SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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HALDUN TIHAN,

Plaintiff,

- v -

APOLLO MANAGEMENT HOLDINGS, L.P., FRANCIS VERDIER, GARY ALBELLI

Defendant.

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INDEX NO. 152196/2019

MOTION DATE 01/31/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff Haldun Tihan brings this action against his former employer and coworkers, defendants Apollo Management Holdings, L.P. (Apollo), Francis Verdier (Verdier) and Gary Albelli (Albelli) (collectively, defendants), for alleged employment discrimination based on national origin and creed and retaliation in violation of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII), New York State Human Rights Law (Executive Law § 290 *et seq.*) (NYSHRL) and New York City Human Rights Law (Administrative Code of City of NY § 8-101 *et seq.*) (NYCHRL). Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Plaintiff is a Muslim of Turkish national origin (NY St Cts Elec Filing [NYSCEF] Doc No. 16, Brendan T. Killeen [Killeen] affirmation, exhibit A, ¶¶ 6-7). Apollo is a global investment manager. From September 22, 2014 to May 11, 2017, plaintiff was employed as a Program

Manager-Fund Finance in the Business Application Services Department in Apollo's Global Technology Group (NYSCEF Doc No. 52, Albelli aff, ¶ 3). His work entailed facilitating applications that recorded financial transactions made by Apollo's traders and portfolio managers and liaising with external vendors on these applications (NYSCEF Doc No. 18, Killeen affirmation, exhibit C at 13-14 and 47-48).

Throughout his tenure, plaintiff reported directly to Albelli, the Head of Credit Technology and the hiring manager for the Global Technology Group, who had interviewed plaintiff for the position and recommended that Apollo hire him (NYSCEF Doc No. 52, ¶¶ 2 and 4). Albelli reported to Verdier, who joined Apollo in 2015 as the Head of that group (NYSCEF Doc No. 19, Killeen affirmation, exhibit D at 9 and 21). Albelli is Italian and a Christian (NYSCEF Doc No. 18 at 294). Verdier is French and a Catholic (NYSCEF Doc No. 19 at 6 and 12).

Apollo's offer letter to plaintiff set his annual base salary at $225,000 (NYSCEF Doc No. 23, Killeen affirmation, exhibit H at 1). A clause detailing Apollo's bonus program reads, in part:

> "**Annual Bonus**. You may be eligible to receive an annual bonus (the '**Bonus**') in addition to your Base Salary and in an amount to be determined by the Company in its discretion. For services performed in 2014, your target Bonus (the '**2014 Target Bonus**') will be $125,000, which is an annualized figure and will not be prorated based on your partial year of employment. The 2014 Target Bonus is not guaranteed, and the actual 2014 Target Bonus payable to you may be greater or less depending upon your performance and the performance of the Company. The 2014 Target Bonus, as well as subsequent annual bonuses, if any, will be paid in accordance with the Company's Incentive Program"

(*id.* at 1-2). Kate Sampson (Sampson), a member of the Human Capital Group, described the "target bonus" as "typically only provided in an offer letter to an employee if they are joining the firm … from another place where we determine that we would like to offer them a discretionary

bonus and give them guidance as to the amount of that discretionary bonus for a specific year" (NYSCEF Doc No. 21, Killeen affirmation, exhibit F at 26).

The process of awarding annual bonuses begins in November, when a pool of money is given to Verdier for allocation within his group (NYSCEF Doc No. 19 at 31). The amount varies each year based on market performance and the group's performance (*id.* at 33-34). Verdier allocates funds to the managers reporting to him, who recommend amounts to award to those they manage, taking into account the employee's individual performance (*id.* at 33; NYSCEF Doc No. 20, Killeen affirmation, exhibit E at 14-15). The employee's manager, Verdier, the Compensation Department in the Human Capital Group and Apollo's board make the final decision on the amounts to award (NYSCEF Doc No. 19 at 31; NYSCEF Doc No. 52, ¶ 8).

Apollo assesses employee performances twice each year, with the individual employees, managers and additional reviewers contributing written evaluations (NYSCEF Doc No. 19 at 20; NYSCEF Doc No. 20 at 9-10). Employees are graded on business knowledge, technical skills and work quality, and relationships within Apollo and with external vendors (NYSCEF Doc No. 27, Killeen affirmation, exhibit L at 1-4; NYSCEF Doc No. 30, Killeen affirmation, exhibit O at 1-5). Employees are given an overall performance rating of Outstanding, Exceeds Expectations, Meets Expectations, Meets Some But Not All Expectations or Not Meeting Expectations (NYSCEF Doc No. 27 at 4; NYSCEF Doc No. 30 at 5). A partner in Human Capital assists managers, particularly when performance issues arise (NYSCEF Doc No. 19 at 20 and 22; NYSCEF Doc No. 20 at 9; NYSCEF Doc No. 51, Sampson aff, ¶ 3). Once finalized, managers discuss the evaluations with their employees (NYSCEF Doc No. 19 at 21). In 2016, the review process began in October, with managers completing their written assessments by November 25 (NYSCEF Doc No. 33, Killeen

affirmation, exhibit R at 1 and 3). The review process ran concurrently with the bonus compensation process (NYSCEF Doc No. 52, ¶ 8).

Apollo used the performance reviews to determine whether an underperforming employee should be placed on a performance improvement plan, or PIP (NYSCEF Doc No. 51, ¶ 3). PIPs identified specific areas where the employee had to demonstrate immediate, consistent and sustained improvement over set period of time (*id.*). Termination was a possible outcome if the employee failed to demonstrate sustained improvement (*id.*).

Plaintiff alleges that he had not been discriminated against in 2014 (NYSCEF Doc No. 18 at 145). Albelli had rated his overall performance as Meets Expectations (NYSCEF Doc No. 25, Killeen affirmation, exhibit J at 3), and Apollo paid him the full $125,000 target bonus described in the offer letter (NYSCEF Doc No. 16, ¶ 9). However, plaintiff "began to sense that he was being treated differently by the new management" beginning in 2015 (*id.*, ¶ 13). Plaintiff claims he experienced discrimination on the basis of his national origin and religion, as evidenced in his 2015 and 2016 reviews and Verdier's and Albelli's conduct towards him.

Albelli indicated that plaintiff was on track to meet goals and expectations in the 2015 mid-year review (NYSCEF Doc No. 26, Killeen affirmation, exhibit K at 2), but he rated plaintiff's overall performance as Meets Some But Not All Expectations in the year-end review (NYSCEF Doc No. 27 at 4). While Albelli generally praised plaintiff's industry knowledge and technical competency, he was critical of plaintiff's communication and interpersonal skills. Albelli wrote:

> "Hal needs to improve his communication style and to engage internal and external constituents in a respecting, constructive manner. Hal is a passionate individual with a desire to deliver and do the best for the firm. Having said that, Hal needs to consistently be more patient, accepting of constructive feedback, and less abrasive in his communication approach. He also needs to work more effectively with internal team members and external vendors – he had a difficult time working with both internal and external

> counterparts throughout the IVP Integration. He can let his emotions get the best of him, which has led him to get into arguments with our vendors and get frustrated with team members. Hal needs to make sure that he is constructive and calm rather than abrasive, as he has exhibited during meetings with senior leaders at VPM and during conference calls while troubleshooting production issues. This has escalated to a level where the vendor felt it necessary to discuss with the global head of technology and myself directly. While Hal's goal is to hold everyone accountable and his intentions may be in the right place, this behavior is completely unacceptable and hinders the process of reaching a conclusion on an already complex and sophisticated integration. Always acts in the best interest of investors and the firm and demonstrates a steadfast commitment to the firm"

(*id.* at 4). Albelli also observed that plaintiff "can often seem disorganized when approaching a problem making it frustrating for others to follow. This manifests itself in him not being organized in meetings and can lead to him being reactive as well as having no clear action plan and confusion around next steps" (*id.*).

The contributing reviewers also praised plaintiff's technical achievements, but several commented on his abrasive manner. Anthony Martucci (Martucci) wrote, "Hal has an opportunity to focus on being more patient, less abrasive and working better with internal Team Members and external vendors … [he] let's [sic] his emotions get the best of him and will routinely get into shouting matches with our vendors and get extremely frustrated with … the internal team" (NYSCEF Doc No. 28, Killeen affirmation, exhibit M at 8). Martucci added, "Hal also has difficulty accepting constructive feedback and taking responsibility for items that have gone wrong – this makes it even more difficult to work with him. He will continuously point fingers at everyone else – both internal and external" (*id.*). Brian Sullivan (Sullivan) wrote, "Hal's communication skills and style need a lot of work. When describing an issue, he often talks in circles instead of getting right to the point. When challenged on an idea or opinion, he rarely gives ground, arguing for the sake of arguing, and the conversation is often times not productive" (*id.*). Carlos Morlas

(Morlas) observed that "[plaintiff] lets his emotions get the better of him leading to unconstructive and combative debates … [with] internal and external counterparts" and sometimes lacked focus from the task at hand, which wasted time (*id.*). Carlos Frunza (Frunza) noted that plaintiff's meetings could "more productive" (*id.*). Robert Geraghty commented that plaintiff's "lack of focus" was a "hindrance" (*id.*).

Plaintiff received his $225,000 base salary and a $90,000 bonus in 2015 (NYSCEF Doc No. 16, ¶ 16). He later learned that several colleagues and their subordinates had received their full bonuses that year (NYSCEF Doc No. 18 at 274-277).

Plaintiff testified that he was surprised Albelli chose to focus on his communication style (NYSCEF Doc No. 18 at 232-233). There were significant challenges in delivering on a project that year (*id.* at 230), and Albelli had told him to focus on "delivery, not communication and collaboration" (*id.* at 232). He and Albelli later discussed his communication style (*id.* at 150). Albelli said plaintiff was "assertive" and asked him to "tone down my assertiveness with vendors, which I don't know – I did not know what that meant" (*id.*). Albelli also told plaintiff to be "sweeter," but "[he] did not have a clear explanation" of what that meant (*id.* at 151).

Plaintiff testified that the review process was too subjective since it did not provide measurable objectives (NYSCEF Doc No. 18 at 124). He contacted Amanda Watterson (Watterson) in Human Capital because he wanted to learn why was it is so subjective (*id.* at 262). When they met, plaintiff did not express that he had been discriminated against because "[a]t that that time, I didn't believe I was" (*id.* at 263). However, plaintiff had a "feeling" his year-end review was discriminatory because he was Muslim and Turkish (*id.* at 183). Immediately after he began working at Apollo, Albelli "mentioned that I was loud. He asked me if I was Italian because

he was from Italian origin and he's as loud as I am. And he said we're both very loud when we speak. It resonates with others. And at that point I said was Turkish" (*id.* at 90-91).

Plaintiff also maintained that Albelli had mischaracterized certain events in the review (NYSCEF Doc No. 18 at 181-182). Plaintiff claimed it was "possible" that Albelli had chosen to describe the events in a misleading manner because he was Muslim (*id.* at 182), and that "[Albelli] might have construed that, you know, this guy's loud, he's Turkish, he's Muslim. This conversation has happened a few times, that I was Muslim, I was loud, I was Turkish. But I don't necessarily believe it had anything to do in my performance" (*id.* at 182-183). Plaintiff later clarified, "I don't know. I can't say yes [to whether the review was discriminatory] but it certainly was completely unreasonable, unfair and certainly treated me differently than the rest of the people, and unfavorably" (*id.* at 282). On another occasion, Albelli said, "Oh, give it to Hal, the Turk. He'll bully people" (*id.* at 283). Plaintiff could not recall "whether that was a joke, meant to be a joke, or it was discriminatory. But I did not feel comfortable" (*id.* at 283-284). He added, "I do not firmly believe whether that was meant to be a joke, a tasteless one, or it was building up to a discrimination" (*id.* at 286).

Plaintiff testified that the alleged discrimination worsened in 2016. He described Verdier's initial behavior towards him as "indifferent" and that Verdier did not often respond to his greetings (NYSCEF Doc No. 18 at 99-100). On one occasion that May, Verdier told plaintiff, "Oh, it's you again" (*id.* at 101). Verdier's behavior purportedly changed after the terrorist attack in Nice, France in June or July 2016 (*id.* at 208), when Verdier "became very unfriendly" and "hostile" (*id.* at 94 and 100). Plaintiff testified that Verdier once walked "past me swiftly without acknowledging me" and used "hand gestures that I took as, you know, get out of my way" (*id.* at 100). He discussed Verdier's behavior with a coworker, Ronan Sheridan (Sheridan), who "shared

with me how insensitive Francis is, and … that it could be possible that he's too French" (*id.* at 208.). Sheridan remarked that "it could be possible that Francis has too much [sic] ties to France. Hence, he has hatred against the Muslim community" (*id.* at 209).

Plaintiff believed Albelli "might have been influenced by [Verdier]" because "I felt increased hostility from Albelli after the incident [in France], so I cannot tell for sure" (NYSCEF Doc No. 18 at 294-295). Albelli "started being completely displeased with everything that I did, even though they were successful. It was no different than 2015 … I was a better team player … [y]et he still was not happy" (*id.*).

Plaintiff described other incidents involving Albelli. Albelli reprimanded him and refused to correct misstatements in his reviews (NYSCEF Doc No. 18 at 186). Albelli wrote an email to him that read, "You're Turkish and you're loud" (*id.* at 89-90). Albelli asked others whether they should take on some of plaintiff's responsibilities (*id.* at 307). Albelli "basically did not respond" when confronted about his actions (*id.*). Plaintiff believed it was "possible" Albelli had acted because he was Turkish and Muslim, since "[t]he only explanation of this incredible hostile, incredible unfairness is discrimination" (*id.* at 307-308). Plaintiff learned from a coworker, Johanna Martinez (Martinez), that Albelli was searching for an additional person for the team (*id.* at 302). When he confronted Albelli with this information, Albelli "downplayed [it] and said, Oh I don't think so but maybe for the project manager position" (*id.*). Plaintiff stated this action "confirmed my concerns about discrimination" (*id.*).

In the 2016 mid-year review, Albelli rated plaintiff's performance as Meets Some But Not All (NYSCEF Doc No. 29, Killeen affirmation, exhibit N at 2). Once again, Albelli wrote that plaintiff needed to improve his communication style (*id.*). Albelli also cited an incident where

plaintiff had walked out on a vendor meeting because of a disagreement, which the vendor then brought to the attention of senior management (*id.*).

On December 8, 2016, plaintiff contacted Sampson by email to complain about "trends in my department that are bordering [sic] discrimination" (NYSCEF Doc No. 37, Killeen affirmation, exhibit at 1). He wrote that "[s]omehow these trends are more pronounced during year end review time which I had experienced significant challenges during last year. At that time I had shared my concerns with Amanda Watterson from the HR team, but without a resolutions [sic] or even a satisfactory exchange of information" (*id.*). Plaintiff asked Sampson for confidentiality (*id.*).

On December 12, 2016, plaintiff met with Sampson and Tara Mullally (Mullally) from Human Capital (NYSCEF Doc No. 21 at 11-12; NYSCEF Doc No. 40, Killeen affirmation, exhibit Y at 1). According to Sampson's notes, plaintiff claimed Verdier had discriminated against him, but Albelli had not (NYSCEF Doc No. 40 at 5). Plaintiff alleged that Verdier was aware he was Turkish and Muslim, though he was not a practicing Muslim (*id.*). Plaintiff stated that after the terrorist attack, Verdier "seemed angry at him," looked at him with "angry eyes," and failed to respond to his greetings (*id.*). He believed Verdier "thinks in French first" (*id.*). Plaintiff also complained about his negative performance reviews and his bonus (*id.*). He identified Jeremy Wessels (Wessels), Sheridan and Martinez as witnesses (*id.*).

On December 13, 2016, plaintiff, Albelli and Sampson met to discuss the 2016 year-end review. Plaintiff received an overall rating of Meets Some But Not All Expectations (NYSCEF Doc No. 30 at 5). Albelli again raised issues with plaintiff's communication and interpersonal skills. Albelli wrote that "Hal needs to build better business relationships with his core partners in operations and controllers. This was a goal and ask for 2016 that was initiated but not followed thru [sic]" (*id.* at 4). Albelli further wrote:

> "Hal has … been working on improving his communications and he has made progress. While he had made improvements in trying to be more respectful and less combative there remains a need for further improvement in a number of areas. He needs to continue to improve on his abrasive tone and temper. This has been observed by team members on several occasions where Hal speaks poorly to external vendors and fellow colleagues. He needs to do a better job in bringing up relevant and impactful topics in meetings to help avoid confusion and wasted time. Hal is very passionate about delivering the right solution, but he would be better served if he can collect his ideas and present it succinctly and in an organized and structured manner. Conversations often go in different directions leaving others to distill and identify key points. Hal can sometimes latch on to issues, focus just on the negatives and risks when discussing technology strategy and related projects. If he could offer his view on potential risks to projects concisely and focus more on possible solutions, he will be effective in influencing the team and users. Hal also needs to improve in the area of collaboration. His approach and style often get in the way of building consensus with the team. As an example, during the firm's DR preparation and testing, Hal had a number of good reasons to disagree with the timelines proposed, but the way he presented his ideas seemed aggressive and presented an unwillingness to work with the team"

(*id.*).

Although the additional reviewers praised plaintiff's technical competency, several commented on his aggressive style. Kenneth Ricci described his interactions with plaintiff as "contentious," and added that plaintiff "was putting words in my mouth and using that as leverage to his users" (NYSCEF Doc No. 31 at 3). Anand Agarwal wrote, "Hal often loses his temper when someone else is not doing his/her work to his satisfaction. In some occasion [sic] this might be justified but is not healthy for overall Technology environment" (*id.* at 9). Martucci commented, "Hal has difficulty working in a team and with counterparties. He would become very agitated during meetings/calls with our vendors and would lash out. While I understand that his thoughts and views were appropriate and in the firms [sic] best interests – his approach was aggressive and concerning" (*id.* at 10). Morlas wrote that plaintiff had improved "in trying to be a bit more

respectful and less combative" but felt that he needed "to do a better job in making sure he is bringing up relevant and be impactful topics in some of our status meetings to help avoid confusion and unnecessary time spent" (*id.*). Morlas also wrote of a "disconnect between the vendor ... on some key tech deliverables which lead to confusion, project delays, and project re-work" (*id.*). Derek Laino indicated that plaintiff's "noted issues with his attitude and overall abruptness, primarily with external vendors" had improved, but more improvement was needed (*id.*). Rangaswami noted that "the way Hal presented his ideas seemed aggressive and presented as an unwillingness to work with the team" (*id.*).

Plaintiff received his $225,000 base salary and a $65,000 year-end bonus[1] (NYSCEF Doc No. 16, ¶ 119). Plaintiff attributed the poor review to the fact that he was a Muslim because "[w]hy else? I was producing – I was one of the top performers of the company ... [t]here was no reason to give me anything other than stellar reviews. Yet somehow the reviews figured out and it's only about my communication style. And the only thing about my communication style is me being Turkish and Muslim and loud" (NYSCEF Doc No. 18 at 186-87).

In email exchanges with Sampson, plaintiff wrote that he was "quite upset" about another review as "baseless, completely subjective with no measurable criteria ... with incorrect conclusions" (NYSCEF Doc No. 38, Killeen affirmation, exhibit W at 2). He also wrote, "I am quite disappointed that senior HR management has found my severance ask high, I believe it is a fair ask considering the situation and my ability to withstand the hostility I have faced over the last 18 months" (*id.* at 1). On December 20, 2016, plaintiff met with Sampson and Mullally, claimed that his review was not substantiated, and stated that "some sort of discrimination [is] at hand here" (NYSCEF Doc No. 40 at 5). Plaintiff also alleged that Albelli had discriminated against him (*id.*).

[1] Defendants maintain that plaintiff received a $70,000 discretionary bonus (NYSCEF Doc No. 17, Killeen affirmation, exhibit B, ¶ 19; NYSCEF Doc No. 34, Killeen affirmation, exhibit S at 2).

Sampson proceeded to investigate plaintiff's claims, with assistance from her manager, the Head of Human Capital and outside legal counsel (NYSCEF Doc No. 21 at 14). She interviewed Verdier, Albelli, Wessels, Sheridan and Martinez, and, apart from Verdier, she did not tell them about the nature of the complaint (*id.* at 16-19; NYSCEF Doc No. 51, ¶ 8). Sheridan, Wessels and Martinez told Sampson that Verdier did not interact with people outside of his leadership team (NYSCEF Doc No. 40 at 2). Sheridan and Wessels recounted that Verdier had once joked that Apollo would not move from its current space unless an airplane crashed into Trump Tower (*id.*). Albelli confirmed that Verdier had little involvement in drafting plaintiff's reviews, although he and Verdier had spoken about plaintiff's performance challenges (*id.*). The three witnesses described Albelli as professional, approachable and non-confrontational (*id.*). In a January 10, 2017 memorandum summarizing her findings, Sampson concluded that there was no evidence to substantiate a claim of religious discrimination by Verdier, and that plaintiff "did not state a specific claim with regards" to Albelli (*id.* at 1).

Meanwhile, on December 1, 2016, Albelli raised the issue of plaintiff's poor performance with Sampson (NYSCEF Doc No. 48, Killeen affirmation, exhibit GG at 1). They later agreed to place plaintiff on a PIP, and told him about the PIP at their December 13 meeting (NYSCEF Doc No. 51, ¶ 5; NYSCEF Doc No. 52, ¶ 13). Sampson presented plaintiff with the written PIP on January 24, 2017, and, after incorporating some of plaintiff's suggestions on language, she presented him with a final version on February 1, 2017 (NYSCEF Doc No. 42, Killeen affirmation, exhibit AA at 1-2). The 60-day PIP reads, in part, that there "must be **immediate, consistent, and sustained** results" in communication, management and delivery and that plaintiff must "[c]ommunicate clearly[,] … be consistent in using a professional, measured tone and approach … [and] be more respectful and less combative" (NYSCEF Doc No. 32, Killeen affirmation,

exhibit Q at 2). Albelli and Sampson subsequently extended the PIP by 30 days to give plaintiff more time to demonstrate improvement (NYSCEF Doc No. 51, ¶ 13; NYSCEF Doc No. 52, ¶ 16).

When plaintiff failed to demonstrate sustained improvement, Human Capital agreed and approved Albelli's recommendation to terminate his employment (NYSCEF Doc No. 51, ¶ 13; NYSCEF Doc No. 52, ¶ 16). Apollo notified plaintiff on May 11, 2017 that his employment had been terminated, with June 9, 2017 set as his last day (NYSCEF Doc No. 17, ¶ 26).

Procedural History

The complaint pleads three causes of action for discrimination and retaliation in violation of the NYCHRL, NYSHRL and Title VII. The complaint alleges that defendants discriminated against plaintiff based on his national origin and creed by failing to pay targeted bonuses, failing to properly investigate his claims of discrimination, placing him on a PIP and terminating his employment. The complaint alleges that defendants retaliated against plaintiff for complaining about discrimination by failing to pay targeted bonuses, placing him on a PIP and discharging him.

Defendants now move for summary judgment on the ground that plaintiff cannot show that (1) he was qualified for the position; (2) he suffered an adverse employment action giving rise to an inference of discrimination; (3) defendants' reasons for the employment decisions were pretexts for discrimination; and, (4) discrimination was a motivating factor. Plaintiff opposes the motion.

Discussion

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits,

depositions and written admissions (*see* CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A. Discrimination under Title VII, the NYSHRL and the NYCHRL

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 USC § 2000e-2 [a] [1]). Similarly, the NYSHRL makes it an unlawful for an employer "because of an individual's ... creed ... [or] national origin... to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (Executive Law § 296 [a]). Under the NYCHRL, it is unlawful for an employer "because of the actual or perceived ... creed ...[or] national origin ... (2) [t]o refuse to hire or employ or to bar or to discharge from employment such person; or (3) [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment" (Administrative Code of the City of NY § 8-107 [1]).

Claims brought under Title VII and the NYSHRL are analyzed under the burden-shifting framework articulated in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) (*McDonnell Douglas*) (*see Eyuboglu v Gravity Media, LLC*, 804 Fed Appx 55, 57 [2d Cir 2020]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Under this three-step framework, the plaintiff employee bears the burden of establishing a prima facie case of discrimination by a preponderance of the evidence (*see Moschetti v New York City Dept. of Educ.*, 778 Fed Appx 65, 65 [2d Cir 2019]; *Ferrante*, 90 at 629). This is a minimal burden (*see Melman v Montefiore Med. Center*, 98 AD3d 107, 113 [1st Dept 2012]). A plaintiff meets this burden by showing "'(1) that he belonged to a protected class; (2) that he was qualified for the position he sought; (3) that he suffered an adverse

employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent'" (*Moschetti*, 778 Fed Appx at 65-66, quoting *Abrams v Department of Pub. Safety*, 764 F 3d 244, 251-252 [2d Cir 2014]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Once the plaintiff meets this initial burden, a presumption of unlawful discrimination arises (*see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 254 [1981]). The burden then shifts to the defendant employer to rebut this presumption with admissible evidence of a legitimate, non-discriminatory reason for the adverse employment action (*see Moschetti*, 778 Fed Appx at 65; *Forrest*, 3 NY3d at 305). If the defendant satisfies its burden, then the plaintiff must demonstrate that the reason put forward by the defendant for the adverse action was merely a pretext for discrimination (*id.*). Thus, a defendant moving for summary judgment on an NYSHRL claim "must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, non-discriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual" (*Forrest*, 3 NY3d at 305]). The plaintiff opposing the motion "must provide more than conclusory allegations to resist a motion for summary judgment" (*Holcomb v Iona Coll.*, 521 F 3d 130, 137 [2d Cir 2008]; *Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005] [same]).

As for the NYCHRL, it "affords protections broader than the State HRL" (*Romanello v Intesa Sanpaolo, S.p.*A., 22 NY3d 881, 884 [2013]), and "should be construed 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible'" (*id.* at 885, quoting *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). A claim brought under the NYCHRL "requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language" (*Williams v New York City*

Hous. Auth., 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Thus, an NYCHRL claim is analyzed under both the *McDonnell Douglas* framework and a "mixed motive" framework (*see Melman*, 98 AD3d at 113, citing *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Under the mixed-motive analysis, "'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'" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016], quoting *Williams*, 61 AD3d at 78 n 27; *Melman*, 98 AD3d at 127 [stating that "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 citation omitted]). A defendant moving for summary judgment on an NYCHRL claim bears the burden of showing that "no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of a number of mixed motives, by direct or circumstantial evidence" (*Bennett*, 92 AD3d at 45).

Defendants do not challenge whether plaintiff can meet the first element under *McDonnell Douglas*. As a Muslim of Turkish descent, plaintiff is a member of a protected class.

As to the second element, defendants contest whether plaintiff was qualified (NYSCEF Doc No. 54, defendants' mem of law at 23). However, plaintiff need only show that he "possesses the basic skills necessary for performance of [the] job" to meet this element (*Owens v New York City Hous. Auth.*, 934 F 2d 405, 409 [2d Cir 1991], *cert denied* 502 US 964 [1991]), not that his performance was satisfactory (*see Slattery v Swiss Reinsurance Am. Corp.*, 248 F 3d 87, 91-92 [2d Cir 2001], *cert denied* 534 US 951 [2001]). Plaintiff has satisfied the second element.

The third element requires the plaintiff to show that an adverse employment action resulted in a "materially adverse change in the terms and conditions of employment" (*Forrest*, 3 NY3d at 306). The change must go beyond just "a mere inconvenience or an alteration of job responsibilities ... [and] might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation" (*id.*, internal quotation marks and citation omitted]).

An employee's placement on a PIP does not qualify as an adverse employment action (*see Brown v American Golf Corp.*, 99 Fed Appx 341, 343 [2d Cir 2004]; *Allen v A.R.E.B.A. Casriel, Inc.*, 2017 WL 4046127, *12, 2017 US Dist LEXIS 147491, * 29 [SD, NY Sept. 12, 2017, No. 15 Civ. 9965 (KPF)]), since the goal of a PIP "was to improve ... performance and avoid ... termination" (*Szarzynski v Roche Laboratories, Inc.*, 2010 WL 811445, *7 2010 US Dist LEXIS 17883, *25 [WD, NY Mar. 1, 2010, No. 07-CV-6008 (MAT]). Thus, plaintiff's placement on a PIP is not an adverse employment action where, despite the fact that he could be terminated if he did not comply, the material terms of his employment did not change (*see Zoll v Northwell Health, Inc.*, 2019 WL 2295679, *14, 2019 US Dist LEXIS 90819, * 41-42 [ED, NY May 30. 2019, No. 16-CV-2063 (JMA) (AYS)]). Additionally, "an employer's failure to investigate a discrimination complaint does not alone constitute an adverse employment action" (*Kane v City of Ithaca*, 2018 WL 3730172, *6, 2018 US Dist LEXIS 131457, *17-18 [ND, NY Aug. 6, 2018, No. 3:18-CV-0074 (DEP)]). Here, plaintiff has not described how Sampson's alleged failure to conduct a proper investigation caused a tangible impact to the terms of his employment. That said, termination plainly constitutes an adverse employment action (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 n 4 [1st Dept 2015]). Likewise, although defendants suggest otherwise, the

failure to grant a discretionary bonus may qualify as an adverse employment action, provided there is evidence of unlawful discrimination (*see Davis v New York City Dept. of Educ.*, 804 F 3d 231, 236 [2d Cir 2015]). Plaintiff has satisfied the third element under *McDonnell Douglas*.

The fourth element requires the plaintiff to show circumstances giving rise to an inference of discrimination (*see Forrest*, 3 NY3d at 305). Plaintiff has described several instances where Albelli referenced his Turkish origin. Given plaintiff's minimal burden of establishing a prima facie case, the court "assume[s] that these circumstances surrounding the challenged adverse actions 'giv[e] rise to an inference of discrimination'" (*Melman*, 98 AD3d at 115, quoting *Forrest*, 3 NY3d at 305).

The burden having shifted, defendants have articulated legitimate, non-discriminatory reasons for the challenged actions. First, defendants have shown that there is no merit to plaintiff's belief that he was entitled to a $125,000 target bonus for each year of his employment. The plain, unambiguous language in the offer letter states that the target bonus applied only to 2014; nothing in the letter supports any other interpretation (*see Ashmore v CGI Group, Inc.*, 923 F 3d 260, 282 [2d Cir 2019]; *Delaney v Bank of Am. Corp.*, 766 F 3d 163, 171 [2d Cir 2014]). The bonus program is also entirely discretionary with awards dependent, in part, upon the employee's performance. In this instance, defendants awarded plaintiff bonuses despite his having received low performance ratings for two consecutive years. Second, the court may rely on a supervisor's evaluation to assess whether an employee's job performance was satisfactory (*see Meiri v Dacon*, 759 F 2d 989, 995 [2d Cir 1985]). An "unsatisfactory work performance" is a legitimate, non-discriminatory reason for an adverse employment action, such as termination (*Bennett*, 92 AD3d at 46).

In response, the plaintiff must show that the reasons proffered for the challenged actions were pretexts for discrimination. The plaintiff cannot simply point to an "unwise business decision

... or that the employer acted arbitrarily or with ill will" (*Ioèle v Alden Press*, 145 AD2d 29, 36 [1st Dept 1989] [internal quotation marks and citation omitted]). Rather, the plaintiff must show "'*both* that the reason was false, *and* that discrimination was the real reason [for the employment decision]'" (*Ferrante*, 90 NY2d at 630, quoting *St. Mary's Honor Ctr. v Hicks*, 509 US 502, 515-516 [1993]). Plaintiff has failed to meet this burden.

As explained *supra*, the offer letter did not set a specific, minimum annual target bonus of $125,000. Plaintiff's reliance on an email from Alan Blum, a recruiter, to Sampson discussing his compensation is unavailing, since the email did not state that defendants had agreed to guarantee an annual compensation package inclusive of a minimum $125,000 target bonus (NYSCEF Doc No. 56, plaintiff aff, exhibit 1 at 1). As such, plaintiff has not shown that the reason for refusing to pay a target bonus was false and that discrimination was the real reason (*see Melman*, 98 AD3d at 120), or that discrimination was a motivating factor (*id.* at 127-128).

Plaintiff also claims that defendants used the subjective parts of the reviews as an excuse to deny him a target bonus (NYSCEF Doc No. 55, ¶ 27), but "a 'plaintiff's subjective disagreement with [his performance] reviews is not a viable basis for a discrimination claim'" (*Sotomayor v City of New York*, 862 F Supp 2d 226, 259 [ED, NY 2012], *affd* 713 F 3d 163 [2d Cir 2013] [internal citation omitted]; *Berner v Gay Men's Health Crisis*, 295 AD2d 119, 120 [1st Dept 2002] [stating that "[p]laintiff's disagreement with defendant's assessment of her performance is insufficient to raise" an issue on pretext]). Likewise, a plaintiff cannot establish pretext by showing that he "has received some favorable comments in some categories or has, in the past, received some good evaluations'" (*Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 197 [1st Dept 1998] [internal citation omitted]). Instead, a plaintiff must show that the defendant applied the "criteria for [a] satisfactory job performance in an inconsistent, arbitrary, or discriminatory manner" (*Ruiz*

v County of Rockland, 609 F 3d 486, 493 [2d Cir 2010]). "Where an employer's explanation, offered in clear and specific terms, 'is reasonably attributable to an honest even though partially subjective evaluation of ... qualifications, no inference of discrimination can be drawn'" (*Byrnie v Town of Cromwell, Bd. of Educ.*, 243 F 3d 93, 105 [2d Cir 2001] [internal citation omitted]).

At the outset, plaintiff's "feeling" that his reviews were discriminatory is insufficient. "A plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination" (*Basso v Earthlink, Inc.*, 157 AD3d 428, 430 [1st Dept 2018] [internal quotation marks and citation omitted]). Moreover, "[n]othing about the evaluation procedures is even vaguely suggestive of discrimination" (*Cadet-Legros*, 135 AD3d at 203). The reviews looked at teamwork, leadership and organization as well as technical competency. Each category set standards by which to assess an employee's performance (NYSCEF Doc No. 27 at 2-3; NYSCEF Doc No. 30 at 2-3). Albelli presented specific examples and critiques of plaintiff's skills in these categories based on those guidelines. While plaintiff acknowledged that he had to act forcefully at times to ensure that the technology applications functioned properly (NYSCEF Doc No. 55, ¶¶ 11 and 21), Albelli explained that "getting the job done is not the only thing," and that "[p]art of that job is interacting with your team, interacting with other colleagues within technology, other colleagues in the firm, as well as external vendors" (NYSCEF Doc No. 20 at 16). In the reviews, Albelli discussed how plaintiff's aggressive attitude hindered plaintiff's and the group's work. Additionally, "[a] discriminatory inference can be rebutted when multiple evaluators all express dissatisfaction with the plaintiff's performance" (*Sotomayor*, 862 F Supp 2d at 259). Several contributing reviewers commented on plaintiff's abrasiveness, lack of patience and inability to listen to constructive criticism, which affected their efficiency. Importantly, plaintiff "cannot say" whether these reviewers discriminated against him (NYSCEF Doc No. 18 at 235).

Moreover, plaintiff's testimony shows that the criticism was warranted (*see Rubinow v Boehringer Ingelheim Pharmaceuticals, Inc.*, 496 Fed Appx 117, 119 [2d Cir 2012] [stating that the plaintiff did not "fundamentally dispute the specific accounts of her insubordination which led to her termination"]; *Stewart v Schulte Roth & Zabel LLP*, 44 AD3d 354, 355 [1st Dept 2007], lv *denied* 10 NY3d 707 [2008] [finding no evidence that the poor reviews were inaccurate]). Plaintiff admitted that he could be "abrasive" or "stern" (NYSCEF Doc No. 18. at 238), that he was a "loud person, which might be construed as yelling" (*id.* at 265), that he "might have been [abrasive] to … vendors" (*id.*), and "would probably get into discussions where I demand, which might be construed as arguments, from my vendors" (*id.* at 239). He admitted it was "possible" others had complained about him (*id.* at 169). For example, one colleague had written about a personal attack plaintiff had made against a vendor (NYSCEF Doc No. 36, Killeen affirmation, exhibit U at 1). Another vendor's chief operating officer met with Verdier and Albelli about his relations with that company (NYSCEF Doc No. 18 at 240). Albelli also met with plaintiff numerous times "about me being assertive and in a couple of cases me basically telling the vendor what they have to produce in a way they felt that I was threatening them by removing them" (*id.* at 170). Thus, plaintiff has not established that defendants' application of the criteria used to assess his performance had been applied in an arbitrary, inconsistent or discriminatory manner.

Nor has plaintiff presented any evidence that the reason articulated by defendants for his termination was pretextual (*see Eyuboglu*, 804 Fed Appx at 57-58; *Bennett*, 92 AD3d at 46). "Dismissals are often preceded by adverse performance reviews" (*Viola v Philips Med. Sys. of N. Am.*, 42 F 3d 712, 718 [2d Cir 1994]). Here, plaintiff received below standard performance ratings for two consecutive years. Albelli continued to note issues with plaintiff's performance even after

he was placed on a PIP (NYSCEF Doc No. 43, Killeen affirmation, exhibit BB at 2 and 4). Plaintiff has not rebutted the assertion that he continued to perform below expectations.

Even under the mixed-motive analysis, none of plaintiff's allegations show that defendants were motivated, at least in part, by discrimination (*see Hudson*, 138 AD3d at 514-515). Preliminarily, plaintiff admits that Verdier never said anything derogatory to him about his religion or national origin (NYSCEF Doc No. 18 at 88). Though Human Capital's investigation revealed that Verdier had once joked about a plane crashing into Trump Tower (NYSCEF Doc No. 40 at 2), the comment, though insensitive, does not reference Turks, Muslims or plaintiff, who does not state whether he personally heard it. In any event, "'[s]tray remarks such as [this], even if made by a decision maker, do not, without more, constitute evidence of discrimination'" (*Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014], quoting *Melman*, 98 AD3d at 125). Plaintiff's complaints that Verdier refused to greet him and looked at him with angry eyes are equally insufficient. Plaintiff may have felt slighted by this behavior, but Title VII, the NYSHRL and the NYCHRL are not "general civility code[s] for the American workplace" (*Burlington N. & Santa Fe Ry. Co. v White*, 548 US 53, 68 [2006] [internal quotation marks and citation omitted]; *Forrest*, 3 NY3d at 309). Instead, these actions constitute "petty slights and trivial inconveniences," which are not actionable (*Williams*, 61 AD3d at 80 [internal quotation marks omitted]). Furthermore, plaintiff's belief that Verdier "has hatred of the Muslim community" is based solely on Sheridan's speculation, but "[s]ubjective conclusions without evidence that would 'reasonably support[ ] a finding of prohibited discrimination'" does not suffice (*Bringley v Donahoe*, 499 Fed Appx 116, 119 [2d Cir 2012] [internal citation omitted]; *Jefferies v New York City Hous. Auth.*, 8 AD3d 178, 178 [1st Dept 2004] [reasoning that unsubstantiated

allegations cannot sustain a claim for discrimination]). Thus, evidence of Verdier's bias is lacking (*see Hamburg v New York Univ. Sch. of Med.*, 155 AD3d 66, 76 [1st Dept 2017]).

Similarly, plaintiff testified that he could not recall Albelli ever saying anything derogatory about his religion (NYSCEF Doc No. 18 at 90), though Albelli allegedly called plaintiff "loud" because he was Turkish and a Muslim. However, given the documented evidence of his unsatisfactory work performance, plaintiff has not shown that discrimination was a motivating factor in his termination or in deciding his bonuses. In addition, plaintiff claimed that Albelli had written plaintiff a derogatory email. Ryan Isaacs (Isaacs), an analyst at Apollo, attests that a search of all emails, skype messages and instant messages from Albelli to plaintiff from January 1, 2015 to December 31, 2016 containing the words "Turkish", "Turk," "Turkey" and "loud" failed to yield any results (NYSCEF Doc No. 53, Isaacs aff, ¶¶ 2 and 4).

Under the NYCHRL, a plaintiff may also raise a triable issue of fact by showing that "[he] or she was 'treated differently' or 'less well' than other employees" (*Gordon v Bayrock Sapir Org., LLC*, 161 AD3d 480, 481 [1st Dept 2018]). Plaintiff avers that his non-Muslim, non-Turkish coworkers all received their target bonuses whereas he did not (*id.*, ¶ 13). Plaintiff, though, has produced no evidence demonstrating that his colleagues' offer letters contained specific annual target bonuses; what overall performance ratings they received; if any received the same ratings as plaintiff; and, whether those who received the same ratings had been paid a target bonus. Consequently, summary judgment is granted to defendants on the first and second causes of action for discrimination.

B. Retaliation under Title VII, the NYSHRL and the NYCHRL

Under Title VII, it is unlawful "for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this

title" (42 USC § 2000e-3 [a]). The NYSHRL makes it unlawful for an employer "to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article" (Executive Law § 296 [e]). The NYCHRL provides that it is unlawful to retaliate against a person who has "opposed any practice forbidden under this chapter" (Administrative Code of City of NY § 8-107 [7] [i]).

Claims for retaliation brought under Title VII and the NYSHRL are analyzed under the burden-shifting framework in *McDonnell Douglas* (*see Eyuboglu*, 804 Fed Appx at 57). The plaintiff meets the initial burden by showing that "(1) he was engaged in protected activity, (2) the employer was aware of that activity, (3) the employee suffered a materially adverse action, and (4) there was a causal connection between the protected activity and that adverse action" (*Agosto v New York City Dept. of Educ.*, 982 F3d 86, 104 [2d Cir 2020] [internal quotation marks and citation omitted]; *Forrest*, 3 NY3d at 313). Under the NYCHRL, that plaintiff must show that "(1) [he] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). "The causal connection may be indirect, made 'by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct,' or direct, 'through evidence of retaliatory animus directed against the plaintiff by the defendant'" (*Rowe v New York State Dept. of Taxation & Fin.*, 786 Fed Appx 302, 305 [2d Cir 2019]; *see Krebaum v Capital One, N.A.*, 138 AD3d 528, 528, 528-529 [1st Dept 2016] [finding that temporal proximity between the protected activity and the adverse action is sufficient to infer a causal connection]).

Complaining about discrimination is a protected activity, and, here, defendants were aware of the internal complaint (*see Krebaum*, 138 AD3d at 528). Plaintiff points to three retaliatory actions – the failure to pay target bonuses, his placement on a PIP and his termination. As discussed above, the first two actions are not adverse actions. Plaintiff misinterprets the clause discussing the bonus scheme in the offer letter, since the clause sets a target bonus for only his first year at Apollo. Next, placement on a PIP is not a materially adverse action (*see Brown*, 99 Fed Appx at 343). In any event, plaintiff has not demonstrated a causal nexus between his complaint of discrimination and his placement on the PIP. "[A]n employer's continuation of a course of conduct that had begun before the employee complained 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). The timeline of events shows that Albelli had already completed plaintiff's 2016 review (NYSCEF Doc No. 33 at 3), and had contacted Sampson about plaintiff's unsatisfactory work performance one week before plaintiff complained about discrimination (NYSCEF Doc No. 48 at 1).

Termination is undeniably an adverse employment action, and the passage of five months between the happening of a protected activity and termination is sufficient to demonstrate a causal connection (*see Gorzynski v JetBlue Airways Corp.*, 596 F 3d 93, 110 [2d Cir 2010]). Defendants' proof, though, demonstrates that plaintiff's termination "was the culmination of continuous progressive discipline" (*Cadet-Legros*, 135 AD3d at 206-207; *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 [1st Dept 2010] [concluding that the reason for discharging plaintiff for poor performance adequately supported by depositions, affidavits and documents]).

Plaintiff fails to show that the reasons proffered by defendants were pretexts, or that they were motivated, in part, by unlawful retaliation (*see Ellison v Chartis Claims, Inc.*, 178 AD3d 665,

669 [2d Dept 2019], *lv dismissed* 35 NY3d 997 [2020]). As an initial matter, plaintiff admitted at his deposition that neither Verdier nor Albelli had retaliated against him (NYSCEF Doc No. 18 at 405). He contends that defendants should have implemented a PIP and terminated him after his first negative review, and the fact that they chose to do so only after he complained of discrimination is retaliatory. The argument is unpersuasive in the absence of any evidence that it was Apollo's policy to discharge an employee immediately after that employee received a single negative review (*see Tubo v Orange Regional Med. Ctr.*, 690 Fed Appx 736, 738 [2d Cir 2017] [finding that the plaintiff, who was terminated without first having been placed on a PIP, failed to present evidence that "similarly-situated employees outside of her protected class … were placed on a PIP in lieu of being discharged"]). In fact, Albelli testified that he had recommended PIPs for other underperforming employees and that he could not recall terminating anyone without first implementing a PIP (NYSCEF Doc No. 20 at 18-19 and 32). Furthermore, plaintiff has not alleged that defendants "actively undermined" his performance on the PIP (*see Heap v CenturyLink, Inc.*, 2020 WL 1489801, * 8, 2020 US Dist LEXIS 54315, * 24 [SD, NY Mar. 27, 2020 No. 18 Civ. 1220 (LAP)]), thereby hastening his termination.

Conclusion

Accordingly, it is

ORDERED that the motion brought by defendants Apollo Management Holdings, L.P., Francis Verdier and Gary Albelli for summary judgment dismissing the complaint is granted in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this Court.

1/27/2021
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE