Nobrega v MTA Metro-N. R.R.
2015 NY Slip Op 30605(U)
April 15, 2015
Supreme Court, New York County
Docket Number: 152527/12
Judge: Nancy M. Bannon
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 42

RODWELL A. NOBREGA,

Plaintiff,

- against -

MTA METRO-NORTH RAILROAD,

Defendant.

Index No.: 152527/12

DECISION/ORDER

BANNON, NANCY, J.:

In this action, plaintiff Rodwell Nobrega (Nobrega) alleges that his employer, defendant MTA Metro-North Railroad (Metro-North), discriminated against him in the terms and conditions of his employment because of his race, and retaliated against him for complaining about discrimination, in violation of the New York State Human Rights Law (Executive Law § 296) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107) (NYCHRL). Defendant Metro-North now moves for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff, who is African-American, has been employed by Metro-North since 1993. He began working as a coachman, was promoted to electrician in 1996, and has worked since then as an electrician in the Maintenance of Equipment Department. Nobrega Affidavit in Opposition to Defendant's Motion (Pl. Aff.), ¶¶ 6-8; Nobrega Deposition, April 23, 2013 (Pl. 2013 Dep.), Ex. C to

Knauth Affirmation in Support of Defendant's Motion (Knauth Aff.), at 15.[1] The terms and conditions of plaintiff's employment, including disciplinary procedures, are governed by a collective bargaining agreement (CBA) between Metro-North and the International Brotherhood of Electrical Workers. *See* Agreement, Def. Ex. D.

In or around 1994, a class action employment discrimination lawsuit was commenced against Metro-North, challenging the manner in which discipline and promotion decisions were made as discriminating against African-American employees. *See* Defendant's Memorandum of Law in Support (Def. Memo of Law), at 4; *see generally Robinson v Metro-North Commuter R.R. Co.*, 175 FRD 46 (SD NY 1997); *Robinson v Metro-North Commuter R.R. Co.*, 267 F3d 147 (2d Cir 2001). Plaintiff became a member of the class sometime before 2002, when the class action suit was settled by permitting plaintiffs to have their individual claims heard by an arbitrator. Nobrega Deposition, January 4, 2011 (Pl. 2011 Dep.), Def. Ex. B, at 16; Pl. 2013 Dep., Def. Ex. C, at 40, 61; Def. Memo of Law, at 4 n 2. In that action, plaintiff claimed that he was denied a promotion to engineer because of his race, and, in particular, that Peter DeCarlo (DeCarlo), then a

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[1]Exhibits annexed to Knauth Affirmation in Support of Defendant's Motion will be referred to as "Def. Ex. -." Exhibits annexed to Barkan Affirmation in Opposition to Defendant's Motion will be referred to as "Pl. Ex. -."

general foreman and later the Maintenance of Equipment Facility Director, prevented him from being promoted. Pl. 2011 Dep., Pl. Ex. 1, at 52; Deposition of Peter DeCarlo (DeCarlo Dep.), Pl. Ex. 2, at 36. Plaintiff's claim was heard by an arbitrator and settled in 2005 for an unspecified monetary amount. Pl. 2011 Dep., Def. Ex. B, at 17-18; Pl. Aff., ¶ 36. Plaintiff received his last payment under the settlement in March 2006. Barkan Affirmation in Opposition to Defendant's Motion (Barkan Aff.), ¶ 10; Pl. Aff., ¶ 36.

Prior to July 1, 2007, plaintiff performed his work satisfactorily, and had no record of any disciplinary charges against him. On July 1, 2007, an incident occurred at plaintiff's workplace (the incident, or the July 1 incident), which lead to disciplinary proceedings and the termination of his employment. On that day, plaintiff was assigned by foreman Victor Acosta (Acosta) to work with Teddy Sheehan, a machinist, to remove and replace worn or broken "contact shoes"[2] on a train on Track 9 in Grand Central Station. Pl. 2011 Dep., Def. Ex. B, at 24-25. Plaintiff's responsibility was to "de-energize" the electrical power to the train cars by "paddling" the cars. *Id.* at 25.

"Paddling" involves placing an insulated paddle between the

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[2]A contact shoe on a train car "collects the power for the car" from the third rail. DeCarlo Dep., Def. Ex. F, at 13.

third rail and the contact shoe of the train car, in order to electrically isolate the equipment from the third rail. DeCarlo Dep., Def. Ex. F, at 13. On the day of the incident, plaintiff wedged wooden paddles between the train cars and the third rail to interrupt the flow of electricity, so that Sheehan could remove and replace the contact shoes. *See* Barkan Aff., ¶ 12; Pl. 2011 Dep., Def. Ex. B, at 26. After "paddling," plaintiff then had to verify that there was no power flowing to the contact shoe, by checking the electricity with a voltage meter, before Sheehan could remove and replace the contact shoe. Barkan Aff., ¶ 12; Pl. 2011 Dep., Pl. Ex. 1, at 32-33; Pl. 2008 Dep., Pl. Ex. 3, at 48-50.

Plaintiff and Sheehan successfully completed their work on several cars, but when Sheehan went to another car to start work, his wrench touched an electrified area, causing an electrical arc, or flash explosion, which burned Sheehan's left arm and injured his left eye. Sheehan Dep., Def. Ex. I, at 27-28; Pl. 2011 Dep., Pl. Ex. 1, at 33; Pl. 2013 Dep., Def. Ex. C, at 117-118, 126. Plaintiff claims that he also was hurt, although at the time of the incident, he did not think he was injured. *Id.* at 134. Sheehan was taken by ambulance to a hospital, where he was kept for two days, and received treatment for another three weeks. Sheehan Dep., Def. Ex. I, at 29-30. Plaintiff did not request, and was not offered, medical treatment. Pl. 2013 Dep.,

Def. Ex. C, at 129-130, 134. Plaintiff was directed to return to work after the incident, but, later the same day, he was suspended, without pay, purportedly for violating safety procedures. Pl. 2011 Dep., Def. Ex. B, at 128, 129-130; Alli Dep., Def. Ex. G, at 41, 44, 46; DeCarlo Dep., Def. Ex. F, at 47-48.

On July 1, 2007, Mohammed Alli (Alli), a general foreman who was not working but was "on call," was called in to investigate the incident. Alli Dep., Pl. Ex. 6, at 12, 28, 29. After Alli arrived at Grand Central Station, he spoke to plaintiff about what happened and plaintiff told him that Sheehan did not wait for him to verify that the power was cut off. Pl. 2013 Dep., Def. Ex C, at 127. Alli questioned plaintiff about the meter he used and whether the meter was working, and went with plaintiff to the scene of the accident. Alli Dep., Def. Ex. G, at 35-36. They checked that the voltage meter was working, and then started to check that the contact shoes were isolated from the third rail, and upon inspection of the contact shoe that caused the accident, discovered that it was not electrically isolated because one paddle was missing. *Id.* at 37-38; Pl. 2013 Dep., Def. Ex. C, at 135-136. Alli asked plaintiff for a statement, but he declined at that time to make one. Alli Dep., Def. Ex. G, at 68-69. Alli later spoke to Sheehan at the hospital, who told him that plaintiff said the whole train was verified. *Id.* at 49-

51.

Alli testified at his deposition that an electrician is responsible for paddling and verifying that the power is cut to the contact shoes, and that a machinist, whose job was to change the contact shoes, had no obligation to check the electrician's work. Alli Dep., Def. Ex. G, at 22-23. Alli also testified that, before the machinist touches anything, he should get an okay from the electrician. Alli Dep., Pl. Ex. 6, at 43. In contrast, plaintiff testified that verifying the voltage with a meter after the paddling is done is a two-person job and that he could not do it by himself. Pl. 2008 Dep., Pl. Ex.3, at 49-50; Pl. 2011 Dep., Pl. Ex. 1, at 30-31. DeCarlo testified that the machinist should observe the electrician verifying that the power is off, and not just take the electrician's word that it was. DeCarlo Dep., Ex. 2 to Barkan Aff., at 33.

After plaintiff was suspended, and following Alli's investigation, plaintiff was sent a notice of charges, pursuant to the procedures set out in the CBA. DeCarlo Dep., Pl Ex. 2 at 54; *see* Notice dated July 3, 2007, Pl. Ex. 10. Plaintiff was charged with three violations: failing to paddle all contact shoes on two cars, failing to verify that two cars were electrically isolated, and informing Sheehan that two cars were de-energized when they were not. *Id.* Pursuant to the CBA, once formal charges are made, a pretrial conference is held with the

parties, which is intended to be an informal meeting to try to work things out without a trial. DeCarlo Dep., Pl. Ex. 2, at 52, 54. At the pretrial conference in plaintiff's case, the only solution suggested by defendant was plaintiff's resignation. DeCarlo Dep., D. Ex. F, at 103-104; Pl. 2011 Dep, Def. Ex. B, at 20.

In August 2007, a disciplinary hearing was held, at which plaintiff was represented by his union, and had an opportunity to present evidence and question witnesses. Plaintiff, Sheehan, and Alli testified, although Acosta did not, to which plaintiff objected. *See* Transcript of Disciplinary Hearing, dated August 8, 2007 (Transcript), Def. Ex. H. At the hearing, plaintiff and Sheehan, the only people who were present when the accident occurred, told conflicting versions of the events leading up to and surrounding the incident.

Sheehan testified that, on July 1, 2007, he was assigned to work with plaintiff to change contact shoes, and after they set out the contact shoes, Sheehan went to get something to help remove nuts from the shoes, and when he returned, plaintiff told him that everything was tested and "dead," and ready to go. Transcript, at 38-39, 43. According to Sheehan, he and plaintiff changed four shoes without a problem, but when he put his wrench on the fifth one, "it blew up." Transcript, at 39, 43-46. Sheehan testified that there was no test done on the fifth shoe

because, after the first test, plaintiff told him that it was okay to go ahead. *Id.* at 43, 44, 61. Sheehan also testified that plaintiff was right behind him when the accident occurred (*id.* at 47, 48), although plaintiff testified, at his deposition, that he was about fifteen feet away. Pl. 2013 Dep., Def. Ex. C, at 117-118, 126.

Plaintiff testified that, as far as he recalled, on the day of the incident, he paddled all the shoes, but did not verify that all the cars were electrically isolated, because they were going shoe by shoe to make the verification. Transcript, at 50-51, 53, 56. He further testified that, after he and Sheehan had changed ten shoes, they went to get more shoes, and, heading back, Sheehan went ahead of him to the next car and did not wait for him to verify that the electricity was cut from the next shoe that he was going to remove. *Id.* at 51, 56-57, 59. When plaintiff was asked at the hearing if he saw that there was a paddle missing when he revisited the scene with Alli after the incident, he refused to answer, and then testified that he did not recall. Id. at 52-53.

At the hearing, Alli testified, in sum, that he was called in to Grand Central Station on the day of the incident and investigated what happened, by speaking to plaintiff, and going with plaintiff to the site of the accident, where they discovered that a paddle was missing from the car where the accident

occurred. According to Alli, plaintiff had no explanation for the missing paddle, and was equivocal about whether he had paddled all the cars. Transcript, at 18-22.

Following the hearing, plaintiff was notified that he was found guilty of all three violations, and that he was dismissed. *See* Letter dated August 20, 2007, Def. Ex. K. Plaintiff's union appealed the decision, and the Special Board of Assessment (Board) issued a determination on plaintiff's appeal on March 31, 2010. *See* Determination, Def. Ex. L. In its determination, the Board found that the hearing had been fair, that there was credible evidence to support the findings that plaintiff was guilty of the first charge, that he failed to properly paddle all the cars. With respect to the second and third charges, although there was a conflict in the testimony of plaintiff and Sheehan, the only eyewitnesses to the incident, the hearing officer's determination that Sheehan's testimony was more credible than plaintiff's was not "intrinsically flawed or prejudiced." *Id.* at 3-4. The Board accordingly found that the charges against plaintiff were proven. *Id.* at 4. It determined, however, that the punishment of dismissal, considering plaintiff's otherwise unblemished record for 14 years, was excessive, and it directed that plaintiff be "restored to service with seniority unimpaired, but without any pay for time lost." *Id.* Plaintiff returned to work in May 2010. Pl. 2011 Dep., Def. Ex. B, at 21.

After plaintiff returned to work, he again sought a promotion to engineer, and applied to take the written exam, the first step in the process of getting the promotion. *See* Affidavit of Ouida Gaillard in Support of Defendant's Motion (Gaillard Aff.), Def. Ex. N. Plaintiff claims that, due to delays in the administrative process in December 2010, he missed the deadline to take the early 2011 exam, but he took the July 2011 exam and passed, along with 99 other candidates. Pl. Aff., ¶ 4; Gaillard Aff., Def. Ex. N, ¶ 10. After passing the exam and a background check, plaintiff advanced to the interview round. *Id.*, ¶ 13. At this stage, candidates are interviewed by a panel of three persons, representing Metro-North's Human Resources, Training, and Mechanical departments. *Id.*, ¶ 6. At the interview, the candidates are asked the same sixteen questions, including five "structured" interview questions in Part I, and eleven "behavioral and situational" questions in Part II. *Id.*, ¶¶ 7-8; *see* Interviewers' Notes, Ex. 2 to Gaillard Aff. To pass the interview round, and move on the next stage, a candidate must score at least a "3" (out of five) on four of the five Part I questions and on nine of the eleven Part II questions. Gaillard Aff., Def. Ex. N, ¶¶ 8, 9.

Plaintiff was interviewed on January 18, 2012, and did not score high enough to move on to the next and final stage in the application process. Gaillard Aff., ¶¶ 9, 14, 15, 17. Copies of

the interviewers' notes submitted on this motion indicate that none of the interviewers gave plaintiff enough "3" scores to qualify him for the promotion. *See* Interviewers' Notes, Ex. 2 to Gaillard Aff.

Prior to his reinstatement, in 2008, plaintiff filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC) (Pl. Aff., ¶¶ 26, 39), and then commenced an action in this court in March 2010, alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 1981, 42 USC § 1983, and the NYS and NYC HRLs. Defendant removed the action to federal court in April 2010, and, in December 2011, the federal court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state claims. *See* Verified Complaint, Def. Ex. A, ¶ 5. Plaintiff then commenced the instant action in June 2012.

The gravamen of plaintiff's complaint is that he was wrongly disciplined, and terminated, following the July 1, 2007 incident, based on his race and in retaliation for his involvement in the earlier class action lawsuit. More particularly, plaintiff contends that he was treated differently based on his race, on July 1, 2007, when he was not offered medical treatment, and his white co-worker was, and when he was found guilty of charges, disciplined and terminated for the incident, when his white co-worker, who should have been found at fault, received no

discipline at all. He further contends that after he was reinstated and returned to work in 2010, he was discriminated against based on race, and retaliated against for filing a complaint with the EEOC in 2008 and commencing a lawsuit in 2010, when he was denied a promotion in February 2012.

DISCUSSION

It is well settled that to prevail on a motion for summary judgment, the movant must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing is made, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 NY2d at 324; *see Zuckerman*, 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). The nonmoving

party must show, however, "the existence of a bona fide issue raised by evidentiary facts." *Rotuba Extruders, Inc.*, 46 NY2d at 231; *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562.

In employment discrimination cases, courts also urge caution in granting summary judgment, because direct evidence of an employer's discriminatory intent is rarely available. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). Nonetheless, summary judgment remains available in discrimination cases (*see Ferrante*, 90 NY2d at 631; *Desir v City of New York*, 453 Fed Appx 30, 33 [2d Cir 2011]), and is appropriate when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v International Shoppes, Inc.*, 2010 WL 1270173, *5, 2010 US Dist LEXIS 30912, *15 (ED NY 2010) (internal quotation marks and citation omitted); *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 (1st Dept 2012) (summary judgment granted where no evidence of pretext or discriminatory motive); *Bennett*, 92 AD3d at 46 (same).

The NYSHRL and the NYCHRL make it unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in

the terms, conditions and privileges of employment, because of, as pertinent here, the race of an individual. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). It also is unlawful under the statutes for an employer to retaliate against an employee who has opposed or complained about discrimination prohibited by the statutes. Executive Law § 296 (7); Administrative Code § 8-107 (7).

Both statutes require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990); *Sanders v Winship*, 57 NY2d 391, 395 (1982). The NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) (Restoration Act), further "requires an independent liberal construction analysis . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights law." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009); *see* Administrative Code §§ 8-130, 8-101; *Albunio*, 16 NY3d at 477-478 (2011); *Melman*, 98 AD3d at 112; *Bennett*, 92 AD3d at 34; *Nelson v HSBC Bank USA*, 87 AD3d 995, 996-997 (2d Dept 2011).

Employment discrimination claims brought under the NYSHRL, including retaliation claims, generally are analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII. *See Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 (2006); *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Ferrante*, 90 NY2d at 629. Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of employment discrimination, that is, that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. *See Stephenson*, 6 NY3d at 270 n 2, citing *Ferrante*, 90 NY2d at 629; *Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003); *Melman*, 98 AD3d at 113-114; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). Plaintiff's burden at this stage has been described as "de minimis" or "minimal." *See St. Mary's Honor Ctr. v Hicks*, 509 US 502, 506 (1993); *Brathwaite v Frankel*, 98 AD3d 444, 445 (1st Dept 2012); *Melman*, 98 AD3d at 115; *DeNigris v New York City Health & Hosp. Corp.*, 861 F Supp 2d 185, 194 (SD NY 2012).

Once plaintiff establishes a prima facie case, the burden

then shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and nondiscriminatory reason for its employment decision. If the employer makes that showing, the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 (1981); *Melman*, 98 AD3d at 114.

Courts similarly have applied the *McDonnell Douglas* burden-shifting framework to employment discrimination claims brought under the NYCHRL, even after the 2005 Restoration Act required an independent analysis of such claims. *See Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 (2d Dept 2013); *Braithwaite*, 98 AD3d at 445; *Melman*, 98 AD3d at 113-114. The First Department, however, in *Bennett* (92 AD3d at 39-40), modified the burden-shifting framework to the extent that it concluded that, on a motion for summary judgment, when a defendant offers evidence of a nondiscriminatory basis for its actions, a court need not decide whether a prima facie case has been made. Instead, the court should "proceed directly to looking at the evidence as a whole" to determine whether defendant, as the moving party, has met its burden of showing that "no jury could find defendant liable under any of the evidentiary routes -- *McDonnell Douglas*, mixed motive, 'direct'

evidence, or some combination thereof." *Id.* at 45; *see Melman*, 98 AD3d at 113-114; *Furfero v St. John's Univ.*, 94 AD3d 695, 697 (2d Dept 2012).

Courts subsequently have held that "an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Melman*, 98 AD3d at 113; *see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 (1st Dept 2014); *Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 (1st Dept 2012). Thus, once a defendant has produced evidence of a legitimate reason for its action, "t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Bennett*, 92 AD3d at 39; *see Brightman*, 108 AD3d at 741; *Melman*, 98 AD3d at 127; *Carryl*, 93 AD3d at 590.

In support of its motion for summary judgment, Metro-North submits evidence, including deposition testimony and documents, sufficient to establish that it had legitimate non-discriminatory reasons for the challenged actions, including the 2007 disciplinary actions, and the 2012 denial of a promotion. Evidence shows that, after hearing conflicting versions of what occurred on July 1, 2007, a hearing officer determined that

plaintiff, as the electrician, was responsible for failing to ensure that the electricity was isolated, and that finding was upheld by the Board, notwithstanding its determination that termination was excessive discipline. Defendant's evidence also establishes that plaintiff was not offered a promotion in 2012 because the scores he received from three interviewers were lower than what was required to qualify to advance to the final stage of the application process.

Plaintiff, in opposition, provides no admissible evidence that raises triable issues of fact about whether defendant's actions were racially motivated or whether he was treated differently from similarly situated employees because of his race. Plaintiff contends that defendant has misrepresented the events of July 1, 2007, that plaintiff was not at fault (Pl. 2013 Dep., Def. Ex. C, at 139), and that everything that followed the incident, including the disciplinary charges, suspension, hearing and termination were sham proceedings, raising questions of fact as to defendant's motivation. *See* Barkan Aff., ¶¶ 5, 23-24. Plaintiff argues that evidence of race discrimination exists because Sheehan, a white co-worker, was given medical treatment, when plaintiff was not, after the incident (*id.*, ¶¶ 17-18), and Sheehan was not disciplined for the July 1, 2007 event, when plaintiff was.

As to the medical treatment, plaintiff does not dispute that

Sheehan was visibly burned after the incident, and was taken to the hospital after emergency personnel came to the scene, or that plaintiff, by his own admission, did not appear injured and did not think he needed medical attention. Further, while plaintiff disputes that the incident was his fault, and asserts that Sheehan was to blame because he did not wait for plaintiff to verify the power before he started to work on the contact shoe in question, at the disciplinary hearing, after hearing the conflicting testimony, the hearing officer found that Sheehan was more credible, which finding was sustained by the Board. Plaintiff presents no evidence to show any discriminatory animus on the part of the hearing officer or the Board.

Nor has plaintiff demonstrated that the decision to impose termination, even if it was later found to be excessive, was based on race. By his own acknowledgment, the July 1 incident was the worst plaintiff had witnessed in his career at Metro-North (Pl. 2013 Dep., Def. Ex. C, at 136), and he knew of no similar incidents in which white electricians were disciplined differently. *Id.* at 137-139. Although plaintiff contends that DeCarlo was primarily responsible for directing the severe penalty of termination, he does not show that, even if true, that decision was based on race.

Plaintiff also has demonstrated no basis for finding that the denial of his promotion in 2012 was a pretext for or

motivated even in part by race discrimination. Plaintiff submits no evidence that similarly situated non-African-American employees were granted the promotion, and his argument that employees with less seniority than he had were promoted does not, without more, show bias. Plaintiff also submits no evidence that less qualified, non-African-American candidates were chosen over him, or that other qualified African-American candidates were rejected. Plaintiff does not dispute that, of the twelve employees selected for promotion to engineer in February 2012, two were African-American. Further, while he alleged in the complaint that "two Caucasion co-workers in his department with less experience, years of service and qualifications were selected for promotion" (Verified Complaint, Def. Ex. A, ¶ 15), he could neither identify their names, nor remember when they were promoted, other than he believed it was before July 1, 2007. Pl. 2013 Dep., Def. Ex. C, at 161-163.

Significantly here, as defendant correctly observes, plaintiff has submitted no memorandum of law in opposition to defendant's motion, and otherwise has cited not a single legal authority to support his arguments. Such an omission in a case like this is, to this court, incomprehensible. Absent any legal authority to support plaintiff's arguments, and interpretation of the evidence, his belief that the evidence shows bias, and his conclusory assertions that DeCarlo influenced others to make

discriminatory decisions because, plaintiff claims, DeCarlo was out to get him, are insufficient to raise triable issues of fact that defendant's reasons were pretextual, that a non-African American electrician under the same circumstances would not have been similarly treated, or that race otherwise played a part in defendant's decision to discipline plaintiff and to deny him a promotion.

Plaintiff similarly fails to offer admissible evidence that raises triable issues of fact with respect to his retaliation claims. To establish a claim of unlawful retaliation under the NYSHRL and the NYCHRL (Administrative Code § 8-107 [7]), a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff, or, under the NYCHRL, the employer's actions were reasonably likely to deter a person from engaging in protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest*, 3 NY3d at 312-313; *Brightman, Inc.*, 108 AD3d at 740; *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 528 (1st Dept 2013); *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). A causal connection can be established directly, through evidence of retaliatory animus, such as verbal or written remarks, or indirectly, by showing that the adverse action closely followed in time the protected

activity. *See Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 (2d Cir 2001); *Pace Univ. v New York State Commn. on Human Rights*, 85 NY2d 125, 129 (1995).

However, "[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 ... uniformly hold that the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v Breeden*, 532 US 268, 273-74 (2001) (internal citations omitted); *see Walder v White Plains Bd. of Educ.*, 2010 WL 3724464, *14, 2010 US Dist LEXIS 100831, *50-51 (SD NY 2010); *Rommage v MTA Long Isl. R.R.*, 2010 WL 4038754, *15, 2010 US Dist LEXIS 104882, *46 (ED NY 2010); *Dubois v Brookdale Univ. Hosp. & Med. Ctr.*, 6 Misc 2d 1023(A), *8, 800 NYS2d 345 (Sup Ct, Kings County 2004), *affd* 29 AD3d 731 (2d Dept 2006). Courts have repeatedly held that as little as a few months between the protected activity and the alleged retaliation breaks any causal connection as a matter of law. *See e.g. Hollander v American Cyanamid Co.*, 895 F2d 80, 85-86 (2d Cir 1990) (three and a half months too long to establish retaliation); *Garrett v Garden City Hotel, Inc.*, 2007 WL 1174891, *20-21, 2007 US Dist LEXIS 31106, *69 (ED NY 2007) (two and one-half months precludes finding of a causal connection); *Cunningham v Consolidated Edison Inc.*, 2006 WL 842914, *19, 2006 US Dist LEXIS 22482, *55 (ED NY 2006) (passage of two months between the protected activity and

the adverse employment action seems to be the dividing line); *Carr v WestLB Admin., Inc.*, 171 F Supp 2d 302, 310 (SD NY 2001) (four month lapse of time insufficient); *Nicastro v Runyon*, 60 F Supp 2d 181, 185 (SD NY 1999) (retaliation claims "routinely dismissed" when as few as three months elapse between protected activity and alleged retaliation); *see also Williams v City of New York*, 2006 WL 5255391 (Sup Ct, NY County 2006), *affd* 38 AD3d 238 (1st Dept 2007) (two year gap defeats claim of causal connection); *Chang v Safe Horizons*, 254 Fed Appx 838 (2d Cir 2007) (gap of almost one year undermines any causal connection); *Stroud v New York City*, 374 F Supp 2d 341, 351 (SD NY 2005) ("yawning temporal gap" of two years cannot give rise to inference of causation).

Plaintiff alleges that he was retaliated against, on July 1, 2007, for being a member of a class action suit commenced in 1994, which was settled with respect to his claim in 2005, under the terms of which he received his last payment in March 2006. Plaintiff alleges no retaliatory action prior to the July 1 incident, but, rather, contends, that July 1, 2007 was DeCarlo's "first opportunity" to retaliate against him. Barkan Aff., ¶¶ 33, 51. Even if plaintiff did not join the lawsuit until 2002, the "yawning temporal gap" of five years between his participation in the class action and the alleged retaliation defeats any claim of a causal connection. *See Williams v City of*

New York, 2006 WL 5255391, *supra; Stroud*, 374 F Supp 2d at 351. Although plaintiff argues that his case was not fully settled until he received his last payment in March 2006, he offers no authority to support finding that the settlement of an action, much less payment under a settlement, constitutes opposition to discrimination prohibited by the NYSHRL or the NYCHRL. The court notes, moreover, that the settlement occurred two years prior to the alleged retaliation, and the last payment 15 months before, and therefore also would be too remote to show a causal relationship. *See Miller*, 357 Fed Appx at 386-387 (one year "well beyond" time frame allowing for inference of causation).

Plaintiff's additional claim that, following his reinstatement in 2010, he was subjected to retaliation when he was denied a promotion to engineer, also is unsupported by evidence of a causal connection. As plaintiff asserts, he filed a complaint with the EEOC in 2008, and commenced an action in this court, which was substantially similar to this action, in 2010. Thus, the denial of a promotion in 2012 is, as discussed above, too remote from the protected activity to show a causal connection. Moreover, the instant action was commenced in 2012, after he was denied a promotion, and cannot, therefore, be the basis of a retaliation claim.[3] *See Gaffney v City of New York*,

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[3]To the extent that plaintiff, for the first time in opposition to defendant's motion, claims that he was denied a promotion in 2014 (*see* Pl. Aff., ¶¶ 30, 33), the court will not address that claim, but

101 AD3d 410, 411 (1st Dept 2012). In any event, plaintiff offers no evidence that the administrators of the test or the interviewers had any retaliatory motive, and or that DeCarlo interfered with the application process.

Accordingly, it is

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

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/15/15

ENTER:

HON. NANCY BANNON, J.S.C.

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notes that plaintiff offers no evidence at all pertaining to that claim to show that it was based on discrimination or retaliation. *See* Email, Pl. Ex. 21.