

**Gomez v Cablevision Sys. New York City Corp.**

2016 NY Slip Op 31177(U)

June 20, 2016

Supreme Court, New York County

Docket Number: 151245/14

Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X  
SIMON GOMEZ,

Plaintiff,

Index No.: 151245/14

- against -

CABLEVISION SYSTEMS NEW YORK CITY  
CORPORATION and RICH HOUSE,

Defendants.

-----X  
**Gerald Lebovits, J.:**

In this action for employment discrimination, defendants Cablevision Systems New York City Corporation (Cablevision) and Rich House (House) move, pursuant to CPLR 3212, for an order dismissing the complaint in its entirety.

For the reasons set forth below, the motion is denied in part and granted in part.

**Background**

Plaintiff, Simon Gomez (Gomez), began his employment with Cablevision on November 21, 2001. He was hired to work in the construction department, mainly working at Cablevision’s office located at 500 Brush Avenue, Bronx, New York 10465. At all relevant times, plaintiff’s direct supervisor was defendant House, then the construction manager.

**Plaintiff’s Contentions**

**Discrimination**

Plaintiff claims that beginning in 2005, he was subjected to discriminatory comments and acts which escalated throughout his employment. Specifically, he alleges that House would routinely call plaintiff and other African American employees “monkeys,” among other

derogatory names; and that House would routinely make racist comments, many including referring to African-Americans eating watermelons (complaint, ¶¶ 20-21; plaintiff dep tr at 303-304, 309-310). Plaintiff never complained to anyone about the watermelon comment (plaintiff dep tr at 348-349).

In addition, plaintiff alleges that he was required to adhere to a very strict set of rules and regulations, whereas Caucasian employees were given much more latitude. For example, plaintiff identifies a Caucasian employee at Cablevision, Randy Reed (Reed), who was given a number of privileges, including permitting: (1) Reed to engage in a side business in which he contracted with Cablevision;<sup>1</sup> (2) Reed to use the company vehicle while out on Worker's Compensation (plaintiff dep tr at 522); (3) Reed to use the company car to tow trailers for his personal vehicle and to run errands for his personal business while "on the clock," among others (complaint, ¶ 24; plaintiff dep tr at 529).

Plaintiff claims that he would routinely ask House why Caucasian employees were treated differently than minority employees, to which House allegedly would respond "if it walks like a duck and looks like a duck, you know what it is" (*id.*, ¶ 25). On one occasion, plaintiff alleges that he told House, "I feel like I don't have the complexion for protection around here" to which House responded "you said it, not me" (*id.*, ¶ 26; plaintiff dep tr at 309).

On one occasion, House referred to a coworker, Dan Clark as a monkey (plaintiff dep tr at 309-310). Plaintiff never said anything to House about the comment, nor did he report it to

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<sup>1</sup> While plaintiff alleges in the complaint that Reed contracted with defendant Cablevision, during his deposition, plaintiff testified that that was a misstatement, and that one of Cablevision's contractors used Reed's services, not Cablevision directly (plaintiff dep tr at 311-312).

human resources or anyone (*id.* at 317-318). House denies ever calling Dan Clark, and never referred to plaintiff or any other employee by such a name (House dep tr at 57; plaintiff dep tr at 319-320).

Plaintiff also alleges that coworkers James Solis and Jose Zayas, both technicians at Cablevision, would openly use the word “nigger” when addressing each other and in the presence of others, including House and plaintiff, without repercussion (complaint, ¶¶ 28-29; plaintiff dep tr at 358-359). When plaintiff complained of this conduct to House, House said he would talk to them, however, such conversations between Solis and Zayas continued (plaintiff dep tr at 359, 366). Solis was eventually promoted. House recalls overhearing Solis and Zayas using the “n-word.” House testified that he called them into his office and told them that use of the “n-word” was not allowed in the office (House dep tr at 52-53). House denies that plaintiff ever spoke to him about the n-word being used at Cablevision (*id.* at 53).

#### Allegations regarding Unpaid Wages

Plaintiff alleges that in February 2010, he worked his regular shift from Monday, February 8<sup>th</sup> through Thursday, February 11<sup>th</sup> from 7:00 a.m. to 3:30 p.m. each day. After he returned home on February 11<sup>th</sup>, he was directed to report back to work at 8:30 p.m. that evening and work through the night until 6:00 a.m. on Friday. After an hour break, he was then to begin his regularly assigned shift on Friday, February 12<sup>th</sup> from 7:00 a.m. until 3:30 p.m. Again when he returned home that afternoon, he was told to report back to work from 6:00 p.m. until 12:00 midnight that Friday, and then again from 11:00 a.m. until 7:00 p.m. on Saturday, February 13<sup>th</sup>. He claims that he worked a total of 76 hours that week, and was not paid overtime as required under New York law. Plaintiff complained to the director of construction, Peter Odell, and to his

manager House, regarding Cablevision's violation of the law by refusing to pay him overtime. He claims that as a result of his complaint, he was the target of retaliation (complaint, ¶ 16).

