SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **04**

Justice

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KENNETH EVSEROFF,

Plaintiff,

- v -

SCRIPPS MEDIA, INC, WPIX, LLC, CHRISTIAN TAUSSIG, COURTNEY WILLIAMS,

Defendants.

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INDEX NO. 150375/2020

MOTION DATE 08/19/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, defendants' motion for summary judgment is granted, for the reasons set forth below.

In this action, plaintiff asserts claims for hostile work environment and retaliation under Executive Law §296 (the "New York State Human Rights Law" or "NYSHRL"), and Administrative Code §8-107 (the "New York City Human Rights Law" or "NYCHRL"), and Labor Law §201-d against all defendants and a claim for defamation against Christian Taussig and Courtney Williams.

FACTUAL BACKGROUND

Plaintiff's EBT Testimony and Affidavit in Support

Plaintiff, a Jewish Caucasian male, started working at WPIX in 1996, as a per diem broadcast engineer (NYSCEF Doc No. 76, Evseroff tr at 8). His duties included filming reporters

and stories, and editing "broadcast audio and video for air" (*id.* at 9). In July 2019, plaintiff became a full-time employee of WPIX.

On September 11, 2019, plaintiff shared a post on his personal Facebook page (the "Facebook Post") with a photo of the World Trade Center in the wake of the attacks of September 11, 2001, over which the words "'Never Forget'–You Said" were superimposed, above a photo of Representative Ilhan Omar[1] in the United States House of Representatives with the words "I Am The Proof – You Have Forgotten" superimposed over it (*id.* at 59-60; NYSCEF Doc No. 53, defendants' memo of law in support at 7). On September 13, 2019, plaintiff was called into a meeting with Williams and Taussig regarding this Facebook Post (the "HR Meeting").

During the HR meeting, Williams asked plaintiff whether he understood that the Facebook Post could be perceived as racist (NYSCEF Doc No. 76, Evseroff tr at 85-86). Williams told plaintiff, in sum and substance, that the post reflected poorly on WPIX (NYSCEF Doc No. 85, Evseroff aff at 6 [internal quotations omitted]). Plaintiff testified that neither his race nor religion was mentioned at the HR meeting, or at any time during his employment at WPIX (NYSCEF Doc No. 76, Evseroff tr at 91-93). Plaintiff was fired shortly after the meeting.

On September 23, 2019, plaintiff's union, the International Brotherhood of Electrical Works ("IBEW"), filed a grievance challenging his termination. On March 2020, WPIX and IBEW arbitrated the grievance (*id.* at 102). On January 2, 2021, the arbitrator issued a decision finding that plaintiff was terminated without just cause, as required under the relevant collective bargaining agreement, and reinstated his employment without backpay (NYSCEF Doc No. 77, arbitration award at 22-23). In this decision, the Arbitrator noted that:

[1] Congresswoman Ilhan Omar represents Minnesota's 5th Congressional District in the U.S. House of Representatives and is one of two Muslim women elected to Congress (Ilhan Omar, https://omar.house.gov/ [last accessed June 13, 2025]).

> The documentary evidence and witness testimony presented by the Company does not establish that the Grievant's posting of the meme on his Facebook page was an act of religious or racist motivated hate speech. The Grievant did not add any additional commentary or derogatory content to conclude that the meme had a discriminatory purpose. However, the posting on his Facebook page, identifying him as a WPIX employee, was an inflammatory and reckless use of a controversial meme, which he knew or should have known, could lead to negative media coverage causing potential harm to the Company's reputation in the news media. Approximately six months before the Grievant's post, the meme caused a high profile controversy covered by the national news media surrounding comments made by Congresswoman Omar. There is no evidence that the Grievant made any reference to the controversy during the six months before September 11, 2019. On its face, the meme does not provide any insight as to the Grievant's opinion of the image or that he intended it to be an attack on a religion, race, or ethnicity.

(*id.* at 21). Plaintiff returned to work at WPIX on February 10, 2021 (*id.* at 106).

Plaintiff testified that Andrew Ramos, a former reporter at WPIX, had previously published a post on his personal Twitter account stating that he wanted "to punch [President Trump] in the head" but did not receive any "serious disciplinary action" as a result of his post (*id.* at 129 and 131).

Plaintiff further testified that he learned during the arbitration that five years prior Narmeen Choudhury, a WPIX reporter had filed a complaint against plaintiff, alleging that he made disparaging comments about "women, about black people, about Muslims, about poor people" almost every time they worked together (*id.* at 23-24, 157). Choudhury testified at the arbitration that plaintiff showed her a video game he was creating that "showed plaintiff engaging in workplace violence against people of a Muslim background" (*id.* at 24). Plaintiff realized, in retrospect, that after Choudhury's complaint he was no longer scheduled to work with her (*id.* at 140).

Testimony of Christian Taussig

Christian Taussig, WPIX's Director of News Operations and plaintiff's supervisor, testified that complaints about plaintiff by Choudhury and Katie Corrado did not result in

disciplinary action against plaintiff, though Taussig had a conversation with plaintiff in which he told him that some of his comments could be viewed as "a form of harassment" and he should keep such comments "to himself" (NYSCEF Doc No. 84, Taussig tr at 43).

Testimony of Courtney Williams

Courtney Williams, the Human Resources Director for Tribune Media, testified that she found the Facebook Post "offensive and racist" (NYSCEF Doc Nol 83, Williams tr at 32, 34). Williams and Taussig viewed plaintiff's Facebook account prior to the HR Meeting and noted that he listed himself as WPIX photographer (*id.* at 35-38). She testified that she, Taussig, and WPIX management decided to fire plaintiff based on the content of the Facebook Post and plaintiff's identification of himself on Facebook as a WPIX employee (*id.* at 45-47).

Testimony of Andrew Ramos

Andrew Ramos testified that he formerly worked at WPIX as a Multimedia Journalist—i.e., a shoot photographer, editor, and reporter who produced his own "products" for air—and that on December 9, 2015, he was contacted by WPIX management and asked to issue an apology for a Twitter post regarding President Trump (NYSCEF Doc No. 82, Ramos tr at 14, 19, 23). He was not suspended from work (*id.* at 18-19, NYSCEF Doc No. 68, Ramos Errata Sheet). Ramos also noted that his Twitter account did not identify him as an employee of WPIX (NYSCEF Doc No. 82, Ramos tr at 24).

Defendants' Motion for Summary Judgment

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Defendants interpret plaintiff's complaint as asserting a claim for employment discrimination under the NYSHRL and NYCHRL (rather than hostile work environment and retaliation claims) and argue that they are entitled to summary judgment dismissing this claim

because defendants had legitimate, non-discriminatory reason for plaintiff's discharge. As to plaintiff's Labor Law §201-d claim, defendants argue that his social media post is not a "recreational activity" protected by that statute but that, even if it was, plaintiff was terminated for the content of his post rather than the act of posting on social media. Finally, defendants argue that to the extent plaintiff's defamation claim is based upon Taussig's 2018 statement it is barred by the statute of limitations and that Taussig and Williams's statements during the HR Meeting are non-actionable opinions that are, in any event, protected by the common interest privilege.

Plaintiff argues, in opposition, that he has raised an issue of fact as to defendants' discriminatory intent through evidence that defendants responded differently to his Facebook Post and Ramos's 2015 tweet and that they changed his schedule after Choudhury's complaints about him. He further argues that he has established that defendants' asserted basis for his termination—that the Facebook Post was Islamophobic and racist—was a pretext, because the Arbitrator's conclusion that "[t]he documentary evidence and witness testimony presented by the Company does not establish that the Grievant's posting of the meme on his Facebook page was an act of religious or racist motivated hate speech" is binding on this Court as the law of the case. Finally, plaintiff argues that he has established that defendants' asserted rationale for his termination was his violation of WPIX's social media policy was pretextual because he was not governed by WPIX's social media policies or employee handbook but by the collective bargaining agreement of his union.

In reply, defendants assert that plaintiff mischaracterizes the Arbitrator's ruling and that the conclusions in the Arbitrator's decision is not the law of the case, as the arbitration as limited to determining whether defendants had good cause to terminate plaintiff under WPIX's collective bargaining agreement with plaintiff's union.

DISCUSSION

"The proponent of a summary judgment motion 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]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In reviewing a motion for summary judgment, the Court "must view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmoving party" (*Vega v Metro. Transportation Auth.*, 212 AD3d 587, 588 [1st Dept 2023]).

Employment Discrimination

Defendants' motion for summary judgment dismissing plaintiff's employment discrimination claim is granted. In assessing this branch of defendants' motion, the Court applies the burden-shifting analysis developed in *McDonnell Douglas Corp. v Green*, 411 US 792 (1973). Under this analysis, plaintiff bears the initial burden to establish a prima facie case of discrimination after which "the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions" (*Ciulla v Xerox Corp.*, 70 Misc 3d 1205(A) [Sup Ct, NY County 2021] internal citations omitted]). If the defendant then meets this burden, summary judgment is warranted unless plaintiff raises "an issue as to whether the action was motivated at least in part by...discrimination" (*id.* quoting *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]). However, where, as here, "a defendant in a discrimination case has moved for summary judgment and has offered evidence in admissible form

of one or more nondiscriminatory motivations for its actions" the Appellate Division, First Department, has instructed trial courts to "avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place" and instead immediately address "whether the defendant has sufficiently met its initial burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 39-40 [1st Dept 2011]).

The Court does so here, and concludes that defendants have demonstrated a non-discriminatory reason for plaintiff's termination, i.e., that the Facebook Post violated WPIX's social media policy and upset and offended its present and former employees (*see Koslosky v Am. Airlines, Inc.*, 20-2081, 2022 WL 4481537, at *3 [3d Cir Sept. 27, 2022] ["As Koslosky points to no evidence of pretext, we are thus left with one conclusion: American fired her because her racially insensitive social media posts violated its policies and generated an outcry from employees and customers alike"]). Accordingly, the burden shifts to plaintiff to raise an issue of fact "either with evidence that "the [defendants'] stated reasons were false and that discrimination was the real reason or with evidence that discrimination was one of the motivating factors for the defendant's conduct" (*Hamburg v New York Univ. School of Medicine*, 155 AD3d 66, 73 [1st Dept 2017] [internal citations and quotations omitted] [emphasis added]). Plaintiff has failed to carry his burden.

To the extent plaintiff takes issue with defendants' stated interpretation of the Facebook Post as offensive, "[t]he mere fact that [plaintiff] may disagree with [his] employer's actions or think that [his] behavior was justified does not raise an inference of pretext" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004] [internal citations omitted]; *see Schlisserman v PA*

Consulting Group Inc., 2013 NY Slip Op 33287[U] [Sup Ct, NY County 2013] ["Plaintiff's disagreement with defendant's conclusion that her work on the plasma sterilization project did or could create the appearance of a conflict of interest and must stop, does not show that defendant's proffered reason was pretextual"]). The fact that the arbitrator came to a contrary conclusion on this issue is insufficient to create a question of fact on this point. "[T]he arbitrator did not reach the question of whether defendants had engaged in discriminatory or defamatory conduct and there has been no final judgment on the merits of those claims. The issue in the arbitration was whether defendants had just cause to discharge plaintiff…" (*Clark v Beth Israel Med. Ctr.,* 2011 NY Slip Op 30089[U] [Sup Ct, NY County 2011]). The arbitrator's determination that defendants did not have good cause to fire plaintiff does not create a "genuine dispute" of fact as to defendants' subjective motivations for terminating [plaintiff]" (*Russell v New York Univ.*, 204 AD3d 577, 580 [1st Dept 2022] [internal citations and quotations omitted], *affd*, 42 NY3d 377 [2024]).

Defendants misplaced reliance upon WPIX's social media policy as the basis for plaintiff's termination is insufficient to meet plaintiff's burden. Rather, he must additionally raise an issue of fact as to whether the real motivation for his termination was his race or religion (*see Ruderman v Doe*, 2022 NY Slip Op 30927[U], 9-10 [Sup Ct, NY County 2022], *affd sub nom. Ruderman v New York State Ins. Fund*, 215 AD3d 505 [1st Dept 2023]), which he fails to do. "Discriminatory motivation may be inferred from, among other things, invidious comments about others in the employee's protected group, or the more favorable treatment of employees not in the protected group" (*Trinidad v Mary Manning Walsh Nursing Home Co., Inc.*, 2019 NY Slip Op 31706[U], 15 [Sup Ct, NY County 2019] quoting *Mazzeo v Mnuchin*, 751 Fed Appx 13, 14 [2d Cir 2018]). "For differential treatment to suffice to show an inference of discrimination, a comparator must be similarly situated in all material respects to the plaintiff (*Barcellos v The City of New York*, 2024

NY Slip Op 32005[U], 6 [Sup Ct, NY County 2024] [internal citations omitted]; *see Uwoghiren v City of New York*, 148 AD3d 457, 458 [1st Dept 2017]). As plaintiff testified that neither his race nor religion was referenced during his time at WPIX, let alone unfavorably referenced, the only avenue available to raise a question of fact as to defendant's discriminatory intent is through evidence of differential treatment. None is present on this record. Defendants' failure to fire Ramos after his tweet about President Trump does not establish such differential treatment because Ramos, a Multimedia Journalist, was not similarly situated to plaintiff, a broadcast engineer (*see Herskowitz v State*, 222 AD3d 587, 590 [1st Dept 2023] [plaintiff and colleague not similarly situated where they "had different job titles and duties"]; *see also Pogil v KPMG, LLP*, 2024 NY Slip Op. 30340[U], 20-21 [Sup Ct, NY County 2024], *affd*, 228 AD3d 469 [1st Dept 2024]). Accordingly, defendants' motion for summary judgment is granted as to plaintiff's employment discrimination claims.

Hostile Work Environment

Defendants' motion is also granted as to plaintiff's hostile work environment claims. Under the NYSHRL, a hostile work environment exists where a workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment" (*Pitter-Green v NYU Langone Med. Ctr.*, 223 AD3d 576, 578 [1st Dept 2024], quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]). Under the NYCHRL, a plaintiff need only prove that he was treated less well than other employees because of his protected status or under circumstances giving rise to an inference of discrimination (*see Franco v Hyatt Corp.*, 189 AD3d 569 [1st Dept 2020]). Plaintiff's testimony that he was aware that colleagues claimed that he posted "racist things," does not make out a hostile work environment claim (*see Forrest v Jewish Guild for the*

Blind, 3 NY3d 295, 309 [2004] ["mere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code"]). His testimony that defendants rescheduled his work hours after Choudhury's complaint is similarly unavailing—nothing in the record indicates that this change altered the conditions of his employment or caused him to be treated less well than the other WPIX employees. To the contrary, plaintiff testified that his total hours were not affected by this scheduling change (*see Valentin v Fox Bus. Network*, 2016 NY Slip Op 30372[U] [Sup Ct, NY County 2016] [defendant's motion for summary judgment dismissing hostile work environment claim granted where "[t]here is no indication that the schedule change … had anything to do with plaintiff's race or national origin"]). Finally, defendant's failure to terminate Ramos for his tweet does not establish differential treatment to support a hostile work environment claim, for the reasons discussed above. Accordingly, defendants' motion for summary judgment is granted as to plaintiff's hostile work environment claims and these claims are dismissed.

Retaliation

Defendants' motion is also granted as to plaintiff's retaliation claim. To establish a claim for retaliation, plaintiff must establish that: (1) he engaged in a protected activity; (2) the employer was aware of the activity; (3) his employer acted in a manner reasonably likely to deter plaintiff from engaging in protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]). "Protected activity refers to actions taken to protest or oppose statutorily prohibited discrimination" (*Thomas v Mintz*, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted], *affd as mod*, 182 AD3d 490 [1st Dept 2020]) and does not include plaintiff's Facebook Post about Representative Omar.

New York Labor Law §201-d

Defendants' motion for summary judgment is also granted as to plaintiff's Labor Law §201-d claim. Labor Law §201-d(2)(c) provides that

> Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of … an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property.

(Labor Law §201-d[2][c]). The statute defines "recreational activities" as any "lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material" (Labor Law § 201-d[1][b]). The statute also provides, however, that "[t]he provisions of subdivision two of this section shall not be deemed to protect activity which … creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest" (Labor Law §201–d[3][a]).

Even assuming that posting on social media is a recreational activity under Labor Law §201-d and that the statute's protections "encompass[] the public expression of one's views" in a social media post—questions that remains unsettled (*see Sander v Westchester Reform Temple*, --- NE3d ----, 2025 NY Slip Op 0695 at *2 [2025])—the record demonstrates that the Facebook Post "created a material conflict of interest with defendant's business interest," insofar as it "invite[d] a public backlash" against WPIX and therefore, per Labor Law §201–d(3)(a), falls outside the statute's protections (*id.* at *4 [Rivera, J., concurring] citing *Berg v German Nat. Tourist Off.*, 248 AD2d 297, 298 [1st Dept 1998]).

Defamation

Finally, defendants' motion for summary judgment is granted as to plaintiff's defamation claim. Defamation involves the publication of a false statement without privilege or authorization to a third party with, at minimum, the speaker's negligent disregard for the statement's truth, which either results in special harm to plaintiff or constitutes defamation per se (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008] [internal citations omitted]).

To the extent plaintiff's defamation claim is based upon a statement Taussig made two years before the commencement of this action, it is time-barred (*see Denson v Donald J. Trump for President, Inc.*, 2025 NY Slip Op 30511[U] [Sup Ct, NY County 2025]). In addition, the statements made by Williams and Taussig during the HR Meeting are "protected by the common interest qualified privilege, having been communicated between individuals who shared a common interest in plaintiff's performance, and/or constitute nonactionable statements of opinion about him" (*Pogil v KPMG LLP*, 228 AD3d 469, 470-71 [1st Dept 2024] [internal citations omitted]). Finally, "[t]o the extent any of the statements were made to plaintiff only … [they fail] to satisfy the publication requirement" (*id.* at 471).

To overcome the qualified privilege that these statements enjoy, plaintiff was required to raise an issue of fact as to whether Taussig and Williams's statements were made with actual malice (*id.*; *see Liberman v Gelstein*, 80 NY2d 429 [1992]). Plaintiff has not done so. Instead, he argues that he is a private figure and therefore need not establish actual malice, citing *Gottwald v Sebert*, 40 NY3d 240 (2023). This argument misapprehends *Gottwald*, which involved the question of whether a different qualified privilege, for statements made about a public figure, applied

(*Gottwald v Sebert*, 40 NY3d 240, 251 [2023]). In no way did it vitiate the principle that actual malice is required to overcome a qualified privilege.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and this action is dismissed; and it is further

ORDERED that within fifteen days of the date of this decision and order counsel for the defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this Court's website); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

1/6/2026
DATE

HON. JUDY H. KIM, 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