conducted as part of the Audit did not identify any missing equipment in the IT Department (*see id.* at GM3215).

In August 2017, Dickson resigned (FIT SMF, ¶ 15; Plaintiff's Response, ¶ 15). On August 16, 2017, plaintiff and Bill Hokien one of plaintiff's subordinates, engaged in a heated argument. FIT claims that plaintiff charged down the hall after Hokien, made threatening and profane statements—such as "fuck you" and "do you want to fight?"— and kicked something in Hokien's office. It also claims that Torres had to restrain plaintiff to keep him from rushing at Hokien. (*See* FIT's SMF, ¶¶ 30-34.) Plaintiff claims that Hokien instigated the argument by barging into his office, behaving aggressively, and using profanity. Plaintiff denies that he threatened Hokien and explains that "[b]y 'fight', [he] only meant argue, not a physical fight." He also denies that Torres ever held him back and states that he never had any intention of physically attacking Hokien. (*See* McCourt aff, ¶¶ 35-56.) Plaintiff admits that "[o]ut of frustration, [he] kicked over a small office chair in Hokien's office" (*id.*, ¶ 50).

A portion of the argument took place in the hallway and was captured by a security camera (*see* NYSCEF Doc No. 96, Reduque aff, ¶ 13, exhibit B [NYSCEF Doc No. 98]).[3] The video footage, which is without audio, shows plaintiff following Hokien down a hallway and appearing to shout at him. Hokien then walks back toward plaintiff and the argument continues until Torres steps in and puts

[3] FIT provided chambers with a physical copy of this video recording.

his arm out in front of plaintiff as plaintiff moves toward Hokien. As plaintiff heads back to his office, he appears to kick something in Hokien's office. (*See id.*)

"After the incident, [plaintiff] admitted to Fittinghoff that [he] lost [his] temper" (McCourt aff, ¶ 57), but he also confronted Fittinghoff about his failure to address plaintiff's complaints about "the hostility, aggression, and abuse [he] received regularly from Hokien" (*id.*). Fittinghoff states that he "told [p]laintiff that his behavior was not acceptable, did not comport with FIT's values of civility in the workplace, and instructed him to not engage in any further uncivil conduct" (Fittinghoff aff, ¶ 52). Following the incident, Fittinghoff directed plaintiff to attend a meeting at Human Resources (HR) at which Robert Brown, an HR employee, attempted to de-escalate the tension between plaintiff and Hokien (McCourt aff, ¶¶ 62-65; NYSCEF Doc No. 94, Brown aff, ¶¶ 12-13).

On August 23, 2017, Fittinghoff sent an email to the entire IT Department, "regarding a topic that [he] deeply support[ed] and [did] [his] best to exhibit under all circumstances—Civility." In the email, he noted that a lack of civility and outright rudeness was a problem in the IT Department and urged the IT staff to "remember to 'treat others, as we would want to be treated ourselves.'" (NYSCEF Doc No. 66, Fittinghoff aff, exhibit C.)

The parties dispute plaintiff's exact role in the Move following Dickson's departure. According to Fittinghoff, "[he] placed [p]laintiff in charge of the Data Center Move and asked him to review the Dell Lease Quote to determine whether it was the best strategy for FIT" (Fittinghoff aff, ¶ 31). Plaintiff states that he refused Fittinghoff's suggestion that he take over Dickson's responsibilities (McCourt aff, ¶ 26) and merely offered "to help in good faith with many aspects of the projects involved in the Data Center [M]ove" (*id.*, ¶ 27). However, during his deposition, plaintiff acknowledged that, following Dickson's departure, Fittinghoff appointed plaintiff the "point person" for the Quote (Plaintiff

deposition tr at 184, lines 17-23) and directed him to contact Peter Griffin, the Dell representative, for details about it (*id.* at 187, lines 13-17).

In September 2017, Master attempted to obtain information about the products and services included in the Quote and was informed that Dell had no supporting documentation for the quote (*see* Master aff, ¶¶ 38-41; *see also* NYSCEF Doc No. 122, Perlman affirmation, exhibit 15 [email exchange between Master and Dell representative]). Master also states that the SYS/OPS team was unresponsive to his inquiries regarding existing equipment and that one of its members, Jack Ming, repeatedly lied to him in response to his inquiries (Master aff, ¶¶ 21-23). Master recorded a conversation he had with Ming on September 13, 2017, in which Ming admitted that, prior to his departure, Dickson had directed Ming to lie to Master about the number of storage assets in FIT's possession and that FIT had three storage units instead of the previously reported one (*see* Master aff, ¶¶ 24-30; *see generally* NYSCEF Doc No. 117, Perlman affirmation, exhibit 10, Jack Ming recording).[4]

On September 21, 2017, Master purportedly emailed plaintiff, Fittinghoff and Torres, informing them of purchase orders for multi-year support as well as yearly maintenance support, which he believed showed that FIT was "double paying for support" (Plaintiff deposition tr at 147, line11, through 148, line 15). A copy of this email is not included among plaintiff's papers. Additionally, plaintiff testified that, while he was copied on the subsequent correspondence between Master and Fittinghoff and had "in passing" conversations with Fittinghoff about the matter, he had no recollection of the substance of those conversations (*id.* at 149, lines 8-24).

Plaintiff met with Fittinghoff on September 27, 2017 (*see* FIT SMF, ¶ 37; Plaintiff's Response, ¶ 37). The parties dispute what occurred during the meeting. On the one hand, Fittinghoff states that

[4] Plaintiff provided chambers with a physical copy of this recording along with three other recordings included among his exhibits (*see* NYSCEF Doc Nos. 117, 126, 153, 154).

he met with plaintiff "to discuss the importance of engaging in email communications with the IT staff that could not be construed as rude, demeaning, belittling, harassing or uncivil" and that he advised plaintiff to address performance issues "behind closed doors so that the employee does not feel attacked" (Fittinghoff aff, ¶ 55).

Plaintiff, on the other hand, states that the purpose of the meeting was to discuss the ongoing performance issues of Hokien and another employee. According to plaintiff, Fittinghoff approved of plaintiff's plan to email these employees with his expectations and was aware that plaintiff intended to copy Fittinghoff, Torres, Master and Brown on the email. (*See* Plaintiff deposition tr at 152, line 11, through 154, line 22). That same day, plaintiff emailed the employees in question and copied Torres, Fittinghoff, Brown and Master. In pertinent part, the email read as follows:

> . . . Any projects that are underway and not presently listed in Innotas will need to be initialized in Innotas by the PM [Project Management] team. Your expectation that the directors are responsible for this task is unfounded.
>
> Please respond to my questions when addressed via email. [Hokien's] failure to do so several times recently (i.e. my unanswered email on Tuesday 9/12) has caused problems and is unprofessional.
>
> Although I have had numerous discussions about this significant lack of service from project management with the Executive Director, Bob Brown in HR, the CIO and the PM team directly, I still feel it necessary to highlight how damaging this continues to be towards the major goals that we are trying to accomplish. I hope you can understand my position in light of my role change since Angus Dickson resigned. I am able to put the past behind me and I am looking forward to developing a partnership with you. I hope we all share this mindset.

(NYSCEF Doc No. 67, Fittinghoff aff, exhibit D).

Torres responded to this email, telling plaintiff that Hokien "[was] not a direct report to [plaintiff]" and that plaintiff "should cease writing these inflammatory emails and including HR" (NYSCEF Doc No. 68, Fittinghoff aff, exhibit E). Master then emailed Torres, stating that he found

Torres' response "surprising," as he had previously promised to address the performance concerns raised in plaintiff's email (*see* NYSCEF Doc No. 87, Torres aff, exhibit C). To this, Torres responded that he found "some [complaints to be] legitimate and others not so much" and that he believed "there should be more collaboration and working with the PM[s] rather than drag[ging] them down at every opportunity." Torres concluded the email, stating, "no one goes to HR without my knowledge again, or email anyone about anyone on my staff." (*Id.*)

Master claims this was intended to intimidate him and plaintiff from "bring[ing] complaints to HR regarding Torres' staff or Torres" (Master aff, ¶ 34). Torres explains that he merely wanted to be made aware of issues pertaining to his staff before they were escalated to HR. (NYSCEF Doc No. 84, Torres aff, ¶¶ 51, 52, exhibit D]).

Fittinghoff also responded to plaintiff's September 27, 2017 email, by highlighting the last paragraph and the last few sentences of the preceding paragraph of plaintiff's email and explained that, while "[he] was 100% behind [plaintiff's] email" as it concerned performance issues, the "the yellow highlighted sections represent[ed] wording that could alienate someone." Fittinghoff noted that "[t]his [was] the type of exchange . . . that [they had] discussed [that] morning and that [Fittinghoff had] asked [plaintiff] to avoid" and requested plaintiff to reflect on his conduct (NYSCEF Doc No.68, Fittinghoff aff, exhibit E.) Plaintiff forwarded Fittinghoff's email to Master, stating, "[m]ore bs from [Fittinghoff]" (*id.*).

By letter dated October 2, 2017, Fittinghoff issued plaintiff a written warning (Written Warning), addressing the September 27, 2017 email (NYSCEF Doc No. 69, Fittinghoff aff, exhibit F). In pertinent part, the Written Warning stated as follows:

> The warning is a result of you taking actions that were contrary to a discussion you and I had immediately prior to you sending the email. The discussion we had related to incidents that you were involved in that were considered uncivil and hostile to others -verbal statements, as well

> as a hallway situation that escalated into a physical event. We also discussed how you had taken positive steps, including engaging with HR, to resolve the physical/verbal hallway event.
>
> At the conclusion of our morning meeting, we agreed that you would refrain from engaging in actions (written or verbal) that could reasonably be considered by others as uncivil, hostile, or demeaning. In essence, your interactions with FIT colleagues should be something that could be printed on the front page of the New York Times without any concerns.
>
> After our detailed discussion, you created an email to the project management team with the intention of clarifying your expectations of how projects in your department were to be handled. I fully supported the intention of the clarification. However, your email went beyond clarifying expectations and specifically contained statements that would reasonably be considered by others as uncivil, hostile, and demeaning. The additional problem with the email is that the project management team does not report to you. Therefore, any issues you have with the performance of a project management team member should be directed to their manager–Lionel Torres.
>
> To be clear, the email as a whole was inappropriate and caused an unnecessary disturbance in the department that hinders a collaborative team environment.
>
> Consider this as a warning, if further incidents occur where you are being uncivil, hostile, or demeaning to others, I will need to take further action up to and including a change in your personnel status.

(*Id.*)

As far as the Move, Master states that "[i]n October 2017, [he] made the recommendation to upper management, including Fittinghoff, that no purchases were needed, and FIT could move its current equipment into the new building during the Data Center [M]ove" (Master aff, ¶ 19). FIT adopted this recommendation, the Quote was never reduced to a contract and $1 million, which had been budgeted for the Move, was reallocated elsewhere (see FIT SMF, ¶¶ 18, 19; Plaintiff's Response, ¶¶ 18, 19).

During his deposition, plaintiff explained that he believed that "numerous poor financial decisions" were a result of "unusually suspicious practices" and that this belief was, in large part, based

on his communications with Griffin about the lack of supporting documentation for the Quote. When asked to clarify what he meant by "unusually suspicious," plaintiff stated that "[he] got the feeling that there was a lot of kickbacks happening" (Plaintiff deposition tr at 249, lines 3-14.)

Plaintiff was also asked whether "[he] believe[d] that FIT was violating some sort of law or rule or regulation" when he voiced his concerns. Plaintiff responded that FIT had a policy dealing with irregularities and that Master provided him with an excerpt from it in mid to late 2017. (*Id.* at 250, line 11, through 251, line 12; at 252 lines 13-16.)

The policy in question is entitled "Fraud and Irregularities, Procedure on Reporting and Reviewing Fraud and Irregularities" ("SUNY Policy") (*see* complaint, ¶ 160; NYSCEF Doc No. 120, Perlman affirmation, exhibit 13, SUNY Policy), and it sets forth the protocols for reporting and investigating fraud affecting SUNY (*see* SUNY Policy at GM4762). In pertinent part, it directs SUNY employees to "report any known or suspected fraud and irregularities," which includes "activities that are (1) a misappropriation of assets; (2) in violation of or non-compliant with any SUNY, New York State, or federal law, regulation, policy or procedure; (3) wasteful economically; (4) an indication of gross misconduct or incompetency; or (5) an unethical, improper, or dishonest act" (*id.* at GM4763).

According to Master, on October 20, 2017, he had a conversation with Fittinghoff about Master's compensation and his future at FIT. Master claims that Fittinghoff informed him that "[Fittinghoff] had a plan, which included [p]laintiff retiring soon so that [Master] could stay on at FIT at a higher salary and position, and provide 'new, fresh ideas,' and 'fast thinking' that Fittinghoff wanted, and which [p]laintiff was not doing" (Master aff, ¶ 44). Master also claims that "Fittinghoff specifically told [him] that [p]laintiff was getting older and that he did not know the new technology" (*id.*, ¶ 45).

Fittinghoff states that he continued to received complaints from employees about plaintiff and Master's uncivil conduct, including that they were verbally aggressive and abusive, condescending and bullying (Fittinghoff aff, ¶¶ 68-75). Torres testified that other teams did not want to work with plaintiff or Master and that there "was always some form of an argument" (Torres deposition tr at 78, line 13, through 79, line 2). According to Brown, he "received many complaints from individuals in the IT Department regarding [p]laintiff which described him as undermining projects, being a bully, exhibiting poor management skills, playing favorites with IT Department staff members and mistreating other staff members" (NYSCEF Doc No. 94, Brown aff, ¶ 10). Brown states that, in October 2017, he was part of a meeting with union representatives "for the purpose of receiving complaints from the Union employees regarding [p]laintiff's uncivil and aggressive conduct" (*id.*, ¶ 14; *see also* NYSCEF Doc No. 119, Brown deposition tr at 108, lines 14-21). No further details are provided about these alleged complaints against plaintiff.

For his part, plaintiff claims that various IT employees, including Hokien, were regularly uncivil and unprofessional toward him and that Fittinghoff, Torres and Brown did nothing to remedy the situation (*see* McCourt aff, ¶¶ 57, 76-77).

On November 7, 2017, Torres emailed various members of the IT Department, copying Fittinghoff and plaintiff on the email, and expressed his disappointment that the Department had not "moved on from distrust, animosity and any hard feelings that were lingering from the past" and had not met his expectation that "everyone . . . respect each other and work in a professional environment." He also required attendance at a meeting the following day, at which civility would be covered. (NYSCEF Doc No. 86, Torres aff, exhibit B).

On November 17, 2017, Master met with Fittinghoff, purportedly to discuss "the ongoing performance issues causing delays and needless extra costs incurred in the Data Center [M]ove, due to

the mismanagement by Torres and his staff's unwillingness and inability to perform the tasks involved in the Data Center [M]ove" (Master aff, ¶ 89). Master states that during this conversation he "indicated to Fittinghoff that [he] was still being lied to by SYS/OPS regarding what inventory was coming in and how much it was costing" (*id.*, ¶ 82) and that "due to this delay . . . it would become necessary to hire Dell to perform the transfer of the equipment to the new Data Center, which would cost an estimated 'quarter of a million dollars,' to meet the deadline for the Data Center [M]ove" (*id.*, ¶ 82).

Master recorded this conversation (*id.*, ¶¶ 87, 88; NYSCEF Doc No. 153, Perlman affirmation, exhibit 46, 11/17/2017 recording), which reflects that he did state that the full inventory necessary for the Move was still outstanding, although he made no reference to misconduct by the SYS/OPS team (*see* 11/17/2017 recording at 8:47). In addition, Master repeatedly urged Fittinghoff to bring in "real professionals" or "commandos" (*see id.* at 9:35; 29:25) from Dell to accomplish the Move in a timely manner, because "[the IT Department] d[id] not have skills . . . not only to move, but to support it" (*id.* at 16:34). Fittinghoff then proposed a plan to move forward, whereby the IT Department would continue to try to do as much as was possible internally before bringing in consultants (*id.* at 31:00-32:42; *see also* Master aff, ¶ 84).

On January 24, 2018, plaintiff had a conversation with Torres, which plaintiff recorded (McCourt aff, ¶¶ 87-90; *see* NYSCEF Doc No. 126, Perlman affirmation, exhibit 19, 1/24/2018 recording). During this conversation, Torres stated that he wanted to see if he could "bend the rules" in connection with $70,000 in spending (1/24/2018 recording at 7:30), and he mentioned that he was having issues with "WindStream," that he was unhappy with the additional costs that kept coming up and that he was starting to look at other solutions (*see id.* at 12:27). In his affidavit, plaintiff claims that "WindStream . . . refers to thousands of dollars that were spent and wasted on an external (Cloud

based) Avaya phone system which Torres was now considering whether to abandon" (McCourt aff, ¶ 82). Plaintiff does not provide any additional details with respect to the $70,000 (*see id.*, ¶ 81).

On February 1, 2018, Fittinghoff met with plaintiff and Master to "address[] the continued complaints about their behavior" (Fittinghoff aff, ¶ 78). Plaintiff believed that the purpose of the meeting was to "rais[e] [his] concerns regarding wasteful spending and the slowdown of the Data Center Move caused by the unwillingness of the SYS/OPS union members to perform their duties in connection with the move, the wasteful spending on vendors," as well as Torres' mismanagement and the continued "hostile and uncivil conduct of the SYS/OPS team" (McCourt aff, ¶ 92). Plaintiff claims that "Master specifically raised [their] concerns . . . with respect to wasteful spending on inventory, the Dell quote, and vendors who had no receipts or paperwork for the products and services FIT was paying them to perform" (*id.*, ¶ 97) as well as "the extra cost of having to bring in a Dell 'emergency commando service' at $259,000 per month to make the physical transfer of the equipment to the new Data Center by the deadline, due to the SYS/OPS team's constant obstinance and refusal to detail assets and perform the physical work" (*id.*, ¶ 98).

Master recorded the February 1, 2018 meeting (Master aff, ¶¶ 124-130). A transcript of that recording is annexed to plaintiff's papers (*see* NYSCEF Doc No. 118, Perlman aff, exhibit 11, 2/1/2018 meeting tr). What took place at this meeting forms, in large part, the basis of plaintiff's whistleblower claim and is, therefore, set out below in significant detail.

Throughout the meeting, Fittinghoff repeatedly brought up the frequent complaints he received about plaintiff and Master and their seeming inability to work with others (*see* 2/1/2018 meeting tr at 6, lines 19-24; at 11, lines 3-10; at 35, lines 24-25; at 48, lines 2-24; at 72, line 21, through 73, line 6). Master and plaintiff responded with their own complaints against various IT employees (see *id.* at 22, line 1, through 23, line 6) and claimed that there was a double standard (*id.* at 24, line 17, through 25,

line 10). Specifically, plaintiff complained that he was "being held to a higher standard of civility when things [were] being perpetrated to [him] that [were] off the charts in another universe" (*id.* at 25, lines 13-16).

As to the issue of wasteful spending and financial irregularities, Master first brought it up by stating:

> "The money that's being wasted on vendors just because this guy refused, refused to lift—we're not doing it. We're not doing it. $100,000, $60,000, $11,000, $70,000, $200,000 –"
>
> ***
>
> "—for nothing, just because this guy is not working." (*Id.* at 20, lines 4-11).

Master again raised the issue, by referencing a previous meeting at which Fittinghoff had allegedly decided not to use outside vendors (*see id.* at 31, line 19). Master then asked, "[s]o why are we paying all this money, 11k, 13k, 100k, another 30k, another 60k, another 15k, another—I mean, $1.2 million in salaries and 17k when nobody's doing anything?" (*Id.* at 31, lines 20-24.) To this, Fittinghoff responded, "I don't know what numbers you're talking about" (*id.* at 31, lines 25, through 32, line 1). Master then enumerated the allegedly wasteful spending as follows:

> "—11k for the blade, 13k for the training that nobody did, that they had and nobody took. They scheduled it. They [sic] guy was right there building the blade.
>
> "Nobody was in the room. I am the only one that asked the guy afterwards to send me a document how he fixed that blade. Nobody knows. Nobody knows how the blade was fixed. Nobody knows.
>
> ***
>
> "The 100k for the myriad thing from 30k to 100k which is being advertised all over the college for some reason, we've had 30k—30k quote that turned into 100k quote. I don't know why we're advertising it all over the college. But it's okay. I don't even know. They're moving 13 boxes and they're wiring them.

> "I was told that we were going to wire ourself because we have a bunch of wires and patch panels. It's only nine racks. It shouldn't take much. And we're going to move 13 servers ourselves. That's not happening. 100k. I have 17k for info blocks which is taking months and months. All we got to do, again, I've already talked to the vendor. They said they'll give us 40 hours.
>
> "We can use hours to move it and then we use all of the hours to– you know, to configure, reconfigure because the info blocks needs a lot of work. As soon as I am out of the meeting, the next day—the meeting happens and there is 17k quoted to move the boxes because there's no technical people on the call. There's 60k for VBX. Nothing is happening with VBX. Cloud, no cloud.
>
> "I've been trying. We had a great meeting six months ago with Windstream where we decided, you know what, you don't need to waste money on all this survivable because we can make a triangle with MPLS instead of paying for—I thought, yeah, yeah, yeah, we'll do it. Gone. Nothing. Now I see 60k is—" (*Id.* at 32, lines 5-13; at 32, line 18, through 33, line 24.)

Master and plaintiff then complained that "[they] [were] the only ones that [were] willing to work" (*id.* at 36, lines 1-2) and that the other members of the IT Department "[did] not want to lift a finger" (*id.* at 38, lines 23-24). Master also mentioned that the "SWAT team which [he] told [Fittinghoff] to bring in before" was being brought in now (*id.* at 39, lines 12-14) and claimed that, while Fittinghoff had been on vacation, "300,000 or 200,000 . . . were wasted" (*id.* at 42, lines 12-15). Fittinghoff responded that he did not believe the money had been wasted and that "[he] kn[e]w what [he] signed off on," but Master and plaintiff insisted, without expanding, that it had been wasted (*id.* at 42, lines 16-24). Master and plaintiff then challenged Fittinghoff's judgment to "sign[] off on stuff," since he would have signed off on the Quote if Master had not discovered that it was unnecessary (*see id.* at 42, line 25, through 45, line 12).

One of the last substantive exchanges between Master and Fittinghoff on the subject of waste concerned the hiring of outside vendors to physically move equipment to the new data center:

"MASTER: . . . If you know, if you accept as my professional opinion that it is to you, and I can write it in an email that we wasted all this money, if you accept that and you still know that we're doing it, you know that this guy's not doing anything, and I can prove it, if you accept all that from me as professional because this is my job as the technical director I was hired. You can't just shove me back in somewhere at the bottom that's not me.

"So if you agree with that as CIO that all this money, all this budget, while we're talking about these phones that we're wasting money and we're trying to save, blah, blah, blah, while wasting all the other money, that's okay. But that's why you brought me here, to save money and to build and learn. That's why I'm here.

"But these guys are against that. They don't care. They're wasting money by—and I'm going to not use the word, but sometimes it is, lying to you why we are wasting this money.

"There is no—how can you say—I'm just curious. When you take this $100,000 quote and Lionel tells you or whoever tells you we can't do it, how is it being assessed? Who's the—who's the professional authority?

