

Chaplin v Permission Data, LLC
2022 NY Slip Op 32475(U)
July 25, 2022
Supreme Court, New York County
Docket Number: Index No. 156913/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART **35**

Justice

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MICHAEL CHAPLIN,	INDEX NO. <u>156913/2019</u>
Plaintiff,	MOTION DATE <u>03/22/2022</u>
- v -	MOTION SEQ. NO. <u>002</u>

PERMISSION DATA, LLC, and DOUG O'NEILL

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby

ORDERED AND ADJUDGED that Defendants Permission Data, LLC and Doug O'Neill's motion for summary judgment pursuant to CPLR 3212 is denied as to Plaintiff Michael Chaplin's first cause of action for gender discrimination under the New York City's Human Right's Law ("NYCHRL") to the extent that such cause of action is based on disparate treatment throughout Plaintiff's employment (Motion Seq. 002); and it is further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is granted as to Plaintiff's first cause of action for gender discrimination under NYCHRL to the extent such cause of action is based on Plaintiff's termination; and it further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is denied as to Plaintiff's second cause of action for caregiver status discrimination under NYCHRL to the extent it is based on disparate treatment; and it is further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is granted as to Plaintiff's second cause of action for caregiver status discrimination under NYCHRL to the extent it is based on Plaintiff's termination; and it is

ORDERED AND ADJUDGED that Defendants motion for summary judgment is granted as to Plaintiff third cause of action for retaliation under NYCHRL; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order, along with notice of entry, on all parties within ten (10) days of entry.

MEMORANDUM DECISION

In this action, Plaintiff Michael Chaplin has alleged that Defendants Permission Data, LLC and Doug O'Neill engaged in gender and caregiver status discrimination as prohibited by Section 8-107 (1) (a) of the New York City Human Right's Law (NYCHRL) when they refused to modify his work schedule because of his membership in a class protected by the statute. Plaintiff further alleges that Defendants retaliated against him as prohibited by § 8-107 (7) after he informed Defendants that he was objecting to their unlawful employment discrimination practices. In this motion sequence, Defendants move for an order pursuant to CPLR 3212 granting it summary judgment and dismissing the complaint with prejudice (Mot. Seq. 002). Plaintiff opposes the motion in its entirety. For the foregoing reasons, Defendants' motion is granted in part and denied in part.

BACKGROUND

In 2018, Plaintiff interviewed with Defendant Permission Data LLC d/b/a Adquire Media (hereinafter "Adquire"), a digital marketing firm, for a position as a Project Manager. After

Plaintiff's interview with several Acquire employees, including Jake Kalstad (a software engineer who would work closely with Plaintiff), Acquire extended Plaintiff an offer of employment and the parties entered into an "at-will" contract. (See NYSCEF doc No. 46.) The contract described the terms of employment including compensation and job responsibilities,¹ and provided that Plaintiff would begin work in Acquire's New York City Office on October 8, 2018. (*Id.*)

From the beginning of Plaintiff's employment, Acquire required him to be in the office starting at 9:00 a.m. and work through 6:00 p.m. Sometime around Halloween that year, Plaintiff informed O'Neill that such a schedule, without some allowances, would be difficult to adhere to as Plaintiff was a single father with sole physical and legal custody of his son Ethan (a 17-year-old high-school senior). (NYSCEF doc No. 45 at 218.) As Ethan's primary caregiver, Plaintiff provided the housing, food, clothes, and other necessities that attends ordinary parenting. (NYSCEF doc No. 64.) Acquire and O'Neill did not acquiesce to Plaintiff's requested scheduling accommodation. Nonetheless, throughout his employment, Plaintiff rarely arrived by 9:00 a.m. and would most often arrive between 9:30 and 10:00 a.m.

After approximately six months of employment, on March 28, 2019,² Acquire and O'Neill decided to terminate Plaintiff's employment.

In July 2019, Plaintiff commenced this action against Acquire and O'Neill alleging causes of action for employment discrimination based upon his gender and status as a caregiver in violation of Section 8-107 (1) (a) of the NYCHRL. Plaintiff contends that, during his

¹ Pertinently, the contract itself does *not* describe either Acquire's work-from-home policy or a policy relating to the adjustment of employee's hours. The employee handbook does not mention the company's policies either.

² Ethan turned 18 years old approximately two weeks before Plaintiff's termination. Ethan's 18th birthday is a significant date in this case as New York City Human Right's Law defines caregiver status based on the care of either a person with disability (not relevant here) or a child under the age of 18.

employment, Defendants subjected him to disparate treatment based on these protected statuses by, on a case-by-case basis, approving requests from other employees to modify their schedules but denying his request after he informed them of his caregiving responsibilities at home. Additionally, Plaintiff alleges that Defendants violated Section 8-107 (7) of the NYCHRL by terminating him in retaliation for opposing these employment practices. In August 2019, Defendants filed an answer denying each cause of action.

Defendants' Proffered Evidence

Defendants contend that it did not treat Plaintiff any differently than any other new hire and that his employment was terminated due to sub-par work performance. In his deposition, O'Neill testified that Adquire created a remote-work policy in 2017 that provided new hires with the opportunity to work from home certain days but only after they successfully completed six months with the company.^{3 4} (NYSCEF doc No. 45 at 56-57; *see also* Wyand Affidavit, NYSCEF doc No. 52.) During Plaintiff's interview, several employees allege they advised Plaintiff of Adquire's policy.⁵ Defendants maintain that it held all employees post-2017 to this standard including several who were hired around the same time as Plaintiff.⁶ Yet, despite its formal policy on this front, Adquire and O'Neill provided Plaintiff with the opportunity to work

³ Plaintiff does not allege disparate treatment under the company's remote-work policy.

⁴ O'Neill describes company policy this way: "during the first six months of an employment, we are also evaluating the employee... But up until that point [when the company's first holds a formal evaluation] we are getting eyeballs on that employee. We are seeing, is their work product good. Are they able to show up on time. Are they working well with other employees... Do they understand the business." (O'Neill Deposition, NYSCEF doc No. 45 at 56-57.)

⁵ *See* Prat Affidavit, NYSCEF doc No. 51 at ¶7 ["I advised Mr. Chaplin that all employees are expected to report to work at the Company's New York City offices on a five day per week basis during their first six months"]; Kalstad Affidavit, NYSCEF doc No. 50 ["I also never told or promised Mr. Chaplin... that he would only be required to commute to the New York City offices twice a week.]"

⁶ Caroline Molina started in early 2019; Shanika Steward started in late 2018; and John Klett started in 2018 as well. All were required to work 9:00 a.m. to 6:00 p.m. for six months before they could choose which days to work remotely. (NYSCEF doc No. 45 at 86, 101, and 103.)

from home on an unplanned, *ad hoc* basis (as opposed to a negotiated plan) when transportation or commute troubles arose. (Plaintiff's Deposition, NYSCEF doc No. 44 at 124-125.)

Within a month or so of Plaintiff's arrival at Adquire, O'Neill alleges he began noticing problems with Plaintiff's work performance. On Nov. 9, 2018, O'Neill sent a text to Kalstad on a messaging service app that Adquire uses that questioned, in addition to Plaintiff's arrival times, Plaintiff's perceived lack of effort and excessive focus during work on a guitar side business run by Ethan. (NYSCEF doc No. 67.) During his deposition, O'Neill described the context of the text as one in which he felt Plaintiff's work product was suffering and still could not grasp the company's business model. (NYSCEF doc No. 45 at 179-180.) O'Neill alleges that he held a meeting with Plaintiff and told him that he expected Plaintiff to be farther along in developing and writing certain products for the company. (*Id.* at 182.) Others noticed Plaintiff's alleged deficient work product. Kalstad, who as discussed *supra* worked closely with Plaintiff, avers that Plaintiff's work throughout his employment generally did not improve over time. (NYSCEF doc No. 54 at 70.) As early as January 2019, O'Neill, in tandem with Kalstad, Wyand, and Eric O'Neill, considered terminating Plaintiff's employment. In one message, on January 4, O'Neill sent a text that read, "He [Kalstad] agrees that Chaplin needs to step it up or we let him go." (NYSCEF doc No. 67.) On January 10, Eric O'Neill wrote to (Defendant) O'Neill, "This guy can't show up at 10am and expect to keep his job. It's bad for morale." To which, O'Neill writes back, "First, I'm deciding if I'm keeping him...He has until the end of the month...If we keep him, Ill [sic] make him figure out how to get here on time." (*Id.*) On January 18, O'Neill wrote: "Hey, I think we let go of Chaplin tomorrow. He's actually been better lately, but it's still not enough and too late." (*Id.*) Despite the sentiment, O'Neill decided not to terminate Plaintiff's employment at that time, ultimately deciding, it appears, the cost to replace Plaintiff would

outweigh the benefit because “stuff would grind to a halt [as] there wasn’t someone who could take on his work.” (NYSCEF doc No. 45 at 186.)

On March 22, O’Neill wrote to Kalstad, “Chaplin is driving me nuts and I don’t think he’s helping much. On my side, I think he’s causing more problems. Gonna sleep on it over the weekend, but will probably make a call early next week.” (NYSCEF doc No. 67.) Kalstad wrote O’Neill back, “He’s been helpful with walking through any questions witek/ruben have on requirements and has been owning it more. Would be a hiccup but not the end of the world.” (*Id.*) Despite Kalstad’s hesitations, on March 28, 2019, nearly two weeks after Ethan turned eighteen years old, O’Neill terminated Plaintiff.

Plaintiff’s Deposition Testimony

Plaintiff’s responsive pleadings contend that Adquire’s 2017 policy did not contain any language relating to the *hours* an employee works. In contrast to its formalized work-from-home policy, Adquire did not have an express policy as to which employees could receive modifications to their schedule and on what basis such modifications would be granted. Put differently, Plaintiff maintains Defendants always retained discretion to adjust hours of work.

At Plaintiff’s deposition, he asserts (contrary to Defendants’ contentions) that Adquire employees told him during the interview process he would be able to develop a schedule that included working remotely certain days. Moreover, Plaintiff alleges that he made Defendants aware of his parental responsibilities within a short period after his start date. (NYSCEF doc No. 44.) During the previously discussed meeting around Halloween, Plaintiff explained his difficulty coordinating Ethan’s morning commute to school—which often required use of the family’s car since Ethan’s senior-year alternative school schedule made use of the bus system impossible—with Plaintiff own commute to work, which also required driving to a train station

particularly early in the morning. (NYSCEF doc No. 44 at 92-93.) Such difficulties added to an already long travel-time (from Plaintiff's house to the office could take up to two hours when considering problems with train schedules), which, according to Plaintiff's testimony, is why he requested an accommodation to arrive by 10:00 a.m.⁷ (*Id.* at 135.)

Around this same time, Plaintiff alleges that he complained to O'Neill that he was being treated differently from other employees at the company.⁸ Plaintiff pointed out that Stephanie Wyand (who had worked with the company for 13 years and had risen to the company's General Manager position) had received approval to work on an adjusted schedule and worked remotely several days a week so that she could care for her three young children. (O'Neill Deposition, NYSCEF doc No. 45 at 32, 47.) O'Neill's response when confronted with this, according to Plaintiff, was by noting that "she's a mom and she has kids to care for, young kids." (NYSCEF doc No. 44 at 130.) Plaintiff also cited how Adquire permitted Brad Cherney to adopt a more lenient schedule as evidence of disparate treatment. With Cherney, the company allowed him to take time off to deal with a divorce, which meant he occasionally arrived late in the morning or left early for half days.⁹ (NYSCEF doc No. 44 at 168.) Later, at Adquire's holiday party in December, when Plaintiff was leaving, O'Neill made an allegedly disparaging remark in that Plaintiff had to leave for "daddy duty." (NYSCEF doc No. 64)

Of course, Plaintiff also disputes whether his employer really believed his performance suffered. Plaintiff alleges that he received informal reviews of his work (as he had not had any formal reviews yet), including from Kalstad, whom he reported to, and submits they were

⁷ Plaintiff's deposition reveals that, during a conversation with O'Neill regarding the 9:00 a.m. start time, Plaintiff informed him that he would try to get in as early as possible but it would "be around 9:30, 10 a.m. That's the best I can do given the circumstances." (NYSCEF doc No. 44 at 135.)

⁸ The Court will discuss whether Plaintiff's complaints amounted to opposing unlawful discrimination *infra* in its section entitled "Plaintiff's Retaliation Cause of Action."

⁹ Defendants dispute Plaintiff's representation of the alleged accommodations it gave Stephanie Wyand and Brad Cherney. The Court will further address this dispute in the Discussion section *infra*.

positive. (NYSCEF doc No. 44 at 54.) Plaintiff also intimates that the standard with which Adquire and O'Neill judged his work against was, itself, based upon an animosity to his caregiver status. O'Neill, in his deposition, explained that *months* will pass without new hires fully understanding Adquire's business: "it's rare that I could talk to any employee at three months and say, 'Tell me what it is we do' and have them give a—any type of valuable explanation within...a five-minute period...[T]hese are terms that will confuse a lot during their first few weeks and months." (NYSCEF doc No. 45 at 56.) In Plaintiff's view, the fact that O'Neill considered firing him within just weeks of his hire suggests that a motive unrelated to his performance existed for his treatment. (NYSCEF doc No. 69 at 6.)

DISCUSSION

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact', and the opponent fails to rebut that showing." (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].) Within the statutory framework the City has enacted to address employment discrimination, courts must approach summary judgment motions with special caution. As the First Department wrote in *Bennett v Health Mgt. Sys. Inc.*, courts must be particularly careful when weighing parties' submissions so as to avoid "undercut[ing] the City's HRL's intent to maximize the opportunities for discrimination to be exposed." (92 AD3d 29, 36-37 [1st Dept. 2011].)

The NYCHRL is codified in title 8 of the Administrative Code. (*§ 8-101 et. seq.*) Administrative Code § 8-107 (1)(a)(3) provides that “it shall be an unlawful discriminatory practice: for an employer... because of the actual or perceived...gender...[and] caregiver status...of any person to (3) discriminate against such person in compensation or in terms, conditions, or privileges of employment.” § 8-102, entitled “Definitions,” defines “caregiver” to mean any person who provides direct and ongoing care for a minor (“a child under the age of 18”) or a care recipient (generally, a family relative with a disability who relies on the caregiver for medical care or daily living). (Administrative Code § 8-102.) Since Plaintiff has not alleged that he is a caregiver of a “care recipient,” this motion exclusively focuses on Plaintiff’s caregiver status with respect to a minor. Moreover, notwithstanding the fact that Plaintiff’s at-will contract permitted Defendant to terminate him with or without cause, §8-107 (1) (a) (2) prohibits an employer from discharging a person based on one’s gender and caregiver status.

In *Williams v New York City Housing Authority* (61 AD3d 62, 62 [1st Dept. 2009]), the First Department considered disparate treatment and retaliation claims under the above Administrative Code for the first time after the City passed the Local Civil Rights Restoration Act of 2005. The Act mandated that the NYCHRL “shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights law, including those laws with provisions comparably-worded to provisions of this title, have been so construed.” (Administrative Code § 8-130.) Recognizing that the Act modified the NYCHRL to surpass the protections provided by Federal and State employment discrimination laws, *Williams* held that the Supreme Court’s standard for employment discrimination—that it must be “severe and pervasive” before it becomes actionable— could not be reconciled with the NYCHRL’s broad, remedial purposes.

(*Williams*, 61 AD3d at 75-76.) Because the court found the “severe and pervasive” standard to be under protective of employees against the unique evil of discrimination, it instead held that a plaintiff need only allege that they have been treated “less well” than other employees because of a protected status. (*Id.* at 78.)

Perhaps fearing its holding would swing the pendulum too far in the opposite direction, *Williams* specifically noted that the Act, as broadly favorable to victims of discrimination as it is, did not connote an intention to transform the NYCHRL into a “general civility code” and recognized that an employer can still avoid liability in “truly insubstantial cases” by showing that the alleged discrimination consisted of what the reasonable person would consider “petty slights and trivial inconveniences.” (*Id.* at 80.) Several years later, the First Department held that “stray remarks” that are only marginally or tangentially related to a protected category are not actionable under the NYCHRL. (*Melman v Montefiore*, 98 AD3d 107, 112-113 [1st Dept. 2012].) In surveying New York caselaw under the City’s HRL after the Restoration Act, the Second Circuit Court of Appeals, summarized the broad considerations courts look to when applying the differential-treatment test:

“(1) NYCHRL claims must be analyzed separately and independently from federal and state discrimination claims; (2) the totality of the circumstances must be considered because the overall context in which [the challenged conduct occurs] cannot be ignored”; (3) the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages; (4) the NYCHRL is not a general civility code, and a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives, or if the defendant proves the conduct was nothing more than petty slights or trivial inconveniences; (5) while courts may still dismiss truly insubstantial cases, even a single comment may be actionable in the proper context, (6) summary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory.”

(*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 113 [2d Cir 2013]; *Otero v District Counsel 37, AFSCME, AFL-CIO*, 2019 NY Slip Op 32313[U] [Sup. Ct. New York County 2019].).

Mindful of these principles, to determine whether a plaintiff has been treated less well, courts have two evidentiary frameworks available to them: the *McDonnell-Douglas* burden-shifting approach (established in the Supreme Court case *McDonnell Douglass Corp. v Green*, 411 US 792 [1973]) and the mixed-motive approach. (*Singh v Covenant Aviation Sec., LLC*, 131 AD3d 1158 [2d Dept 2015].) The *McDonnell-Douglas* framework requires courts to assess (1) whether the plaintiff has alleged membership in a protected class and that an adverse action against him occurred under circumstances giving rise to an inference of discrimination; (2) if the plaintiff has done so, whether the defendant has proffered through competent evidence legitimate, independent, and nondiscriminatory reasons that actually motivated defendant's actions; and (3) if defendant has rebutted plaintiff's showing, whether the plaintiff can show defendant's proffered reasons were false or pretextual. (*See Bennett*, 92 AD3d at 35-36.) In contrast, the mixed-motive approach recognizes that decisions made by employers are often motivated by a number of different factors and that courts, in assessing liability under the NYCHRL, look to whether discrimination was one of those reasons. (*Bennett*, 92 AD3d at 40 [finding that, on a motion for summary judgment in an action brought under the NYCHRL, the motion court must analyze the facts using both frameworks]; *see also Watson v Emblem Health Servs.*, 158 AD3d 179 [1st Dept 2018] ["A plaintiff may prove her case if she 'proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor'"].) Because discrimination may not play any role in decisions related to employment (Administrative Code § 8-101; *Melman*, 98 AD3d at 127), a defendant's motion for summary judgment may only be granted where he has shown, based on the evidence before the court and

drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under either the *McDonnell-Douglas* or mixed-motive framework. (*Bennett*, 92 AD3d at 41; *Melman*, 98 AD3d at 126.)

The Court engaged in the foregoing discussion to give proper context to the respective parties' contentions. As to the *McDonnell-Douglas* standard, Defendants assert that (1) Plaintiff has not demonstrated that he is a member of a protected class, i.e. that Plaintiff does not provide "direct and ongoing" care to a minor; (2) Defendants have proffered a legitimate, nondiscriminatory reason for its employment practices (Plaintiff's poor work performance); and (3) Plaintiff has failed to demonstrate their reasoning was pretextual: not only was Plaintiff simply required to report to Adquire's New York City office from 9:00 a.m. to 6:00 p.m. *as it required of all other new hires who were employed for less than six months*, but Plaintiff's evidence of discriminatory treatment and motive—three other employees with material different circumstances—is irrelevant. To a large extent, Defendants arguments with respect to the mixed-motive standard are the same: they contend that Plaintiff's status as a single father and caregiver did not enter its considerations when deciding to terminate him, only his poor work performance. The Court will address each argument in turn.

Plaintiff's Membership in a Protected Class

Where a defendant on its motion for summary judgment has proffered nondiscriminatory motivations for its employment actions, the First Department has instructed that, because the prima facie showing is a de minimis hurdle, a court should *ordinarily* avoid the unnecessary step of going back to the question of whether a prima facie case has been made out in the first place. (*Bennett*, 92 AD3d at 39-40.) Applied here, the Court assumes that Plaintiff has demonstrated that he was treated "less well" under *circumstances giving rise to an inference of discrimination*,

as required by the first *McDonnell-Douglas* burden-shifting state.¹⁰ The Court only revisits the prima facie prong to address Defendants' contention that Plaintiff is not a member of a protected class.¹¹

Defendants contend that two different time periods are relevant to whether Plaintiff is a member of the "caregiver" class protected by NYCHRL—the time period during which Ethan was not yet 18 years old (comprising the majority of Plaintiff's employment at Adquire); and the time period after Ethan turned 18 (or approximately the last two weeks of Plaintiff's employment before his termination). (NYSCEF doc No. 37 at 14.) Defendants argue that while Ethan was still 17, Plaintiff did not provide "direct and ongoing" care as required by the statute to be considered a caregiver. They maintain Ethan owned his own guitar business, performed as a professional musician in New York City, and had certain responsibilities around his house such that he was self-sufficient to a degree which prevents Plaintiff from asserting caregiver status. (*Id.* at 13.) The Court is not persuaded by this argument. First, as a factual matter, Defendants place greater significance on Ethan's self-sufficiency than is warranted: at his deposition Ethan explained that he would buy and flip guitars as "more of a hobby than a business," which would "make enough money...to buy myself lunch" (NYSCEF doc No. 42 at 17); Ethan testified that he was "as self-sufficient as I could be in senior year of high school...I would say no more than average" (*Id.* at 35); and household responsibilities are a common feature of any teenager's life, regardless of whether their parent is a "caregiver" or not. And in his affidavit, Plaintiff set forth his responsibilities toward Ethan as his sole physical and legal guardian, which included providing

¹⁰ Even after a careful review, Plaintiff, at the prima facie stage, has demonstrated (1) Defendants did not accommodate a request to shift his hours as it had with other employees; and (2) O'Neill expressed some level of animus, however minimal, toward Plaintiff's status as a single father during the company's holiday party. These facts establish that Plaintiff has met the de minimis prima facie standard.

¹¹ Defendants' assertion that Plaintiff has not made a prima facie showing because it's policy of requiring workers to be in the office by 9:00 a.m. extended to all new employees will instead be addressed *infra* as evidence of Defendant's legitimate, nondiscriminatory reasons.

housing, food, and clothing, taking him to doctor appointments, or taking care of him when he was sick. (NYSCEF doc No. 64.)

More importantly, in the absence of any definition of “direct and ongoing care” in §8-102 or of any appellate precedent that has interpreted the phrase’s meaning, the Court has at its disposal only the principles with which cases like *Williams* and *Bennett* have provided to use as guideposts. In this vein, should the Court conclude that §8-102’s definition of caregiver status does *not* include Plaintiff, who, to reiterate, is a single father and Ethan’s sole provider of a great many necessities, it would be construing the statute in a manner that restricts its “uniquely broad and remedial purpose.” (*Williams*, 61 AD3d at 65.) Limiting the NYCHRL’s protection for caregiver status by, in essence, attaching a requirement that this Court apply some abstract notion of a child’s self-sufficiency undermines controlling precedent’s mandate that the statute be construed “broadly in favor of discrimination plaintiffs, to the extent such a construction is reasonably possible.” (*Albunio v City of New York*, 16 NY3d 472, 477-78 [2011].) For this reason, Defendants’ narrow reading of the statute cannot be reconciled with its purpose. As such, the Court finds that Plaintiff has demonstrated he falls within the ambit of protections provided by the NYCHRL.

Furthermore, with respect to Plaintiff’s termination after Ethan turned adult, the Court finds that the statute’s protection extends beyond the immediate date to the extent that Plaintiff’s status as a “caregiver” continued to animate Defendants’ employment actions. For example, here, what is alleged to have begun as a discriminatory motive by virtue of Plaintiff’s membership in the protected caregiver class may have continued to affect Defendants’ decision-making after he no longer qualified for such protection.¹² In covering this situation and extending

¹² Of the various classes that §8-107 protects, caregiver status may be unique in that a plaintiff may receive its protection, then lose that protection through no choice of their own i.e., either by a minor turning 18 or through a

NYCHRL in this manner, i.e. up until an employee can no longer demonstrate that the formerly discriminatory motive continued to operate on his employer's actions, the Court concludes it is advancing, compared to any alternative, the purpose of the statute. (Remember, under §8-101, the statute was enacted "to eliminate and prevent discrimination from playing *any* role in actions relating to employment.") In this light, Plaintiff has met his initial burden under the *McDonnell-Douglas* framework by making a prima facie showing of: (1) membership in a protected class *throughout* his employment with Adquire; and (2) that he was treated less well under circumstances giving rise to an inference of discrimination.

*Plaintiff's Response to Defendant's Legitimate Nondiscriminatory Motive*¹³

Without question, Defendants have put forth legitimate, nondiscriminatory reasons for both its treatment of Plaintiff while employed and his termination. They contend that it instituted its policy of not allowing new hires to work remotely in 2017 so that they could better evaluate those employees during the early stages of their employment. (NYSCEF doc No. 45 at 56.) They contend that Plaintiff and new hires from around the same time, of which there were several, were all held to this standard, requiring each to commute to the office by 9:00 a.m. and stay until 6:00 p.m. Defendants' have also proffered evidence that they terminated Plaintiff's employment after several months of deficient work product. In addition to O'Neill's deposition testimony describing complaints he had with Plaintiff's work performance, the record contains text messages that O'Neill sent to and received from several of Plaintiff's coworkers that reveal their overall dissatisfaction. (NYSCEF doc No. 67.) As discussed *supra*, at various times throughout

care recipient's recovery from their affliction. Consequently, the above legal dispute's wider application is narrowly circumscribed to these types of cases.

¹³ The Court acknowledges that Defendants have proffered legitimate nondiscriminatory reasons for their treatment of Plaintiff. With Defendants having met its burden at this stage, the burden shifts back to Plaintiff to demonstrate these reasons were pretextual or that discriminatory motives played a role in his treatment under the mixed-motive approach. Consequently, in this section the Court briefly discusses Defendants' legitimate reasons, but primarily focuses on Plaintiff's argument regarding pretext and mixed motive.

Plaintiff's employment, Defendants considered terminating his employment on these grounds only to hold off. (*Id.*)

Disparate Treatment During Plaintiff's Tenure

As to Defendant's suggestion that it treated all new hires equally, Plaintiff responds that Defendants' use of its 2017 work-from-home policy for new hires is a red herring: Plaintiff sought only to adjust his *hours* of work as other employees had, and not to negotiate a work-from-home schedule. (NYSCEF doc No. 63 at 11.) In Plaintiff's view, then, since Acquire did not have an express policy toward schedule modifications, the issue of his arrival time is unrelated to the Acquire's remote-work policy; under Defendants' case-by-case approach, it could have chosen to extend him an adjusted schedule while retaining its remote policy. That Defendants refused his request while granting others', Plaintiff contends, constituted, at the very least, a discriminatory intent separate and apart from Plaintiff's work product. As the New York City Commission on Human Rights' Guidelines provide, "Employers cannot provide certain benefits, like flexible scheduling, to some employees, and refuse to provide the same benefits to employees who request them because of their caregiving responsibilities." (NYC Commission on Human Rights' Guidelines, NYSCEF doc No. 43) To support its contention, Plaintiff lists several employees to whom Acquire allegedly provided alternative work hours. As discussed *supra*, Plaintiff alleges that Wyand worked from 8:00 a.m. to 5:00 p.m. to accommodate raising three small children; Cherney adjusted his hours to accommodate a divorce; and Iliana Karlson was allowed to leave early Wednesdays so that she could attend a dance class. (NYSCEF doc No. 69.)

After a review of the parties' submissions, the Court finds issues of fact preclude it from granting summary judgment as to whether Defendants treated Plaintiff differently from other

employees on a discriminatory basis. To justify different schedules given to Wyand, Cherney, and Karlson, Defendants allege they are situated differently from Plaintiff and were treated as such. In Wyand's case, she had a level of seniority far above Plaintiff; with Cherney, they allege his "adjusted schedule" simply amounted to Cherney taking personal time;¹⁴ and with Karlson, Defendants attribute to her a work ethic above Plaintiff's. To be sure, the above allegations could differentiate Plaintiff from his colleagues. However, Defendants have not demonstrated the *materiality* of these difference. With a relatively small number of employees (currently Adquire has 13), the trier of fact may find that the differences between Plaintiff and the alleged comparators to be trivial. Where Plaintiff has cited, out of a limited number of potential employees, three who have had schedule changes accommodated (or at least appears to have been) by Adquire and O'Neill, any differences in their situations may recede away and the trier of fact could find that appropriate comparators may simply be everyone employed by Adquire. In other words, under the mixed motive approach, Plaintiff has demonstrated, through these three examples, that a discriminatory motive may have been operated alongside legitimately proffered reasons.

Plaintiff's "gender-plus" discrimination cause of action survives for this same reason. Under the "gender-plus" discrimination rubric, a plaintiff must allege that discrimination is based on gender plus another trait. (*See Trezza v Hartford, Inc.*, 1998 US Dist. Lexis 20206 [SDNY 1998] [Sex-plus discrimination occurs when a person is subjected to disparate treatment based, not solely on her sex, but on her sex "considered in conjunction with a second characteristic"].)

¹⁴ Defendants argue that, under the NYC Commission on Human Rights' Guidelines in a section entitled "What is NOT Prohibited," Defendant is not required to change an employee's shift or allow them to leave early just because they have caregiving responsibilities. (NYSCEF doc No. 43.) They argue, therefore, that its refusal to provide an accommodation to Plaintiff is not actionable. Such an argument depends, as stated *supra*, on whether it provided accommodations to other employees. Defendants may seek to differentiate Plaintiff's circumstances from those of other employees to the trier of fact, but at the summary judgment stage, where all inferences are to be given to the non-moving party, the Court cannot assume Defendants provided no such accommodations to other employees.

Here, Plaintiff alleges that he was treated less well on account of being a man with primary childcare responsibilities. For evidence, Plaintiff contends O'Neill treated Wyand, who had primary care responsibilities of her own, more leniently, attesting that he justified his treatment of her by saying, "she's a mom and she has kids to care for, young kids." (The obvious implication being that O'Neill discounted Plaintiff's responsibilities because he was a father and possibly due to the age of Plaintiff's son.) While the Court recognizes that Plaintiff's evidence is to some extent thin, it nonetheless finds that Plaintiff has alleged enough to create an issue of fact as to whether Defendants treated his status as a caregiver differently from Wyand's status as a caregiver based on their respective genders.¹⁵

Plaintiff's Termination

Under the *McDonnell-Douglas* framework, Plaintiff responds to Defendant's allegation that it fired him solely based on his poor work performance by suggesting that (1) his informal evaluations were positive and (2) to the extent his evaluations were negative, Defendants applied a standard towards him in a discriminatory manner.¹⁶ The Court finds that Plaintiff has not met its burden of showing Defendants' work-performance rationale was pretextual or false. To the extent that discrimination based on caregiver status was part of a mixed motive, it also finds that Plaintiff has not shown discriminatory intent played a role in Defendants' decision to terminate him.

¹⁵ Defendants' argument that Plaintiff has raised a new or materially different theory of recovery from those pled in the complaint is meritless. That Plaintiff now pleads "gender-plus" discrimination as opposed to discrimination based solely on gender is not a material difference. Likewise, the Court finds meritless Defendant's argument that evidence in Plaintiff's affidavit is "self-serving" and therefore does not create an issue of fact. Plaintiff's affidavit does not contradict his deposition testimony and cannot be considered self-serving. (*See MIC Gen. Ins. Corp. v Okapa*, 191 AD3d 479, 479-80 [1st Dept 2021]; *cf Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007].)

¹⁶ As discussed *supra*, Plaintiff notes that O'Neill testified to understanding that it might take employees months to get acclimated to the company's business, but he wanted to fire Plaintiff within weeks. Plaintiff implies that this gives rise to an inference of discrimination because it signifies Defendants held him to a standard not applied to other employees based on his gender or caregiver status.

Throughout numerous depositions and affidavits, Defendants and other employees describe Plaintiff's poor work experience beginning in November 2018. To reiterate briefly, the evidence of Plaintiff's work consists of: (1) O'Neill's deposition testimony wherein he describes a meeting with Plaintiff in early November (which is corroborated by Adquire's text messaging system) that he used to explained to Plaintiff that he should be farther along in his development; (2) O'Neill's testimony describing how he delayed Plaintiff termination several months until Plaintiff's work performance was actively damaging to Adquire; (3) text messages between O'Neill and variously Kalstad, Wyand and Eric O'Neill beginning in January and lasting through March 2019 discussing whether Plaintiff should be terminated; and (4) Kalstad's deposition in which he describes how Plaintiff showed no improved performance throughout his employment. Against this backdrop, Plaintiff has proffered only conclusory statements that during his employment he received positive performance reviews from Kalstad. (NYSCEF doc No. 44 at 54.)¹⁷ Such conclusory claims cannot constitute the basis for a discrimination claim. (*See Fruchtman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015] ["Plaintiff's conclusory claim that her termination was motivated by a gender-related bias is insufficient to establish discrimination."], citing *Askin v Department of Educ. Of the City of N.Y.*, 110 AD3d 621 [1st Dept 2013].)

But the fact that Plaintiff's testimony is conclusory is only half the problem: Kalstad's deposition along with the text messages he sent O'Neill belies Plaintiff's assertions. Plaintiff does not address Kalstad's belief that his work improved little over approximately six-months of employment. And while Plaintiff asserts that Kalstad initially pushed back against his

¹⁷ To the question, "What was your impression of those discussions [with Kalstad regarding informal reviews]?", Plaintiff responded with "I believe they were generally positive from Mr. Kalstad." This is the only assertion in Plaintiff's moving papers of *unequivocally* positive work performance. (*See "Counterstatement of Material Facts" Section in Plaintiff's Memorandum of Law*, NYSCEF doc No. 44 at 7-12.)

termination, Kalstad did so only by explaining, in response to O'Neill's concern over Plaintiff's performance, that "the guy is brand new, give him a minute." (NYSCEF doc No. 54.) Kalstad's text messages similarly provide little support for Plaintiff's contention that he was provided good evaluations. In one text exchange from November provided by Plaintiff, Kalstad wrote, "He's making an effort to get acclimated with how we're doing things through jira [an app the company uses]," but concluded it by saying, "it did seem like [Plaintiff had] a colder start than I imagined." (NYSCEF doc No. 67.) In January, as O'Neill was suggesting Kalstad be in the meeting in which they terminate Plaintiff, Kalstad wrote, "That's fine." (*Id.*) Lastly, Plaintiff describes "positive feedback" Kalstad provided toward the end of his employment, but the Court hardly understands how the feedback can be considered positive: after acknowledging that Plaintiff had been helpful with walking other employees through questions on certain company requirements, Kalstad wrote that "[Plaintiff's termination] Would be a hiccup but not the end of the world." (*Id.*)

As to Plaintiff's argument that *something* other than work performance must have motivated Defendants' decision given the supposed contradiction between O'Neill's recognition that employees ordinarily take months to learn the intricacies of the business and his desire to terminate Plaintiff after several weeks: the Court has no evidence from which to infer the "something" was discrimination. From the Court's perspective, that Plaintiff does not fully understand the business at several weeks does not preclude Defendants from evaluating Plaintiff's work up to that point and finding it to be deficient. In fact, after reviewing the deposition transcripts, O'Neill seems to have evaluated various aspects of Plaintiff's performance throughout October and into early November based on what an employee *should* be able to perform. (NYSCEF doc No. 45 at 182.) That he found Plaintiff's performance to be sub-

par in no way implies the existence of discrimination, at least without more evidence from the Plaintiff.

Consequently, Plaintiff's bare-bones allegation that he performed well as a Project Manager does not create an issue of fact as to whether Defendants' rationale for terminating him was pretextual. And even under the more permissive mixed motive standard, the Court cannot find Plaintiff's evidence creates an issue of fact exists as to whether a discriminatory motive played a factor in his termination. (*See Gonzalez v EVG, Inc.*, 123 AD3d 486, 487-488 [1st Dept 2014] [holding that even where a plaintiff has received positive annual performance review and annual raises, she failed to raise a triable issue of fact as to either pretext or the defendant's mixed motive].)

Plaintiff's Retaliation Cause of Action

§8-107 (7) of the NYCHRL makes it an unlawful discriminatory practice "for any person...to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter." Moreover, "the retaliation or discrimination complained of under this subsection need not result in an ultimate action...or in a materially adverse change in the terms and conditions of employment...provided that the retaliatory or discriminatory acts complained of must be reasonably likely to deter a person from engaging in protected activity." (Administrative Code 8-107 (7).) To demonstrate a claim for retaliation, a plaintiff must prima facie show that: (1) he engaged in protected activity; (2) the employer was aware of the activity; (3) the employer took an action that disadvantaged plaintiff; and (4) a causal connection exists between the protected activity and the employer's actions. (*Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018].) Here, Plaintiff alleges that he engaged in protected activity by opposing Defendants' discriminatory conduct based on his

gender and caregiver status; Defendants were aware of Plaintiff's engagement in protected activity through Plaintiff's numerous complaints to O'Neill; and Defendants terminated his employment based on Plaintiff's complaints (which, if true, would satisfy both prongs three and four). Conversely, a defendant on a summary judgment motion in a retaliation case must demonstrate the plaintiff has not made out a prima facie claim of retaliation, i.e., has failed to demonstrate at least one of the above mentioned four prongs, or that, as the defendant, he has offered legitimate nonretaliatory reasons for the challenged actions and no triable issues of fact as to whether defendant's explanations were pretextual. (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-41 [2d Dept 2013]; *Lambert v Macy's E., Inc.*, 84 AD3d 744, 745-46 [1st Dept 2011] [applying the *McDonnell-Douglas* framework to retaliation claims under NYCHRL].)

Plaintiff has not made a prima facie claim for retaliation. He argues that his repeated discussions with O'Neill over his failure to arrive on time due to his parental responsibilities amounts to opposition to forbidden employment practices and thus he engaged in protected activity that Defendants knew about. The Court disagrees. While conduct clearly prohibited by statute need not mention discrimination (*Int'l Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F. Supp 2d 345, 357 [SDNY 2007]), employment practices that are less obviously prohibited—for example discrimination based on caregiver status as opposed to race—may indeed require more specificity from a plaintiff in identifying the basis for objecting to the employment practice. As such, to qualify as protected activity, a plaintiff must often “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.” (*Aspilaire v Wyeth Pharms.*, 612 F. Supp. 2d 289, 308-09 [SDNY 2009]; *Sletten v LiquidHub, Inc.*, 2014 US Dist.

Lexis 94697 at 12-14 [SDNY 2014] [dismissing a plaintiff's retaliation cause of action because a plaintiff's complaints failed to link his pay cut to his sexual orientation].) Here, Plaintiff does not point to any set of facts that indicate (1) that his complaints were based on caregiver status or gender *discrimination*; and (2) that Defendants were, or should have been, aware of Plaintiff's protected activity. To be sure, Plaintiff complained that he was being treated differently from other employees, but the record does not reflect any suggestion that he considered the source of his treatment to be based on any protected status. General complaints, which in the Court's view accurately describes Plaintiff's discussions regarding Wyand and Cherney, do not constitute protected activity under the statute. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313-14 [2004] [dismissing a plaintiff's retaliation claim because, in her complaints to management, she failed to allege that she was discriminated against on account of her race]; *Frutchman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015].)

Additionally, Plaintiff has made no showing that a causal connection exists between his repeated complaints and his termination. His evidence (outside his conclusory testimony) consists solely of "the close proximity of time between Plaintiff's latest complaint in March and [his] subsequent termination." (NYSCEF doc No. 69 at 21.) However, such evidence is insufficient to satisfy this prong. As discussed in much further detail *supra*, Plaintiff's termination followed months of performance issues, none of which Plaintiff demonstrated were pretextual or false. Where this is the case, the temporal proximity alone cannot support a claim for retaliation. (*See Koester v New York Blood Ctr.*, 55 AD3d 447, 449 [1st Dept 2008] [where a termination followed "repeated unapproved absences and failure to notify supervisors that she would be late" and "instances of poor performance" the temporal proximity between a complaint and the adverse action is not sufficient to support a claim of retaliation]; *Correa v City of New*

York, 188 AD3d 452, 452 [1st Dept 2020] [temporal proximity unavailing in the absence of any allegations suggesting a causal connection].)

Accordingly, it is hereby,

ORDERED AND ADJUDGED that Defendants Permission Data, LLC and Doug O'Neill's motion for summary judgment pursuant to CPLR 3212 is denied as to Plaintiff Michael Chaplin's first cause of action for gender discrimination under the New York City's Human Right's Law ("NYCHRL") to the extent that such cause of action is based on disparate treatment throughout Plaintiff's employment (Motion Seq. 002); and it is further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is granted as to Plaintiff's first cause of action for gender discrimination under NYCHRL to the extent such cause of action is based on Plaintiff's termination; and it further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is denied as to Plaintiff's second cause of action for caregiver status discrimination under NYCHRL to the extent it is based on disparate treatment; and it is further

ORDERED AND ADJUDGED that Defendants' motion pursuant to CPLR 3212 is granted as to Plaintiff's second cause of action for caregiver status discrimination under NYCHRL to the extent it is based on Plaintiff's termination; and it is

ORDERED AND ADJUDGED that Defendants motion for summary judgment is granted as to Plaintiff third cause of action for retaliation under NYCHRL; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this Order, along with notice of entry, on all parties within ten (10) days of entry.

7/25/2022

DATE



CAROL R EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE