SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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SIDNEY SIMS,

Plaintiff,

-against- Index No. 156566/2013

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

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JAMES, DEBRA, J.:

In this action, plaintiff Sidney Sims (Sims) alleges that his employer, defendant Trustees of Columbia University in the City of New York (Columbia or the university), unlawfully discriminated against him in the terms and conditions of his employment based on his race, age, and disability or perceived disability, and retaliated against him for complaining about discrimination, in violation of the New York State Human Rights Law (Executive Law § 296 [1]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 [1])(NYCHRL). Columbia moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

CONCLUSION

The motion for summary judgment dismissing the complaint against Columbia shall be granted.

BACKGROUND

Sims is an African American man, who is now 64 years old. In this complaint, he alleges that he is disabled as a result of various knee, wrist, elbow and arm conditions, and hypertension. He has been employed by Columbia since 1991, when he was hired as a truck driver, and is currently employed as a "Heavy Cleaner" (cleaner) in the university's Facilities Department. As a custodial employee, plaintiff is a member of and represented by Local 241 of the Transport Workers Union of America, AFL-CIO (Union).

Sims worked as a truck driver from 1991 until he took a leave of absence in December 1999. When he returned to work in December 2000, he requested and was granted a transfer to the cleaner position. Sims subsequently requested and was granted a transfer back to the position of truck driver in or around November 2004. From 2004 to 2011, Sims was suspended on three occasions, in 2004, 2006, and 2008, for sleeping on the job and other alleged misconduct. Sims, through the Union, grieved at least two of his suspensions, which were sustained or otherwise resolved with the university. Sims denies that he was sleeping on the job and claims that all of the disciplinary actions taken against him were "bogus" and made up because he is black.

In May 2011, Sims was fired for, among other things, negligent driving and failing to report two accidents. Sims then

told Theresa Todman (Todman), the Manager of Labor Relations and Human Resources in the Facilities Department, that he thought his termination might be related to his age. Todman attests that she investigated Sims's complaint and found no evidence of discrimination. The Union grieved the termination of Sims's employment, and in June 2011, the Union and Sims reached an agreement with Columbia, converting the termination into a suspension and reinstating Sims to his truck driver position, with some conditions. The agreement provided that it constituted a final warning and that failure to comply with its terms would result in immediate termination, which would not be arbitrable. It also included a release of claims against the university.

In November 2011, following further alleged incidents of negligent driving, Sims's employment again was terminated. The Union grieved Sims's termination, and filed a demand for arbitration. On the scheduled arbitration date, the parties reached a settlement agreement, providing that Sims would be reinstated to a custodial position effective March 12, 2012, and was ineligible for any driver's or driver's helper position at the university. Pursuant to the agreement, Sims and the Union withdrew his grievance; Sims acknowledged that he was "fully and fairly" represented by the Union during the grievance proceedings; and Sims released Columbia from all claims to date against the university arising from his employment, including

claims under city, state and federal anti-discrimination laws.

Sims returned to work as a cleaner on March 12, 2012, and was assigned to a cleaning detail at the university's Mathematics Building (the building). Sims's supervisor at that time was Christopher Roopchand (Roopchand); the Head Cleaner was Manny Lopez (Lopez), and the Manager of Custodial Services in the Facilities Department was William Acevedo (Acevedo). Sims worked the night shift, five nights a week, and was assigned to clean all bathrooms, classrooms and common areas of five floors of the building.

In his examination before trial, Sims testified that in March 2012 almost immediately after starting work as a cleaner, he had difficulty completing his work routine during his eight and one half hours shift. He told Roopchand that he needed to work through lunch to get his work done, and Roopchand told him he could not do that and needed to punch out for lunch. Acevedo attests that he met with Sims, his Union shop steward, and Roopchand on March 15, 2012, gave Sims a copy of the department's rules and regulations, and advised him to talk to his supervisors if he had questions concerning his work. On March 20, 2012, Sims and his shop steward again met with Acevedo and Roopchand to discuss the expectations of his position, and Sims complained that Roopchand was unnecessarily checking up on his performance and instructing him how to do his job. Acevedo told Sims that it

was Roopchand's job to check on his work and that plaintiff must comply with Roopchand's instructions. At his deposition, Sims stated that he did not know whether his co-worker Alan Dixon, who had worked as a Heavy Cleaner for nearly a decade, was able to complete the routine during the allotted shift.

In late March 2012, Roopchand accused Sims of not changing the water in his bucket, which resulted in plaintiff receiving a written warning for insubordination, for yelling at or not answering Roopchand and refusing to follow Roopchand's instructions to change the water in his bucket.

Acevedo attests that during April 2012, Roopchand told Sims on several occasions that he needed to improve his performance, and reassessments later in April, May and early June 2012 showed that it had improved. On or about June 7, 2012, Sims took an injury-related leave of absence, and which ended on October 15, 2012. While Sims was on leave, he was replaced by a "casual" employee who, according to Acevedo, did not have difficulty completing the cleaning routine.

In October 2012, Nick Djuravcevic (Djuravcevic) became supervisor of the Mathematics Building and Sims's direct supervisor, replacing Roopchand.

Following Sims's return to work in October 2012, and as a result of Sims's continuing problems with completing his cleaning routine, Columbia agreed to evaluate Sims's assigned cleaning

routine with the Union to determine whether it was manageable and fair. A time study was conducted in February 2013, which consisted of Djuravcevic and Sims's Union representative following Sims during a shift and observing Sims performing each of his tasks, step by step.

Acevedo then met with Sims, Djuravcevic, and the Union shop steward to go over the results of the test study, and Acevedo informed Sims that the study showed there was sufficient time during his shift for him to complete his tasks. He also informed Sims that the cleaning routine would be adjusted and the Head Cleaner would work with him to make sure the adjusted schedule was followed; and Djuravcevic would check on Sims's work several times a week. In addition, Sims was advised that another cleaner in the department would be assigned to perform Sims's routine for a single night to see if the assignment could be completed within the shift, and, according to Acevedo, the cleaner was able to complete the routine during the shift.

From mid-February to early June 2013, Sims called in sick on about 15 days and reported late to work on numerous occasions, and on June 6, 2013, Sims went out on medical leave and remained out until September 2, 2013.

In January 2015, an incident occurred involving Sims's use of a radio used by employees to communicate with each other. Sims claims that he was wrongly accused of using the radio for

entertainment and that, like other workers, he was only conducting a radio sound check.

On February 3, 2015, Sims tripped and fell down stairs at work, and due to injuries to his lower back, hand, ankle, thigh, head and knee, was absent from work from February 3, 2015 through February 22, 2016. He then returned to work in his same position, where he remains, to date, employed by defendant as a cleaner, and is the subject of no disciplinary actions other than the written warning about insubordination issued in April 2012.

PLAINTIFF'S COMPLAINT

In July 2013, Sims commenced the instant action. The gravamen of his complaint is that, after he started work as a heavy cleaner in March 2012, Roopchand, Djuravcevic, and Acevedo subjected him to disparate treatment and a hostile work environment in an attempt to terminate him or force him to retire because of his race, age, and disability or perceived disability. He alleges that compared to other workers in his same position, he was subjected to greater scrutiny and micro-management, greater and more difficult workload, and biased discipline. He further asserts that with the same discriminatory animus, Columbia terminated him from his position as a truck driver in 2011; gave him unrealistic time frames in which to complete his work, forced him off the clock for lunch; and denied him a second locker. He further alleges that he was subjected to racist and

ageist comments.

With respect to Sims's allegations that he was discriminated against prior to March 2012, particularly by Frank Molina (Molina), his supervisor during the time he worked as a truck driver, Sims does not dispute that the March 2, 2012 agreement included a release of all claims against Columbia, including any discrimination claims, up until the date of the agreement. Thus, as Sims acknowledges, he has released claims arising prior to March 2, 2012, which are not the subject to this lawsuit.

DISCUSSION

On a motion for summary judgment, the moving party has the initial burden of showing its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to show 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 has been made, to defeat summary judgment, the opposing party must demonstrate, also by producing admissible evidence, that genuine material issues of fact exist which require a trial of the action. See Jacobsen, 22 NY3d at 833; Alvarez, 68 NY2d at 324; 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, or where the issue is even arguable. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978); Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 (1968). It further "is not the court's function on a motion for summary judgment to assess credibility." Ferrante v American Lung Assn., 90 NY2d 623, 631 (1997); see Vega v Restani Constr. Corp., 18 NY3d 499, 505 (2012).

To defeat summary judgment, however, "the opposing party must assemble and lay bare its affirmative proof" (Kornfeld v NRX Technologies, Inc., 93 AD2d 772, 773 [1st Dept 1983], affd 62 NY2d 686 [1984]), and demonstrate "the existence of a bona fide issue raised by evidentiary facts." 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; see Iselin & Co. v Mann Judd Landau, 71 NY2d 420, 425-426 (1988).

In employment discrimination cases, where direct evidence of an employer's discriminatory intent is rarely available, courts urge caution in granting summary judgment. See Ferrante, 90 NY2d at 631; Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 43-44 (1st Dept 2011). "'[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would

show discrimination.'" Sibilla v Follett Corp., 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), quoting Gallo v Prudential Residential Servs., Ltd. Partnership, 22 F3d 1219, 1223 (2d Cir 1994). Nonetheless, summary judgment remains available in discrimination cases, even under the more liberal NYCHRL, 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, *16 (ED NY 2010) (internal quotation marks and citation omitted); see e.g. Fruchtman v City of New York, 129 AD3d 500 (1st Dept 2015); Melman v Montefiore Med. Ctr., 98 AD3d 107, 127-128 (1st Dept 2012); Bennett, 92 AD3d at 45-46; Kerman-Mastour v Financial Indus. Reg. Auth., Inc., 814 F Supp 2d 355, 367 (SD NY 2011); see also Campbell v Cellco Partnership, 860 F Supp 2d 284, 294 (SD NY 2012) (the NYCHRL, although construed more liberally than the NYSHRL, "does not alter the kind, quality or nature of evidence that is necessary to support or defeat a motion for summary judgment").

NYSHRL and NYCHRL

Under the NYSHRL and the NYCHRL, it is unlawful for an employer to discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an employee's race, age, disability or perceived disability. Executive Law § 296 (1)

(a); Administrative Code § 8-107 (1) (a). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices. 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); Sanders v Winship, 57 NY2d 391, 395 (1982). The NYCHRL further explicitly requires courts to conduct a liberal and independent analysis of claims brought under it, in light of its "'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; Albunio, 16 NY3d at 477-478 (2011); Melman, 98 AD3d at 112; Bennett, 92 AD3d at 34.

Generally, employment discrimination claims brought under the NYSHRL and the NYCHRL 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 of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (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); *Melman*, 98 AD3d at 113. Under McDonnell Douglas, the plaintiff has the initial burden to establish a prima facie case of employment discrimination, that is, to show 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 270-271; Mittl v New York State Div. of Human Rights, 100 NY2d 326, 330 (2003); Melman, 98 AD3d at 113-114.

Once the plaintiff has made the required "minimal" prima facie showing (see Melman, 98 AD3d at 115; Bennett, 92 AD3d at 35), the burden 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.

Claims under the NYCHRL must "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); Bennett, 92 AD3d at 45. Under a mixed-motive theory, a plaintiff may prevail "if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision." Melman, 98 AD3d at 123; see Williams, 61 AD3d at 78 n 27. On summary judgment, under this analysis, once a defendant has offered its nondiscriminatory reasons, the court should proceed to consider whether the defendant 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." Bennett, 92 AD3d at 45.

Notwithstanding the plaintiff's "'lesser burden of raising an issue as to whether the [adverse employment] action was motivated at least in part by . . . discrimination'" (Hudson v Merrill Lynch & Co., Inc., 138 AD3d 511, 514-515 (1st Dept 2016), quoting Melman, 98 AD3d at 127), "a plaintiff asserting an NYCHRL claim must still establish 'by a preponderance of the evidence that she [or he] has been treated less well than other employees' due to protected status." Julius v Department of Human Resources Admin., 2010 WL 1253163, 2010 US Dist LEXIS 33259, *13 (SD NY 2010), quoting Williams, 61 AD3d at 78. A plaintiff must "do 'more than cite to [his] mistreatment and ask the court to conclude that it must have been related to [his] race'" or other

protected status. Campbell, 860 F Supp 2d at 296 (citation omitted); see Dickerson v Health Mgmt. Corp. of Am., 21 AD3d 326, 329 (1st Dept 2005) ("[c]onclusory allegations of discrimination are insufficient").

Disparate Treatment/Hostile Work Environment

An inference of discrimination based on disparate treatment may arise where an employer "treat[s] [the plaintiff] less favorably than a similarly situated employee outside his protected group." Graham v Long Is. R.R., 230 F3d 34, 39 (2d Cir 2000), citing International Brotherhood of Teamsters v United States, 431 US 324, 335 n 15 (1977); see Melman, 98 AD3d at 115 n 2. "No inference of discrimination arises, however, unless [plaintiff] is able to demonstrate that a similarly situated . . . employee [outside plaintiff's protected group] benefitted from terms and conditions of employment that were denied to [plaintiff]." Matter of Washington County v New York State Div. of Human Rights, 7 AD3d 895, 896 (3d Dept 2004) (emphasis in original); see O'Connor v Bank of N.Y., 2008 WL 644822, 2008 NY Misc LEXIS 8338, *33-34, 2008 NY Slip Op 30614(U) (Sup Ct, NY County 2008). Plaintiff must show that he was "similarly situated in all material respects" to the individual with whom he compares himself. Graham, 230 F3d at 39; see Fahrenkrug v Verizon Servs. Corp., 652 Fed Appx 54, 56 (2d Cir 2016); Shah v Wilco Sys., Inc., 27 AD3d 169, 177-178 (1st Dept 2005). "Vague

references that plaintiff's treatment was inferior to that afforded to unidentified comparators are insufficient to withstand a motion for summary judgment." Watson v Arts & Entertainment Television Network, 2008 WL 793596, *16, 2008 US Dist LEXIS 24059, *45 (SD NY 2008) *affd* 352 Fed Appx 475 (2d Cir 2009); see also Lee v Winthrop Univ. Hosp., 2015 WL 7161955, 2015 US Dist LEXIS 153939, *30-31 (ED NY 2015) ("mere conclusory assertions that the employees outside of the plaintiff's class were treated more favorably will not suffice to create a triable issue of fact").

Hostile work environment claims generally "are different in kind from discrete acts . . . . [as] [t]heir very nature involves repeated conduct" (Julius, 2010 US Dist LEXIS 33259, at *22, quoting National Railroad Passenger Corp. v Morgan, 536 US 101, 115 [2002]), and usually involve such work place conduct as comments, jokes or insults about a plaintiff's protected classification. See Ben-Levy v Bloomberg, L.P., 2012 WL 2477685, *12, 2012 US Dist LEXIS 90292, *33-34 (SD NY 2012); Faraci v New York State Off. of Mental Health, 2013 WL 5717124, 2013 NY Misc LEXIS 4853, *16-17, 2013 NY Slip Op 32613(U) (Sup Ct, NY County 2013).

To prevail on a claim of hostile work environment under the NYSHRL, a plaintiff must show that the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is

'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v Forklift Sys., Inc., 510 US 17, 21 (1993), quoting *Meritor Sav. Bank*, 477 US at 65, 67; see Forrest, 3 NY2d at 310. To be actionable, the incidents of harassment, generally, "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." Kotcher v Rosa & Sullivan Appliance Ctr., 957 F2d 59, 62 (2d Cir 1992); see Ferrer v New York State Div. of Human Rights, 82 AD3d 431, 431 (1st Dept 2011); Father Belle Community Ctr. v New York State Div. of Human Rights, 221 AD2d 44, 51 (4th Dept 1996).

Under the NYCHRL, a plaintiff need not show that the harassing conduct was severe and pervasive, but only that the conduct was "more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" Williams, 61 AD3d at 80; see Gonzales v EVG, Inc., 123 AD3d 486, 487 (1st Dept 2014); Hernandez v Kaisman, 103 AD3d 106, 113-114 (1st Dept 2012). The primary question in harassment cases brought under the NYCHRL, as it is in other terms and conditions cases, is whether plaintiff "has been treated less well than other employees because of her [or his protected status]." Williams, 61 AD3d at 78; see Chin v New York City Hous. Auth., 106 AD3d 443, 445 (1st Dept 2013); Hernandez, 103 AD3d at 113. Under either state or city law, therefore, "a plaintiff must

still establish that she suffered a hostile work environment *because of her gender*" or membership in another protected category. Russo v New York Presbyterian Hosp., 972 F Supp 2d 429, 451, 453-454 (ED NY 2013) (emphasis in original); see Pena v Board of Elections, 2017 WL 713561, 2017 US Dist LEXIS 17392, *34-35 (SD NY 2017); Cortes v City of New York, 700 F Supp 2d 474, 485 (SD NY 2010).

Retaliation

Retaliation claims under the NYSHRL and the NYCHRL are similarly analyzed under the above described standards, including the McDonnell Douglas burden-shifting framework. 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 disadvantaged plaintiff and 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; Serdans v New York Presbyterian Hosp., 112 AD3d 449, 450-451 (1st Dept 2013); Brightman v Prison Health Serv., Inc., 108 AD3d 739, 740 (2d Dept 2013); Fletcher v The Dakota, Inc., 99 AD3d 43, 51-52 (1st Dept 2012).

"Protected activity" refers to action taken to oppose or complain about unlawful discrimination. See Forrest, 3 NY3d at 313; Brook v Overseas Media, Inc., 69 AD3d 444, 445 (1st Dept 2010). "[C]omplaining 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). "'The onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally.'" Sharpe v MCI Communications Servs., Inc., 684 F Supp 2d 394, 406 (SD NY 2010), quoting Aspilaire v Wyeth Pharms., Inc., 612 F Supp 2d 289, 308-309 (SD NY 2009). Even where a "plaintiff may have believed that she was the victim of discrimination, an undisclosed belief of such treatment will not convert an ordinary employment complaint into a protected activity." Id. at 309.

Application of Law

For purposes of this motion, Columbia does not dispute that Sims is a member of one or more protected classes under the NYSHRL and NYCHRL, or that he was qualified for his position as a cleaner.

Columbia argues, however, that Sims cannot establish that he suffered any adverse employment action or was treated less well

than similarly situated employees or that any action occurred under circumstances giving rise to an inference of unlawful discrimination or retaliation. Columbia also contends that it had legitimate, nondiscriminatory reasons for actions taken with respect to Sims's employment.

In support of its motion, Columbia submits evidence, including deposition testimony, affidavits, and documents, showing that, from the start of his work as a cleaner in March 2012, Sims had difficulty completing his tasks, and that scrutiny of his work was in response to his complaints, was part of Columbia's efforts to determine whether his workload was manageable and fair, and was not based on his race, age or disability. Columbia comes forward with evidence that, in response to Sims's complaints that he was given too much work, Columbia evaluated his cleaning routine, and later conducted a time study, which involved his supervisor and a Union representative following Sims closely during his shift to observe what he did. Columbia also had other employees work Sims's shift, and determined that the work assigned to Sims could be completed during the shift. Subsequently, Columbia informed Sims that his supervisor would be checking on him on a regular basis. Sims acknowledged that he was told, after the time study, that he was spending too much time on detail work and should manage his time better; and testified that, although he was told he was

doing too much detail work, he did not stop doing it. Columbia also submits evidence that Sims was advised not to work through his lunch hour to get his work done, and he was therefore directed to punch out and in. Columbia's evidence also shows that the written warning plaintiff received in April 2012 for insubordination was given because Sims refused to comply with or respond to his supervisor's instruction, which Sims, while explaining the reason he did not respond, does not deny. The records show that the written warning issued in April 2012 resulted in no adverse employment action, such as a suspension or loss of pay or benefits, and to date, no other disciplinary action has been taken against Sims.

With regard to Sims's claim that he was denied a second locker because of his race, age, and disability, Columbia submits evidence that a second locker was provided only to members of the snow removal team, due to the heavier equipment its members used, and submits a notice issued in April 2012 advising employees that they were provided with only one locker.

As Columbia argues, the instances of alleged discrimination raised by Sims, including the excessive scrutiny and criticism of his work, the amount of work assigned, the order to clock out for lunch, and the written warning, do not constitute adverse employment actions under the human rights statutes. See Gaffney v City of New York, 101 AD3d 410, 410 (1st Dept 2012)

(disciplinary memos, threats of unsatisfactory ratings not adverse actions); Mejia v Roosevelt Is. Med. Assoc., 95 AD3d 570 (1st Dept 2012) ("'reprimands and excessive scrutiny do not constitute adverse employment actions in the absence of negative results such as a decrease in pay or being placed on probation'" [citation omitted]); Trachtenberg v Department of Educ. of City of N.Y., 937 F Supp 2d 460, 467 (SD NY 2013) (same); Dauer v Verizon Communications Inc., 613 F Supp 2d 446, 461 (SD NY 2009) (increased scrutiny is not an adverse employment action); Bennett v Watson Wyatt & Co., 136 F Supp 2d 236, 248 (SD NY 2001) ("reprimands, threats of disciplinary action and excessive scrutiny do not constitute adverse employment actions"); see also Joseph v Leavitt, 465 F3d 87, 91 (2d Cir 2006) (reasonable enforcement of preexisting disciplinary policies not an adverse action).

Even assuming arguendo that the alleged actions are adverse employment actions, Columbia's evidence demonstrates that there were legitimate nondiscriminatory reasons for its actions, which are not refuted by Sims. Sims's opposition contains no evidence sufficient to raise a triable issue of fact as to whether he was treated differently than other employees outside his protected classes or whether Columbia's actions were motivated in any part by discriminatory animus.

Specifically, although Sims claims that he received more

work, more scrutiny of his work, and more discipline than other employees, he identifies no similarly situated non-African American, younger, or non-disabled cleaners who were treated more favorably or differently than he was. To the contrary, the only employee Sims identified as receiving a more favorable assignment was Donald Boyce (Boyce), who worked as a cleaner in the Mathematics Building for about ten months in 2014 and early 2015, and, according to Sims, was the only other cleaner who worked the same shift. Sims testified, and Boyce submitted an affidavit similarly stating, that Boyce had a lighter workload than Sims. Boyce, however, is African American, and neither Sims nor Boyce addresses his age or disability status. Sims, in any event, also testified that Boyce was not given preferential treatment.

To the extent that Sims claims Latino workers were favored by being given two lockers, Sims identifies no worker who had a second locker. He also submits no evidence that refutes Columbia's evidence that only workers who were on the snow team were given second lockers, and that other employees were informed in April 2012 that they could not have a second locker. Sims's unsupported testimony that there was no snow removal team, and that the date on the April 2012 notice was wrong, fails to create any issue of material fact as to whether he was denied a second locker because of his race, age or disability, rather than that he did not take part in any snow removal tasks.

With respect to Sims's claim that his work was excessively scrutinized, he again offers no similarly situated co-workers, and provides no basis for finding that Columbia's reasons for checking his work were pretextual or based in any part on discrimination. Moreover, in view of Sims's admitted ongoing struggles with and complaints about his workload, there is no reasonable basis to conclude that the scrutiny of Sims's work was excessive or unfair, rather than a consequence of plaintiff's ongoing complaints. See Colon v Fashion Inst. of Tech. (State Univ. of N.Y.), 983 F Supp 2d 277, 292 (SD NY 2013); see also Trachtenberg, 937 F Supp 2d at 467; Morrison v Potter, 363 F Supp 2d 586, 591 (SD NY 2005) (although "'close monitoring may cause an employee embarrassment or anxiety, such intangible consequences are not materially adverse alterations of employment conditions'" [citation omitted]).

As to the disciplinary action occurring in April 2012, which consisted of a written warning, even if Sims disagreed that he was insubordinate, "'[t]he 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.'" Melman, 98 AD3d at 121 (citation omitted). "'[A] challenge ... to the *correctness* of an employer's decision does not, without more, give rise to the inference that the [adverse action] was due to ... discrimination.'" *Id.* (citation omitted) (emphasis in

original); see Forrest, 3 NY3d at 308 (mere assertion that stated reason was false is not enough to raise issue of pretext).

Thus, even under the more liberal standards of the NYCHRL, and even viewing the evidence in a light most favorable to plaintiff, Sims fails to show, or raise a triable issue of fact, that similarly situated non-African American cleaners, older or younger than he and with or without disabilities or perceived disabilities, were treated more favorably than he, or that discrimination played any part in Columbia's actions with respect to the terms and conditions of plaintiff's employment. See Whitfield-Ortiz v Department of Educ. of the City of New York, 116 AD3d 580, 581 (1st Dept 2014) (claim dismissed where no showing that "similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff"). Sims's conclusory assertions that Columbia's actions were based on his race and/or age and/or disability are insufficient to create an inference of discrimination. See Sampson v City of New York, 2009 WL 3364218, 2009 US Dist LEXIS 96526, *22 (SD NY 2009) (dismissing discrimination claim under NYCHRL where plaintiff offered "nothing more than conclusory allegations and speculation" as evidence of disparate treatment). Sims's claim that he was the only African American cleaner working in the building, at least until Boyce arrived, also "'without more, will not support an inference of

discrimination.'" Brown v Northrup Grumman Corp., 2014 WL 4175795, *15-16, 2014 US Dist LEXIS 116188, *22-23 (ED NY 2014), quoting Pearson v Lynch, 2012 WL 983546, *9, 2012 US Dist LEXIS 39456 (SD NY 2012).

Sims similarly fails to raise a triable issue of fact as to whether Columbia created a hostile work environment based on race, age, or disability.

"[A] plaintiff may demonstrate an inference of discrimination by showing that 'the employer criticized the plaintiff's performance in ethnically degrading terms' or 'made invidious comments about others in the employee's protected group.'" Brown, 2014 US Dist LEXIS 116188, at *17-18, quoting Smalls v Allstate Ins. Co., 396 F Supp 2d 364, 371 (SD NY 2005). However, "'[a] plaintiff's speculations, generalities, and gut feelings, however genuine, when they are not supported by specific facts, do not allow for an inference of discrimination to be drawn.'" Id.

Here, according to Sims, notwithstanding that he worked with a bucket of water that sometimes had visible suds, or bubbles, the use by Roopchand, Djuravcevic and Acedevo of the word "bubbles" was racially derogatory because it was the name of the late singer Michael Jackson's pet chimpanzee. Sims also contends that their description of the water as black, which it admittedly may appear, and reference to black fish in a conversation about

Sims's fishing trips, were really discriminatory references to his dark skin, and the reference to him as "boy", a term of racist disrespect. Sims has not rebutted Columbia's prima facie defense because

> Of course, even a " mere[ly] offensive" racial slur is reprehensible. But it is not actionable. Here, the epithets complained of did not pervade plaintiff's work environment, having allegedly occurred on three occasions over nine years. A hostile work environment requires "more than a few isolated incidents of racial enmity".

Forrest, 3 NY3d at 311.

As to alleged comments about age and disability, Sims's sole testimony was that Molina, his supervisor prior to March 2012, told him that he should not be working if he was too "sick and old" to work fast. His allegations in his affidavit that Molina, Roopchand, and Acevedo made age-related comments, unsupported by any evidence, are too vague as to time, place, and speaker, to raise an inference of age bias.

Further, although Sims asserts that derogatory comments were made to him on a daily basis, he identifies no more than a few instances when the comments were made. Such sporadic or "[s]tray remarks . . ., even if made by a decision maker, do not, without more, constitute evidence of discrimination." Melman, 98 AD3d at 125, citing Mete v New York State Ofc. of Mental Retardation & Dev. Disabilities, 21 AD3d 288, 294 (1st Dept 2005); see also Hudson, 138 AD3d at 517; Fruchtman, 129 AD3d at 501.

In his deposition, Sims admits that there were no witnesses

to his supervisors' allegedly discriminatory comments. On this motion, Sims submits his affidavit with that of Boyce, and for the first time contends that Boyce was a witness to comments made by his supervisors. These affidavits contradict Sims's prior testimony that he knew of no such witnesses, and appear tailored to avoid the consequences of his earlier testimony, and therefore, will not be considered. See Covington v City of New York, 119 AD3d 408, 409 (1st Dept 2014); Garcia v Good Home Realty, Inc., 67 AD3d 424, 425 (1st Dept 2009). "'Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment.'" Telfeyan v City of New York, 40 AD3d 372, 373 (1st Dept 2007) (citations omitted); see Addo v Melnick, 61 AD3d 453, 454 (1st Dept 2009) ("Unquestionably an affidavit tailored to avoid the consequences of a deposition lacks evidentiary value.")

As to Sims's retaliation claims, although he testified that he complained many times to the Union and to Columbia's Human Resources department, there are no claims of discrimination in any of the letters he sent to Columbia, and Sims otherwise identifies no specific time when he complained about

discrimination, as opposed to generally unfair treatment, other than in May 2011. There is evidence that, in May 2011, when he first was terminated from his truck driver position, he complained that his termination was age-related. Todman attests that she investigated his complaint and found no evidence of discrimination, and Sims never complained to her about race or disability discrimination. Sims acknowledged that he did not complain about race discrimination, and essentially conceded that he has made no complaints of race, age, or disability discrimination to Columbia since he returned to work in March 2012. While acknowledging that he did not then complain about race discrimination, Sims testified that he believed that age and race discrimination are the same thing. That belief, however, fails to raise any issue as to whether Columbia knew that he was complaining about race discrimination. There also is no evidence that he complained about disability discrimination. Moreover, the alleged retaliatory actions, such as name calling, disciplinary actions, and unfair assignments, were a continuation of the same conduct that caused him to complain, which "does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct." Melman, 98 AD3d at 129; see Gaffney, 101 AD3d at 411.

Although Sims was unhappy with his assignments, and

apparently believed that, since 2002, "every individual at Columbia University has been trying to fire me or just don't [sic] like me for whatever apparent reason", the evidence shows that the alleged discriminatory actions of which Sims complains were no more than "petty slights and trivial inconveniences" (Williams, 61 AD3d at 80), not based on his race, age, or disability, and that Sims has retained his position, even after several lengthy leaves of absence, without receiving any warnings, reprimands or other discipline since April 2012.

On this record, therefore, Columbia has demonstrated its entitlement to summary judgment under the NYCHRL as well as under the NYSHRL by showing "that there is no evidentiary route that could allow a jury to believe that discrimination [or retaliation] played a role in their challenged actions." Cenzon-Decarlo v Mount Sinai Hosp., 101 AD3d 924, 927 (2d Dept 2012); *see* Spinello v Depository Trust & Clearing Corp., 147 AD3d 572, 572-573 (1st Dept 2017); Bennett, 92 AD3d at 41. In opposition to such showing, Sims failed to raise a triable issue of fact. See Arfi v Central Moving & Stor. Co., 147 AD3d 551, 551 (1st Dept 2017); Reyes v Brinks Global Servs. USA, Inc., 112 AD3d 805, 806-807 (2d Dept 2013).

Accordingly, it is

ORDERED that the motion for summary judgment of defendant The Trustees of Columbia University in the City of New York is

granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: November 1, 2017 ENTER:

DEBRA A. JAMES J.S.C.