"FITTINGHOFF: Wait. You don't even know what the $100,000 is composed of, do you?

"MASTER: Yes, I do. Some of it.

"FITTINGHOFF: What is it?

"MASTER: It's a wiring and the physical move.

"FITTINGHOFF: Okay. But do you know who's doing it?

"MASTER: Are you trying to catch me in something? I'm not sure.

***

"FITTINGHOFF: I'm saying is we're throwing around things saying that all this—there's a lot of waste there.

"MASTER: I don't throw things around. I say it as facts.

"FITTINGHOFF: Okay. That's a fact then, if you're saying it. And I said to you do you know why it's there. And you don't.

"MASTER: And I'm asking you a question. Yes. I don't.

"FITTINGHOFF: So, but how can you say it's being wasted if you don't know the facts?

"MASTER: Because I'll tell you how. Because when we sat in the meeting six months ago and talked about the same physical and they say we're not going to use vendors, we're going to do that, they had six months to plan it and do it. Nothing happened. So please explain it to me.

"FITTINGHOFF: Okay. So the Miroc is the one who is coming in to do the work, who is always going to physically move the boxes. I can't have—I'm not going to be able to have internal people that are—that are part of the collective bargaining—

"MASTER: I'll move it.

"FITTINGHOFF: —physically move the boxes.

"MASTER: I'll move it.

"FITTINGHOFF: Hold on. And then there is the issue of taking responsibility—

"MASTER: Jack, Dimitry, me, you.

"FITTINGHOFF: —of taking the physical responsibility of moving the boxes and doing stuff. So we said fine. For being able to go in and do a quote and to be able to get an external party who's bonded, who's a service provider, to be able to physically move the boxes.

"MASTER: I'm sorry. For the sake of time, can you answer me a question. Six months ago when you mentioned that meeting and these guys say we're not using vendors, we're doing it ourselves, what happened?

"FITTINGHOFF: The piece about the moving came—was soon after that, that we had to do it because I can't have them, the C[B]A."

(*Id.* at 51, line 14, through 52, line 25; at 53, line 4, though 54, line 25.)

During the remainder of the meeting, Master and plaintiff complained about IT employees' refusal to work, the lack of professionalism, competence and accountability among the staff, and poor

management, particularly by Torres (*see generally id.* at 55-96). Master also made the following brief statements about waste:

> "I think, I hope, I hope, I hope in all of this that you're extremely misinformed because I will state the facts, and I can prove a hundred percent that the money being wasted and the reason they're being wasted because the executive director over there is hiding what's being done, what's not done.
>
> "Whether he's hiding from you, I don't know. But it's definitely being hidden from me and [plaintiff]. That's the fact. And every time I ask, I've been told it's none of my business basically.
>
> ***
>
> "But what our problem is, is camps. There's a camp over there that tries to hide everything to make sure these guys are not working and we're paying—I'm not going to use the word kid, but we're paying a lot of money to the vendors. Keep paying, paying.
>
> "The numbers that I've seen that we're paying the data guys that run the cables while our guys are doing absolutely nothing, that's just outrageous. What are we doing? What are these guys hours? Give me tickets. Give me production. Give me anything. There is nothing."

(*Id.* at 57, line 15, through 58, line 2; at 117, lines 14-24). To this last statement, Fittinghoff responded, "[i]t's over by my desk" (*id.* at 117, line 25).

According to Fittinghoff, "[p]laintiff and Master's demeanor during this meeting was aggressive and combative," with both of them "rais[ing] their voices to the point of yelling" and with Master "slam[ming] his hands on the conference table and [rising] from his seat at least twice" (Fittinghoff aff, ¶ 81).

On the morning of February 2, 2018, plaintiff and Master met with Delica Reduque, who was FIT's Acting Director of Labor Relations at the time (*see* FIT SMF, ¶ 78; McCourt aff, ¶ 108; Reduque aff, ¶ 3). Master recorded the meeting and plaintiff submits a transcript of that recording annexed to his papers (*see* Master aff, ¶¶ 138-142; NYSCEF Doc No. 130, Perlman affirmation, exhibit 23, Reduque

meeting tr). During the meeting, Plaintiff and Master shared their concerns about interpersonal issues at the IT Department, including that union members were uncivil and refused to work and that management was not addressing these concerns (*see generally* Reduque meeting tr; *see also* Plaintiff's Response, ¶ 80 [a]-[e]).

As concerns wasteful expenditures, Master stated, in pertinent part, as follows:

> ". . . I was brought here to save money and build infrastructure, as per [Fittinghoff].
>
> "When I try to save money, I'm not allowed to do that anymore because we're wasting money. We're hiding the (indiscernible). IT [D]epartment is hiding how much money is being wasted to [v]end[o]rs. So for example, if there's something broken and we have people–we have 10, 15 people working in the department, instead of telling these people they have to fix it, we pay $20,000 to the vendor to come press a button.
>
> ***
>
> "There's very funny stuff with money going on in IT [D]epartment right now. I can tell you that. I'm an extremely professional person and I can't have that. I see that, that we're paying vendors the money that we paid these guys to do." (Reduque meeting tr at 15, lines 1-11; at 16, lines 5-9.)

At no point during the meeting did plaintiff or Master provided any specific examples of wasteful spending (*see generally* Reduque meeting tr).

After Master told Reduque of the conversation with Fittinghoff about "money being wasted" (*id.* at 20, lines 23-25), Reduque advised him that it was not appropriate for an employee to tell his superior how to spend money (*id.* at 21, lines 5-23). Master, however, insisted that it was his responsibility to do so (*id.* at 22, lines 3-4) and Reduque responded, "[t]hen you have to think about how you are sending the message because you are basically saying to your boss, spending money . . . in a way that I don't agree with" (*id.* at 22, lines 5-11). Then she stated, over Master's frequent interruptions, "[f]ine, but he's the one who gets to make that . . . decision and if you're not . . . leave it

alone . . . . Leave it alone. I'm trying to protect you" (*id.* at 22, lines 13-23). She repeated "leave it" a few more times (*id.* at 23, lines 1, 5; at 24, line 4), explaining that having told Fittinghoff, there was nothing else for Master to do (*id.* at 23, lines 6-9). She repeated this point again, "[y]ou can't control the money issue. That's a [Fittinghoff] issue. You can't control other employees who are in the union" (*id.* at 37, line 25 through 38, line 2). When Master insisted that policies and procedures were being violated and asked about his options (*id.* at 35, lines 15-25), Reduque responded, "[i]f you have hard evidence that is a violation of policy, then you file a complaint and then I do an investigation" (*id.* at 36, lines 1-3). She later repeated this point, explaining that to pursue a claim "of violation of college policy, [they] [had] to really give [her] something real" (*id.* at 39, lines 19-21).

Because Reduque had another meeting, they reconvened in the afternoon to continue their discussion (*see* McCourt aff, ¶ 115). Master also recorded this conversation (Master aff, ¶¶ 145-146, 151; *see* NYSCEF Doc No. 154, Perlman affirmation, exhibit 47, second Reduque meeting recording). The substance of this conversation largely mirrored the first (*see generally* second Reduque meeting recording; *see also* Master aff, ¶ 147). In addition to the previously raised topics, plaintiff expressed that he wished to speak to the FIT representative who handled age discrimination claims (second Reduque meeting recording at 54:40; *see also* McCourt aff, ¶ 119). Master inquired whether the meeting was confidential, to which Reduque replied that she had not informed Fittinghoff of the meetings and that their discussion was confidential to an extent, as she had to apprise her supervisor (second Reduque meeting recording at 46:42, 53:50). Master and plaintiff each scheduled meetings with Reduque for the following week (*id.* 48:30; 49:33). According to Master, he planned on providing Reduque with evidence of the financial irregularities within the IT Department during his follow-up meeting (Master aff, ¶ 136).

Also on February 2, 2018, plaintiff and Master met with Torres and Francine Post, FIT's Director of IT Administration, Finance and Planning, concerning complaints Torres had received about Master's behavior during a Change Control meeting held the previous day. Torres purportedly wanted to hear Master's side of the story. (*See* Torres aff, ¶¶ 57-59; FIT SMF, ¶ 77; Plaintiff's Response, ¶ 77; Torres deposition tr at 253, lines 10-23). Plaintiff had not been involved in the incident at the Change Control meeting and was present at the February 2, 2018 meeting as Master's supervisor only (Torres deposition tr at 254, lines 4-5; at 313, lines 17-21).

Master recorded the meeting with Torres and Post, and plaintiff annexes the transcript of that recording to his papers (Master aff, ¶¶ 155, 176-182; NYSCEF Doc No. 135, Perlman affirmation, exhibit 28, Torres/Post meeting tr). The transcript reflects many interruptions and indiscernible words. Torres stated that he wished to hear Master's side of the story about what had happened in the Change Control meeting (Torres/Post meeting tr at 2, lines 9-13), because he and Post had received complaints about Master's conduct (*id.* at 6, line 25, through 7, line 1; at 8, lines 19-20; at 9, lines 10-11; at 10, lines 5-12). Master repeatedly demanded that they simply listen to the recording of that meeting (*id.* at 5, lines 21-25; at 8, lines 21-23; at 10, lines 22-25) and that HR be involved (*id.* at 7, line 5; at 9, lines 6-8). Eventually, Torres said, "[t]hen we're going to follow through. Then we go to HR, we follow through" (*id.* at 11, line 24 through 12, line 1). Master asked what Torres meant by this and if Torres was threatening him (*id.* at 12, lines 7-19). Torres responded "No" (*id.* at 12, line 20), but that "it [was] not over" and "[they were] going to HR" (*id.* at 13, lines 16-24). Torres then ended the meeting (*id.* at 14, lines 15-25). Plaintiff rarely spoke during this meeting (*see generally id.*).

According to Torres, after he decided to end the meeting, he and Post left his office and plaintiff and Master followed them, with Master shouting "are you threatening me?" (Torres aff, ¶ 69). He also states that he saw plaintiff say something to Hokien, but that he did not hear what was said (*id.*, ¶ 70).

He states that he then returned to his office and that plaintiff and Master followed him in (*id.*, ¶ 71) and that they were both "increasingly angry" (*id.*, ¶ 72). He states that Post then entered the office and asked them to leave, which they did (*id.*, ¶¶ 73, 74). Notably, during his deposition, Torres testified that plaintiff held Master back when he tried to come back a second time (Torres deposition tr at 293, lines 6-20).

For his part, plaintiff claims that "Torres and Post became rude and defensive" (McCourt aff, ¶ 128) and that "Torres became visibly upset" (*id.*, ¶ 130) and "told Master that 'this [wasn't] over' and [that] he would 'follow through with HR'" (*id.*, ¶ 131). Plaintiff states that he followed Master back into Torres' office to see if anything more would be said (*id.*, ¶ 138), that he did not physically threaten or intimidate Torres (*id.*, ¶ 145), and that he and Master both left when Post asked them to (*id.*, ¶ 146). As they exited the office, plaintiff noted a crowd of people, who "appear[ed] to be listening to what was going on" (*id.*, ¶ 147). He denies addressing Hokien (*id.*, ¶ 149) and states that "[he] muttered to [himself] only, quietly, 'nothing better to do'" (*id.*, ¶ 150).

Fittinghoff states that he saw plaintiff and Master leaving the building, looking "flustered and upset" (Fittinghoff aff, ¶ 100) and that he then met with Torres and Post, who informed him of what had transpired (*id.*, ¶ 105). Fittinghoff states that, after consulting with HR, he decided to suspend plaintiff without pay while he determined if plaintiff had violated the Written Warning (*id.*, ¶ 106).

On February 5, 2018, Fittinghoff informed plaintiff of the decision to suspend him (*id.*, ¶ 110). Master did not report for work on February 5, 2018 and was terminated (*id.*, ¶ 108). Fittinghoff then collected statements from employees who witnessed the February 2, 2018 incident (*id*, ¶¶ 112, 113).

By letter dated February 2, 2018, Post provided her account of the incident, which largely mirrored Torres' account:

> "George for the most part did not get involved or try to calm Dmitry down. He only kept laughing and shaking his head and let Dmitry continue to rage at us. . . .
>
> "Both Lionel and I were very shook up by the way Dmitri behaved. I felt he was extremely aggressive and I was not comfortable in his presence. I was also concerned and embarrassed that this took place in front of a student aid[e] and the rest of the administrative staff."

(NYSCEF Doc No. 75, Fittinghoff aff, exhibit L.)

Post also emailed a copy of this statement to Fittinghoff and Torres. At the end of the email, Post encouraged Torres to "to add anything [she] may have missed or may have stated incorrectly" (NYSCEF Doc No. 143, Perlman affirmation, exhibit 36 at 2).

By email dated February 4, 2018, Hokien wrote to Torres, in pertinent part, as follows:

> "Friday I witnessed a confrontation between Dmitry Master and yourself with Master being belligerent and confrontational. This in my opinion, he was very aggressive in his actions towards you. These transgressions have been on going in our work place [sic] environment. I am voicing my concerns and I do fear for my welfare and others. As George McCourt was walking back into your office he pick me out of a crowd to make a derogatory statement at me in front of my peers and a student aid[e], as I was helping with an issue with the student aid[e']s Internet with telecom and network at the time."

(NYSCEF Doc No. 72, Fittinghoff aff, exhibit I.) Torres forwarded the email to Fittinghoff, who responded, "I need to know what George said to [Hokien] and if there were any witnesses. His actions could have violated my written warning to George." (*Id.*)

By email dated February 4, 2018, Torres provided his account to Fittinghoff, stating, "[i]f it is good enough and you agree, I will print and sign Monday. OK?" (NYSCEF Doc No. 142, Perlman affirmation, exhibit 35), to which Fittinghoff responded that "[t]he letter [was] fine," but recommended "deleting the footer about SUNY from page one, since it [was] missing from Page 2" (*id.*). Fittinghoff also stated that "[he] need[ed] to know what George said to [Hokien] during this outburst," as plaintiff

"may have violated [Fittinghoff's] written instructions to him" (*id.*). Torres's written statement mirrored the account he provides in his affidavit (NYSCEF Doc No. 74, Fittinghoff aff, exhibit K).

By email dated February 5, 2018, Hokien "elaborate[d]" that plaintiff made the following statement to him: "don't you have anything better to do" (NYSCEF Doc No. 73, Fittinghoff aff, exhibit J).

In an email dated February 5, 2018, Pritesh Patel wrote to Torres, in pertinent part, as follows:

> "I was fixing the student aide's computer by your office on Friday during which an argument broke out between Dimitry & George and yourself. They acted very aggressively and without regard of who was in their presence, including a student aide. I couldn't see much but what I heard should've stayed in your office. I don't know what sparked the argument but those guys tried to bully you into getting their way. The way George came out of the office and scanned the room and ended up targeting [Hokien] for just standing there? It was [Hokien] that brought up the network issue with the computer in front of your office so he had plenty of reason to be there. Instead, George came out and aggressively asked him something to the effect of: 'Why are you here?' or 'Don't you have anything better to do?' That was just plain unnecessary and clearly hostile. He brought another person in the mix just to get a shot in. That's unprofessional, discourteous, and never should have occurred." (NYSCEF Doc No. 71, Fittinghoff aff, exhibit H).

Torres forwarded the email to Fittinghoff (*see id.*).

In an email dated February 5, 2018, Dana Viscosi wrote to Post as follows:

> "On Friday 2/2/18, there was a meeting inside Lionel Torres' office. George McCourt, Dimitry Master and Francine Post were in this meeting. About two minutes into the meeting, yelling was clearly heard from the hallways coming from Lionel's office. I could hear Francine asking Dimitry to please have a seat and to calm down. A few minutes later, Lionel stepped outside his office, with Dmitry Master following him closely. Lionel was visibly upset and appeared to be walking away from Dimitri who was aggressively following him. It seemed Lionel was trying to get away from Dimitry because he walked around the file cabinets as Dmitry followed him. **Dimitry said something about him recording the meeting that was going on in Lionel's office and was red in the face seemingly with anger. Francine said something about Dimitry wanting to have this meeting with HR which is not why the meeting was being stopped.** Lionel started to walk back inside his

> office and everyone present followed Lionel back into the office. On the way back in, George said something that I couldn't hear to Bill Hokien who was outside Lionel's office fixing the student aide computer. A moment later, George and Dimitry walked out of Lionel's office and from what I understand left for the day."

(NYSCEF Doc No. 144, Perlman affirmation, exhibit 37 [bold in the original].)

Post responded, "Dmitri was aggressively following Lionel and got in his facing [sic] saying 'are you threatening me!' and Francine said, no he didn't threaten you, he didn't say that, you want HR representation." (*Id.*) Viscosi then emailed an edited statement to Fittinghoff, which was substantially similar to the one she had sent Post, with the exception that the previously bolded portion was no longer bolded and incorporated Post's comment as follows: "Dimitry was saying to Lionel 'Are you threatening me?!' and was red in the face seemingly with anger. Francine said 'No, he didn't threaten you, YOU said you wanted HR representation.'" (NYSCEF Doc No. 76, Fittinghoff aff, exhibit M.)

In an email dated February 5, 2018, Kathleen Schau wrote to Fittinghoff that she "didn't see much of what went on" but that "behind the closed door of Lionel's office [she] could hear loud voices as the meeting between Lionel, George, Dimitri and Fran was going on." She also stated that "[Hokien] and Pritesh we're [sic] working on the student aide's computer" and that, "as George was passing, he looked straight at [Hokien] and asked him 'Don't you have anything better to do?'" (NYSCEF Doc No. 77, Fittinghoff aff, exhibit N.)

Neither plaintiff nor Master were interviewed or asked to provide a written statement about what occurred during their meeting with Torres and Post (*see* McCourt aff, ¶¶ 161-163; Master aff, ¶¶ 202-203). When questioned why, Brown explained that, because "the statements were all so consistent," with everyone "repeating what [Fittinghoff] already knew," there was no "reason to meet with [plaintiff]" (Brown deposition tr at 113, lines 11-21; at 104, lines 3-14).

By email dated February 7, 2018, Brenda Smith, who was the Interim Vice President of HR at that time, notified Fittinghoff that both "[Master] and [plaintiff] were on the list of merit" for a performance-based bonus. She noted that Master would not receive his bonus and advised that neither should plaintiff, arguing that "[i]f his behavior was bad enough to put him out on an unpaid leave of absence, then why would we reward him with a bonus?" She also observed that this argument could be used against FIT in a wrongful termination case. (NYSCEF Doc No. 140, Perlman affirmation, exhibit 33.) Fittinghoff agreed that neither Master nor plaintiff should receive the bonus and informed Smith that he was "going to review the write-ups from employees about the incident" and that, if these "verif[ied] that [plaintiff] violated the write-up [Fittinghoff] gave him," then Fittinghoff would terminate him as well (*id.*).

Fittinghoff states that the written statement "corroborated the fact that [p]laintiff and Mr. Master acted inappropriately during their meeting with Mr. Torres and Ms. Post and that Plaintiff made an aggressive and uncivil comment to Mr. Hokien as Plaintiff and Mr. Master were following Mr. Torres' into his office" (Fittinghoff aff, ¶ 114). Fittinghoff claims that he was particularly concerned that plaintiff's statement to Hokien was in violation of the Written Warning, because plaintiff had a "lengthy history of aggressive behavior" with Hokien (*id.*, ¶ 115). On February 7, 2018, Fittinghoff emailed Brown to set an appointment to review the statements he had collected (Fittinghoff aff, ¶ 126, exhibit O [NYSCEF Doc No. 78]).

Fittinghoff claims that after he had forwarded the witness statements to HR, another FIT employee, Rita Cammarata, approached him to share an interaction she had had with plaintiff on the evening of February 1, 2018, during a train ride from work (Fittinghoff aff, ¶ 127). Fittinghoff states that his conversation with Cammarata demonstrated to him that "[p]laintiff had no intention of correcting his behavior going forward" (*id.*, ¶ 130). He requested that Cammarata put her statement in

writing, which she did (*id.*, ¶ 131). In an email dated February 8, 2018, Cammarata wrote, in pertinent part, as follows:

> "During our train ride, George asked me if I heard the yelling on the 13th floor at 11:00 am on the day above. . . . He proceeded to tell me that he and Dmitry Master had a meeting with you and that they were both 'yelling and screaming' at you for an issue that took place during the week. It was as if he was bragging to me about how they both treated you. He mentioned that not only was there screaming but that they were banging their hands on the table. . . .
>
> "He then proceeded to bad mouth Lionel. He carried on that Lionel knows nothing about the networking side of the house . . . that in order to be on his good side that you had to be Hispanic . . ." (NYSCEF Doc No. 79, Fittinghoff aff, exhibit P.)

On February 8, 2018, Fittinghoff forwarded Cammarata's email to Brown, who commented that it was "[v]ery interesting and useful" (NYSCEF Doc No. 145, Perlman affirmation, exhibit 38).

Plaintiff admits that he shared a train ride with Cammarata on February 1, 2018 (McCourt aff, ¶ 167) and that they spoke "about the meeting with Fittinghoff and Master very generally, and [that he] told her that the level of tension was very high" (*id.*, ¶ 169). He also states that he "may have brought up Torres generally in a negative light in terms of his management of his SYS/OPS staff" (*id.*, ¶ 172). However, he denies that he bragged about "screaming or yelling at Fittinghoff" (*id.*, ¶¶ 170, 171).

Fittinghoff claims that, "[i]n light of the six witness statements . . . and [p]laintiff's continued uncivil and sometimes threatening conduct in violation of the Written Warning, . . . [he] reached the conclusion that the best way to foster a civil, non-toxic working environment in which all employees felt safe, was to bring [p]laintiff's employment at FIT to an end" (Fittinghoff aff, ¶ 133). He states that he informed Brown of his conclusion but, nonetheless, deferred to HR's review and recommendation before taking action (*id.*, ¶ 134).

On February 12, 2018, Smith exchanged emails with Brown to set up a time to discuss plaintiff, because "[Fittinghoff] said he [was] awaiting [their] recommendation" (NYSCEF Doc No. 146, Perlman affirmation, exhibit 39).

On February 20, 2018, Fittinghoff emailed Smith "to follow-up on the next steps for George McCourt," stating that, "[b]ased on HR's support that he did violate the terms of his written warning," Fittinghoff wished "to proceed with the appropriate next steps" and "to bring the situation to a close" (NYSCEF Doc Nos. 147, 148, Perlman affirmation, exhibits 40, 41). Smith then forwarded this email to Brown, asking to talk with him "so [they] can get everything in line to support [Fittinghoff]" (*id.*).

On February 22, 2018, Brown emailed Fittinghoff, stating that he had spoken to Smith and that they "agree[d] that George should be separated from FIT," but also noted that plaintiff "[was] eligible to retire" and should be given the option (NYSCEF Doc No. 95, Brown aff, exhibit A; *see also* Brown aff, ¶ 34). That same day, Fittinghoff emailed the Deputy to the President of FIT, to inform her that he and HR had determined that plaintiff violated the Written Warning and that he would be given the option to "retire or be fired" (Fittinghoff aff, ¶ 138, exhibit S [NYSCEF Doc No. 82]). The deputy replied that she and the President "agree[d] with this approach" (*id.*).

On March 1, 2018, Fittinghoff, Torres and Brown met with plaintiff and informed him that he had violated the Written Warning and that he had the option to retire or be fired (*id.*, ¶¶ 139, 140). On March 21, 2018, plaintiff retired from FIT (*id.*, ¶ 141).

At the time of plaintiff's termination, he was 63 years old, Brown was approximately 64 years old, Torres was approximately 56 years old, and Fittinghoff was approximately 55 years old (FIT SMF, ¶¶ 134-138; Plaintiff's Response, ¶¶ 134-138).

While Reduque was not involved in the decision to terminate Master and suspend plaintiff, the investigation into plaintiff' conduct, or the subsequent decision to terminate his employment (Reduque

aff, ¶¶ 34-37), she did, however, provide Smith with a summary of her two meeting with Master and plaintiff on February 2, 2018. By email dated February 5, 2018, she told Smith, in pertinent part, that Master was concerned about "how money was spent in the department; specifically, . . . that outside vendors were doing work that FIT employees could do," that he had spoken to Fittinghoff about it and that she had informed Master that she "would need to see evidence because VP Fittinghoff [could] choose how he want[ed] to spend departmental money." (NYSCEF Doc No. 132, Perlman affirmation, exhibit 25).[5]

In December 2018, plaintiff commenced the instant lawsuit, and alleged that he engaged in protected activity when he confronted Dickson in August 2017, and subsequently notified Torres, Fittinghoff, and Reduque, about the SYS/OPS team's plan to lease $2.4 million worth of largely unnecessary equipment (*see* complaint, ¶¶ 45-52). He also claims that he engaged in protected activity on February 1, 2018, when he and Master disclosed to Fittinghoff that the SYS/OPS team was wasting money by paying vendors to perform work they could perform themselves, and on February 2, 2018, when he and Master met with Reduque to discuss the same issue (*see id.*, ¶¶ 88-96, 165-166). Plaintiff claims he was terminated in retaliation for his reporting of activities that violated New York Public Officers Law § 74(3)(h), SUNY Rules and Regulations for Purchasing and Contracting (SUNY Procurement Regulations), specifically 8 NYCRR 316.2(c), and the SUNY Policy (*id.*, ¶¶ 154-163). He also alleges that he was terminated due to his age in violation of the NYSHRL (*id.*, ¶¶ 181-184).

II. ANALYSIS

Pursuant to CPLR 3212(b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

[5] Plaintiff claims that Smith responded to this email with "Uh Oh" (*see* NYSCEF Doc No. 158, plaintiff's brief in opposition at 15, citing Perlman affirmation, exhibit 25 [NYSCEF Doc No. 132]). However, exhibit 25 does not contain any response from Smith (*see* NYSCEF Doc No. 132).

demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez,* 68 NY2d at 324). "A party opposing a motion for summary judgment is bound to lay bare his proofs and make an evidentiary showing that there exist genuine, triable issues of fact and he must do so with admissible evidence" (*Oates v Marino*, 106 AD2d 289, 291 [1st Dept 1984] [internal citations omitted]). "[A] motion for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*id.* [internal citation omitted]).

A. Retaliatory Termination in Violation of CSL § 75-b (First Cause of Action)

1. Contentions

To the extent that plaintiff's claim is premised on the lack of justification for the Quote, FIT argues that it is entitled to summary judgment, because plaintiff's deposition testimony—that he had a "feeling that there were a lot of kickbacks happening" (Plaintiff deposition tr at 249, lines 9-10), that he was not involved in the discussions that led to the Quote (*id.* at 178, lines 8-14), and that he was not aware of anyone at FIT also working for Dell (*id.* at 179, lines 2-8)—demonstrates that his assumptions about the Quote were "patently unreasonable" (NYSCEF Doc No. 101, FIT's brief at 10). Plaintiff responds that his belief was reasonable because the Quote was for equipment that FIT already had and there was no supporting documentation. The parties also dispute whether: (1) plaintiff was required to alert FIT to the scope of the problem by raising his suspicions about kickbacks; and (2) plaintiff's communications with Fittinghoff regarding the Quote constitute whistleblowing or were merely part of plaintiff's job. Lastly, the parties dispute whether plaintiff can demonstrate a causal nexus between an

adverse action and the disclosures, considering that FIT adopted plaintiff's recommendation to move the existing equipment rather than to proceed with the Quote.

To the extent that plaintiff's claim is premised on the SYS/OPS team engaging vendors to perform work that should have been done internally, FIT argues that it is entitled to summary judgment, because, even assuming that plaintiff may rely on statements made by Master, plaintiff cannot establish that he reasonably believed that he was disclosing violations of procurement rules or regulations, since Master offered only vague allegations of the purported violations and admitted that he did not know what work was included in vendors' quotes.

Plaintiff denies that it is significant that Master made many of the disclosures, since nearly all disclosures were made jointly and Master was plaintiff's direct report, who "spoke with the full support, knowledge, and authority of Plaintiff during these meeting" (plaintiff's brief in opposition at 11). He also argues that FIT's contention, that Master had no basis for his belief that work could be performed internally, ignores Fittinghoff's prior assurance that union members would handle the physical aspect of the Move. The parties also dispute whether there is a causal connection between the disclosures and plaintiff's termination, whether Reduque's admonition to "leave it alone" constitutes direct evidence of retaliatory animus, and whether plaintiff's disciplinary issues predate his disclosures, such that any inference of causation through temporal proximity is negated.

FIT further argues that even assuming that plaintiff can make out a prima facie case, it is still entitled to summary judgment, because FIT had an independent basis for terminating plaintiff – his violation of the Written Warning. Plaintiff responds that the violation was merely pretext for retaliation and that numerous issues of fact require denial of the motion. First, he argues that Master's September 21, 2017 email, which raised concerns about double-paying, triggered the retaliatory Written Warning, issued six days later. Plaintiff also argues that there are significant issues of fact as to whether he

engaged in uncivil conduct on February 2, 2018. Lastly, plaintiff takes issue with the six witness statements, because: (1) the statements are not based on personal knowledge; and (2) Fittinghoff, Torres, and Post improperly reviewed and revised the statements to form a single narrative, without ever speaking to plaintiff or Master about the February 2, 2018 incident.

2. Applicable law

Civil Service Law (CSL) § 75-b prohibits a public employer from taking adverse personnel action in retaliation against an employee who engages in whistleblowing. "To make out a prima facie case for violation of section 75-b, a plaintiff must establish (1) an adverse personnel action; (2) disclosure of information to a governmental body [regarding an improper governmental action], and (3) a causal connection between the disclosure and the adverse personnel action" (*Matter of Lin v New York City Dept. of Educ.*, 191 AD3d 431, 434 [1st Dept 2021] [internal quotation marks and citation omitted]).

In order to constitute a protected disclosure under the whistleblower statute, the employee must "reasonably believe[]" that the complained of conduct constitutes "[i]mproper governmental action," which is defined as "any action by a public employer or employee . . . which is in violation of any federal, state or local law, rule or regulation" (Civil Service Law § 75-b[2][a][ii]). "Civil Service Law § 75-b does not require an actual violation of the law for a subsequent action to be maintained thereunder. Plaintiff need have had only 'a reasonable belief of a possible violation' of the law'" (*Zielonka v Town of Sardinia*, 120 AD3d 925, 926-927 [4th Dept 2014], quoting *Bordell v General Elec. Co.*, 88 NY2d 869, 871 [1996]; *see* Civil Service Law § 75-b[2][a][ii]).

While there is no caselaw defining a reasonable belief under this statute, in general, "[s]tatutes or rules of law requiring a person . . . to have a 'reasonable belief'" require "conduct meeting an objective standard measured with reference to how 'a reasonable person' could have acted" (*People v*

Goetz, 68 NY2d 96, 112 [1986]). In other words, "[a] reasonable belief contains both subjective and objective components and, therefore, a plaintiff must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation." (*Ashmore v CGI Group Inc.*, 138 F Supp 3d 329, 341 [SD NY 2015], *affd* 923 F3d 260 [2d Cir 2019]).

"The element of causation requires that but for the protected activity, the adverse personnel action by the public employer would not have occurred" (*Lilley v Greene Cent. Sch. Dist.*, 168 AD3d 1180, 1182 [3d Dept 2019] [internal quotation marks and citations omitted]). "A plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action. Since a direct showing requires plaintiff to provide tangible proof of retaliatory animus, conclusory assertions of retaliatory motive are insufficient." (*Smith v County of Suffolk*, 776 F3d 114, 118-119 [2d Cir 2015] [internal quotation marks and citations omitted]).[6]

While no bright line rule exists, "[t]he cases that accept mere temporal proximity . . . as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal

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[6] Although *Smith* addresses a First Amendment retaliation claim rather than a CSL § 75-b claim, the standards for establishing causation are identical (*see e.g. Maher v Town of Stony Point*, 2018 WL 4759786, *11 [, SD NY, Sept. 29, 2018, No. 16-CV-607] [finding that the plaintiff satisfied the "causation prong under § 75-b for the reasons stated in the analysis of (the) First Amendment claim"]). Indeed, various federal and state laws serve the same purpose and require the same showings, which is why this decision often cites to cases that do not address CSL § 75-b (*see e.g. Matter of Lin*, 191 AD3d at 434, citing *Uwoghiren v City of New York*, 148 AD3d 457, 458 [1st Dept 2017] [dismissing a CSL § 75-b claim, upon determining that the independent basis for the termination was not pretextual, and relying on *Uwoghiren,* a case addressing pretext in the context of a national origin discrimination claim under the NYSHRL]; *see also DaCosta v New York City Dept. of Bldgs.*, 203 AD3d 571, 572 [1st Dept 2022] [observing that "[s]ection 75-b serves a purpose similar to that of other anti-retaliation statutes, including the [NYSHRL]" and using the latter in interpreting the former]; *Rainer N. Mittl, Opthamologist, P.C. v New York State Div. of Human Rights,* 100 NY2d 326, 330 [2003] [stating that "[t]he standards for establishing unlawful discrimination under section 296 of the Human Rights Law are the same as those governing title VII cases under the Federal Civil Rights Act of 1964"]).

proximity must be very close" (*Wang v Palmisano*, 157 F Supp 3d 306, 327 [SD NY 2016] [internal quotation marks and citation omitted]). "Courts have repeatedly held that as little as a few months between the protected activity and the alleged retaliation breaks any causal connection as a matter of law" (*Nobrega v MTA Metro-N. R.R.*, 2015 NY Slip Op 30605[U] [Sup Ct, NY County 2015]; *see Brown v City of New York*, 622 Fed Appx 19, 20 [2d Cir 2015] [finding that "(t)he time lapses between (the) protected activities and the alleged retaliatory acts—ranging from two months to several years—were simply too attenuated to establish" a causal connection "absent other supporting factual allegations"]). In addition, "the courts have found that where even very close temporal proximity exists, the requisite causal connection will falter if the employer's complained-of conduct began before the employee's corresponding protected activity" (*Wang*, 157 F Supp 3d at 327).

CSL § 75-b does not "prohibit any personnel action which otherwise would have been taken regardless of any disclosure of information" (Civil Service Law § 75-b [4]). Therefore, even where plaintiff is able to establish a prima facie case of retaliation, the employer is entitled to summary dismissal of the claim if it can establish "an 'independent basis' for the personnel action" (*Matter of Lin*, 191 AD3d at 434 [internal citations omitted]). However, the "court must make a separate determination regarding the employer's motivation to ensure against pretextual dismissals and "shield employees from being retaliated against by an employer's selective application of theoretically neutral rules" (*Lilley v Greene Cent. Sch. Dist.*, 168 AD3d 1180, 1182 [3d Dept 2019] [internal quotation marks and citations omitted]; *see e.g. Matter of Lin*, 191 AD3d at 434 [dismissing the retaliation claim where there was no "evidence that [employer's] actions were pretexts for retaliation, or that [the employer] would not have taken the same actions against [the employee] had she not reported the alleged . . . misconduct"]).

3. Analysis

As a preliminary matter, the parties dispute whether plaintiff can demonstrate that he had a reasonable belief that his disclosures related to a violation of federal, state or local law, rule or regulation when he read only a portion of the SUNY Policy and never referenced it at the time of his disclosures. However, nothing in the statute requires plaintiff to specifically cite the law he believes to have been violated when making his disclosures or even when pleading his claim (*see e.g. Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 452 [2014] [addressing similar language in Labor Law § 740(2)(a) and finding that "(t)he plain language of (the statute) (did) not impose any requirement that a plaintiff identify the specific 'law, rule or regulation' violated" when reporting the employer's activity, policy or practice and that there was no obligation to do so in the complaint either]; *see Moore v County of Rockland*, 192 AD2d 1021, 1024 [3d Dept 1993] [finding that plaintiff's CSL § 75-b claim was properly dismissed, but "not because the complaint was facially deficient for failing to state the particular law, rule or regulation violated, as Supreme Court found"]).

Moreover, plaintiff's testimony—that Master showed him an unspecified portion of the SUNY Policy and that he believed his disclosures related to violations of that policy (*see* Plaintiff deposition tr at 250, line 11, through 251, line 12; at 252 lines 13-16)—does not permit a determination, as a matter of law, that he did not have reasonable belief that he was reporting violations. Plaintiff supports his claim, that he believed his disclosures pertained to violations of state laws, rule or regulations, by identifying New York Public Officers Law § 74(3)(h), which requires "[a]n officer or employee of a state agency … [to] endeavor to pursue a course of conduct which will not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust," and SUNY Procurement Regulations, which "apply to all purchases and contracts made by the State-operated campuses and System Administration of State University" (8 NYCRR 316.1) and set SUNY's "basic

procurement objective [as] secur[ing] the most appropriate materials, supplies, equipment, services, and construction at the lowest available price, consistent with quality requirements and delivery needs as will best promote the interests of State University" (8 NYCRR 316.2 [c]).

a. Quote

FIT fails to demonstrate, as a matter of law, that plaintiff's disclosures regarding the Quote were not protected activity. Nothing in CSL § 75-b suggests that disclosures made in the course of one's normal job responsibilities may not also be protected disclosures, and there appears to be no authority to support such a proposition. The cases FIT cites in support are inapposite. In *Valdes v New York City Dept. of Envtl. Protection* (1997 WL 666279 [SD NY 1997]), the court noted in dicta that the disclosures at issue "were part of [plaintiff's] job" and dismissed the claim on a separate ground (1997 WL 666279, *4).

FIT also cites *Landfield v Tamares Real Estate Holdings, Inc.* (112 AD3d 487 [1st Dept 2013]), but it involved retaliation in violation of New York's False Claims Act (*see id.* at 487), which prohibits retaliation based on "acts done by the employee . . . *in furtherance* of an action brought under [False Claims Act]" (State Finance Law § 191). This requires the plaintiff to show that the "employer knew that the employee was engaged in *such conduct*" (*Landfield*, 112 AD3d at 487 [emphasis added]). Therefore, in *Landfield*, where the "plaintiff's job responsibilities as Chief Financial Officer and Chief Operating Officer included managing the financial affairs of the company," he "was required to show that his complaints of noncompliance with the tax laws went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligations" (*id.* at 488).

In contrast, CSL § 75-b merely requires a plaintiff to show that he made a disclosure of what he "reasonably believes constitutes an improper governmental action" (Civil Service Law § 75-b[2][a][ii]),

and does not require a showing that the employee understood such disclosures to constitute protected activity (*see Matter of Lin*, 191 AD3d at 434).

Likewise, plaintiff's failure to share his suspicions concerning possible kickbacks does not require dismissal. FIT's reliance on *Carter v Incorporated Vil. of Ocean Beach* (172 AD3d 1608 [3d Dept 2019]), for the proposition that a plaintiff must alert his employer to the scope of the problem, to provide the employer with an opportunity to address his concerns, is misplaced. The court in *Carter* premised its dismissal of the whistleblower claim on the plaintiff's failure to "make the notification efforts which [were] a procedural prerequisite to invoke the protections of Civil Service Law § 75-b" (172 AD3d at 1609 [internal quotation marks and citations omitted]), but the procedural prerequisite provision was contained in section 75-b(2)(b) (*see Hastie v State Univ. of N.Y. (SUNY) Coll. of Agric. & Tech. at Morrisville*, 74 AD3d 1547, 1548 [3d Dept 2010]), which was repealed in 2015 (L 2015, ch 585, § 2).

In light of the evidence that the Quote included equipment that FIT already had in its inventory, that plaintiff was unable to find any documentation to justify the products and services included in the Quote, and that Dickson directed Ming to lie about existing inventory, FIT cannot establish, as a matter of law, that plaintiff's belief that the Quote violated procurement rules or regulations was patently unreasonable.

However, FIT establishes the lack of a causal link between any disclosure related to the Quote and an adverse personnel action. It is undisputed that Fittinghoff placed plaintiff in charge of the Quote after Dickson's resignation, directed plaintiff to contact Dell regarding the Quote, and, ultimately, adopted the plan to move existing equipment, for which plaintiff and Master had advocated.

To the extent that plaintiff claims that the temporal proximity of the Written Warning, dated October 2, 2017, to plaintiff's voicing of concerns regarding the Quote in August 2017, permits a

reasonable inference of causation, this argument fails. The passage of even two months is sufficient to negate an inference of causation "absent other supporting factual allegations" (*Brown*, 622 Fed Appx at 20; *see Nobrega*, 2015 NY Slip Op 30605[U]). Plaintiff's evidence indicates that he and Master raised these concerns before Dickson's departure in August 2017, which further attenuates the time between the disclosures and the Written Warning. Moreover, no other basis to infer retaliation is raised. To the contrary, by plaintiff's own admission, Fittinghoff made plaintiff the "point person" for the Quote after he had already expressed his concerns regarding it.

To the extent that plaintiff claims that his termination in March 2018 was a result of his disclosures in connection with the Quote, the passage of many months between the two events negates any inference of causation (*see Brown*, 622 Fed Appx at 20; *see Nobrega*, 2015 NY Slip Op 30605[U]).[7]

In a final attempt to establish retaliatory animus, plaintiff argues that Fittinghoff was in a hurry to complete the Move and was the one who directed Dickson to get a quote for all new equipment, which permits "[a] reasonable inference. . . that Fittinghoff was not happy because Plaintiff's disclosures regarding the Dell quote could make him look incompetent and wasteful of FIT resources and [sic] felt had no choice to cancel the Dell lease deal based on the evidence that was disclosed." However, as plaintiff does not offer "tangible proof of retaliatory animus" (*Smith*, 776 F3d at 118-119 [internal quotation marks and citation omitted]) and instead relies on "surmise, conjecture or

[7] Notably, to the extent that plaintiff claims he made disclosures regarding the wastefulness of the Quote during his meetings with Fittinghoff and Reduque in February 2018, it is difficult to see what basis he could have had to believe that he was reporting improper governmental action. At that point, the Quote had been long abandoned (*cf. Catapano-Fox v City of New York*, 2015 WL 3630725, *10, [, SD NY 2015] [explaining that "proposals are not reasonably understood as falling within the scope of an 'improper governmental action,' defined as 'any action by a public employer or employee . . . which *is* in violation of any federal, state or local law, rule or regulation'" (quoting Civil Service Law § 75-b [2] [a] [ii])]).

suspicion," this is insufficient to defeat FIT's prima facie showing (*Oates*, 106 AD2d at 291; *see also Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 [2d Dept 2019] [finding that the plaintiff's "speculation that any of the defendants' challenged actions were motivated, even in part, by unlawful discrimination or retaliation . . . [was] insufficient to defeat summary judgment"]).

Accordingly, FIT's motion for summary judgment dismissing the first cause of action is granted to the extent that the claim is premised on disclosures related to the Quote.

b. Wasteful Spending on Vendors

The record reveals that during the February 1, 2018 meeting, Master claimed waste had occurred. However, when Fittinghoff pressed Master on how he reached these conclusions, particularly with respect to a quote for $100,000, when Master did not know what work was included in the quote or who was to perform the work, Master responded that he knew "some of it," but ultimately acknowledged that he did not. As such, FIT demonstrates that plaintiff did not have a reasonable belief of improper governmental action during the meeting with Fittinghoff.

In opposition, even accepting that Master spoke for plaintiff as well as himself during their meetings with Fittinghoff and Reduque, plaintiff fails to raise an issue of fact as to the reasonableness of his belief that he was disclosing improper governmental action. While plaintiff need not demonstrate that a violation occurred, he must demonstrate a basis to support an objectively reasonable belief that a violation occurred (*see Zielonka*, 120 AD3d at 927; *People*, 68 NY2d at 112).

Plaintiff claims that he reasonably believed he was reporting a procurement violation when disclosing that $100,000 was to be spent on outside vendors to physically move equipment to the new data center because, approximately six months before the February 1, 2018 meeting, Fittinghoff had stated that the Move would be handled internally. However, when plaintiff and Master confronted Fittinghoff about this issue, Fittinghoff explained that, shortly after deciding that the Move would be

handled internally, it became apparent that the this was not possible under the CBA with the IT Department's employees.

Nowhere in plaintiff's submissions does he dispute that the CBA limited FIT's ability to complete the move internally, and indeed, he acknowledges that "union employees refused to complete the physical transfer of the equipment to the new [data center]" (plaintiff's brief in opposition at 8) and, while he states that "Torres and Fittinghoff allowed [this] to occur" (*id.*), plaintiff does not provide any basis to conclude that they had a choice in the matter.

While plaintiff plainly disagreed with his superiors about how money should have been spent on the Move, his belief that the use of outside vendors was wasteful is subjective, and he provides no basis from which a reasonable person in plaintiff's position could have reached the same conclusion (*cf. Tompkins v Metro-North Commuter R.R. Co.*, 983 F3d 74, 80-81 [2d Cir 2020] [applying the reasonableness standard of a whistleblower claim under the Sarbanes-Oxley Act to a claim under the Federal Railroad Safety Act and finding that the plaintiff's assessment that the "walkways were unsafe [that] contradict[ed] the other employees' assessments that they were safe" satisfied the subjective component, but not "the objective component" of reasonableness]).

As the disclosures made during plaintiff and Master's meeting with Reduque were even more vague than the ones made during their meeting with Fittinghoff, nothing said in the course of this meeting raises an issue of fact as to whether plaintiff had an objectively reasonable belief that FIT was violating procurement rules or regulations. In fact, Reduque repeatedly told plaintiff and Master that to proceed with an investigation, she required "something real," and it is undisputed that they provided her with nothing.

Plaintiff contends that he and Master were terminated to keep them from providing Reduque with evidence, but any such evidence is neither identified nor submitted on this motion. Moreover,

plaintiff's and Master's affidavits do not provide any details concerning the purported procurement violations.[8] In short, plaintiff fails to point to any facts that would permit a reasonable person to conclude that a violation had occurred. None of plaintiff's additional reasons for suspecting the SYS/OPS team of procurement violations is sufficient to raise an issue of fact as to the reasonableness of his beliefs.

Plaintiff argues that his "belief that the IT [D]epartment was engaging in illegal practices was reasonable based on the fact that he was involved in a prior investigation regarding similar fraudulent activities back in 2015." However, plaintiff submits no evidence showing that there is any valid comparison to the earlier misconduct. During his depositions, plaintiff acknowledged that he was unaware of any FIT employees who were also employed by Dell and offered only a "feeling that there were a lot of kickbacks happening."

Plaintiff also points to the 2017 Inventory Audit regarding missing inventory, but the Report concludes that the inventory was not missing due to fraud but rather to staff failing to account for the inventory properly. Thus, the Audit does not provide a basis for a reasonable belief that financial misconduct had occurred.

For all of these reasons, plaintiff fails to raise an issue of fact as to whether he had an objectively reasonable belief that he was reporting improper governmental action.

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[8] Notably, in his affidavit, plaintiff discusses the January 24, 2018 conversation he had with Torres, which he recorded (*see* McCourt aff, ¶¶ 78-91). During this conversation, Torres stated that one of the finance administrators "[would] 'bend the purchasing rules' . . . in order to spend $70K on something" (*id.*, ¶ 81). However, nothing in the recording clarifies what the money was to be spent on or what rules were to be "ben[t]" (1/24/2018 recording at 7:30). Plaintiff does not provide clarification in his affidavit (*see generally* McCourt aff, ¶¶ 78-91). Once again, plaintiff fails to provide any facts to permit a reasonable belief that this purchase was unnecessary, too expensive, violated any laws, rules or regulations, or even occurred, for that matter.

In any event, plaintiff cannot establish a causal connection between the disclosures made in his meetings with Fittinghoff and Reduque and his termination. Although plaintiff was suspended only a few days after these meetings, plaintiff's history of uncivil conduct predates his purported whistleblowing activities. The Written Warning was issued on October 5, 2017, approximately four months earlier, and arose in part from plaintiff's altercation with Hokien in August 2017. In fact, all three incidents—the August altercation, the uncivil email that led to the Written Warning, and plaintiff's comment on February 2, 2018 that led to his termination—involved incivility toward Hokien.

Therefore, FIT demonstrates a pattern of uncivil conduct and discipline that predate plaintiff's whistleblowing, rendering temporal proximity, without more, insufficient to establish a causal nexus (*see Wang*, 157 F Supp 3d at 327; *see also Matter of Plante v Buono*, 172 AD2d 81, 85-86 [3d Dept 1991] [finding "no indication . . . that petitioner's dismissal resulted solely from his efforts to inform respondent of County Health Department violations," in violation of CSL § 75-b, where the petitioner prepared the memorandum disclosing the violations after he was disciplined for insubordination that ultimately led to his dismissal]).

Plaintiff's argument that his whistleblower activities related to the Quote predate any disciplinary action is without merit, as he fails to demonstrate that he was retaliated against in any way in connection with those disclosures.

Plaintiff's attempt to establish a causal relationship between the February 2018 disclosures and his termination through direct evidence of retaliatory animus is equally unavailing. While plaintiff claims that "Fittinghoff was very 'defensive' when [p]laintiff raised his concerns on February 1, 2018," he points to nothing in Fittinghoff's words or deeds to demonstrate that Fittinghoff harbored retaliatory animus toward plaintiff. Therefore, plaintiff's "conclusory assertions of retaliatory motive are

insufficient" to establish causation (*Smith*, 776 F3d at 119 [internal quotation marks and citations omitted]).

Plaintiff also contends that Reduque's statement to him to "leave it alone" constitutes direct evidence of retaliatory animus, but as Reduque was not involved in the decision to suspend or terminate plaintiff, her statements are not evidence of retaliatory animus (*see Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 [1st Dept 2005] [finding no nexus between remarks and the decision to terminate plaintiffs, where, among other things, the remarks were not made by decision makers]; *see also Sattar v United States Dept. of Homeland Sec.*, 669 Fed Appx 1, 3 [2d Cir 2016] [finding that even if comments suggested retaliatory animus, plaintiff failed to present any evidence that such animus was causally connected to the decision to promote another employee over plaintiff, where comments were made by individuals not involved in the selection process]).

Plaintiff attempts to raise an issue of fact about Reduque's involvement in the decision-making process by claiming that "Reduque was evasive during her second meeting with [p]laintiff and Master on February 2, 2018 when asked if the conversation was confidential," and that Reduque sent an email to Smith on the day of plaintiff's suspension, summarizing her meetings with plaintiff and Master. While this demonstrates that a decision-maker was aware of plaintiff's conversation with Reduque before his termination, it does not raise any issue of fact as to Requeue's involvement in the decision to terminate plaintiff. Therefore, plaintiff fails to raise an issue of fact as to causation.

Accordingly, FIT's motion for summary judgment dismissing the first cause of action is also granted to the extent that the claim is premised on disclosures related to wasteful spending on vendors.

c. Independent Basis

FIT submits evidence that civility was an issue of concern in the IT Department and that Fittinghoff, Torres and Brown received numerous complaints about plaintiff's lack of civility. It also

submits evidence of plaintiff's previous, problematic behavior toward Hokien, which resulted in an HR intervention and the Written Warning, which explicitly advised plaintiff that "further incidents [of plaintiff] being uncivil, hostile, or demeaning to others" could result in "a change in [plaintiff's] personnel status." Lastly, FIT submits evidence that, before terminating plaintiff, Fittinghoff collected six witness statements, some of which noted that plaintiff spoke to Hokien in an aggressive or uncivil manner during the February 2, 2018 incident, and supported his conclusion that plaintiff violated the Written Warning. FIT thus demonstrates that it had an independent basis for deciding to terminate plaintiff's employment.

"Nor is there any evidence that . . . [FIT] would not have taken the same actions against [plaintiff] had [he] not reported the alleged [procurement violations]" (*Matter of Lin*, 191 AD3d at 434). Accordingly, FIT has demonstrated, prima facie, a legitimate, nonretaliatory reason for plaintiff's termination (*see id.* [granting summary judgment dismissing CSL § 75-b where "respondents had ample independent bases for their actions against petitioner, in the form of the well-documented unsatisfactory reports and a corresponding U-rating for the year"]).

In opposition, plaintiff fails to raise an issue of fact as to whether FIT's stated reason for plaintiff's termination was a pretext for retaliation. Plaintiff's argument, that there are issues of fact as to whether he was uncivil during the February 2, 2018 meeting with Torres and Post and whether he made an uncivil remark to Hokien, misses the point. First, plaintiff's conduct during the meeting is irrelevant, as, according to Fittinghoff, plaintiff's termination was not based on his conduct *during* the meeting, but on his incivility to Hokien outside of Torres' office.

Second, while plaintiff disputes that his statement of "nothing better to do" was aggressive or directed at Hokien, "the factual validity of the underlying imputation against the employee is not at issue" in determining "the legitimacy of a reason given to justify a challenged employment action"

(*McPherson v New York City Dept. of Educ.*, 457 F3d 211, 215 [2d Cir 2006]). The issue is "what *motivated* the employer" (*id.* at 216 [internal quotation marks and citation omitted]).

Thus, it is irrelevant whether the witnesses are wrong or are lying, as plaintiff implies, as long as FIT had a good faith basis to believe that plaintiff's actions violated the Written Warning, and the witness statements demonstrate that it did so (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 121 [1st Dept 2012] [internal quotation marks and citations omitted] [explaining that "(i)t is not for the Court to decide whether the( ) complaints (against plaintiff) were truthful or fair, as long as they were made in good faith"]; *Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1222-1223 [3d Dept 2017] [finding that, where the plaintiff was terminated for failure to disclose prior state employment that resulted in termination, the "plaintiff failed to raise a triable issue of fact as to whether defendants' reasons . . . were pretextual" by claiming that he had departed voluntarily, because "it matter(ed) not why or how he left, but whether (the employer) had a good faith basis to believe that he had been fired from his prior state position"]).

Plaintiff's argument, that the witness statements are inadmissible hearsay and must be disregarded, fails for a similar reason. The witness statements are not being offered for the truth of the matter asserted, i.e., to prove that plaintiff was uncivil to Hokien, but rather to demonstrate that Fittinghoff terminated plaintiff because he had reason to believe that plaintiff had violated the Written Warning. As such, the witness statements are not hearsay (*see Rivera v City of New York*, 200 AD2d 379, 379 [1st Dept 1994] [finding that testimony was not hearsay, as "it was not admitted for the truth of the matter asserted, but for the purpose of showing the technician's state of mind with respect to plaintiff's condition"]; *see also Poppito v Northwell Health, Inc.*, 2019 WL 3767504, *3 [ED NY 2019] [rejecting a hearsay objection to a "a broad swath of factual assertions," as the statements were "offered

not for the truth of the matter, but rather to provide insight into defendants' thought process in taking disciplinary action against plaintiff"]).

Plaintiff also argues that Fittinghoff ensured that the witness statements supplied a reason to find that he violated the Written Warning, observing that several witnesses asked for feedback on their statements or revised their statements in response to feedback. However, to the extent that there were revisions, none pertained to plaintiff. Additionally, although Hokien was prompted to specify what plaintiff said to him, he did not change his initial statement that plaintiff picked him out of the crowd to make a derogatory statement to him, and nothing in the record suggests that anyone coached him on what to say or revised his statement for him.

Plaintiff also misconstrues Brown's deposition statement, that the witness statements were "without deviation," to imply that Fittinghoff fashioned a single narrative, but Brown testified that the consistency of the statements rendered anything plaintiff or Master could say superfluous, which is why they were not interviewed as part of the investigation. Accordingly, nothing in the record raises an issue of fact as to whether FIT had a good faith basis for terminating plaintiff.[9]

Lastly, plaintiff once more attempts to demonstrate that the Written Warning was issued in retaliation for his whistleblowing and that, as such, FIT's claim that he violated the Warning is pretextual. In addition to plaintiff's other arguments concerning the Quote, he claims that the Written Warning was issued in retaliation for an email Master sent on September 21, 2017 (*see* plaintiff's brief in opposition at 16). However, Master sent the email with his concern that FIT was double-paying for

[9] Notably, in Plaintiff's Response, plaintiff argues that Fittinghoff had determined to terminate plaintiff before he reviewed the witness statements and that he and HR were merely looking for a pretext to do so. Even viewed in a light most favorable to plaintiff, none of this raises an issue of fact about whether FIT had a good faith basis for terminating plaintiff. At most, these facts demonstrate that Fittinghoff believed that plaintiff had violated the Written Warning and that HR personnel were conscious of the fact that plaintiff might bring a wrongful termination suit.

services,[10] and plaintiff was merely copied on the correspondence between Master and Fittinghoff. Neither plaintiff nor Master mention this email in their affidavits, much less provide any details concerning it. Also, while plaintiff and Fittinghoff had "in passing" conversations about this matter, plaintiff does not recall the substance of those conversations. Plaintiff thus fails to demonstrate that the Warning was issued in retaliation for his whistleblowing about the Quote.

In the end, "[a]part from temporal proximity, [plaintiff] offers no evidence that [FIT's] reliance on [his violation of the Written Warning] as the reason for [his] discharge was a pretext for retaliation" (*Sanderson v New York State Elec. & Gas Corp.*, 560 Fed Appx 88, 94 [2d Cir 2014]) [affirming grant of summary judgment dismissing a Title VII retaliation claim]). As "temporal proximity is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext," FIT is entitled to summary judgment dismissing the first cause of action (*El Sayed v Hilton Hotels Corp.*, 627 F3d 931, 933 [2d Cir 2010]; *Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1222-1223 [3d Dept 2017] [explaining that temporal proximity of the protected activity to the plaintiff's termination "[was] insufficient, standing alone, to raise a triable issue of fact"]; *see also Matter of Tenenbein v New York City Dept. of Educ.,* 178 AD3d 510, 510-511 [1st Dept 2019] [finding that the CSL § 75-b claim failed because the employer "demonstrated an independent basis supporting" the petitioner's termination, his "history of poor work performance," and the "petitioner failed to show that his dismissal was in bad faith"]).

[10] Notably, plaintiff does not provide a copy of this email and instead cites to his deposition testimony about it.

B. Age Discrimination in Violation of NYSHRL (Second Cause of Action)

1. Contentions

FIT argues that the age discrimination claim must be dismissed, because there is no evidence of discriminatory animus, observing that at the time of plaintiff's termination, Fittinghoff was 55 and had previously promoted plaintiff to Director. FIT argues that the Deloitte Report demonstrates that FIT was engaged in permissible succession planning. In any event, FIT asserts, plaintiff cannot rebut FIT's legitimate, nondiscriminatory reason for the termination.

Plaintiff responds that an inference of discriminatory animus arises from: (1) plaintiff having been replaced by younger employees; (2) Fittinghoff's May 2016 inquiries regarding plaintiff's age and plans for retirement; (3) statements during plaintiuff's termination meeting, encouraging him to retire; (4) statements made by Chottiner in 2015; (5) the Deloitte Report; and (6) Fittinghoff's townhall meeting discussing the Deloitte Report's findings and recommendations. He also argues that Fittinghoff's statements to Master, regarding his plan for Master to take plaintiff's place, serve as direct evidence of discriminatory animus and that neither Fittinghoff's membership in plaintiff's protected class, nor Fittinghoff's promotion of plaintiff negates this. Plaintiff also argues that his promotion does not negate the inference of discriminatory animus, because he did not want the promotion and Fittinghoff strongarmed him into accepting it. Lastly, plaintiff argues that because Fittinghoff shared his plans for plaintiff's retirement with Master on October 20, 2017, it supports the conclusion that the Written Warning, issued on October 2, 2017, was pretext for age discrimination.

2. Applicable law

To establish a discrimination claim under the NYSHRL, a plaintiff must demonstrate:

> "(1) that he/she [was] a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action . . . , and (4) that the adverse . . . treatment occurred under circumstances giving rise to an inference of discrimination"

(*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018] [internal citations omitted]).

"[C]ircumstances that give rise to an inference of discrimination . . . include actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus and preferential treatment given to employees outside the protected class" (*Mejia v Roosevelt Is. Med. Assoc.*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50506[U], *4 [Sup Ct, NY County 2011], *affd* 95 AD3d 570 [1st Dept 2012] [internal quotation marks ad citations omitted]; *see Sogg v American Airlines*, 193 AD2d 153, 156 [1st Dept 1993] [internal citations omitted] [stating that inference of discrimination "may be drawn from direct evidence . . . or merely from the fact that the position was filled or held open for a person not in the same protected class"]).

"To prevail on a summary judgment motion, the employer must demonstrate either the employee's failure to establish every element of intentional discrimination, or—having offered legitimate, nondiscriminatory reasons for the challenged action—the absence of a material issue of fact as to whether its explanations were pretextual" (*Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314, 314 [1st Dept 2005], citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Once the defendant establishes a nondiscriminatory reason, the plaintiff must show "that there is a material issue of fact as to whether (1) the employer's asserted reason . . . is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997] [internal quotation marks and citations omitted]; *see Forrest*, 3 NY3d at 305).

3. Analysis

Here, the first three elements of a discrimination claim are not disputed as plaintiff belongs to a protected class, was qualified for the position, and his termination constitutes an adverse action. As discussed above, FIT has demonstrated that plaintiff was terminated for a legitimate, nondiscriminatory reason, namely, his violation of the Written Warning.

The record does not support an inference that Fittinghoff was motivated by discriminatory animus when he made the decision to terminate plaintiff. At 55 years old, Fittinghoff was within the same protected class as plaintiff, "weakening any inference of discrimination that could be drawn in this case" (*DiGirolamo v MetLife Group, Inc.*, 2011 WL 2421292, *11 [SD NY 2011], *affd* 494 Fed Appx 120 [2d Cir 2012] [internal quotation marks and citations omitted]; *see Meyer v McDonald*, 241 F Supp 3d 379, 390-391 [ED NY 2017], *affd sub nom. Meyer v Shulkin*, 722 Fed Appx 26 [2d Cir 2018], *cert denied sub nom. Meyer v Wilke*, 138 S Ct 2583 [2018] [explaining that, while "members of a protected class can discriminate against other members of that class," nonetheless, "(w)hen the person who allegedly discriminated against plaintiff is a member of the same protected class as plaintiff, the court applies an inference against discrimination"]).

Moreover, a little more than a year before terminating plaintiff, Fittinghoff had promoted him. While plaintiff argues that he did not want this promotion and that Fittinghoff strongarmed him into accepting it, plaintiff, nonetheless, admits that he was promoted, which negates an inference of discriminatory animus (*see Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005] [reversing denial of defendant's motion for summary judgment, where same individuals who hired and promoted plaintiff also terminated him, all within nine-month period, creating strong inference that discrimination was not reason for termination]; *see also Watkins v New York City Health & Hosps. Corp.*, 2018 NY Slip Op 31054[U], **10 [Sup Ct, NY County 2018] [finding that an inference of discrimination was belied by the fact that "the same individuals who plaintiff claim(ed) discriminated against him . . . , (had) hired and/or promoted him . . ."]).

Plaintiff argues that, despite the promotion, age was a factor in his termination, "as evidenced by [Fittinghoff's] uncomfortable conversation with plaintiff in May 2016 (which was prior to the 'promotion' decision in October 2016) about his age and when he planned on retiring." Even

assuming Fittinghoff's comments reveal a discriminatory bias, the evidence does not support a finding of discrimination, as, by plaintiff's own account, *after* this conversation, Fittinghoff promoted him (*see Dickerson*, 21 AD3d at 329; *see also Watkins*, 2018 NY Slip Op 31054[U] at **10). Moreover, these remarks "were not made close in time to the decision to [terminate plaintiff] or in relation to the process of making the decision," and "even a decision maker's stray remark[s], without more, do[] not constitute evidence of discrimination" (*Mete*, 21 AD3d at 294 [internal citations omitted]; *see also Godbolt v Verizon New York Inc.*, 115 AD3d 493, 494 [1st Dept 2014] [internal citation omitted] [finding no evidence of discrimination where "plaintiff did not demonstrate a nexus between the employee's remark and the decision to terminate him"]).

Similarly, to the extent that plaintiff relies on comments about older employees made by Fittinghoff's predecessor and various members of FIT's administration, as none of these remarks were "made by decision makers and they were not made close in time to the decision to eliminate [plaintiff]," plaintiff cannot establish a causal nexus between them and his termination (*Mete*, 21 AD3d at 294 [internal citations omitted]; *see also Godbolt*, 115 AD3d at, 494).

That plaintiff was given the option to retire, rather than be fired, is also not evidence of discriminatory animus. The evidence demonstrates that the decision to terminate plaintiff for violating the Written Warning was reached *before* Brown suggested that plaintiff be given the option to retire. Under these circumstances, that plaintiff was permitted to retire does not permit a reasonable inference of age discrimination (s*ee Tullo v McCall Pattern, Co.*, 2007 WL 1815466, *4 [SD NY 2007]).

Nor does the Deloitte Report permit an inference of retaliatory animus. The focus of the Report was, in part, FIT's succession planning and how to deal with employee retirements. As plaintiff "has failed to submit evidence to suggest that [FIT] was interested in the age of its employees for any reason other than permissible concerns about orderly succession," neither the Report nor Fittinghoff's

townhall meeting explaining it permit an inference of discriminatory animus (*see Ghorpade v Metlife, Inc.*, 2016 WL 3951183, *7 [SD NY 2016] [finding that "the fact that MetLife tracked the age of its executives (was) not evidence of discriminatory bias, where . . . the evidence indicate(d) that the company did so as a part of 'succession planning,'" to guard against company's inability to manage leadership transitions in event large portion of leadership retired, "rather than to aid discrimination"]).

Plaintiff also seeks to demonstrate pretext by pointing to the close timing of the Written Warning, dated October 2, 2017, and Fittinghoff's alleged statements to Master on October 20, 2017, that plaintiff was getting old and did not know the new technology and that Fittinghoff planned for plaintiff to retire soon and for Master to replace him. However, any causal relationship between these remarks and Fittinghoff's decision to terminate him is belied by the fact that Master, who was substantially younger than plaintiff and plaintiff's intended replacement, was also fired in connection with the February 2, 2018 incident (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 14 AD3d 325, 332 [1st Dept 2005], *affd* 6 NY3d 265 [2006] [internal citation omitted] [setting aside the verdict, where "a finding of age discrimination was not . . . one of the 'permissible inferences' the jury could choose" where "plaintiffs never disputed defendants' evidence that, at the time plaintiffs were terminated, . . . younger employees who . . . had been the subject of [the same misconduct] accusations" as plaintiffs, were likewise terminated] [internal quotation marks and citation omitted]).

Plaintiff's attempt to establish discriminatory motive for his termination, by arguing that he was replaced by younger employees, also fails. In support of this contention, plaintiff relies on FIT's responses to plaintiff's first set of interrogatories, which confirm that Dimitri Cohen and Cesar Vitery were the "younger employees" who took over plaintiff's responsibilities. However, plaintiff submits no evidence of Cohen and Vitery's respective ages. While it is undisputed that they are younger than

plaintiff, unless they are outside of plaintiff's protected class, no inference of discrimination arises (*see Meyer*, 241 F Supp 3d at 391 ["(a)n inference against discrimination is appropriate when the individual hired to replace plaintiff alleging discrimination is within the same protected class as plaintiff"]).

Here, plaintiff speculates that, "upon information and belief," Cohen "was in his 30s" and Vitery "was in his early 50s" (Plaintiff's Response, ¶ 133 [g]).[11] "Such conjecture as to . . . alleged replacement employee[s'] age[s] does not suffice to raise a triable issue of fact on a motion for summary judgment" (*Sass v Hewlett-Packard*, 153 AD3d 1185, 1186 [1st Dept 2017] [internal quotation marks and citations omitted] [finding that "(t)he record provide(d) no basis to find that the alleged replacement was substantially younger than plaintiff," where the record did not state the age of his replacement and "contain(ed) only witnesses' 'guess(es)' that she was in her 'mid–40s'"]).

Plaintiff's claim, that he reasonably believed that he was being discriminated against based on his age when he told Reduque that he wanted to speak with the FIT's representative who handled age discrimination claims, is nothing more than a conclusory assertion of discrimination, insufficient to raise an issue of fact on motion for summary judgment (*see Oates*, 106 AD2d at 291; *see also Ellison*, 178 AD3d at 669).

Finally, to the extent that plaintiff renews his objections with respect to FIT's investigation into the February 2, 2018 incident, even assuming that he raises issues of fact as to whether the stated reason for his termination was false, plaintiff is unable to raise an issue of fact as to whether FIT's real motive was age discrimination (*see Forrest*, 3 NY3d at 305 [explaining that showing of pretext requires plaintiff to "demonstrate[e] both that the stated reasons were false and that discrimination was the real reason"]; *Miranda v ESA Hudson Val., Inc.*, 124 AD3d 1158, 1162 [3d Dept 2015] [finding that even if

[11] As supporting evidence for this, plaintiff sites to response 54 of FIT's responses to plaintiff's first set of interrogatories, which is silent as to these employees' ages (*see* Plaintiff's Response at 108 n 50).

plaintiff was falsely accused and "defendant mistakenly held him accountable," plaintiff still failed to raise an issue of fact as to whether the stated reason for his termination was pretext for discrimination]; *Chin v New York City Hous. Auth.*, 106 AD3d 443, 444 [1st Dept 2013] [affirming grant of summary judgment where the "plaintiff failed to raise an issue of fact whether defendant's (legitimate, nondiscriminatory reasons for not promoting plaintiff) were merely a pretext for discrimination"]).

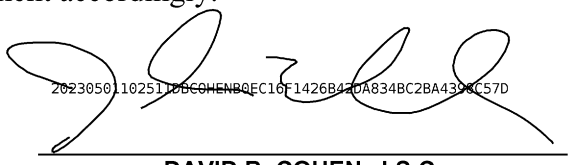
For the foregoing reasons, FIT's motion for summary judgment is granted to the extent of dismissing the second cause of action.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



5/1/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE