SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
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SEAN BREITSTEIN,

Plaintiff,

Index No.:

151240/2014

-against-

THE MICHAEL C. FINA COMPANY, MICHAEL FINA, GEORGE FINA, TINA GINNAS, MANINDER RATTU, TIM LORENZ,

Defendants.

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ROBERT KALISH, J.:

Upon the foregoing submitted papers, Defendants' motion for summary judgment pursuant to CPLR 3212 dismissing Plaintiff's action in its entirety is hereby granted as follows:

This action arises out of Plaintiff Sean Breitstein's claims that his employer, Defendant Michael C. Fina Company (the Company), as well as Defendants Michael Fina (Michael), George Fina (George), Tina Ginnas (Gimas)[1], Maninder Rattu (Rattu) and Tim Lorenz (Lorenz), discriminated against Plaintiff, by wrongfully terminating him and subjecting him to a hostile work environment as a result of his age and his religious beliefs, in violation of the New York State Human Rights Law (NYSHRL) and the

[1] Defendant's name is Tina Gimas.

New York City Human Rights Law (NYCHRL).

Plaintiff's Causes of Action

Plaintiff's complaint sets forth ten causes of action:

- Plaintiff's first cause of action alleges discrimination based upon his religion;
- Plaintiff's second cause of action alleges discrimination based upon his age;
- Plaintiff's third cause of action alleges negligent hiring;
- Plaintiff's fourth cause of action alleges negligent supervision;
- Plaintiff's fifth cause of action alleges negligent retention;
- Plaintiff's sixth cause of action alleges hostile work environment;
- Plaintiff's seventh cause of action alleges retaliation;
- Plaintiff's eighth cause of action alleges intentional infliction of emotional distress;
- Plaintiff's ninth cause of action alleges reckless infliction of emotional distress; and
- Plaintiff's tenth cause of action alleges negligent infliction of emotional distress.

Plaintiff claims that, among other things, he was terminated from the Company based on his religion and age, in violation of the NYSHRL and NYCHRL. In addition, Plaintiff claims that neither the Company nor any of the Defendants made any efforts to protect him from this discrimination, harassment and/or intimidation based on religion or age. Plaintiff further alleges

that all of the Defendants, except Lorenz, breached their duties to Plaintiff.

Parties' general contentions on the instant motion

Defendants argue in support of their motion for summary judgment, in sum and substance, that there are no factual issues which should preclude summary judgment. Defendants claim that there is no basis to conclude that Plaintiff was discriminated against based upon his religion or age. According to Defendants, Plaintiff was terminated for, among other things, engaging in unethical negotiating tactics. Specifically, that the Plaintiff disclosed certain confidential information concerning one of the Company's customers in violation of a confidentiality agreement.

Plaintiff argues in opposition that he has presented evidence that his alleged breach of confidentiality was nothing more than a pretextual reason to terminate him. Plaintiff further argues that he had been disclosing that type of information for ten years and that doing so was standard operating practice at the Company. Plaintiff further contends that he was terminated without cause and that there is a factual dispute as to whether the Company conducted an investigation into his alleged breach of confidentiality.

Plaintiff further argues in opposition that he is a member of a protected class based both upon his Jewish religion and his age (43 years) at the time of his termination. He further argues that following his discharge, Defendants hired a younger person to take his position at a lower salary.

Plaintiff further argues that he was subject to a hostile work environment during the course of his employment in that George and Lorenz engaged in a pattern of open and obvious mentally abusive and offensive behavior concerning Plaintiff's age and religious beliefs. Plaintiff further claims that he reported Lorenz's activities to Rattu, the Human Resource manager for the Company, and to George, but that no action was taken.

Plaintiff argues that there are issues of fact as to whether or not he breached a confidentiality agreement; issues of fact as to whether or not he was ever instructed to keep certain information confidential; issues of fact as to whether or not he was subject to a hostile work environment; and issues of fact as to his seventh cause of action alleging retaliation. For these reasons, Plaintiff argues that the Defendants are not entitled to summary judgment.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being terminated in July 2013, Plaintiff had been employed by the Company since 2003.[2] The Company was founded in 1935 and originally specialized in the sale of fine silver merchandise. However, in 1970, the Company opened its Corporate Sales Division, "dedicated to supporting reward and recognition programs." (Aff of Michael in support of motion for summary judgment, ¶ 3). The Company is owned by the Fina family and has five shareholders: nonparty Ashley Fina, nonparty Jane Fina, nonparty Steven Fina, nonparty Jeffrey Fina (Jeffrey) and Michael, who is the Chief Operating Officer.

Plaintiff is a Jewish male and was 43 at the time that he was terminated. Plaintiff had worked as a Buyer, and his sales duties included "[p]urchasing merchandise, negotiating price, working on contracts." (Defendants' exhibit 3, Plaintiff tr at 50).

George supervised Plaintiff from 2003 until 2009 when nonparty Debbie Fenton (Fenton) became his direct supervisor. Lorenz supervised Fenton.

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[2] Plaintiff also worked for the Company between 1998-1999 but then moved to Ohio.

On January 6, 2012 and March 22, 2013, Plaintiff signed "receipt and acknowledgments" indicating that he was informed about his obligation to read the Company employee handbook (Defendants' exhibit 5). The receipt and acknowledgments further indicated that Plaintiff understood that his employment was "terminable at will, either by myself or Michael C. Fina, regardless of the length of my employment or the granting of benefits of any kind." (*Id*). In addition, the receipt and acknowledgment set forth that Plaintiff understood that he was being provided with confidential information, including, but not limited to, customer lists, customer employee data and pricing policies. Plaintiff signed that he understood that "this information is critical to the success of Michael C. Fina and must not be disseminated or used outside of Michael C. Fina's premises." (*Id*).

On January 6, 2012 Plaintiff also signed a confidentiality agreement in which he agreed that he was "required to maintain the confidentiality of all confidential information concerning [the Company] and its clients." (Defendants' exhibit 4).

The Company also had a "non-discrimination and anti-harassment" policy in place, as set forth in the Company Handbook. Defendants' exhibit 6. The policy contained the complaint procedure for reporting an incident of harassment, discrimination or retaliation. The policy further stated,

"[h]arassment of *any employee will not be tolerated* [emphasis in original." (*Id.* at 1). Plaintiff acknowledged receipt of this handbook.

Specific contentions relating to the individual Defendants based upon deposition testimonies and affidavits

George Fina

George was Plaintiff's supervisor from 2003 until 2009. Plaintiff claims in the complaint that George subjected him to severe and pervasive harassment based on his religion and/or age. However, Plaintiff testified that George did not say anything to him that was discriminatory based on age. Plaintiff states that George subjected him to a hostile work environment based on Plaintiff's religion. Plaintiff testified that George would say the following, in pertinent part:

> "He would say, you know, about those Syrian Jews, how clanny [sic] they are, and you can't trust them. Then when we had orthodox people in the office that I would deal with, he would call them 'the beards.' Then he referred to yarmulkes on several occasions as beanies. And he would also refer to Syrian Jews as being cheap." (*Id.* at 28-29).

Plaintiff testified that George made these statements between 2003 and 2009, and that it was "too numerous to count." (*Id.* at 29). He further testified that George continued to make these comments after 2009. However, Plaintiff could not recall any specific instances or dates that George made the comments.

Plaintiff testified that, although he is not a Syrian Jew and does not wear a yarmulke, he believed George was directing the comments right at Plaintiff. George allegedly made these comments in front of both Plaintiff and Fenton, Plaintiff's supervisor. Plaintiff testified that he was offended by George's comments but that he did not complain to anyone about George's comments because he "didn't think it was going to make a difference." (*Id.* at 31). Plaintiff noted that sometimes he would be bothered by George's comments, but sometimes they did not bother him. Plaintiff testified that "[i]t would all depend on how he would say it to me." (*Id.* at 41).

In the complaint, Plaintiff also states that George "commented on and insulted Plaintiff's appearance, to wit: calling him old, fat and telling him he needs a haircut." Complaint, ¶ 37. In his testimony, Plaintiff acknowledged that the comments regarding the length of his hair and his weight had nothing to do with his religion. (Plaintiff's tr at 39).

George states that he is currently the Chairman of the Company, which is strictly an advisory position. He claims that he has not had any ownership interest in the Company since 2009 and that he has no authority to hire or fire employees. George advises that he was consulted about the decision to terminate Plaintiff and that he agreed with the decision.

While training Plaintiff, George states that he specifically advised Plaintiff that everything he did at the Company was confidential. He writes, "I know that [Plaintiff] was aware that he should never reveal the name of a Customer or prospective customer to a vendor because I told him that myself." (George aff, ¶ 6). George does not deny referring to Orthodox Jews as "beards." He states that it is "common" in the jewelry business to refer to Hasidic Jews as the "beards," and that it is not "meant in a derogatory way, but rather as a descriptive term." (*Id.*, ¶ 7). George claims that Plaintiff never told George that he was offended by the term "beards," and that he has heard Plaintiff use the same expression.

George does not recall making derogatory comments about Jewish people and claims, "[a]fter all, the Fina family is Jewish." (*Id.*, ¶ 8). George also denies referring to yarmulkes as beanies, stating, "I have no idea what that even means." (*Id.*, ¶ 9).

George does not deny making comments about Syrian Jews "clinging" together. He states,

> "I did express my opinion to [Plaintiff] that Syrian Jews tend to 'cling' together, i.e., they tend to be in the same industries, live in the same neighborhoods and vacation together in the same place in New Jersey. I also told [Plaintiff] I think that the Syrian Jews are shrewd business people and tough negotiators, an opinion with which Plaintiff he [sic] shared. Once again, I did not mean this in a derogatory manner, but rather as business advice to him."

(*Id.*, ¶ 10).

Maninder Rattu

Rattu worked in the Human Resources Department at the Company from May 2008 through April 2011. In the complaint, Plaintiff states that he complained to Rattu about Lorenz's "severe and pervasive harassment and/or discrimination and/or intimidation," but that Rattu failed to take prompt and reasonable action against Lorenz. Plaintiff testified that he spoke to Rattu once, on an unspecified date, about Lorenz yelling and screaming at him. Plaintiff does not recall if he told her to take any action but thought "it should have been implied or inferred that I did . . .." (Plaintiff's tr at 75). He believes that, after he complained to Rattu, the "abuse kept coming a little bit harder than before." (*Id.* at 56). Plaintiff further believed that his complaint "got back to Lorenz . . . because [Lorenz] told me that if I had a problem with him to talk to him about it . . .." (*Id.* at 158).

Plaintiff did not file a formal complaint with human resources and did not speak to any other human resources representatives after his alleged conversation with Rattu.

Tim Lorenz

Lorenz was hired in 2008 and worked at the Company until he was involuntarily terminated in 2013. Lorenz was employed as the Vice President of Operations. According to Michael, Lorenz did not have any ownership interest in the Company, did not have the authority to hire and fire employees and "could only carry out decisions made by or in connection with the shareholders of the Company." (Michael aff, ¶ 8).

Plaintiff alleges that Lorenz engaged in a pattern of mentally abusive and offensive behavior directed at Plaintiff that created a hostile work environment. Plaintiff contends that Lorenz engaged in this behavior despite Plaintiff's protests. According to Plaintiff, Lorenz's unlawful actions included the following, in pertinent part:

- Lorenz allegedly used the term "beanies" when referring to yarmulkes on numerous but unidentified occasions
- On the occasions where Plaintiff took off for the high holidays, which were a few times in a couple of years, Lorenz would allegedly say "in a derogatory manner what are you going to do, go sit there and pray?"
- Lorenz would make fun of traditional Jewish foods Plaintiff would eat, such as matzoh, kugel and gefilte fish
- Lorenz asked Plaintiff "what is this shit?" in reference to matzoh
- Lorenz screamed at Plaintiff, as Lorenz did with others, and cursed at Plaintiff with the intent to intimidate him and asking "are you stupid?" and slammed doors in Plaintiff's face
- Lorenz once told Plaintiff he is a "highly compensated old Jew for what [he] does and if [he] thinks [he] can go, go find a better job."

