Miller v New York Univ.

2008 NY Slip Op 33057(U)

October 27, 2008

Supreme Court, New York County

Docket Number: 111945-2006

Judge: Carol R. Edmead

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SCANNED ON 10/28/2008
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. PART 35

Index Number : 111945/2006

MILLER, DOUGLAS

VS.

NEW YORK UNIVERSITY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE 6/2/08

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

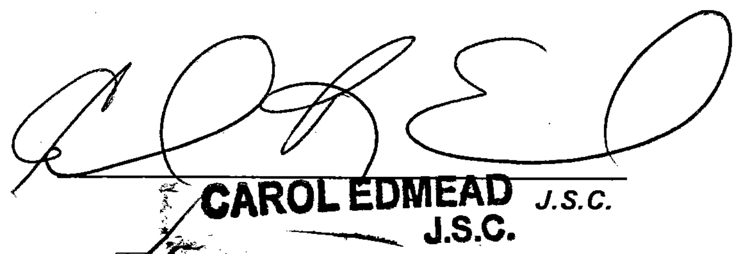
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, on the ground that issues of fact exist as to whether defendants violated NYCHRL §8-107 when it removed plaintiff as Residency Director in October 2004; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/27/08



CAROL EDMEAD J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

DOUGLAS MILLER,

Plaintiff,

Index No. 111945-2006
Sequence #001

-against-

NEW YORK UNIVERSITY, NEW YORK UNIVERSITY SCHOOL OF MEDICINE FOUNDATION, INC. and NYU HOSPITALS CENTER,

Defendants

---x

FILED
OCT 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Douglas Miller ("plaintiff"), seeks damages under New York Human Rights Law ("NYCHRL") against defendants New York University, New York University School of Medicine Foundation, Inc. and NYU Hospitals Center (collectively "defendants" or "NYU") for wrongful retaliation. Plaintiff alleges that the Chair of the Pathology Department and Vice-Chair for Clinical Affairs of the Pathology Department at NYU began retaliating against him when he challenged their plan to select residents based on their national origin: All-American residents over Asian PhDs.

Defendants now move for summary judgment dismissing the complaint (CPLR 3212) on the grounds that plaintiff cannot show that he was retaliated against for engaging in protected activity, that any of the alleged retaliatory acts were reasonably likely to deter a person from engaging in protected activity, and that there is any causal connection between his alleged protected activity and materially adverse action.

Factual Background[1]

Plaintiff joined NYU as an Assistant Professor of Pathology in the Division of Neuropathology in June 1987. In 1994, he was granted tenure as Associate Professor of Neuropathology and Neurosurgery, and then, appointed Director of Neuropathology and Director of the Neuropathology Training Program. In 1997, he was appointed Director of Residency Training for the Department of Pathology, and in this capacity, became involved on a national level with pathology residency activities. He was then elected to the Council of Pathology Residency Directors ("PRODS") in 2002 and to the two-year term of Vice-Chair of the PRODS Council in July 2004. After a two-year term as Vice-Chair, there would be automatic succession to the position of Chairman of the PRODS Council for two years. In February 2003, plaintiff was promoted to full Professor, retroactive to September 2002.

In 1997, one of the attending neuropathologists resigned, leaving plaintiff and Dr. David Zagzag ("Dr. Zagzag"), the other attending neuropathologist, in the Division of Pathology for several years.

In September 2004, Dr. David Roth ("Dr. Roth") was appointed Chairman of Pathology. Plaintiff met with Dr. Roth to discuss the need for a third neuropathologist, to run the autopsy service and teach residence autopsy techniques.

On October 18, 2004, plaintiff attended a meeting with Dr. Roth and Dr. Joan Cangiarella, the Vice-Chair for Clinical Affairs of the Department of Pathology (the "meeting"). At this meeting, a number of changes to the residency program were suggested, including when

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[1] These facts are taken from the plaintiff's First Amended Complaint, and plaintiff's opposition to the motion.

residency applicants were interviewed and the type of resident recruited by the Pathology Department. Plaintiff claims that Dr. Cangiarella stated that NYU "had a reputation for taking only Asian PhDs" and wanted to recruit a "different" resident population. Plaintiff claims that he objected to this characterization of NYU's residency program in the Pathology Department, and noted that NYU had excellent residents from American and foreign schools, including residents from China who had done research and obtained PhD degrees in the United States. Plaintiff also noted that choosing residents based on ethnicity or national origin was probably a violation of federal and state laws, as well as a violation of the rules of the National Residency Matching Program, through which most of the residents were obtained.

Within days after this meeting, by telephone and in Dr. Roth's office, Dr. Roth confronted plaintiff and accused him of speaking negatively about Dr. Roth behind his back.

By letter dated October 20, 2004 ("Dr. Roth's termination letter"), Dr. Roth removed plaintiff as Director of the Residency Program of the Pathology Department. In his letter, Dr. Roth indicated that plaintiff's removal as Director of the Residency Program would permit plaintiff to spend more time on his work in the Division of Neuropathology and denied the suggestion of other colleagues that leaving this Division with only two neuropathologists would render the service "unstable." Plaintiff would be responsible for two-thirds of the neurosurgery pathology cases (in addition to his other responsibilities) while Dr. Zagzag would be responsible for one-third.

On October 22, 2004, plaintiff wrote a "memorandum for file" detailing the substance of the meeting ("plaintiff's memorandum").[2]

By email dated October 24, 2004 ("plaintiff's email"), plaintiff expressed a need for a third neuropathologist and a "hope that the recruitment process will continue to seek out the very best and brightest of residents regardless of their origins; I was disturbed to hear Joan speak of the "all American graduate" complement at Cornell as if that was a desirable characteristic by itself. . . ."

In response on the same day, Dr. Roth acknowledged that he would consider a "2+" arrangement which would leave room for higher salaries ("Dr. Roth's email"),

Since August 2004, plaintiff has not been given any salary increases as required under NYU's guidelines, notwithstanding Drs. Roth and Cangiarella's promises to address this issue.

As a necessary consequence of plaintiff's removal as Director of the Residency Program, plaintiff was forced to resign as Vice-Chair of PRODS Council, as continued eligibility required that one serve as Program Director.

In 2005, plaintiff and Dr. Zagzag, the only two neuropathologists in the Neuropathology Department, had to attend a meeting held by the American Association of Neuropathologists ("AAN") in order to obtain continuing medical education and state licensing requirements. Although previous Chairs of the Pathology did not object to the coverage arranged by plaintiff, Dr. Roth was upset, told plaintiff never to let both neuropathologists be absent, and refused to hire a third neuropathologist.

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[2] According to plaintiff's memorandum, Drs. Roth and Cangiarella "proposed moving all interviews from Friday to Saturday or Sunday; to limit the interview sessions to four, instead of virtually every week from mid-October to early February; and to increase the number of applicants seen at each session from 6-8 to 20. . . ."

By the Fall of 2005, the backlog of autopsy cases had grown. Dr. Roth emailed plaintiff in February 2006 a "final warning" for him to resolve this backlog by April 1, 2006 and threatened administrative changes and disciplinary actions if plaintiff failed to comply.

In a June 21, 2006 letter, Dr. Roth accused plaintiff of leaving the Pathology Division uncovered, reiterated the delay in the turnaround of cases, questioned the quality of the service provided by the Neuropathology Division, criticized plaintiff's inability to retain and fulfill fellowship positions with quality candidates, and removed plaintiff as Neuropathology Fellowship Director.

Throughout plaintiff's employment at NYU, there was a low number of autopsy neuropathology specimens available for adequate teaching of residents and fellows. Plaintiff was encouraged to bring outside cases to NYU from other hospitals and from medical examiner offices in New Jersey, where plaintiff served as a consultant to the latter. Arrangements were made for reimbursement to the Pathology Department for some of these cases. Other cases were done at no charge through arrangements approved by Dr. Roth's predecessor. In October 2005, the Director of Bellevue Pathology asked plaintiff about the outside consultation autopsy cases. Within days thereafter, Dr. Roth sent plaintiff a letter enjoining him from any further outside autopsy consultation activities through the Pathology Department. The letter advised that any such consultations would constitute a "theft of services" and implied that the previously-conducted consultations also constituted a "theft of services." Dr. Roth expressed the "theft of services" accusation to others in the Pathology Department and within the School of Medicine. In March 2006, Dr. Roth's false statements of "theft of services" served as a basis to ask plaintiff to resign his tenured faculty position or face prosecution.

[* 7]

Defendants' Motion

Defendants argue that plaintiff cannot show that he engaged in protected activity. At the October 18, 2004 meeting, neither Dr. Roth nor Dr. Cangiarella ever stated that they planned to hire American-born residents. Drs. Roth and Cangiarella stated only that they wanted to focus on recruiting recent graduates of American medical schools. Thus, plaintiff cannot show that his opposition was directed against something that is an "unlawful employment practice."

In any event, plaintiff never protested this alleged discriminatory statement. In a letter written by plaintiff days after the meeting, plaintiff memorialized the important statements at the meeting, but does not state that he said anything at the meeting about Dr. Roth's alleged discriminatory plan. Plaintiff merely refers to his belief about Dr. Roth's alleged plan.

Further, plaintiff cannot show that any of the alleged retaliatory acts were reasonably likely to deter a person from engaging in protected activity. For example, changes to plaintiff's status with no loss of salary or benefits, the inability to secure a raise for plaintiff, disallowing plaintiff to leave the Division uncovered, plaintiff's dissatisfaction with his workload, threatening disciplinary action for failure to meet deadlines, falsely accusing him of "theft of services" (which Dr. Roth disputes), removing him as the Director of Neuropathology Fellowship, and enjoining him from continuing consulting services on his personal letterhead, are not likely to deter a person from engaging in protected activity.

Defendants also note that in plaintiff's June 21, 2006 letter, plaintiff admits that since 2004, Neuropathology failed to meet the requirement that 10% of each neuropathologist's cases must be review by staff colleagues.

Plaintiff also cannot show a causal connection between his alleged protected activity and any alleged retaliation as all of the alleged retaliatory acts were motivated by legitimate business reasons, *i.e.*, plaintiff failed to carry out Dr. Roth's directive not to invite applicants for Friday interviews; Dr. Roth recommended plaintiff for salary increases to address his salary complaints, which began prior to Dr. Roth's appointment as Chair, but these requests were rejected by Bellevue which funded 90% of plaintiff's salary; Dr. Roth's direction for plaintiff not to leave the Division uncovered was motivated by concerns for patient care; the requirement that plaintiff complete autopsies within 30 days was imposed by an outside accrediting body; and plaintiff was removed as Director of Neuropathology because of problems with recruiting and retaining fellows, and a complaint made against him. Further, Dr. Roth did not reallocate salary from Bellevue to the Faculty Practice for any doctor who was denied an increase by Bellevue. Defendants assert that Dr. Roth hired Dr. Mary Fowkes ("Dr. Fowkes") as a third neuropathologist on September 1, 2006. However, prior to beginning work at NYU, Dr. Fowkes accepted a position at The Mount Sinai Hospital. Also, Dr. Roth permitted plaintiff and Dr. Zagzag to attend the AAN meeting, but advised plaintiff to refrain from leaving the Division uncovered in the future. Further, the deadline imposed to complete the autopsies were imposed by the College of American Pathologist, an outside entity. Dr. Roth also directed plaintiff to cease processing brain autopsies because Bellevue had a policy of billing Tisch for any case that was not a Bellevue case as a Tisch case, and therefore, Tisch was being billed for the processing fee associated with these autopsies even though Tisch had nothing to do with the case.

In any event, all of the alleged retaliatory acts are too remote in time from plaintiff's alleged protest. The mere passage of time, *i.e.*, at least six months, between plaintiff's alleged protest and any possible materially adverse action negates an inference of retaliation.

Defendants also assert that in April 2007, plaintiff accepted a tenured professor position with the University of Missouri, with an annual salary approximately $40,000 more than his salary at NYU. Plaintiff voluntarily resigned from his position at NYU as of November 30, 2007.

Opposition

In opposition, plaintiff argues that based on the discrepancies between Dr. Roth's termination letter and his deposition testimony, issues of fact exist as to reasons Dr. Roth removed plaintiff as Residency Director, days after the meeting. Dr. Roth's termination letter gave two reasons for plaintiff's removal: (1) to permit plaintiff to devote more time to neuropathology and (2) to take the residency program in a somewhat different direction. Although the letter indicates that plaintiff's removal was not due to plaintiff's disagreement with the weekend interview dates, at his deposition, Dr. Roth stated an additional reason: that plaintiff contradicted a direct order not to invite any more residency applicants, and then uninvited them without Dr. Roth's knowledge, permission or prior discussion. Plaintiff also submits an affidavit of Rosemary Melendez ("Ms. Melendez"), the Residency Program Coordinator in October 2004. In her affidavit, Ms. Melendez states that at the time she sent an email inviting applicants to interview for the Residency Program, she did not speak with plaintiff about any changes to the interview process and was unaware of any. She later sent an email stating that she could not schedule any more applicants for interviews on October 25, 2004, after plaintiff had already been

removed as Residency Director. Plaintiff asserts that his alleged contradiction of a direct order and uninviting of applicants, transmitted contemporaneously with his removal, does not support his removal as Residency Director. Thus, issues of fact exist as to whether plaintiff's objection to using national origin as a basis for selecting residents was the true reason for his removal as Residency Director. Dr. Roth also made permanent a temporary arrangement increasing plaintiff's workload to 66%, and then refused to hire a third neuropathologist to replace Dr. George Kleinman who had resigned in mid-2004. Dr. Roth's immediate and lingering changes to plaintiff's work conditions following in the years after the meeting raise issues of fact concerning whether a reasonable employee would have been dissuaded from complaining of unlawful discriminatory practice.

Further, there are issues of fact as to the substance of the discussion at the meeting regarding the types of residents the Residency Program should recruit. Data provided by defendants regarding the geographical location of medical schools attended by subsequent residents in the Residency Program is consistent with plaintiff's account of the meeting.[3] The number of residents from Chinese medical schools diminished substantially after plaintiff was dismissed. Also, Drs. Roth and Cangiarella testified that they discussed with plaintiff their intention to focus recruiting efforts on recent graduates of American medical school because such graduates received a superior education and had a better grasp of the legal issues. Plaintiff's

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[3] Plaintiff asserts that 2002 through 2004, 13 residents were from foreign medical schools (including 11 from Chinese medical schools) and six were from U.S. medical schools. After plaintiff was dismissed, from 2005 through 2007, 13 residents were from foreign schools, but only four from Chinese medical schools, and eight from US medical schools.

letter and subsequent October 24, 2004 email however, reflect a different basis given at the meeting for the change in recruitment.

Additionally, plaintiff objected at the meeting to the characterization of the Residency Program and the perceived intent to reduce the number of Asian PhDs in favor of American students. Consistent with plaintiff's letter, plaintiff advised, in his October 24, 2004 email, that he hoped candidates would be sought regardless of their origins. Thus, issues of fact exist as to whether plaintiff's objection to using national origin as a basis for selecting residents was the true reason for his removal as Residency Director.

Plaintiff maintains that he states a *prima facie* case of retaliation, in that plaintiff reasonably believed that the change in the recruitment process to favor "all American residents" over "Asian PhDs" involved discrimination, that his employer was aware of plaintiff's protests to such changes, plaintiff suffered adverse employment decisions, and such adverse decisions occurred within days of the meeting at which he challenged the proposed recruitment policy.

Caselaw indicates that the adverse employment decisions made concerning plaintiff raises an issue of fact as to whether plaintiff would have been dissuaded from complaining of unlawful discrimination. And, the alleged business reasons, *i.e.*, an issue as to defendants' decision not to hire a third neuropathologist, stated in support of defendants' adverse actions only create additional issues of fact. Further, issues exist as to why plaintiff was the only similarly-situated employee who received no bonuses, and virtually no salary increases, in 2005 and 2006, after his removal. In 2005, Drs. M. Alba Greco ("Dr. Greco"), Jonathan Melamed ("Dr. Melamed"), Khush Mittal ("Dr. Mittal"), Aylin Simsir ("Dr. Simsir") and Dr. Zagzag received bonuses of at least $10,000 and in 2006, of at least $5,000, where plaintiff received increases in each year of

just over $2,000. Dr. Roth's deposition testimony that plaintiff's salary was subject to financial constraints imposed by Bellevue is insufficient and raises questions of fact, especially since Dr. Roth coupled plaintiff's approval of changes to the Residency Program with the faculty salary issue. Plaintiff's letter indicates that when Dr. Roth called him on the Monday following the meeting, Dr. Roth said that he was trying to deal with much "harder" issues and specifically brought up faculty salaries.

Reply

The plain meaning of plaintiff's memorandum and plaintiff's email shows that plaintiff never protested any alleged plan to hire American-born residents. Further, the record shows that the reasons given by Dr. Roth at his deposition for removing plaintiff as Residency Director were the same reasons Dr. Roth gave at the time of the removal. Plaintiff knew at the time of his removal the reasons therefor: that plaintiff objected to the proposed changes to the recruiting process and failed to carry out Dr. Roth's directive not to invite applicants to interview on Fridays. Nor does the comparison of the residents between 2002-2004 and 2005-2005 support plaintiff's claim that he voiced an objection to the new changes.

Further, the October 24 email and statistics do not show a plan to hire American-born residents. The statistics show that the number of foreign medical school graduates remained the same and that the number of American medical school graduates increased from six to eight during 2002-2004 and 2005-2007. In further support, defendants submit the affidavit of Dr. Cangiarella, wherein she attests that in 2005 NYU had six residents entering its Pathology Training Program in July. All six are graduates of American medical schools. Two of the six are not United States citizens. Before the October 18, 2004 meeting, she visited the Cornell Medical

Center's website and discovered that seven of its 23 pathology residents in 2003-2004 and three of its 23 pathology residents in 2004-2005 were from foreign medical schools. In both of those years, the first-year resident classes were all American medical school graduates. To her knowledge, nothing on Cornell's website indicated the national origins of Cornell's pathology residents.

Defendants also point out that nowhere in plaintiff's complaint did he allege that defendants' plan was to recruit fewer Chinese residents. Plaintiff's belief and perception that Drs. Roth and Cangiarella's intent was to reduce the number of Asian PhDs is insufficient to create an issue of fact. Additionally, the allegation that Dr. Roth wanted to recruit a "different" resident population cannot create an issue as such nonspecific references have been rejected by the courts.

Plaintiff failed to oppose defendants' showing that virtually all of the alleged adverse employment actions occurred too long after his alleged protest. In any event, none of these employment actions constitutes materially adverse employment actions.

Nor has plaintiff shown that the physicians to whom he compares his salary are similarly situated. According to the affidavit of Dr. Cangierella, the biographies of Drs. Greco, Mittal, Zagzag, Melamed and Simsir demonstrate that they have different educational backgrounds, responsibilities, disciplines, research experience, publications and awards from each other and from plaintiff. Members of the faculty at NYU School of Medicine receive percentages of their salaries from various sources, including Tisch, Bellevue, the Faculty Group Practice and departmental budgets, which include outside research grants. Plaintiff's salary comprised of different percentages compared with the doctors whom he alleges are similarly situated to him.

Contrary to plaintiff's assertion, Dr. Zagzag is an Associate Professor, not an Assistant Professor, and received a bonus of an additional $10,000 for being selected for the Teacher of the Year Award. Like plaintiff, in 2005 through 2006, Drs. Greco, Mittal and Zagzag did not receive any increases in their salaries other than a cost of living increase. In 2007, Drs. Greco, Mittal, Zagzag, Melamed and Simsir received increases after plaintiff resigned, and such increases did not go into effect until December 2007.

In addition, the salaries of said physicians are derived from a variety of sources which pay differing percentages of those salaries.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce

admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Under NYCHRL §8-107, it is "unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (I) opposed any practice forbidden under this chapter . . . ." It is uncontested that to establish *prima facie* retaliation, plaintiff must show that: (1) he has engaged in a protected activity, (2) his employer was aware of such participation, (3) he suffered from an adverse employment action based upon his activity, and (4) there is a causal connection between

the protected activity and the adverse action taken by his employer (*see Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003] *citing Pace v Ogden Services Corp.*, 257 AD2d 101, 104, 692 NYS2d 220 and *Van Zant v KLM Royal Dutch Airlines*, 80 F 3d 708, 714).

When evaluating claims of retaliation under NYCHRL, courts use the well-known *McDonnell Douglas* burden-shifting framework (*Kemp v Metro-North R.R.*, 2007 WL 1741256 [SDNY 2007] *citing McDonnell Douglas Corp. v Green*, 411 U.S. 792, 793 (1973); *Slattery v Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir 2001)). The plaintiff must first prove by a preponderance of the evidence a prima facie case of retaliation (*McDonnell Douglas*, 411 U.S. at 802-04; *Terry v Ashcroft*, 336 F.3d 128, 138 [2d Cir 2003]). "Only if the plaintiff meets this initial burden will the burden then shift to the defendant to produce evidence that the adverse employment action was taken for some legitimate, non-discriminatory reason (*Kemp v Metro-North R.R., supra*). If the defendant articulates a legitimate non-discriminatory reason for its action, "the presumption raised by the prima facie case is rebutted, and drops from the case" (*Kemp v Metro-North R.R., supra*). Then, the plaintiff has the ultimate burden to demonstrate by a preponderance of the evidence that the articulated reason offered by the defendant for the adverse employment action is merely a pretext for actual discrimination (*Kemp v Metro-North R.R., supra citing Mandell v County of Suffolk*, 316 F.3d 368, 380-81 [2d Cir 2003]).

A. Plaintiff Engaged in Protected Activity

Protected activity is considered "action taken to protest or oppose statutorily prohibited discrimination" (*Cunningham v Consolidated Edison Inc.*, 2006 WL 842914 [EDNY 2006] *citing Cruz v Coach Stores, Inc.*, 202 F 3d 560, 566 [2d Cir 2000]). The protest may be

expressed in the form of an informal or formal complaint and may include "making complaints to management" (*Cunningham v Consolidated Edison Inc., supra, citing Lamberson v Six West Retail Acquisition, Inc.*, 122 F Supp 2d 502, 511 [SDNY 2000] and *Iannone v Frederic R. Harris, Inc.*, 941 F Supp. 403, 410 [SDNY 1996]). However, in order to constitute a "protected activity" the opposition must be directed against something that is an "unlawful employment practice" (*Cunningham v Consolidated Edison Inc., supra citing Manoharan v Columbia University College of Physicians and Surgeons,* 842 F 2d 590, 594 [2d Cir 1988]).

Defendants' arguments that (1) Drs. Roth and Cangieralla never stated that they wanted to hire American-born residents; they intended to recruit residents from American medical colleges and (2) plaintiff never protested discrimination at the meeting, are sufficiently contested.

At the outset, plaintiff's letter, in pertinent part, states as follows:

> Dr Roth and Dr Cangiarella . . . presented me with a two page "proposal" to change the manner in which we have interviewed applicants for the AP/CP residency program. . . .
>
> * * *
>
> . . . I perused the two pages and suggested that while this might be possible there were substantial issues to be resolved. . . .
>
> * * *
>
> First, that I had . . . interviewed every applicant for the last 7 years . . . and that a schedule as proposed . . . would preclude that. . . .
>
> * * *
>
> Second, I asked if the faculty had been asked . . . this had not been done. . . .
>
> * * *
>
> I asked what was motivating this. Dr Cangiarella replied that she had recently visited Mt Sinai and Cornell, and each of those programs did this this way, *AND HAD ALL AMERICAN residents* (emphasis mine). . . . Joan said our program had a "reputation for taking only Asian PhDs". I replied that this was obviously false, as half of our residents in the PGY 1 year this year are US graduates and a fourth is a graduate of the University of Vienna; there are only two "Asian PhD" residents in that year. In the PGY 2 year we have three (of six) US graduates. . . . *Dr. Roth still stated he wanted to try and get a "different" resident population."* (Emphasis added).

Further, the deposition testimony of Drs. Roth and Cangiarella that defendants "wanted to emphasize graduates of American medical schools" (Roth, p. 157, Cangiarella, p. 47), the issue of national origin of individuals was not discussed (Roth, p. 169, 175, Cangiarella, p. 44), and that he did not recall having any discussions subsequent to the meeting about national origin (Roth, p. 170), simply raise issues of fact as to whether Dr. Roth expressed a change in the program to recruit American-born residents to accomplish a "different" population of residents. Although plaintiff did not allege in his First Amended Complaint that defendants wanted to recruit fewer Asian residents, the alleged reference to defendants' reputation of admitting "only Asian PhDs" lends support for plaintiff's allegation that defendants intended to refrain from recruiting foreign-born residents.

It appears that the statistical record indicates that during the time periods in question, there was no change in the number of foreign medical school graduates and an increase in the number of American medical school graduates. However, that such data supports defendants' claim that the change in the recruitment process was aimed at recruiting recent graduates of American medical schools raises an issue of fact as to whether defendants expressed an intent to recruit American-born residents, and does not overcome Drs. Roth and Cangiarella's statements depicted in plaintiff's memorandum or email to Dr. Roth. Furthermore, an employment practice need not actually violate anti-discrimination laws; plaintiff need only have a good faith reasonable belief that there was such a violation, which is assessed in light of the totality of the circumstances (*Budzanoski v Pfizer, Inc.*, 1996 WL 808066 [Sup Ct New York County 1996]). Here, plaintiff presented sufficient evidence to support his belief that defendants intended to recruit American-born residents, *i.e.*, Drs. Roth and Cangiarella's own alleged statements at the

meeting. Dr. Roth's statement of his desire to recruit a "different" resident, coupled with the statements by Dr. Cangiarella's statement of Cornell's and Mt. Sinai's "All-American" residents and NYU's reputation for admitting "only Asian PhD" residents, are arguably sufficiently specific references to discrimination.

More importantly, plaintiff's memorandum and opposition papers indicate that he objected at the meeting to the proposed changes to the residency program. Plaintiff's memorandum continues:

* * *

> I reiterated that we had a long-standing goal of seeking research-oriented residents. . . . Dr. Roth suggested that the Chinese MD/PhD applicants had come to the US and done research in order to go into residency but that they were through [sic] with research once they were qualified as pathologists. *I demurred*; I pointed out that most of our graduates were in academic positions, including Dr Peng Lee who was a member of our own faculty and who had trained with us. I was not answered, but I clearly had not changed any minds. . . .
> (emphasis added).

As indicated above, plaintiff "demurred" and criticized defendants' plan to "get" a "different" population so as to dispel defendants' reputation for admitting only "Asian PhDs." Further, in his opposition papers, plaintiff claims that he also stated at the meeting that choosing residents based on national origin was probably a violation of federal and state laws and of the rules of the National Residency Matching Program. Additionally, plaintiff's October 24, 2004 email to Dr. Roth states that plaintiff hoped candidates would be sought "regardless of their origins," indicating a reference to his discussion with Drs. Roth and Cangiarella at the meeting. Therefore, the record indicates that plaintiff's opposition to Drs. Roth and Cangiarella was directed at an unlawful employment practice. The deposition testimony of Drs. Roth and

Cangiarella that plaintiff expressed at the meeting displeasure with the proposed interview schedules (Roth, p. 174, Cangiarella, p. 52) raises an issue of fact as to whether plaintiff protested the alleged discriminatory practice.

Therefore, it cannot be said, as a matter of law, that plaintiff cannot establish that he engaged in protected activity.[4]

B. *Plaintiff Suffered From An Adverse Employment Action Resulting From Engaging in Protected Activity*

NYCHRL § 8-107(7) further provides in relevant part:

> The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment . . . , provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

An adverse employment action is no less than a materially adverse change in the terms and conditions of employment *(Hanna v New York Hotel Trades Council*, 18 Misc 3d 436, 851 NYS2d 818 [Sup. Ct. New York County 2007]). Such change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities (*Hanna v New York Hotel Trades Council supra, citing Galabya v New York City Bd. of Educ.*, 202 F 3d 636, 640 [2d Cir 2000]).

1. *Dismissing Plaintiff as Director of the Residency Program and Causing Plaintiff to Resign as Vice-Chair of PRODS-October 2004*

A "materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, *a less distinguished title*, a material loss of

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[4] Defendants claim, in a footnote, that since plaintiff did not engage in protected activity, defendants could not have known about any such activity (Defendants' Memo of Law, fn 15, p. 19). However, assuming plaintiff's claim that he voiced his objection at the meeting as true, and in light of plaintiff's email to Dr. Roth, it cannot be said that defendants did not understand that plaintiff's opposition was directed at the alleged discriminatory employment practice.

benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation" (*Hanna v New York Hotel Trades Council supra* at 442 (emphasis added).

The record indicates that plaintiff was removed as Residency Director as a result of his objections made at the meeting. Plaintiff claims that days after he voiced his objection to the plan to recruit "All-American" residents, defendants removed him as Residency Director. Defendants' claim that plaintiff was removed as "Residency Director (which also resulted in his resignation from PRODS) because of plaintiff's objections to the proposed changes in the resident recruiting process" (Defendants' Memo of Law, p. 24). The rationale that it was also plaintiff's failure to carry out Dr. Roth's directive not to invite applicants to interview on Fridays, does not negate the fact that plaintiff's removal was based on objections he made at the meeting. An issue of fact exists as to whether plaintiff's objections were aimed solely at the change in the scheduling of interviews or at the proposed plan to recruit American-born residents. Therefore, it cannot be said, as a matter of law, that plaintiff did not suffer an adverse employment action, *i.e.*, the dismissal of plaintiff as Director of the Residency Program, as a result of his objection to defendants' discriminatory employment practice.

2. *Increasing Plaintiff's Workload and Refusing to Hire a Third Neuropathologist - October 2004 through 2007*

It is uncontested that the alleged "increase" in plaintiff's workload was a condition of plaintiff's employment that existed *prior* to Dr. Roth's appointment as Chair. Therefore, it cannot be said that the continuation of such increased workload was the result of plaintiff's objection to Drs. Roth and Cangierella's alleged discriminatory recruitment plan. Further, the claim that Dr. Roth did nothing to hire a third neuropathologist in retaliation to plaintiff's protest

is flatly contradicted by the uncontroverted evidence that Dr. Roth hired Dr. Fowkes in September 2006 to serve as the autopsy service director to spend 30% of her time in neuropathology. Therefore, the alleged increase in plaintiff's workload and defendants' alleged refusal to hire a third neuropathologist were not materially adverse actions or actions reasonably likely to deter a person from engaging in protected activity.

3. *Refusing to Award Bonuses and Issuing Nominal Raises - 2004 through 2007*

It is uncontested that although more than 90% of plaintiff's salary was paid by Bellevue, Drs. Melamed, Simsir and Zagzag received none or a small percentage of their salaries from Bellevue. Also, the record indicates that plaintiff's issue with his salary existed prior to Dr. Roth's appointment as Chair, and that Drs. Roth and Cangierella requested increases in plaintiff's salary to no avail. There is no indication that defendants had any other control over plaintiff's salary, or that defendants played any role in Bellevue's denial of the request for an increase in plaintiff's salary. Further, three of the five doctors with whom plaintiff compares himself also received only cost of living increases in 2005 and 2006. Notably, it is uncontested that plaintiff resigned before the 2007 salary increases were awarded. And, with respect to the claim of that he did not receive a bonus, it is uncontested that Dr. Zagzag received a bonus for being awarded Teacher of the Year and plaintiff failed to set forth any evidence demonstrating the basis upon which bonuses were awarded, from which it may be inferred that defendants' failure to grant him a bonus constituted a retaliatory employment action. Plaintiff failed to raise an issue of fact that the alleged refusal to issue raises and bonuses was pursuant to defendants' "policy" with Bellevue concerning plaintiff's salary.

4. *Demanding Completion of Backlog of Autopsy Cases Despite No Increase in Staff - 2006*

Chang v Safe Horizons (1997 WL 3254414 [2d Cir 2007]) cited by defendants for the proposition that defendants' alleged retaliatory acts were not likely to deter a person from engaging in protected activity, is instructive. In *Chang*, plaintiff claimed that her supervisor terminated her, in retaliation for complaining about the discrimination she perceived in the workplace. The Court held that plaintiff's supervisor's "conduct falls into the . . . category of trivial harms and does not constitute action that 'would have dissuaded a reasonable worker from bringing a discrimination charge.'" The Court noted that "oral and written warnings do not amount to materially adverse conduct" under circumstances where the employer simply applied its disciplinary policies to the employee. Since defendant Safe Horizons issued Chang warnings consistent with its progressive discipline policy, Chang did not suffer a materially adverse action under the circumstances.

Here, defendants' warnings to plaintiff that he might face possible disciplinary measures for failing to complete the backlog of autopsy cases by April 2006 was consistent with the "policy" imposed by the College of American Pathologist, an outside body independent from defendants. Plaintiff testified that he and Dr. Zagzag were responsible for completing autopsies within 30 days of their assignment (plaintiff, p. 151). Plaintiff further stated that the failure to satisfy the 30-day requirement ultimately results in the loss of accreditation (plaintiff, pp. 147-148). "The first time that happens during a CAP inspection it's called a phase 2 violation. Nothing happens to the accreditation in the lab, but you have to develop a plan of corrective action . . . If when they do a repeat visit, a year or two years, . . . you haven't fixed it . . .that's

more serious and can in theory threaten the accreditation." Therefore, the warnings for failing to timely complete autopsies are not reasonably likely to deter a person from engaging in protected activity.

5. *Prohibiting Plaintiff from Processing Outside Neuropathology Cases - Fall 2005*

It is undisputed that plaintiff's work on outside cases was being billed to and paid for by Tisch. The record indicates that approximately one year after the meeting, Dr. Robert Boorstein, the Director of Pathology and Dr. Cangiarella met with the plaintiff and discussed that Bellevue considered any case that was not a Bellevue case as a Tisch case, and therefore, would bill Tisch for such cases. It is uncontested that Tisch would therefore pay for autopsies performed by plaintiff at Bellevue for other institutions, notwithstanding the fact that Tisch had nothing to do with such cases. The legitimate business reason for instructing plaintiff to cease from processing brain autopsies from other hospitals which resulted in Tisch paying for work that was performed for other institutions is obvious. Plaintiff failed to present any evidence contradicting these facts or indicating that the direction to cease from performing such autopsies was related to his objection made at the meeting approximately one year prior thereto. Therefore, prohibiting plaintiff from processing outside autopsies did not constitute an adverse employment action and was not likely to deter a person from engaging in protected activity.

6. *Criticizing Plaintiff for Leaving the Division "Uncovered" on Two Occasions- March and June 2005*

Although there is a dispute as to the date on which plaintiff failed to arrange for coverage when the Dr. Zagzag, over whom plaintiff claims he had no control, left work to go to the airport, it is undisputed that plaintiff failed to arrange for coverage for the period of June 9, 2005 through

June 12, 2005 for plaintiff to attend the annual meeting of the American Association of Neuropathologists. Plaintiff testified that he sent an email to Dr. Roth advising that both plaintiff and Dr. Zagzag would be attending the annual meeting and there "would be no neuropathology attending service at the medical center (plaintiff, p. 463). Although attendance at the annual meeting provided educational and social value, and was a matter of "prestige" and "visibility" (plaintiff, p. 466), the instruction that plaintiff not leave his Department without coverage was motivated by a legitimate business reason. Dr. Roth permitted plaintiff to attend the 2005 annual meeting, and warned that Dr. Roth did not "want to see it happen again"(plaintiff, p. 470). According to Dr. Roth, "This is a patient care issue, and your primary responsibility is to make sure patient care is taken care of" (Defendant's Memo of Law, Exh. 27). According to defendants, "On Surg Path, people have to stay behind to miss USCAP or other big meetings; this is done in rotation so that everyone gets a chance to go every other year" (Defendant's Memo of Law, Exh. 27). Notably, only Dr. Zagzag went to the annual meeting in 2006, and plaintiff attended the annual meeting in 2007, both apparently alternating attendance at the annual meeting every other year. Therefore, it cannot be said that the instruction in 2005 not to leave plaintiff's department uncovered constituted a materially adverse action or action reasonably likely to deter a person from engaging in protected activity.

7. *Removing Plaintiff as Director of Neuropathology Fellowship -2006*

The record indicates that the removal of plaintiff as Director Neuropathology was based on the reasons: (1) a complaint by Dr. Carolyn Revercomb ("Dr. Revercomb") against plaintiff, (2) "Dr. Chakaverty's" departure from the Neuropathology Department, (3) plaintiff's recruitment efforts of an unqualified fellowship candidate, (4) leaving the Department uncovered,

(5) failing to timely complete cases. As to Dr. Revercomb's complaint, at plaintiff's deposition, he testified that in 2006, Dr. Revercomb complained that she was afraid of plaintiff, that plaintiff pounded his fist on a table or wall, and expressed anger in such a way that made her afraid that plaintiff was going to attack her (plaintiff, 249). Plaintiff then attempted to replace Dr. Chakaverty with a fellowship candidate who attended an offshore Carribean medical school (plaintiff, p. 250). Although plaintiff denied the allegations, Dr. Revercomb was reassigned to a different building. Plaintiff's removal from a position, however, is not actionable where the employee exhibits behavior and performance problems (*St. John v NCI Bldg. Sys. Inc.*, 2008 WL 576778). Plaintiff failed to overcome defendants' showing that his removal as Director was based legitimate business reasons, so as to constitute a materially adverse employment action resulting from his objection at the meeting in 2004.

C. *A Causal Connection Between the Protected Activity and the Adverse Employment Action*

A causal connection may be established indirectly by showing that the protected activity was closely followed in time by the adverse action (*Dubois v Brookdale Univ. Hosp.*, 6 Misc 3d 1023, 800 NYS2d 345 [Sup Ct New York County 2004]; *see McCoy v State*, 16 Misc 3d 1128, 847 NYS2d 903 [N.Y.Ct.Cl. 2007]; *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 [2d Cir2000]; *see also Pace Univ. v New York City Commn. on Human Rights,* 85 N.Y.2d 125, 129 [1995]). As for indirect causal proof, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close" (*Dubois v Brookdale Univ. Hosp., supra, citing Clark Co. Sch. Dist. v*

Breeden, 532 U.S. 268, 273-74 [2001], *citing Richmond v ONEOK*, 120 F3d 205, 209 [1997] [holding three-month period insufficient to establish causal connection], and *Hughes*, 967 F2d at 1174-75 [1992] [four-month period insufficient]; *see also Williams v City of New York*, 38 AD3d 238 [1st Dept 2007] [no evidence of a causal connection between the filing of the harassment claim in 1998 and the denial of job title in June 2000]; *Budzanoski v Pfizer, Inc.*, 1996 WL 808066 [Sup Ct New York County 1996] [passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation]; *see e.g., Garrett v Garden City Hotel*, 2007 WL 1174891, at 21 [EDNY 2007]["[D]istrict courts in this Circuit have consistently held that a passage of more than two months between the protected activity and the adverse employment action does not allow for an inference of causation"]; *Ruhling v Tribune Co.*, 2007 WL 28283, at *23 [EDNY 2007] [finding that "a passage of two months between the protected activity and the adverse employment action seems to be the dividing line"]; *Nicastro v Runyon*, 60 F Supp2d 181, 185 [SDNY 1999] ["Claims of retaliation are routinely dismissed when as few as three months elapse between the protected EEO activity and the alleged act of retaliation"]; *cf. Reuland v Hynes*, 2004 WL 1354467, at *11 [SDNY 2004] [four-and-one-half-month gap sufficient to sustain an inference of causation]).

Except for plaintiff's dismissal as Residency Director in October 2004, defendants' demand that plaintiff complete the backlog of autopsy cases in 2006, the prohibition against plaintiff processing outside neuropathology cases in the Fall 2005, the warning against plaintiff leaving the division "uncovered" in 2005, and removal of plaintiff as Director of Neuropathology Fellowship in 2006, which more than eight months after his objection at the meeting in 2004, does not allow for an inference of causation.

[* 28]

Nor is there a causal connection between plaintiff's objection in 2004 and the permanent increase in plaintiff's workload and refusal to hire a third neuropathologist, and refusal to award plaintiff bonuses and raises. Such conditions existed long before plaintiff's objection at the meeting in 2004 (*see generally, Slattery v Swiss Reinsurance Am.*, 248 F3d 87, 95 [2001] [an inference of retaliation did not arise where the adverse employment actions complained of were the ultimate product of an extensive period of progressive discipline which began five months *prior to* plaintiffs filing of the EEOC charges, so that the gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity]).

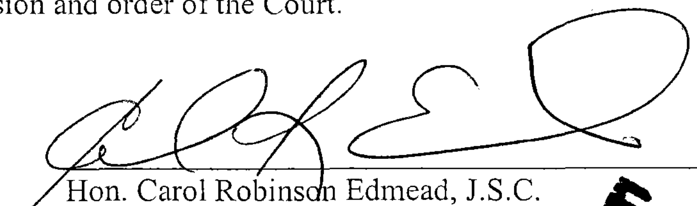
Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, on the ground that issues of fact exist as to whether defendants violated NYCHRL §8-107 when it removed plaintiff as Residency Director in October 2004; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.



Dated: October 27, 2008

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

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OCT 28 2008
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