SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31**

Justice

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ERIC LAI,

Plaintiff,

- v -

JOSEPH AUBEE and JOHN DOE,

Defendants.

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INDEX NO. 160731/2024

MOTION DATE 04/23/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8 were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion by plaintiff Eric Lai ("Lai") for an order, pursuant to CPLR § 3211(a)(7), dismissing the counterclaims asserted against him by defendant Joseph Aubee ("Aubee"), is granted.

Background

The following facts are drawn from the parties' pleadings and are assumed to be true for purposes of this motion. Lai is a biology researcher at Memorial Sloan Kettering Cancer Center where he leads The Eric Lai Lab (the "Lab"), which is part of the Developmental Biology department (NYSCEF Doc. No. 1). Aubee was a research scholar at the Lab from August 3, 2022 to July 7, 2023 (*id.*). In or about August 2023, Aubee allegedly authored numerous emails defaming Lai, which has hindered the ability to recruit researchers and potentially harmed Lai's ability to procure funding for the Lab (*id.*). The complaint pleads causes of action for: (1) defamation *per se* and (2) tortious interference with prospective economic advantage.

Aubee, appearing *pro se*, interposed an answer and asserted counterclaims for "cyberstalking, harassment and racial discrimination" (NYSCEF Doc. No. 4). Aubee, who self-identifies as a Black man born and raised in Gambia, alleges that Lai engaged in "toxic and abusive workplace behavior" and made "racially insensitive comments" (*id.*). Aubee cites three instances where Lai allegedly engaged in "abuse of power, bullying and emotional abuse" (NYSCEF Doc. No. 4) against two former Lab colleagues, both from Sri Lanka. The first incident occurred on August 2, 2022, when Lai wrote that "[H]imari [Gunasinghe] gave notice to switch to a more clinical lab for med school applications" and "to be honest, [H]imari has not been a positive contributor to the lab for some time, so hope she finds what she is looking for. We have just hired a new technician and several postdocs are hoping for a better attitude" (*id.*) (internal quotation marks omitted). The second incident occurred when plaintiff "axe[d]" Himari Gunasinghe ("Gunasinghe") as a contributing co-author on a research article (*id.*). The third incident occurred when plaintiff wished a Happy Father's Day to fathers at the Lab but excluded Aubee's colleague, a father of two, from the message (*id.*).

Aubee also alleges that he was subjected to racially insensitive comments consisting of "subtle racial bias, microinsults and microaggression" (*id.*). He asserts that Lai twice questioned his "intellectual

ability as a black man to execute experiments" (*id.*). Specifically, Lai questioned Aubee on whether he had performed certain experiments and contacted his former academic and research advisor at Howard University to ask whether Aubee had performed those experiments in his dissertation research (*id.*). In addition, "[Lai] commented that it was his responsibility to train me to become a better scientist because he did not think that I was properly trained at Howard University, a historically and predominantly black university," and Lai once "remarked that 'I meet the diversity qualifications and that my status as an underrepresented minority in science will help him secure the grant from NIH'" (*id.*).

Finally, Aubee contends that Lai used his power to give preferential treatment to Seungjae Lee ("Lee"), a research scholar from South Korea, by proposing to assign Lee as the first author on a peer review article (*id.*). Aubee alleges that Lai stated, "Lee has seniority over [Aubee], and the review article is directly tied to one of his projects so having him as the first author would make for a good story for when his project is published" (*id.*) (internal quotation marks omitted). Aubee objected and "expressed [his] disdain for [Lai's] covert racial bias, and unfair treatment" (*id.*). After Aubee resigned his employment, Lee appeared as the first author on the article (*id.*).

Lai now moves to dismiss the counterclaims with prejudice. The motion is unopposed.

Discussion

On a motion to dismiss brought under CPLR § 3211, "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must assess "the pleadings' four corners" (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 291 [2023] [internal citation omitted]), and "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88; *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

The counterclaims for cyberstalking and harassment are predicated upon allegations that Lai "orchestrated" a "collective pattern of unwanted and unlawful cyberstalking behavior" (NYSCEF Doc No. 4 at 9). Aubee alleges that beginning in July 2023, Lijuan Kan, a research scientist, Lee, and a fictitious individual named "Robert Miller" began "stalking and snooping around [Aubee's] LinkedIn profile," which caused Aubee to block those individuals from accessing his profile (*id.*). Then, in May 2024, Lai "began stalking and snooping around [Aubee's] LinkedIn profile," causing Aubee to block Lai, as well (*id.*).

"New York does not recognize a civil cause of action to recover damages for harassment" (*Trec v Cazares*, 185 AD3d 866, 868 [2d Dept 2020] [citation omitted]; *accord Jerulee Co. v Sanchez*, 43 AD3d 328, 329 [1st Dept 2007]). Thus, even assuming the truth of the Aubee's allegations, the counterclaim for harassment is dismissed.

To the extent the allegations can be construed to plead a counterclaim for unlawful stalking under Article 120 of New York's Penal Law (*see* Penal Law §§ 120.45, 120.50, 120.55 and 120.60) or under federal law (*see* 18 USC 2261A ["Stalking"]), those criminal statutes do not provide for a private cause of action (*see Masudi v Maximo Couture Inc.*, 39 Misc 3d 1202[A], 2013 NY Slip Op 50427[U], *4 [Sup Ct, Queens County 2013] [dismissing a cause of action for "stalking" based on Penal Law § 120.40 where "the claim is not adequately supported by facts …, even assuming that a civil claim can be based on this penal statute"]); *Doe v Miller*, 2025 WL 1951839, 2025 US Dist LEXIS 135146, *4 [ND NY, July 16, 2025, No. 3:24-CV-1267 (MAD/ML)] [stating that there is no a private right of action under a federal criminal statute that prohibits stalking]).

Aubee also pleads a counterclaim for racial discrimination, though he fails to state whether he seeks recovery under the New York State Human Rights Law (NYSHRL) (Executive Law § 290 *et seq*.) or the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of NY § 8-101 *et seq*.),[1] both of which prohibit race-based employment discrimination (*see* Executive Law § 296[1][a]; Administrative Code § 8-107[1][a]). However, even in construing the answer liberally and extending every possible favorable inference to Aubee, he fails to plead a prima facie case of race-based discrimination under the NYSHRL and the NYCHRL. To state a cause of action for discrimination, defendant must plead:

> "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

The complaint need only give "'fair notice' of the nature of … [the] claims and their grounds" (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019], quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]).

Aubee has adequately pled the first two elements: (1) he is a member of a protected class, and (2) he was qualified for his position. However, Aubee failed to plead any concrete factual allegations in support of the third and fourth elements (*see Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

First, Aubee has not alleged that he suffered an adverse employment action under the NYSHRL, which "requires a materially adverse change in the terms and conditions of employment" (*Pastor v August Aichhorn Ctr. for Adolescent Residential Care, Inc*., 238 AD3d 645 [1st Dept 2025], quoting *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-345 [1st Dept 2005]). "[T]ermination 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" can constitute materially adverse changes (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004] [internal quotation marks and citation omitted]). Aubee asserts that Lai proposed naming Lee as the first author on an article (NYSCEF Doc. No. 4), but even if true, such action does not constitute a materially adverse change for purposes of the NYSHRL. Additionally, although Aubee alleges that Lai ultimately removed his name from the article, that occurred *after* Aubee's resignation (*id*.). The other objectionable actions Aubee references concern other persons.

Second, Aubee has not pled any facts sufficient to infer that he was treated differently or less well than other similarly situated persons because of his race (*see Aykac v City of New York*, 221 AD3d 494, 495 [1st Dept 2023] [the plaintiff failed to allege that he had been treated less well or had been disadvantaged because of a protected characteristic]; *Pappas v Moody's Inv. Serv*., 202 AD3d 630 [1st Dept 2022] [complaint failed to allege that the plaintiff "was treated differently or less well than his

[1] The court presumes that Aubee did not seek to plead a cause of action under Title VII of the Civil Rights Act of 1964, as the answer does not allege that defendant had exhausted his administrative remedies before the Equal Employment Opportunity Commission (EEOC) before bringing the counterclaim (*see Patrowich v Chemical Bank*, 98 AD2d 318, 323-324 [1st Dept 1984], *affd* 63 NY2d 541 [1984]; *see also Romney v New York City Transit Auth*., 294 AD2d 481, 482 [2d Dept 2002] ["the filing of charges with the EEOC is a condition precedent to the commencement of a Title VII action"]).

female coworkers"]; *Wolfe-Santos v NYS Gaming Commn*., 188 AD3d 622, 622 [1st Dept 2020] [no facts alleged that the plaintiff was treated less well than other similarly situated employees because of the plaintiff's disability]). Aubee alleges that Lai appeared to treat Lee more favorably, but he has not pled any specific facts from which it can be shown that this was done because of his race. Significantly, Aubee has not identified other similarly situated employees who shared his protected characteristic who were treated differently or less well (*see Baldwin v Cablevision Sys. Corp*., 65 AD3d 961, 966-967 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010] [statistics showing that a greater number of Black employees were terminated than white employees "supports an inference that the personnel reductions … were affected by considerations of race"]). Here, Aubee alleges that Lai subjected Gunasinghe and an unnamed colleague to poor treatment, but Aubee has not stated whether Gunasinghe and the other colleague, both from Sri Lanka, shared his protected characteristic.

In addition, Aubee failed to plead any factual allegations sufficient "to raise an inference that [plaintiff's] treatment of [defendant] … was racially motivated" (*Unobagha v Hilton Garden Inn Times Sq. N*., 216 AD3d 524, 524 [1st Dept 2023], *lv denied* 40 NY3d 909 [2023]; *see also Pelepelin v City of New York*, 189 AD3d 450, 451 [1st Dept 2020] [complaint "failed to adequately plead that the alleged adverse or disadvantageous employment actions were made under circumstances supporting an inference of discrimination"]). Aubee has not alleged that Lai made any negative or derogatory remarks or statements to show his general view of persons who share defendant's protected characteristic so as to exhibit a discriminatory bias (*see Eustache v Board of Educ. of the City Sch. Dist. of the City of N.Y*., 228 AD3d 482, 483 [1st Dept 2024], citing *Hernandez v Kaisman*, 103 AD3d 106, 114-115 [1st Dept 2012]; *Etienne v MTA N.Y. City Tr. Auth*., 223 AD3d 612, 613 [1st Dept 2024] [no allegation that "explicitly or implicitly invidious comments" about the plaintiff's race had been made]; *Pappas*, 202 AD3d at 630 [complaint contained "no allegations of comments or references to [the plaintiff's] gender to support an inference of discriminatory animus"]). Lai's comments on Aubee's training or that Aubee was an underrepresented minority do not evince a race-based bias (*see Pelepelin*, 189 AD3d at 451). Lai's remarks about Gunasinghe's attitude and his decision to omit Gunasinghe's name as a contributing author is not supported by facts sufficient to infer a racially motivated bias. Aubee also admitted that the unnamed colleague, who Lai had failed to recognize in a Father's Day message, had attributed the slight to his failure to "see eye to eye with [plaintiff]," not race (NYSCEF Doc. No. 4).

Ultimately, the NYCHRL is not meant to "'operate as a 'general civility code'" (*Williams v New York City Hous. Auth*., 61 AD3d 62, 79 [1st Dept 2009], *lv denied* 13 NY3d 702 [1st Dept 2009] [citation omitted]). Thus, "[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] [citation omitted]).

Aubee also fails to adequately plead any facts that plaintiff is an "employer" for purposes the NYSHRL. The NYSHRL proscribes an "employer" from engaging in unlawful discriminatory practices (Executive Law § 296[1][a]). A corporate employee, though, is not individually subject to suit "if [the employee] is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others" (*Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]). Lai alleges he joined Memorial Sloan Kettering Cancer Center in 2005, is a tenured member of the Memorial Sloan Kettering Center and a professor at the Weill Cornell Graduate School of Medical Sciences, and leads the Lab, where Aubee is a former research scholar (NYSCEF Doc. No. 1). Aubee maintains that he resigned from his position in the Lab (NYSCEF Doc. No. 4), but he does not allege that he had been employed by Lai, as opposed to the Memorial Sloan Kettering Cancer Center. Indeed, Aubee had alleged that one of his Lab colleagues who Lai purportedly discriminated against is "an employee of Memorial Sloan Kettering Cancer Center (*id.*). Accordingly, Aubee has failed to plead that Lai is an employer within the meaning of the NYSHRL (*see Kwong v City of New York*, 204 AD3d 442, 445-446 [1st Dept 2022], *lv dismissed* 38 NY3d 1174 [2022]). And while individual employees may be liable for their own discriminatory conduct

under the NYCHRL (*see Doe v Bloomberg, L.P.*, 36 NY3d 450, 459 [2021]), Aubee has failed to adequately plead a counterclaim for racial discrimination under the NYCHRL, above.

Insofar as the allegations can be construed to plead a counterclaim for aiding and abetting discrimination (*see* Executive Law § 296[6]; Administrative Code § 8-107[6]), the counterclaim must be dismissed as defendant has not adequately pled a counterclaim for racial discrimination under the NYSHRL or the NYCHRL (*see Weir v Montefiore Med. Ctr.*, 208 AD3d 1122, 1123 [1st Dept 2022], *lv denied* 39 NY3d 91 [2023]).

Finally, assuming Aubee sought to plead a counterclaim for a hostile work environment under the NYSHRL or NYCHRL, Aubee has failed to plead concrete factual allegations tending to show that Lai's conduct was motivated by defendant's race (*see Etienne*, 223 AD3d at 613).

Accordingly, it is

ORDERED and ADJUDGED that the motion of plaintiff Eric Lai to dismiss the counterclaims of defendant Joseph Aubee is granted, without opposition and on the merits, and the counterclaims are dismissed in their entirety as against said plaintiff, and the Clerk of the Court is directed to enter judgment accordingly in favor of said plaintiff dismissing the counterclaims asserted against him.

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8/4/2025
DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

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