Again in June 2012, plaintiff was directed to work from 9:00 a.m. to 9:00 p.m. following his regular work week. After working the additional 12-hour shift, plaintiff inquired with House regarding the time. House told him plaintiff that he would not be compensated for his time. Plaintiff asked House if he could take the following Monday off since he was not being paid for his time. House advised that if plaintiff wanted to take the day off, plaintiff would have to take it as a vacation day (*id.*, ¶ 35).

Plaintiff said that if he had to use a vacation day, he would enter the hours he worked on Saturday (*id.*, ¶ 36). The request was denied (*id.*, ¶ 37). Plaintiff contacted and left messages for Odell regarding Cablevision's refusal to pay overtime (*id.*, ¶ 38). Odell never responded (*id.*). Gomez entered the overtime he worked on his time sheet, and submitted the hours to be paid (*id.*, ¶ 39).

On July 3, 2012, House approached plaintiff and demanded an explanation for his time sheet. Plaintiff explained that since he was not going to get compensatory time in exchange for the additional hours he worked, he entered the actual time he worked so he would be paid for it. House stated that he would not be paid for Saturday.

On July 5, 2012, plaintiff sent an email to the human resources (HR) department and complained that he was not being paid overtime despite being forced to work. He also advised that he had reached out to Odell to no avail.

On July 17, 2012, plaintiff noticed that House had erased the 12 hours he worked on that Saturday, and entered the time as eight regular hours for Monday (the day that plaintiff took off)

without plaintiff's consent. Plaintiff again advised HR. Plaintiff claims that on August 3, 2012, he was contacted by an HR representative, Joanne Indemaio, as well as Odell, requesting a meeting. During the meeting, which plaintiff thought was to address his complaints, plaintiff was terminated (complaint, ¶ 45).

#### Defendants' Contentions

Defendants claim that plaintiff was hired in November 2001 as a construction supervisor in Cablevision's construction department. Within that position, plaintiff was provided with a company vehicle to get around between construction sites throughout the City, as well as a company fuel card to the vehicle. Construction supervisors are exempt employees, and are required to electronically enter 8.5 hours for each workday, regardless of actual time worked, to keep track of days of work and days off.

In 2004, defendant House (Caucasian) was promoted to construction manager. His direct reports were plaintiff (African-American), Randy Reed (Caucasian), Winston McIntosh and Burt Blackman (both African-American).

#### *Plaintiff's Alleged History of Misconduct & Company Policy Violations*

According to defendants, throughout plaintiff's employment, plaintiff was repeatedly counseled for his violations of policies and procedures.

In 2005, plaintiff received a written warning. Specifically, on March 11, 2005, plaintiff was at a project with House, when a truck driven by John Spinelli, an employee with one of Cablevision's contractors, swerved towards them but did not make contact. Plaintiff kicked the truck as it passed him. Plaintiff and Spinelli exchanged words and got into a physical altercation. Plaintiff claims that he did not do anything to instigate the fight, but was just defending himself

trying to get Spinelli off of him (plaintiff dep tr at 378). Instead of diffusing the situation, plaintiff was reported as saying that “it was not over” and that he would get his gun “taking [Spinelli] out.” Plaintiff testified, however, that when plaintiff told House he was going to go to HR, House and Odell responded “you could go to human resources with it, but these things tend to have a tendency to backfire on you . . . [and] you many not be happy with the result” (*id.* at 377). Due to plaintiff’s failure to defuse the situation, plaintiff received a “Formal Written Demand” dated April 20, 2005. At Cablevision’s request, Spinelli was also removed from the project and Cablevision’s list of approved contractors for approximately one year.

On December 3, 2010, plaintiff was verbally counseled for sharing confidential company information with an employee of Consolidated Edison (ConEd). ConEd contacted Cablevision accusing Cablevision’s upper management of violating construction safety processes. While plaintiff was verbally coached about disclosing confidential company information, no further disciplinary action was taken. The verbal coaching was noted in his performance review dated January 19, 2011, however, he received an overall rating of “Achieved Expectations” and a pay increase.

On August 27, 2011, plaintiff had an accident with his company vehicle. Rather than immediately report the accident to management, as required by company policy, plaintiff called his wife to have her pick him up. Plaintiff also failed to notify the police before leaving the scene. The reason for company notification is to permit substance testing, which is required to take place no more than two hours following an accident. Here plaintiff failed to contact management or the police and simply explained that it was because of inclement weather, however, he did not explain how he was able to call his wife. Plaintiff was suspended for 10

days without pay.

On September 20, 2011, plaintiff was counseled by House regarding a ticket he received for running a red light in the company vehicle, which occurred while covering McIntosh's stand-by shift, without notifying House or Cablevision management, and was also against company policy.

In June 2012, House received a gas consumption report which indicated that plaintiff had used the company gas card to fuel up his vehicle on May 18, 2012 and again on May 21, 2012. After confirming plaintiff was not on stand-by duty over that weekend and checking the mileage, House questioned plaintiff as to why 201 miles had been traveled during the weekend, requiring additional fuel. Plaintiff responded that he had driven through Manhattan and Queens, which accounted for 50 miles. Plaintiff did not explain the other 160 miles. No reprimands were issued in connection with this incident.

*Events Leading to Plaintiff's Termination*

On June 11, 2012, plaintiff was observed unsafely driving into a Cablevision parking lot at a very high speed, nearly striking an employee, followed by another vehicle. The other driver reported that plaintiff ran a red light on a public highway and nearly struck his vehicle, causing the other driver to have to drive on the curb and damage his car. The driver stated that he had followed plaintiff into the parking lot in order to get the license plate number. During the company's investigation, plaintiff claimed that the other driver had tried to cut him off, and plaintiff became so angry, he sped into the Cablevision location and through the parking lot in order to avoid the driver. Plaintiff was advised that his reckless driving was not justified and that he should have contacted Cablevision dispatch personnel to contact the police if he needed to

evade the other driver.

By email dated June 11, 2012, House contacted HR for guidance about how to proceed with plaintiff (defendant's exhibit 17). It is not clear from the record what response House received from HR. However, on June 23, 2012, Jorge Vasquez contacted Cablevision about the incident, claiming that he was involved in the incident with plaintiff and sought compensation for damage to his car (defendant exhibit 19). On June 28, 2012, House provided HR with documents concerning the time line of issues he had with plaintiff (defendant exhibit 22). Cablevision began a further investigation into the incident. On July 31, 2012, HR decided to proceed with separation (defendant exhibit 21).

On August 3, 2012, plaintiff met with Odell and an HR representative (plaintiff dep tr at 725). House testified that he had no role in plaintiff's termination (House dep tr at 63). Plaintiff testified that the reason he was terminated was never really made clear (plaintiff dep tr at 278), although Odell informed him that the company investigated the incident involving the other driver, and found that his erratic driving put the company and other people at risk, in contravention to company policy (*id.* at 725-726). Odell also mentioned the issue concerning his fuel usage (*id.* at 726). Due to this incident and the incidents above, plaintiff was terminated.

### **Discussion**

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact” (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Under both the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), it is an unlawful discriminatory practice for an employer, because of an individual's race, to refuse to hire or discharge such individual, or to otherwise discriminate against such individual in the terms, conditions and privileges of employment (Executive Law § 296 [1] [a]; Administrative Code of the City of New York [Administrative Code] § 8-107 [1] [a]).

Claims of discrimination and retaliation under the NYSHRL and NYCHRL are subject to a three-year statute of limitations (Executive Law § 297 [a]; Administrative Code § 8-502 [d]). Plaintiff commenced this action on February 11, 2014. Defendants argue that any allegations of discrimination arising before February 11, 2011 are, therefore, time-barred, and must be dismissed, including, but not limited to: (a) a written reprimand in 2005; (b) allegations of favorable treatment toward Reed, such as being permitted to keep a company vehicle while out on workers' compensation leave in or around 2008/2009; (c) verbal coaching in December 2010 and an alleged negative mark in plaintiff's performance evaluation in January 2011.

Plaintiff counters that his allegations fall under the continuing violation exception as plaintiff was allegedly subject to specific and related instances over a continued period of time (see *Lambert v Genesee Hosp.*, 10 F3d 46, 53 [2d Cir 1993] [under the continuing violation exception, a plaintiff who files a complaint that is timely as to an incident of discrimination "in

furtherance of an ongoing policy of discrimination, all claims of discriminatory acts under that policy will be timely even if they would be untimely standing alone”) – specifically, the use of the “n-word” by Cablevision employees, racially tinged comments by plaintiff’s superior, House and disparate treatment afforded to similarly situated non-African American employees at Cablevision (*see Hernandez v Kellwood Co.*, 2003 WL 22309326, 2003 US Dist LEXIS 17862 [SD NY 2003] [continuing violation analysis applied to discrimination claims under NYSHRL]; *Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023[A], 2004 NY Slip Op 51008[U] [Sup Ct, NY County 2004]).

Defendants reply that plaintiff’s untimely claims of discrimination are not saved by the continuing violation doctrine as they are discrete acts which do not constitute a continuing violation. The court agrees. “A continuous practice and policy of discrimination may be shown by ‘proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice’” (*Kumaga v New York City School Constr. Auth.*, 27 Misc 3d 1207[A], 2010 NY Slip Op 50619[U], \*9 [Sup Ct, NY County 2010] [citation omitted]). Plaintiff does not dispute that the 2005 and 2010 reprimands are discrete acts, but rather points to his allegations concerning the permissive use of the n-word by coworkers, House’s racially tinged comments and drawings and the disparate treatment afforded to similarly situated non-African-American employees at Cablevision, presumably Reed. Plaintiff’s complaints of reprimands back in 2005 as well as verbal coaching in 2010 constitute separate and discrete acts, and, are, therefore, time-barred (*Singh v New York City Off-Track Betting Corp.*, 2005 WL 1354038, \*12, 2005 US Dist LEXIS 11098 [SD NY 2005] [reprimands constitute

discrete acts]).

“A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

“To support a prima facie case of . . . discrimination under [both the State and City] Human Rights Law[s], plaintiff must demonstrate: (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of [race] discrimination”

(*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997] [citation omitted]; *see also Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1<sup>st</sup> Dept 2011]).

Once a plaintiff meets his or her initial burden, the burden shifts to the defendant to demonstrate that the action(s) taken against the plaintiff were for legitimate, nondiscriminatory reasons (*Balsamo v Savin Corp.*, 61 AD3d 622, 623 [2d Dept 2009]). The plaintiff must then bear the burden “to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination” (*Ferrante*, 90 NY2d at 629-630; *see also Casablanca v New York Times Co.*, 47 Misc 3d 1215[A], 2015 NY Slip Op 50629[U] [Sup Ct, NY County 2015]). In other words, “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 [race] was the real reason” (*Hardy v General Elec. Co.*, 270 AD2d 700, 703 [3d Dept 2000] [internal quotation marks and citation omitted]).

When analyzing cases under the NYCHRL, however, cases must be analyzed under both the burden shifting analysis, as well as a mixed-motive analysis (*see Melman v Montefiore Med.*

*Ctr.*, 98 AD3d 107, 113 [1<sup>st</sup> Dept 2012]). Under this more liberal standard, once a defendant has offered its nondiscriminatory reasons, the court should “proceed to see whether ‘no jury could find defendant liable under any of the evidentiary routes - *McDonnell Douglas* [burden shifting], mixed motive, direct evidence, or some combination thereof” (*Casablanca*, 47 Misc 3d 1215[A], \*9, quoting *Bennett*, 92 AD3d at 45).

#### *Discriminatory Termination*

Plaintiff is an African-American male who is qualified for the job he held at Cablevision, and suffered an adverse employment action by being terminated from his employment. However, plaintiff must also demonstrate that the decision to terminate plaintiff’s employment was under circumstances giving rise to an inference of discrimination (*Forrest*, 3 NY3d at 305). The court finds that plaintiff does not establish that his termination was discriminatory.

Defendants offer a legitimate, nondiscriminatory reason for the termination, namely, that plaintiff was found to have been driving the company vehicle recklessly, putting others at risk in contravention to company policy.

Plaintiff fails to show that the stated reasons are pretextual or that “regardless of any legitimate motivations the defendants may have had, the defendants were motivated at least in part by discrimination” (*Carryl v MacKay Shields, LLC*, 93 AD3d 589, 590 [1<sup>st</sup> Dept 2012] [internal quotation marks and citation omitted]). Plaintiff testified that the only person who discriminated against him was House, however, it is clear from the record that House was not involved in the decision to terminate plaintiff, aside from providing HR with a time line of events concerning plaintiff’s personnel issues during his employment. Given the context of this

incident, particularly since plaintiff had previous issues concerning Cablevision's company car policy, defendants offer a legitimate reason for his termination.

“Verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue” (*Chiara v Town of New Castle*, 126 AD3d 111, 124 [2d Dept 2015]). “In determining whether a comment is probative of discrimination, the following factors are considered: (1) whether the comment was made by a decision maker, a supervisor, or a low-level coworker, (2) whether the remark was made close in time to the adverse employment decision, (3) whether a reasonable juror could view the remark as discriminatory, and (4) the context of the remark—that is, whether the remark related to the decision-making process” (*id.*).

Here the court finds that plaintiff's allegations regarding his coworkers' use of the “n-word,” while offensive, do not establish discriminatory intent (*Fruchtman v City of New York*, 129 AD3d 500, 501 [1<sup>st</sup> Dept 2015]). Further, plaintiff testified at his deposition that the coworkers ceased using the n-word in his presence, several years before the decision to terminate him was made. Moreover, to the extent that House made a caricature of another African-American coworker holding a watermelon and referring to another as a monkey on another occasion several years later, while offensive, is insufficient to state a claim of discrimination. In addition, plaintiff testified that he raised no objection to the comment to House or to anyone else at Cablevision. It is settled that “isolated and occasional comments . . . are insufficient” to establish the existence of actionable discrimination or improper discharge (*Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193, 194 [1<sup>st</sup> Dept 2005]; *Forrest*, 3 NY3d at 310–311).

Given the context of the incident in June 2012, particularly since plaintiff had previous

issues concerning Cablevision's company car policy, defendant Cablevision offers a legitimate reason for its termination of plaintiff; and the court finds that "there is no evidentiary route that could allow a jury to believe that discrimination . . . played a role" in the decision to terminate plaintiff as is required under NYSHRL and NYCHRL respectively (*Reyes v Brinks Global Servs. USA, Inc.*, 112 AD3d 805, 806 [2d Dept 2013] [citation omitted]).

#### *Hostile Work Environment Claims*

A racially hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993] [citations and internal quotation marks omitted]; *Nettles v LSG Sky Chefs*, 94 AD3d 726, 730 [2d Dept 2012]). "Even one racial epithet is inexcusable" (*Forrest*, 3 NY3d at 310). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive'" (*id.* at 310-311, quoting *Harris*, 510 US at 23). While a hostile work environment need not rise to the level of "severe or pervasive" to be actionable under the NYCHRL, plaintiff must establish that the alleged conduct is more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1<sup>st</sup> Dept 2009]).

Plaintiff alleges that two of his coworkers used the "n-word", and after he advised them

that their use of the “n-word” bothered him, they ceased directing it at him (plaintiff dep tr at 493).<sup>2</sup> However, plaintiff testified that the word was still used in and around the workplace. While these allegations may not be actionable under the NYSHRL, as they do not meet the severe or pervasive standard (*see e.g. Forrest*, 3 NY3d at 311; *Thompson v Lamprecht Transp.*, 39 AD3d 846, 847 [2d Dept 2007]) and did not interfere with plaintiff’s work (*Chiara*, 126 AD3d at 126), the court finds that a jury may find that permissive use of such an offensive word is more than a petty slight or trivial inconvenience, sufficient to sustain a claim under the NYCHRL (*see e.g. Diggs v Oscar de la Renta, LLC*, 2014 NY Slip Op 33173[U] [Sup Ct, Queens County 2014]).

Therefore, the motion for summary judgment dismissal of the hostile work environment cause of action under NYSHRL is granted but denied under NYCHRL.

#### *Intentional Infliction of Emotional Distress*

The elements of a claim for intentional infliction of emotional distress (IIED) are: (1) “extreme and outrageous conduct;” (2) “intent to cause or disregard of a substantial probability of causing, severe emotional distress;” (3) “a causal connection between the conduct and the injury; and” (4) “severe emotional distress” (*Turner v Manhattan Bowery Mgt. Corp.*, 49 Misc 3d 1220[A], 2015 NY Slip Op 51827[U], \*7 [Sup Ct, NY County 2015]). The threshold in such cases is extremely difficult to reach, a plaintiff must show that the conduct complained of is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community” (*id.* at \*8,

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<sup>2</sup> As noted above, the court finds those allegations which pre-date February 11, 2011 to be isolated incidents insufficient to warrant a continuing violation, and are, therefore, time-barred.

quoting *Fisher v Maloney*, 43 NY2d 553, 557 [1978]). Here, when looking at the totality of the circumstances and all of the allegations raised by plaintiff, even if taken as true, the court does not find the allegations rising to such a level of extreme emotional distress (see *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 270 [1<sup>st</sup> Dept 1998]). Accordingly, the motion for summary judgment dismissal of the causes of action for IIED is granted.

#### *Unpaid Wages*

New York Labor Law, 12 NYCRR 142-2.2 (NYLL) requires that “[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee’s regular rate in the manner and methods provided in and subject tot the exemptions of the . . . Fair Labor Standards Act [FLSA].”

Defendants argue that plaintiff’s job duties fall within the classification as an exempt employee under the “administrative exemption.” In order to qualify as an administrative employee, defendant must establish that

“(a) [plaintiff’s] primary duty consist[ed] of the performance of office or nonmanual field work directly related to management policies or general operations of such individual’s employer; (b) who customarily and regularly exercis[ed] discretion and independent judgment; (c) who regularly and directly assist[ed] an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; and (d) who is paid for his services a salary of not less than . . . \$536.10 per week on and after January 1, 2007 . . . \$543.75 per week on or after July 24, 2009 . . . [and] \$600.00 per week on and after December 31, 2013”

(12 NYCRR 142-2.14 [c] [4] [ii]).

There is no dispute that plaintiff’s pay exceeded the regulatory minimum per week, leaving the court to determine the nature and legal character of his duties and the scope of his discretion in their exercise.

*Primary Work Duties and the Relationship to Cablevision's Management Policies or General Operations*

Defendants argue that plaintiff had a primary duty performing work directly related to Cablevision's management policies or general operations, specifically with respect to recommending measures to mitigate the amount of delay and costs incurred by contractors with respect to the work concerning fibers and cables, which are essential to the operation of Cablevision's business in providing cable and Internet services. "An employee's duties are directly related to the employer's management policies or general business operations when they involve the administrative operation of the business as distinguished from production work" (*Matter of Scott Wetzel Servs. v New York State Bd. of Indus. Appeals*, 252 AD2d 212, 214 [3d Dept 1998]). It is defendants' burden to establish that the administrative exemption applies (*id.*).

It is undisputed that the work Gomez performed was "nonmanual work." The issue is whether the primary duty of the field work Gomez performed was related to the management or general business operations of Cablevision, or instead primarily related to direct, hands-on, production and distribution of cable and Internet services. Such work includes "finance; accounting; . . . quality control; purchasing; procurement; . . . safety and health; personnel management; . . . labor relations; . . . legal and regulatory compliance; and similar activities" (29 CFR § 541.201 [b]). "Administrative work could also include 'advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control'" (*Grage v Northern States Power Co.-Minnesota*, 813 F3d 1051, 1055 [8<sup>th</sup> Cir 2015], quoting *Renfro v Indiana Michigan Power Co.*, 370 F3d 512, 517 [6<sup>th</sup> Cir 2004]).

Conversely, “‘production’ employees . . . ‘generate (i.e. ‘produce’) the very product or service that the employer’s business offers to the public.’” (*id.* at 1055-1056). By defendants’ own admission, plaintiff was responsible for determining what steps were needed to restore damaged fibers and cables, and other such outages. These related to the “very product or service” that Cablevision offers to the public. However, as in *Grage*, “the jury needs to weigh the evidence and determine the primary duties [Gomez] performed as a Supervisor . . . before the court can decide the legal question of whether those duties exclude [him] from overtime pay under the FLSA” (*Grage*, 813 F3d at 1056).

“A jury could find that [plaintiff] was responsible for long-term planning of installations and maintenance, short-term planning such as daily work assignments, and that . . . [he] merely provided administrative support for the field crews that build and repair the structures needed for [Cablevision’s] production and services, [i.e., that plaintiff] engage[d] in work that [was] ancillary to [his] employer’s principal production activity, which functions the courts have determined to be administrative work”

(*id.*, quoting *Renfro*, 370 F3d at 517 [internal quotation marks and citation omitted]).

Accordingly, there remains a question of fact as to whether plaintiff’s duties meet the first prong of the administrative exemption.

*Whether Plaintiff Regularly Exercised Independent Judgment and Discretion*

“[E]xercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered” 29 CFR 541.202 [a]). Though generally such discretion should be “independent choice, free from immediate direction or supervision,” the fact that “decisions or recommendations are reviewed at a higher level” (29 CFR 541.202 [c]) does not render the actions nondiscretionary (*Klein v Torrey Point Group, LLC*, 979 F Supp 2d 417, 429

[SD NY 2013]). However, “key factors illustrating that an employee does possess the requisite independence to satisfy the administrative exemption include ‘an employee’s discretion to set [his] own schedule and to tailor communications to a client’s individual needs’” (*id.* [citation omitted]). Other factors a court may consider, include, but are not limited to: whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances, his involvement in planning long-term or short-term business objectives, his authority to negotiate and bind the company on significant matters, and his authority to waive or deviate from established policies and procedures without prior approval (29 CFR 541.202 [b]).

Plaintiff testified that his role was to protect and avoid damage to Cablevision’s fibers and cable, including by being present at construction projects in the field and directing city contractors to avoid Cablevision facilities (plaintiff dep tr at 167), which required him to use independent judgment by: (i) making assessments and recommendations about whether and where to reroute Cablevision facilities to avoid impacting the progress of NYC agency and utility construction projects, and vice versa; (ii) design a system to create estimates of the cost for city construction projects to avoid Cablevision facilities; and (iii) making recommendations to his supervisors as to the amounts to be paid to city contractors for delays created by the need to avoid Cablevision facilities (*id.* at 138-147, 162-165).

House avers that while plaintiff did not always make the final decisions, plaintiff’s recommendations were given substantial weight due to his knowledge, specialized training and experience in the field (House aff, ¶ 16). Plaintiff counters that he did not have any ultimate decision-making authority (plaintiff dep at 147), and that there is no evidence that plaintiff performed any of the tasks outlined for court consideration as detailed above (*see Driggers v*

*Cable Television Installation & Service, Inc.*, 2009 WL 1684449, \*5, 209 US Dist LEXIS 50354 [MD Fl 2009]).

Based on the record, it is clear that plaintiff also did not have the authority to hire or fire employees, negotiate and bind the company on significant matters, or deviate from established policies and procedures without prior approval. It is reasonable for a jury to conclude that plaintiff did not exercise independent judgment based on these factors. Therefore, questions of fact remain as to whether plaintiff did, in fact, exercise regular independent judgment in his job.

In light of the above, this branch of defendants' summary judgment motion is denied.

#### *Discriminatory Retaliation*

To make out a retaliation claim under the NYSHRL and NYCHRL, plaintiff is required to show that "(1) [he] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1<sup>st</sup> Dept 2012]; *Weissman v Dawn Joy Fashions, Inc.*, 214 F3d 224, 234 [2d Cir 2000]). Plaintiff claims that he engaged in a protected activity by making a complaint of discrimination to his supervisor, and in response he was issued a written reprimand following an incident with John Spinelli, and a negative mark on his 2011 performance evaluation, and ultimately, was terminated from his employment.

Negative evaluations without tangible consequences do not constitute adverse employment actions (*Mejia v Roosevelt Is. Med. Assoc.*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50506[U] [Sup Ct, NY County 2011], *affd* 95 AD3d 570 [1<sup>st</sup> Dept 2012]). Here, plaintiff's

negative mark on his performance evaluation and written reprimand were not accompanied by any other consequences as his pay increased and his title remained the same (*id.*). Moreover, there is no temporal proximity in plaintiff's complaint to House in 2005, and in 2009 to another manager, and his termination, which occurred in 2012, as defendants argue' (*Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 545 [1<sup>st</sup> Dept 2014] [plaintiff's internal complaint of discrimination was "far too removed" in time from adverse employment action, which occurred over one year after the complaint, to establish requisite causal nexus]; *Williams v City of New York*, 38 AD3d 238 [1<sup>st</sup> Dept 2007]).

Accordingly, plaintiff fails to establish a claim for retaliation under NYSHRL and NYCHRL as a matter of law.

#### *New York Labor Law Retaliation*

Under New York Labor Law (NYLL) § 215 (1) (a), "no employer . . . shall discharge, thereafter, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his . . . employer . . . (ii) . . . that the employer has violated any provision of [the Labor Law]" (*Liebowitz v Bank Leumi Trust Co. of N.Y.*, 152 AD2d 169, 174 [2d Dept 1989]). In order to establish a prima facie case of retaliation under the NYLL, plaintiff must establish that "while employed by [Cablevision], he made a complaint about [Cablevision's] violation of the [NYLL] and, as a result, was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action" (*Oram v SoulCycle LLC*, 979 F Supp 2d 498, 511 [SD NY 2013] [internal quotation marks and citation omitted]). In addition, "there must be a nexus between the employees complaint and the

employer's retaliatory action" (*Esmilla v Cosmopolitan Club*, 936 F Supp 2d 229, 239 [SD NY 2013] [internal quotation marks and citation omitted]). "Once the plaintiff establishes a prima facie case of retaliation under Section 215, the burden shifts to the defendant to produce evidence suggesting that it had a legitimate, non-retaliatory explanation for its actions" (*id.*). "The plaintiff must then persuade the finder of fact that the proffered explanation is pretextual" (*id.*).

Plaintiff claims that he made two complaints to Cablevision's HR department in July 2012, one month prior to his termination, regarding the company's failure to pay him overtime and House's changing plaintiff's work hours on the time sheet after plaintiff had entered them in. Defendants concede that plaintiff complained to HR, however, they make the argument that it is questionable whether the specific person in HR to whom plaintiff complained had any involvement in the decision to terminate, since plaintiff had no specific knowledge. This only raises a question of fact. The court finds that plaintiff met his prima facie burden.

Defendants, as discussed above, contend that they had a legitimate, nondiscriminatory reason for plaintiff's termination, i.e., repeated violation of company policy. However, plaintiff counters that such an argument is pretextual, since the timing of the termination occurred two months after the incident with Vazquez, but only one month after plaintiff complained of the company's failure to pay him overtime. Further, plaintiff testified that one of the reasons he was being terminated was since he liked sending emails to people (Gomez dep at 278), which he concluded was his email to HR concerning the overtime complaint (plaintiff exhibit D). It is unclear why the decision to terminate plaintiff took nearly two months to make. A jury could reasonably conclude that the timing of Gomez's overtime complaints one month before his termination supports a finding of retaliation.

Therefore, the court denies this branch of defendants' motion.

*Individual Claims against House*

Plaintiff alleges that House should be held individually liable under both the NYSHRL and NYCHRL because he aided and abetted in the allegedly discriminatory conduct. Executive Law § 296 (b) provides that “[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so.” Likewise, the Administrative Code § 8-107 (6) makes it unlawful for “any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.”

“[I]n contrast to Executive Law § 296 (1) (a), which in defining those who may be held liable for unlawful discriminatory practices speaks of an ‘employer’ without mention of employees and agents, Administrative Code § 8–107 (1) (a) expressly provides that it is unlawful for ‘an employer or an employee or an agent thereof to engage in discriminatory employment practices’” (*Murphy v ERA United Realty*, 251 AD2d 469, 471 [2d Dept 1998]). “Thus, the NYCHRL provides for individual liability of an employee ‘regardless of ownership or decision making power’” (*Malena v Victoria's Secret Direct, LLC*, 886 F Supp 2d 349, 366 [SD NY 2012] [citation omitted]; see also *DeFrancesco v Metro North R.R.*, 2012 NY Slip Op 31626[U] [Sup Ct, NY County 2012], *affd* 112 AD3d 445 [1st Dept 2013] [“The question of whether individual defendants who work in a supervisory capacity can be held liable under the various discrimination statutes is complicated and the law is sometimes conflicting, largely depending on which law the claim is made under”]).

Regardless, it is impossible for House “to ‘aid and abet’ in [Cablevision’s] discriminatory acts (Exec Law § 296 [6] and [7]) if, in fact, what plaintiff is claiming is that [House] [him]self personally discriminated against” plaintiff (*DeFrancesco v Metro-North R.R.*, 2012 NY Slip Op 31626[U]). Such a finding would also be true under the NYCHRL, except that there remains a question of fact as to whether House aided plaintiff’s coworkers by failing to discipline them in their continual use of the “n-word” in the workplace. Consequently, defendants’ motion for summary judgment on the claims against House is granted with respect to the NYSHRL claims, however, it is denied as to the NYCHRL cause of action.

### **Conclusion**

Accordingly, it is

ORDERED that the motion by defendants Cablevision Systems New York City Corporation and Rich House for summary judgment dismissal of the complaint is granted in that the causes of action for: (1) discrimination under the New York State Human Rights Law, and New York City Human Rights Law; (2) hostile work environment under the New York State Human Rights Law; (3) intentional infliction of emotional distress; (4) retaliation under the New

York State and City Human Rights Laws; (5) individual claims as against defendant Rich House under New York State Human Rights Law are dismissed, and the motion is otherwise denied.

ORDERED that defendants serve a copy of this decision and order with notice of entry upon plaintiff and upon the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: June 20, 2016



J.S.C.

**HON. GERALD LEOVITS**  
J.S.C.