(Complaint, ¶ 27).

During his testimony, Plaintiff stated that Lorenz told him that he was highly compensated for what he does and that, in the same conversation, he said, one time, you are a highly compensated old Jew. This conversation occurred a couple of weeks before Plaintiff was terminated and Fenton was also in the room.

Plaintiff testified that he used to hear Lorenz screaming "at others as well," (Plaintiff's tr at 68). Plaintiff testified that he did not complain to Lorenz about the comments or behavior. Plaintiff testified that he indirectly reported to Lorenz because Lorenz was Fenton's supervisor and he characterized his relationship with Lorenz as "not good" from the start. (*Id.* at 139). Plaintiff believed that Lorenz did not like him for some reason and that he did not know why Lorenz did not like him.

Although he does not provide any specific dates or instances, Plaintiff testified that Lorenz would refer to yarmulkes as beanies and ask Plaintiff and other co-workers why orthodox Jewish people were wearing them. Plaintiff stated that, although a yarmulke could be considered a beanie, he believed Lorenz was saying it in a condescending way. Similarly, Lorenz would only ask Plaintiff about Plaintiff praying on the high holidays, but Plaintiff thought he was being ridiculed for taking

days off.

Plaintiff testified that he only ate matzoh and other typical Jewish foods on the holidays. He stated that he did not eat it on any other occasion and that Lorenz may have commented three or four times a year about the matzoh. Evidently Lorenz did not like the smell of the gefilte fish would say "how can you eat that crap." (Plaintiff's tr at 51).

Plaintiff testified that Lorenz used to make the comments about praying only on Rosh Hashana and Yom Kippur. He continued that, he used to take off for the holidays but stopped in 2011 or 2012 because he did not want to have to hear Lorenz ask him about sitting and praying.

Plaintiff further testified that, while in the office with Michael, Lorenz made the comment "you people all drive Mercedes." (*Id.* at 61). Plaintiff stated that he "think[s] [Lorenz] might have used the word Jew, but I'm not 100 percent sure." (*Id.* at 62).

Michael states that Plaintiff never complained to him about any employee's behavior or statements. Michael further contends that he has "no recollection of the meeting at which [Plaintiff] claims I was present and [Lorenz] said 'all you people' and then changed it to 'all Jews drive Mercedes'." (Michael Aff, ¶ 14).

Although he does not provide any specific dates or instances, Plaintiff testified that he complained to George about Lorenz's yelling. Plaintiff does not remember when he complained and testified that he "told George that I felt that [Lorenz] was harassing me about certain things and George smiled and laughed at me." (Plaintiff's tr at 60). He continued, "I said to [George] about the remark about the Mercedes Benz comment about you - all you people, about going to pray in the holidays and about - what was it? About calling me stupid and other verbal abuse." (*Id.* at 60).

Tina Gimas

Gimas was the Chief Administrative Officer for the Company from May 2011 through April 2015 and supervised the HR Director, contracts, strategy and special projects. Michael aff, ¶ 6.

Plaintiff testified that he does not recall why he named Gimas in the complaint. He did not complain to her about any alleged discriminatory behavior.

Michael Fina

According to Michael, he made the decision to terminate Plaintiff immediately after a potential customer had complained about Plaintiff's allegedly unethical behavior. He writes, "[t]he sole reason that [Plaintiff] was terminated is because of the unethical negotiation tactics in which he engaged and the harm he caused the Company as a result." (Michael aff, ¶ 24).

In his affidavit, Michael explained that, prior to the Plaintiff's termination, the Company had been involved in a competitive bid for Customer A's business. Customer A and the Company signed a confidentiality agreement not to disclose Customer A's identity and other proprietary information including a list of merchandise items to see if the Company could provide competitive pricing. "The list of items was provided to [Plaintiff] who was then asked to update the list with the prices for which the Company was currently purchasing those same items from the vendors that he worked with." (*Id.*, ¶ 18).

Michael states that, while contacting vendors about current prices, Plaintiff disclosed the identity of Customer A as well as prices that Customer A was currently paying for these items from the vendor. Michael claims that, "[i]t is common for the Buyers to call or email the vendors and ask for a current price for the items based on the expected volume from the new prospective customer, but without divulging any confidential information about the prospect, including their name." (*Id.*, ¶ 19). In addition, Michael states that Plaintiff allegedly "threatened" vendors to provide the same prices that they were currently providing to Customer A, or else the Company would stop doing business with them.

Customer A called Jeffrey, who, at the time, was the Head of Sales, and complained about the Company's alleged breach of confidentiality and about Plaintiff's work. Evidently several vendors had called Customer A's buyers and "told them that [Plaintiff] was using their confidential pricing information to negotiate unethically on the Company's behalf." (*Id.*, ¶ 21).

Michael states that, after Jeffrey advised him what had happened, Michael discussed the situation with Ashley, Gimas and Lorenz. Michael contends that, "Based on the information provided to us by Customer A, we concluded that [Plaintiff] had committed several terminable offenses . . . I made the decision to terminate [Plaintiff] immediately thereafter." (*Id.*, ¶ 22.)

Michael, Gimas and Lorenz met with Plaintiff and told him what Company A's buyers had reported and that Plaintiff was being terminated for unethical behavior, breaching confidentiality as well as violating the Company's policy.

Michael denies that Plaintiff was replaced by a younger person. According to Michael, Plaintiff was not replaced until later 2014 or early 2015 by a male that was older than Plaintiff.

Plaintiff's contentions as to his termination

Plaintiff states that he was "fired without cause" by Michael, Lorenz and Gimas. He further claims that he was subject to a hostile work environment by George and Lorenz, based upon Plaintiff's age and religious beliefs.

According to Plaintiff, throughout his ten years with the Company, he was a qualified and exemplary employee who did not have any disciplinary history. Plaintiff does not dispute that he disclosed Customer A's information. He testified that he would have done that because he was never told that Customer A's information was confidential. Plaintiff continued that, as a practice, he had always disclosed the pricing and model numbers in the ten years that he worked for the Company, unless he was specifically advised not to. He stated that he was trained by George to "get the best possible pricing, whatever you have to do to get it." Plaintiff's tr at 101. Plaintiff further testified that his current supervisor, Fenton, also advised him to get the best pricing. He stated, "in order for me to get the best pricing, I had to share information with vendors to get that information." (*Id.* at 104).

As Plaintiff claims that he had been trained to reveal prices in his course of business, Plaintiff believes that he was not really terminated for breaching any confidentiality, but that his termination was pretextual and motivated by age and religious animus. For example, Plaintiff believes that his termination was motivated by age because Michael "wanted to get younger people into the company." (*Id.* at 117). According to Plaintiff, he was replaced by a younger woman who received a much lower salary than Plaintiff had been earning.

Plaintiff further claims that his termination was motivated by a religious animus because there was no investigation into his alleged breach of confidentiality and that Lorenz, the alleged perpetrator of the religious-based harassment, was involved in the termination.

Plaintiff claims to have suffered severe emotional distress as a result of Defendants' actions and is seeking punitive, as well as other damages from lost wages.

Analysis

I. Summary judgment standard

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007)). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact [internal quotation marks and citation omitted]." (*People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008)). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." (*Id.* at 544). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility [internal quotation marks and citation omitted]." (*Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010)).

II. NYSHRL/NYCHRL/Religion/Age

NYSHRL and NYCHRL standards

Pursuant to NYSHRL, as set forth in Executive Law § 296 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender, race, creed, national origin or age.

Pursuant to the NYCHRL, as stated in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's age and religion.

In evaluating causes of action under both the NYSHRL and the NYCHRL, the Court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where Plaintiff has the initial burden to establish a prima facie case of discrimination (*See Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 (2004)).

Under the *McDonnell Douglas* framework, a plaintiff meets his the initial prima facie burden "by showing that [h]e is a member of a protected class, [h]e was qualified to hold the position, and that [h]e suffered adverse employment action under circumstances giving rise to an inference of discrimination. If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination [internal quotation marks and citations omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016); *See also Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009)).

In evaluating claims under the NYCHRL, the Court must also evaluate said claims with regard for the NYCHRL's "*uniquely broad and remedial purposes.*" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009) (emphasis in original)). "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that [he] has been treated less well than other employees because of [his protected status]." (*Id.* at 78; *See also e.g. Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450

(1st Dept 2013)(Court held that plaintiff's testimony regarding disability based discrimination raised issues of fact as to whether she was treated differently under the NYCHRL or suffered an adverse employment action under the NYSHRL)).

In addition, "[a] motion for summary judgment dismissing a City Human Rights Law claim can be granted 'only if the defendant demonstrates that it is entitled to summary judgment under both [the McDonnell Douglas burden-shifting framework and the mixed-motive' framework]'" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) *citing Melman v Montefiore Med. Ctr.*, 98 AD3d 107 (1st Dept 2012)). The Appellate Division, First Department, has reaffirmed the applicability of both the *McDonnell Douglas* framework and the mixed motive analysis to claims brought under the NYCHRL. (*Id., See also Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012) ("an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed under both the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases")).

"Under the mixed-motive framework, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Thus, under this analysis the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination [internal quotation marks and citations omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514-515).

The Court will now address Defendants' motion for summary judgment as to each of Plaintiff's ten causes of action.

Defendants are entitled to summary judgement dismissing Plaintiff's first cause of action based upon allegations of religious discrimination

Upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants are entitled to summary judgment dismissing the first cause of action grounded in religious discrimination under both the NYSHRL and NYCHRL.

Initially, the Court finds that on the issue of alleged religious discrimination under both the NYSHRL and the NYCHRL, Plaintiff has established that he is a member of a protected class, he was qualified to hold the position, and that he suffered adverse employment action under circumstances giving

rise to an inference of discrimination (being terminated by the Company). As such the burden shifts to Defendants to show a legitimate, nondiscriminatory reason for terminating Plaintiff's employment with the Company.

Upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants have set forth a legitimate, nondiscriminatory reason terminating Plaintiff's employment. Specifically, that Plaintiff was dismissed from the Company based upon his disclosure of Customer A's identity to venders as well as the prices that Customer A was currently paying for certain items of merchandise. Said actions were in violation of a confidentiality agreement that the Plaintiff signed as an employee of the Company. The Company had a confidentiality agreement with Customer A not to disclose such information. Defendants submit a copy of the receipt and acknowledgment and also a copy of the confidentiality agreement signed by Plaintiff wherein he agrees not to disseminate confidential client information. As such, Defendants' contentions regarding the Company's client confidentiality policy are well-documented.

Under the *McDonnell Douglas* framework, applicable to discrimination actions brought under both the NYSHRL and the NYCHRL, the burden shifts back to Plaintiff to prove that the reason proffered by the Company for terminating him was merely a

pretext for discrimination.

Further under the mixed-motive framework, applicable to discrimination actions brought under the NYCHRL, the Court will also consider whether there exist triable issues of fact that discrimination was one of the motivating factors for the Company's termination of Plaintiff as an employee.

Upon review of the submitted papers and having conducted oral argument, the Court finds that Plaintiff has failed to raise a triable issue of fact that Defendants' presented reasons for his termination were pretextual. In support of his contention that his termination was pretextual, based on religion, Plaintiff alleges, in pertinent part, that he had never been disciplined and that Lorenz, who had allegedly made discriminatory comments directed at Plaintiff, had been part of the decision to terminate Plaintiff.

Defendants have alleged that Plaintiff was terminated for valid business reasons. Plaintiff argued that he had been conducting business the same way for ten years, that he was trained to conduct business in that way and that there was not a formal investigation into his conduct. However, Plaintiff has failed to demonstrate how Defendants' decision, at the time, to terminate him, was pretextual. Although Plaintiff claims that this decision was wrong, there is no evidence that Defendants did not believe Plaintiff breached the Company policy. "The mere

fact that [Plaintiff] may disagree with [his] employer's actions or think that [his] behavior was justified does not raise an inference of pretext [internal quotation marks and citations omitted]." (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 121 (1st Dept 2012)).

Plaintiff further argues that alleged discriminatory comments made by Lorenz establish that Defendants' reasons for his termination were pretextual. "In determining whether a comment is probative of discrimination, the following factors are considered: (1) whether the comment was made by a decisionmaker, 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." (*Chiara v Town of New Castle*, 126 AD3d 111, 124 (2d Dept 2015) *citing Schreiber v Worldco, LLC*, 324 F Supp 2d 512 (SDNY 2004)).

In the instant case, the Court finds that even if Lorenz made inappropriate comments, "under the circumstances, they constitute at most stray remarks which, even if made by a decision maker, do not, without more, constitute evidence of discrimination [internal quotation marks and citation omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 517). In addition, Michael, not Lorenz, made the ultimate decision to

terminate Plaintiff. "Indeed, plaintiff did not demonstrate a nexus between the employee's [Lorenz's] remark and the decision to terminate him [Plaintiff]." (*Godbolt v Verizon N.Y., Inc.*, 115 AD3d at 494). Given the record, Plaintiff has not established a nexus between any alleged discriminatory comments and the decision to terminate him.

Further, Plaintiff has not established by a preponderance of the evidence that he was treated less well due to his religion. Even under the NYCHRL, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury." (*Melman v Montefiore Med. Ctr.*, 98 AD3d at 131). The Court in an employment discrimination case "should not sit as a super-personnel department that reexamines an entity's business decisions [internal quotation marks and citation omitted]." (*Id.* at 121).

Turning to the mixed-motive analysis, none of Plaintiff's allegations can establish that his termination was motivated, even in part, by discrimination. (*See e.g. Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 (1st Dept 2014) ("Even under the mixed-motive analysis applicable to City Human Rights Law claims, plaintiff's claim fails, because there is no evidence from which a reasonable factfinder could infer that [protected status] played any role in defendant's decision to terminate him").

As such, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's first cause of action for religious discrimination under both the NYSHRL and the NYCHRL.

Defendants are entitled to summary judgement dismissing Plaintiff's second cause of action based upon allegations of age discrimination

Upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants are entitled to summary judgment dismissing the second cause of action grounded in age discrimination under both the NYSHRL and NYCHRL.

Specifically, Defendants have established that the circumstances of Plaintiff's termination from the Company did not give rise to an inference of discrimination. As such, Plaintiff cannot establish a prima facie case for age discrimination under the *McDonnell Douglas* framework. Further Plaintiff has failed to raise any issues of fact that Defendants' proffered reasons for terminating him were pretextual or that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the defendants' actions under the mixed-motive framework (*Id.* at 127; *see also Carryl v MacKay Shields, LLC*, 93 AD3d 589, 590 (1st Dept 2012)).

In an age discrimination claim, an inference of discrimination may be supported by "direct or statistical evidence that would logically support an inference of discrimination." However, if a plaintiff "does not produce direct or statistical evidence that would logically support an inference of discrimination, [he] must show [his] position was subsequently filled by a younger person or held open for a younger person." (*Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 (1st Dept 2007)).

Plaintiff contends that his termination was motivated due to his age. In support of this contention, Plaintiff claims that Michael spoke about wanting to get younger people into the Company and that Lorenz made a comment about his age. Plaintiff further testified that he believed that two other older people were terminated around the same time that he was and that he was replaced by a younger woman.

In the underlying action, Plaintiff's allegations cannot support an inference of discrimination. "Conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment." (*Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 329 (1st Dept 2005)). Plaintiff only speculates that other older employees were terminated and that he was replaced by a younger person. Although Plaintiff claims in this deposition testimony that older people were being terminated, he submits no evidence

of these alleged terminations. Michael testified that Plaintiff was replaced by an older male. In any event, Plaintiff's "reliance on statistics as evidence of pretext or bias is unavailing, because the sample sizes are too small to support an inference of discrimination [internal quotation marks and citation omitted]." (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 (1st Dept 2016)).

Even assuming arguendo that Plaintiff had met his prima facie burden under the *McDonnell Douglas* framework, Plaintiff has failed to produce any evidence demonstrating that the decision to terminate him was pretextual. As previously stated in the instant decision, Defendants have established that Plaintiff was terminated for breaching the confidentiality of a client and negotiating in an unethical manner.

As stated above, there is no basis to show that the circumstances of Plaintiff's termination created an inference of age discrimination(i.e. Plaintiff failed to establish a prima facie case of age discrimination under the *McDonnell Douglas* framework). Similarly, there is nothing in Plaintiff's submitted papers and/or arguments presented at oral argument to create an issue of fact as to whether Defendants' nondiscriminatory reasons for Plaintiff's termination were pretextual based upon age discrimination.

Further, as previously stated in the instant decision, none of Plaintiff's allegations can establish that his termination was motivated, even in part, by age discrimination. In addition, the Plaintiff cannot establish that he was treated less well due to his age.

As such, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's second cause of action for age discrimination under both the NYSHRL and the NYCHRL.

III. Negligent Hiring, Supervision and Retention

Defendants are entitled to summary judgment dismissing Plaintiff's third, fourth and fifth causes of action for negligent hiring, supervision and retention respectively

During oral argument held on September 6, 2016, this Court addressed the Parties' contentions with respect to Plaintiff's third, fourth and fifth causes of action for negligent hiring, supervision and retention respectively. As argued by Defendants, they are entitled to summary judgment dismissing the claims of negligent hiring, retention and supervision, as they are preempted by the New York Workers' Compensation Statute. (*See e.g. Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 (1st Dept 2015) ("The exclusivity of remedy provisions set forth in Workers Compensation Law . . . preclude common-law negligence claims against defendants")). The Court further notes that at oral argument, the Plaintiff's attorney conceded to the dismissal of the Plaintiff's third,

fourth and fifth causes of action for negligent hiring, supervision and retention respectively.

As such, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's third, fourth, and fifth causes of action for negligent hiring, supervision and retention respectively.

IV. Hostile Work Environment under the NYSHRL and the NYCHRL

Plaintiff claims that he was subjected to severe and pervasive religious and age discrimination by George and Lorenz. As set forth in the facts, Plaintiff alleges that George harassed Plaintiff by referring to the Hasidic Jews as "beards," calling Syrian Jews "clanny," calling Jewish people cheap, referring to yarmulkes as beanies, telling Plaintiff that he was getting fat and that he needed a haircut. Plaintiff does not provide any dates for the alleged conduct, and George has not supervised Plaintiff since 2009.

As set forth in the facts, Plaintiff alleges that Lorenz created a hostile work environment for him because Lorenz used the term "beanies" when referring to yarmulkes, asked Plaintiff if he was going to sit and pray when he took off work for the High Holidays, made fun of traditional Jewish foods such as matzah, kugel and gefilte fish, telling Plaintiff he is a highly compensated old Jew for what he does, and screaming at Plaintiff. Although Plaintiff does not address these in his memorandum of

law, Plaintiff had also noted in his complaint that Lorenz would scream at Plaintiff, that Lorenz told Plaintiff all Jews drive Mercedes, asked Plaintiff if Plaintiff was stupid, and slammed doors in Plaintiff's face. Plaintiff claims that he suffered severe emotional distress as a result of Lorenz's conduct.

The Defendants are entitled to summary judgment dismissing Plaintiff's sixth cause of action for hostile work environment brought under the NYSHRL

Under the NYSHRL, a hostile work environment is present when "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 [internal quotation marks and citation omitted]." (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 310 (2004)).

"Whether a workplace may be viewed as hostile or abusive -- from both a reasonable person's standpoint as well as from the victim's subjective perspective -- can be determined only by considering the totality of the circumstances." (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996)). These circumstances include "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 [internal quotation marks and

citation omitted]." (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 310-311). Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive. (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d at 51).

Upon review of the submitted papers and having conducted oral argument, the Court finds that Plaintiff's hostile work environment claims under the NYSHRL fail because they do not rise to the level of severe and pervasive. Most of George's alleged comments were not directed at Plaintiff as he is not a Hasidic Jew or Syrian. George stated that he does not recall making any derogatory comments about Jews because the Fina family is Jewish. Nonetheless, even if Plaintiff found the comments offensive, plaintiff has not raised a triable issue of fact that the alleged discriminatory remarks were so "severe or pervasive as to permeate the workplace and alter the conditions" of his employment. (*La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 920 (2d Dept 2015)).

Plaintiff claims that George made these comments on occasions too numerous to list, but does not specify any dates. Plaintiff commenced this action on February 11, 2014. Any allegations that occurred prior to February 11, 2011 are time

barred as outside the three year statute of limitations.[3] *See* CPLR 214 (2). In addition, by his own testimony, Plaintiff concedes that there were times he did not find the comments to be offensive and did not find them to be directed at him. Moreover, Plaintiff did not file a complaint with the Company pursuant to its non-discrimination and anti-harassment policy, despite being aware that there was such a policy in place.

Even if George told Plaintiff to lose weight and get a haircut, these comments, while they may be offensive, were not directed at Plaintiff because he is Jewish. Plaintiff concedes this in his testimony.

In addition, with respect to Lorenz, in considering the totality of the circumstances, Plaintiff cannot allege Lorenz's comments were severe and pervasive. Plaintiff testified that Lorenz screamed at others in the office. Even if this conduct towards Plaintiff could be considered hostile, evidence fails to establish that this complained-of conduct occurred because of Plaintiff's religion, or that he was "exposed to disadvantageous terms or conditions of employment to which members of the other [religions] are not exposed [internal quotation marks and citation omitted]." (*Oncale v Sundowner Offshore Services,* 523 US 75, 80 (1998)). Similarly, Plaintiff testified that when

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[3] Neither party addresses the statute of limitations or the continuing violations doctrine.

Lorenz called Plaintiff "stupid" it was not in relation to his religion or age. "It is axiomatic that the Plaintiff also must show that the hostile conduct occurred because of a protected characteristic." (*Tolbert v Smith*, 790 F3d 427, 439 (2d Cir 2015)).

Plaintiff testified that when he sporadically brought certain foods in for holidays, Lorenz would complain about the smell or say things like "how can you eat that crap?" In addition, Lorenz would ask Plaintiff if he was going to sit home and pray on the high holidays. While these comments may have been offensive to Plaintiff, by Plaintiff's own acknowledgment, they were sporadic. Plaintiff testified that he would only eat Jewish foods on the holidays and that he only went synagogue on the high holidays. According to Plaintiff, he stopped taking off of work for the high holidays in 2011 or 2012, so the last time Lorenz could have made comments about Plaintiff praying would have been a couple of times in 2010. Again, this would be outside of the three-year statute of limitations period.

Plaintiff does not identify any specific dates of the conduct. Nonetheless, even if all of the comments are within the limitations period, as well as calling yarmulkes beanies, the one comment that Plaintiff is a highly compensated old Jew and the comment that Jews drive Mercedes, while Plaintiff may have been exposed to a "mere offensive utterance" on several occasions, a

reasonable person cannot find that Plaintiff was subject to a hostile work environment. (*Brennan v Metropolitan Opera Ass., Inc.*, 284 AD2d 66, 72 (1st Dept 2001)).

Considering the totality of the circumstances, including the conduct mentioned above, the Court finds that the incidents directed specifically at Plaintiff due to his age and/or religion were isolated and sporadic, rather than pervasive, ongoing harassment, and do not rise to an actionable level under the NYSHRL.

As such, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's sixth cause of action for hostile work environment brought under the NYSHRL.

Defendants are entitled to summary judgment dismissing Plaintiff's sixth cause of action for hostile work environment brought under the NYCHRL

"Under the NYCHRL there are not separate standards for 'discrimination' and 'harassment' claims [internal quotation marks and citation omitted]." (*Johnson v Strive East Harlem Empl. Group*, 990 F Supp 2d 435, 445 (SD NY 2014)). To establish a discrimination claim under the NYCHRL Plaintiff has to prove by a "preponderance of the evidence that [he] has been treated less well than other employees because of [his religion and age]." (*Williams v New York City Housing Auth.*, 61 AD3d at 78).

Despite the broader application of the NYCHRL, *Williams* also recognized that the law does not "operate as a general civility code [internal quotation marks and citation omitted]." (*Id.* at 79). Defendants can still avoid liability if they can demonstrate that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" (*Id.* at 80). However it is the employer's burden to prove the conduct's triviality. (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 111 (2d Cir 2013)).

Without condoning the conduct, the Court finds that the facts as alleged by Plaintiff fall short of establishing that he was subject to a hostile work environment due to his age or religion, in violation of the NYCHRL. Plaintiff cannot demonstrate that he was treated less well due to his religion or age and Defendants have established that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'." (*Williams v New York City Housing Auth.*, 61 AD3d at 80).

In addition, as set forth above, the alleged discriminatory comments were sporadic and occurred a handful of times during the year, in relation to the High Holidays. By Plaintiff's account, Plaintiff and Lorenz worked together from 2008 until 2013 and

Plaintiff stopped attending services in 2011 or 2012 and only ate Jewish foods, like matzoh, on Jewish holidays such as Passover. The other instances of alleged verbal abuse, where Lorenz screamed at Plaintiff or called him stupid, show nothing more than unprofessional behavior, which do not give rise to discrimination claims. "New York does not recognize a common-law cause of action to recover damages for harassment [internal quotation marks and citations omitted]." (*Adeniran v State of New York* 106 AD3d 844, 845 (2d Dept 2013)).

Plaintiff also testified that he and Lorenz did not get along and that Lorenz yelled at others in the office as well. While this conduct may be uncivil, Plaintiff cannot establish that he was treated less well due to a protected characteristic. (*See e.g. Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 126 (1st Dept 2012) ("[M]ere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code[internal citation and quotation marks omitted]").

Applying the standard set forth in *Williams* to the present case, Plaintiff's remaining allegations with respect to Lorenz's comments regarding his religion can also be reasonably interpreted by a "trier of fact" to be no more than "petty slights and trivial inconveniences." (*Id.* at 80). Although the alleged comments about beanies, that all Jews drive Mercedes and

that Plaintiff is a highly compensated old Jew, may have been offensive, a reasonable juror would find that these sporadic comments are too petty and trivial to rise to an actionable level. (*See e.g. Wilson v N.Y.P Holdings, Inc.*, 2009 WL 873206, *29, 2009 US Dist LEXIS 28876 (SD NY 2009), *affd Watson v N.Y. Pressman's Union No. 2, NYP Holdings, Inc.*, 444 Fed Appx 500 (2d Cir 2011)(holding that despite plaintiffs' claims that defendant discriminated against black and female employees, there was no viable hostile work environment claim under the NYCHRL when black female employees were allegedly subject to some derogatory language over a number of years, as this only resulted in "petty slights and trivial inconveniences")).

As such, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's sixth cause of action for hostile work environment brought under the NYCHRL

Accordingly and for the reasons so stated, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's sixth cause of action for hostile work environment brought under both the NYSHRL and the NYCHRL.

V. Retaliation

The Court of Appeals has held that "it is unlawful to retaliate against an employee for opposing discriminatory practices." (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 312). When analyzing claims for retaliation, courts apply the burden shifting test as set forth in *McDonnell Douglas Corp. v Green* (411 US at 802]), which places the "initial burden" for establishing a prima facie case of retaliation on the plaintiff. Claims for retaliation under the NYSHRL and the NYCHRL are analyzed in the same manner as those under Title VII. (*Middleton v Metropolitan Coll. of New York*, 545 F Supp 2d 369, 373 (SD NY 2008)). For a plaintiff to successfully plead a claim for retaliation, he or she must demonstrate that:

> "(1) [he] has engaged in protected activity, (2) [his] employer was aware that he participated in such activity, (3) [he] suffered an adverse employment action based upon [his] activity, and (4) there is a causal connection between the protected activity and the adverse action."

(*Forrest v Jewish Guild for the Blind*, 3 NY3d at 313).[4] Under the NYCHRL, "The retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . .[but] must be

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[4] For a plaintiff to establish a claim for retaliation under the NYCHRL, he or she must demonstrate that: "(1) [he or she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [him or her]; and (3) a causal connection exists between the protected activity and the adverse action." (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012)).

reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

"Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." (*Aspilaire v Wyeth Pharmaceuticals, Inc.*, 612 F Supp 2d 289, 308 (SD NY 2009)).

Defendants are entitled to summary judgment dismissing Plaintiff's seventh cause of action for retaliation brought under both the NYSHRL and the NYCHRL

In the underlying action, there is no indication that Plaintiff's conversations with Rattu or George, constituted protected activity (complaint concerning discrimination), or that Defendants knew about this activity. With respect to the 2011 conversation with Rattu, Plaintiff testified that he complained to Rattu about Lorenz yelling and screaming at him and that, after he complained, Lorenz yelled and screamed more. Plaintiff does not provide a date for his conversation with Rattu, and anything that occurred prior to February 11, 2011, is outside of the statute of limitations. Similarly with George, Plaintiff does not provide any specific dates, but states that he complained to George about Lorenz's comments and complained that Lorenz would yell at him.

However, Plaintiff never stated to Rattu or George that Lorenz's behavior towards him was the result of a religious bias against him. "Complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." (*Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008)). Even using the broadest interpretation of Plaintiff's complaints, Defendants could not reasonably understand that Plaintiff was opposing statutory discrimination. (*See e.g. Fletcher v Dakota, Inc.* (99 AD3d at 54) ("[E]ven under the City HRL, a complaint . . . that contains 269 numbered paragraphs without alleging even on information and belief that defendants knew or should have known that [Plaintiff] was opposing discrimination when he spoke to them about the African-American shareholder who intended to renovate her bathroom fails to state a cause of action for retaliation")).

However, even assuming arguendo, that Plaintiff was opposing discriminatory practices, no causal connection exists between Plaintiff's complaints and Defendants' actions. Further, Defendants have provided legitimate reasons for Plaintiff's termination.

As such, upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's seventh cause of action for retaliation brought under both the NYSHRL and NYCHRL.

VI. Intentional and Reckless Infliction of Emotional Distress

Defendants are entitled to summary judgment dismissing Plaintiff's eighth and ninth causes of action for intentional and reckless infliction of emotion distress respectively

Pursuant to the Court's discussion with the Parties at oral argument, Defendants are granted summary judgment dismissing Plaintiff's eighth and ninth causes of action for intentional and reckless infliction of emotional distress. "The plaintiff's allegations, when taken as a whole, do not rise to such an extreme or outrageous level as to meet the threshold required to sustain this cause of action." (*Seal v Marks*, 232 AD2d 626, 627 (2d Dept 1996); *see also Van Swol v Delaware Val. Cent. School Dist.*, 117 AD2d 962, 963 (3d Dept 1986) (Plaintiff must demonstrate that "defendants engaged in extreme or outrageous conduct which intentionally or recklessly caused severe emotional distress to plaintiff"); *Also see Jaffe v National League for Nursing*, 222 AD2d 233 (1st Dept 1995)).

Further intentional/reckless infliction of emotional distress is a theory of recovery that "reflects the acknowledgment by the courts of the need to afford relief where traditional theories of recovery do not" and is to be invoked only as a last resort (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 256 AD2d 269, 270 (1st Dept 1998) *lv denied* 94 NY2d 753 (1999)). As both the NYSHRL and the NYCHRL provide for the recovery of emotional distress damage, there is no basis for the Plaintiff to make a separate claim for the intentional/reckless infliction of emotional distress (*Id at* 270).

As such, upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's eighth and ninth causes of action for intentional and reckless infliction of emotional distress respectively.

VII. Negligent Infliction of Emotional Distress

Defendants are entitled to summary judgment dismissing Plaintiff's tenth cause of action for negligent infliction of emotion distress respectively

Even assuming the truth of the Plaintiff's allegations, "Plaintiff failed to establish that the defendants' conduct was so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community." (*Naturman v*

Crain Communications, 216 AD2d 150, 150 (1st Dept 1995)).

As such, upon review of the submitted papers and having conducted oral argument, the Court finds that Defendants are entitled to summary judgment dismissing Plaintiff's tenth cause of action for negligent infliction of emotion distress.

VIII. Individual Claims Against Defendants under NYSHRL and NYCHRL

Individual liability can be established under the NYSHRL and NYCHRL under certain circumstances. In pertinent part, under Executive Law § 296 (1), individual liability attaches if the defendant is "an 'employer' (i.e., has an ownership interest or the power to do more than carry out personnel decisions made by others) or if the individual has aided and abetted in the discriminatory conduct." (*Graaf v North Shore University Hospital*, 1 F Supp 2d 318, 324 (SD NY 1998)).

Administrative Code § 8-107 (1) (a) also states that it is a discriminatory practice for an "employer or an employee or agent thereof" to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's religion and age.

In addition, Executive Law § 296 (6) states 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 to attempt to do so." Similarly, under the NYCHRL, Administrative Code § 8-107 (6)

provides that an individual employee may be held liable for aiding and abetting discriminatory conduct.

As the Court is dismissing Plaintiff's complaint in its entirety, no liability can attach to any individual co-employees as aiders and abettors under the NYSHRL and or NYCHRL

Plaintiff has labeled all Defendants as managers, supervisors and employees with George and Michael being additionally labeled as chairman and owner, and chief operating officer and owner, respectively. His claims are generalized and do not specify any sub-parts of the NYSHRL or the NYCHRL and claim that all Defendants subjected him to a hostile work environment and that none of the Defendants made reasonable efforts to protect him from discrimination. In his reply he claims that NYCHRL creates strict liability for employers.

Defendants allege that none of the Defendants, except for Michael, have ownership interest in the company or the ability to hire and fire employees. Plaintiff has not presented any evidence to dispute these contentions. In any event, as a result of this decision, this Court has granted summary judgment dismissing the complaint, including the claims for discrimination under NYSHRL and NYCHRL. As the Company and Michael are not liable for employment discrimination as owner/employer, no liability can attach to any individual co-employees as aiders and abettors under the NYSHRL. (*See e.g. Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 (1st Dept 2005) ("As the claims against

the university were properly dismissed, the court also properly dismissed the claims against the individual defendants for aiding and abetting"); *see also Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 73 (3d Dept 2005) ("Where no violation of the Human Rights Law by another party has been established, we find that an individual employee cannot be held liable for aiding or abetting such a violation")).

Similarly, under the NYCHRL, as Defendants are granted summary judgment dismissing the complaint, there can be no viable claims against the individual Defendants as employees. (*See Priore v New York Yankees*, 307 AD2d 67, 74 n 2 ([1st Dept 2003]) ("[a] separate cause of action against an employee for actively 'aiding and abetting' discriminatory practices [under the NYCHRL] . . . would still require proof initially as to the liability of the employer [internal citations omitted]"); *see also Jain v McGraw-Hill Cos.*, 827 F Supp 2d 272, 277 (SD NY 2011), *affd* 506 Fed Appx 47 (2d Cir 2012) ("the NYSHRL and NYCHRL require that liability must first be established as to the employer/principal before accessorial liability can be found as to an alleged aider and abettor [internal quotation marks and citation omitted]")).

In summary, although Plaintiff argues throughout his papers that there are questions of facts and inconsistencies that need to go to a jury, he has not presented more than speculation, for any of his claims. "A shadowy semblance of an issue or bald

conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment [internal quotation marks and citation omitted]." (*Costello v Saidmehr*, 236 AD2d 437, 438 (2d Dept 1997)).

The Court has considered Plaintiff's remaining contentions and finds them to be without merit.

CONCLUSION

Accordingly and for the reasons so stated it is hereby

ORDERED that the motion of Defendants the Michael C. Fina Company, Michael Fina, George Fina, Tina Gimas, Maninder Rattu and Tim Lorenz for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said Defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Oct 5 2016

ENTER:

HON. ROBERT D. KALISH
J.S.C.

J.S.C.