No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Otis A. Daniel, *Petitioner*

Vs.

T&M Protection Resources, LLC., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

Otis A. Daniel
P.O. Box 1231
New York, NY 10150
(347) 262-6834
pro se plaintiff-petitioner

Mr. Leonard Weintraub
Paduano & Weintraub LLP
1251 Avenue of the Americas
9th floor
New York, NY 10020
(212) 785-9100
Attorney for defendant-respondent

TABLE OF CONTENTS

Page(s)

APPENDIX

A

2ND Circuit Court of Appeals

summary order affirming judgment

07/02/2019

case No. 18-2351

18-2351-cv
Daniel v. T&M Prot. Res., LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 2nd day of July, two thousand nineteen.

Present: ROSEMARY S. POOLER,
DENNY CHIN,
RICHARD J. SULLIVAN,
Circuit Judges.

OTIS A. DANIEL,

Plaintiff-Appellant,

v. 18-2351-cv

T&M PROTECTION RESOURCES, LLC,

Defendant-Appellee.[1]

Appearing for Appellant: Otis A. Daniel, pro se, New York, N.Y.

Appearing for Appellee: Meredith Cavallaro, Leonard Weintraub, Paduano & Weintraub LLP, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Engelmayer, *J.*).

[1] The Clerk of the Court is directed to amend the caption as above.

APPENDIX A PG 1

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Otis Daniel, pro se, sued his former employer, T&M Protection Resources, LLC ("T&M"), under Title VII for hostile work environment. He alleged that his supervisor, John Melidones, harassed him based on his race (Black), national origin (St. Vincent and the Grenadines), and sex/sexual orientation (male and gay). The district court initially granted summary judgment to T&M, but we vacated the judgment. *Daniel v. T&M Prot. Res., LLC*, 689 F. App'x 1 (2d Cir. 2017) (summary order). On remand, the district court held a bench trial and found in favor of T&M. Daniel appeals. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"In reviewing a judgment entered after a bench trial," we review the district court's findings of fact for clear error and its "conclusions of law, and its application of the law to the facts, *de novo*." *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (internal quotation marks omitted) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). Further, we may not "second-guess the bench-trial court's credibility assessments." *Id.*

The factual findings of the district court that Daniel challenges on appeal are not clearly erroneous. First, the district court found that Daniel lacked credibility with respect to the most serious incidents, i.e., that Melidones had called Daniel a racial slur and had rubbed his genitals on Daniel's buttocks while asking if Daniel was gay (in May 2012 and July 2011, respectively). Daniel failed to mention these events in any of the numerous letters or complaints he wrote before or after his termination. The court also found that Daniel's testimony as to the racial slur incident lacked credibility because it "betrayed a degree of paranoia and an easy willingness to blame T&M and/or Melidones" for his life's circumstances. *Daniel v. T&M Prot. Res. LLC*, No. 13 Civ. 4384 (PAE), 2018 WL 3621810, at *15 (S.D.N.Y. July 19, 2018). Finally, Melidones's denial of using the slur was consistent with the testimony of other former T&M employees, who credibly testified that Melidones had never used those words or exhibited racial bigotry. The district court's factual findings are thus amply supported by the record.

Nor do we find merit in Daniel's remaining challenges to the district court's factual findings. Most of those findings were based on a credibility assessment, by which the district court found Melidones's denial of the events more credible than Daniel's story. Because "there are two permissible views of the evidence," the district court's decision to choose T&M's view "cannot be clearly erroneous." *Krist*, 688 F.3d at 95.

Daniel further argues that the exhibits T&M submitted to the court were misleading and knowingly incomplete. He does not point to anything more than the fact that T&M argued that Daniel mostly relied on his personal recollection as evidence for his claims, rather than extrinsic evidence, and that T&M objected to the introduction of a letter belatedly submitted for trial. He relies on his motion for reconsideration as support for his argument that T&M's trial exhibits were incomplete. The reconsideration motion included a copy of a complaint Daniel filed with the Equal Employment Opportunity Commission, but the complaint failed to mention that

APPENDIX A Pg. 2

Melidones rubbed him with his genitals or that Melidones used a racial epithet. It also included a copy of a document Daniel filed with the New York State Division of Human Rights that failed to mention either incident; it merely stated that Melidones rubbed his shoulder on Daniel's shoulder, not his genitals on Daniel's buttocks. Neither of these documents would render the district court's factual findings erroneous or show that T&M's exhibits were incomplete or misleading. The remaining exhibits, which included various emails and letters Daniel wrote during the course of litigation, do not have any bearing on the completeness of T&M's trial exhibits.

As for Daniel's challenges to the district court's legal conclusions, those arguments are meritless. "In order to establish a hostile work environment claim under Title VII, a plaintiff must produce enough evidence to show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 20 (2d Cir. 2014) (internal quotation marks omitted). A "[p]laintiff must show not only that she subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive." *Demoret v. Zegarelli*, 451 F.3d 140, 149 (2d Cir. 2006). "[A] mild, isolated incident does not make a work environment hostile[.] [Instead,] the test is whether the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse." *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (emphasis omitted) (internal quotation marks omitted).

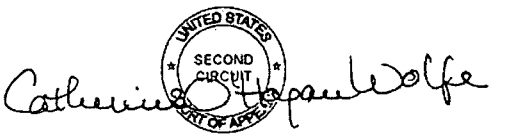
Daniel alleges, and the district court found, that Melidones: (1) sang a calypso song in Daniel's presence; (2) occasionally mocked Daniel's accent; (3) occasionally called another guard "Manny the homo" in Daniel's presence; (4) occasionally asked Daniel to define large words; and (5) asked Daniel if he supported Barack Obama. These allegations, even if true, established only mild or isolated instances of harassment, which are insufficient to create a hostile work environment. *See id.*

Daniel next argues that the district court proceedings were unfair to him because (1) he was pro se for most of the case, (2) his pro bono counsel at trial made bad strategic choices and that he had "valid legal claims that were dropped or removed from the case," Appellant's Br. at 16, and (3) his counsel and T&M did not address certain documents submitted to the district court prior to trial and he was never questioned about these issues. However, the district court appointed Daniel counsel for both discovery and trial, minimizing any risk that his pro se status would have affected the outcome of his case. To the extent Daniel argues that his trial counsel was ineffective, there is generally no right to counsel (and therefore no right to effective counsel) in civil cases. *See Turner v. Rogers*, 564 U.S. 431, 441-42 (2011) (holding that "the Sixth Amendment does not govern civil cases" and individuals will only have a right to counsel in civil cases when facing the possibility of incarceration). Further, the other claims that Daniel asserted in his amended complaint were dismissed, and his appeal of those dismissals was also dismissed as frivolous. Finally, T&M had no obligation to assist Daniel in proving his case, and Daniel should have discussed these documents with his attorney.

APPENDIX A 3

We have considered the remainder of Daniel's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED. Each side to bear its own costs.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX A Pg. 4

APPENDIX

B

2ND Circuit Court of Appeals

order denied petition for re-hearing

08/15/2019

case No. 18-2351

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of August, two thousand nineteen.

Otis A. Daniel,

Plaintiff - Appellant,

v.

T&M Protection Resources, LLC,

Defendant - Appellee.

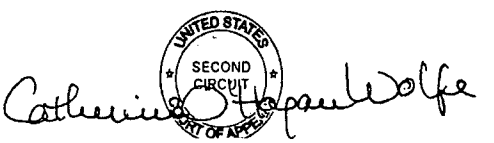
ORDER

Docket No: 18-2351

Appellant, Otis A. Daniel, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B 5

APPENDIX

C

2ND Circuit Court of Appeals

summary order vacate & remand case

04/25/2017

case No. 15-560-cv

15-560-cv
Daniel v. T&M Protection Resources, LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 25th day of April, two thousand seventeen.

Present: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

OTIS A. DANIEL,

Plaintiff-Appellant,

v. 15-560-cv

T&M PROTECTION RESOURCES, LLC,

Defendant-Appellee.[1]

Appearing for Appellant: Otis A. Daniel, *pro se*, New York, NY.

Appearing for Appellee: Leonard Weintraub, Paduano & Weintraub LLP, New York, NY.

Appearing for *Amicus Curiae*: Gail S. Coleman (P. David Lopez, General Counsel, Jennifer S. Goldstein, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, *on the brief*), U.S. Equal Employment

[1] The Clerk of Court is respectfully directed to amend the caption as above.

APPENDIX C 6

Opportunity Commission, Washington, D.C., *amicus curiae in support of Plaintiff-Appellant.*

Appeal from the United States District Court for the Southern District of New York (Engelmayer, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED** and **REMANDED**.

Appellant Otis A. Daniel, proceeding pro se, appeals from the district court's grant of summary judgment in favor of T&M Protection Resources, LLC ("T&M") on his hostile work environment claim alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. Daniel asserts that his supervisor discriminated against him because of his race, sex, and national origin. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review orders granting summary judgment de novo after construing all evidence, and drawing all reasonable inferences, in favor of the non-moving party, and focus on whether the district court properly concluded that there was no genuine dispute as to any material fact and the moving party was entitled to judgment as a matter of law. *See Sotomayor v. City of New York*, 713 F.3d 163, 164 (2d Cir. 2013). "Where summary judgment was granted for the employer, we must take the facts alleged by the employee to be true." *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012) (internal quotation marks, brackets, and ellipses omitted).

To establish a hostile work environment claim, a plaintiff must show "(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004) (brackets omitted). "Isolated incidents usually will not suffice to establish a hostile work environment, although [this Court has] often noted that even a single episode of harassment can establish a hostile work environment if the incident is sufficiently severe." *Redd*, 678 F.3d at 175-76 (internal quotation marks omitted).

I. Supervisor's Statement to Daniel, "You Fucking Nigger"

First, we review whether, as proposed by the Equal Employment Opportunity Commission ("EEOC"), the one-time use of the slur "nigger" from a supervisor to a subordinate can, by itself, support a hostile work environment claim. The district court held that it could not, relying on *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997).

We must disagree with the district court's assessment of *Schwapp*. *Schwapp* states that, "[f]or racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that[,] instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." *Id.* at 110 (internal quotation marks, brackets, and citations omitted). "Thus, whether racial slurs constitute a hostile

APPENDIX C 7

work environment typically depends upon the quantity, frequency, and *severity* of those slurs, considered *cumulatively* in order to obtain a realistic view of the work environment." *Id.* at 110-11 (emphasis added) (internal quotation marks and citations omitted). *Schwapp*, therefore, did not foreclose the possibility that the one-time use of a severe racial slur could, by itself, support a hostile work environment claim when evaluated in the cumulative reality of the work environment. The district court's reading of *Schwapp* is further at variance with this Court's more recent observation, in dicta, that "perhaps *no single act* can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014) (emphasis added) (brackets omitted). Therefore, although we decline to confront the issue of whether the one-time use of the slur "nigger" by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment, we conclude that the district court improperly relied on our precedents when it rejected this possibility as a matter of law.

II. Sexual Harassment and Discrimination Due to "Perceived Sexual Orientation"

Next, the district court properly construed Daniel's sex-related discrimination claims as sexual harassment claims under *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998), which held that "male-on-male sexual harassment" is prohibited by Title VII when the plaintiff demonstrates that he was harassed because of his sex. Additionally, although we have held Title VII does not currently protect against discrimination based on sexual orientation, *see Zarda v. Altitude Express*, No. 15-3775, slip op. at 7-8 (2d Cir. Apr. 18, 2017), it does offer protection for discrimination because of the plaintiff's failure to conform to gender norms, *see Anonymous v. Omnicom Grp., Inc.*, No. 16-748, 2017 WL 1130183, at *3-*4 (2d Cir. Mar. 27, 2017).

Here, the district court properly construed as sexual harassment the alleged incident when Daniel's supervisor brushed his genitalia against Daniel's buttocks. *See Redd*, 678 F.3d at 177 ("Direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment[.]"). Furthermore, Daniel's claims that his supervisor frequently called him a "homo" and told him to "Man up, be a man," can be properly construed as harassment because of Daniel's failure to conform to gender stereotypes. *See Omnicom Grp., Inc.*, 2017 WL 1130183, at *3-*4. Thus, Daniel's sex discrimination claims were properly considered by the district court.

III. Failure to Consider Facially Neutral Incidents in Evaluating Claims

The district court erred, however, by failing to include in its analysis some of the complained-of facially neutral incidents of harassment. We have held that a plaintiff may rely upon facially neutral conduct to bolster a harassment claim when "the same individual engaged in multiple acts of harassment, some overtly [based on a protected characteristic] and some not." *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547-48 (2d Cir. 2010) (internal quotations marks and citation omitted). First, with respect to Daniel's racial harassment claim, Daniel's supervisor's inquiry as to whether Daniel stole a computer—combined with the supervisor's overtly racist remarks—should not have been ignored by the district court. Because "some evidentiary basis" existed for inferring that this "neutral" incident was animated by hostility because of Daniel's

APPENDIX C 8

race, it should have been considered as part of Daniel's racial harassment claim. *See id.* at 548-49. Second, with respect to Daniel's sexual harassment claim, the district court failed to consider Daniel's testimony that his supervisor repeatedly watched him nap and change his clothes as evidence of additional incidents of sexual discrimination and harassment. This evidence should have been included in the district court's analysis because of the overt sexual harassment Daniel experienced from his supervisor. *See id.* Instead, the district court improperly credited T&M's argument that the supervisor had a neutral motive for watching Daniel, instead of drawing an inference in Daniel's favor as the district court must on a motion for summary judgment. *See Redd*, 678 F.3d at 174.

IV. The District Court's Failure to Properly Apply the *Harris v. Forklift* Factors

Finally, the district court erred by determining that, as a matter of law, Daniel failed to allege incidents of harassment sufficient to support a hostile work environment claim. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), provides that courts may determine "whether an environment is hostile or abusive . . . only by looking at all the circumstances" of the work environment, which include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23 (internal quotation marks omitted).

Here, Daniel alleged approximately twenty discrete incidents of harassment during his 15-month employment, and at least two incidents strike this Court as severe (being called a "nigger" by his supervisor, and his supervisor brushing his genitalia against Daniel's buttocks). In addition, the sexual harassment Daniel faced could be perceived as threatening. Finally, although Daniel missed only one day of work because of the harassment he experienced, "no single factor is required" in order for a hostile work environment claim to survive summary judgment. *Id.*

In sum, Daniel presents a persistent pattern of harassment that began as soon as he was hired by T&M and continued until his termination. *See Redd*, 678 F.3d at 174. The evidence that Daniel was harassed on multiple fronts—because of his race, sex, and national origin—should also be considered when evaluating Daniel's work environment as a whole. *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) (recognizing racial harassment can exacerbate the effect of sexual harassment and vice versa). Reviewed in the aggregate, the harassment Daniel allegedly experienced could be found to "alter the conditions of [his] employment and create an abusive work environment" in violation of Title VII. *See Oncale*, 523 U.S. at 78.

Accordingly, we **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

4

APPENDIX C 9

APPENDIX

D

2ND Circuit Court of Appeals

order re-instate appeal

08/16/2016

case No. 15-560-cv

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of August, two thousand and sixteen.

Otis A. Daniel,

Plaintiff - Appellant,

v.

T&M Protection Resources, LLC,

Defendant – Appellee.

ORDER

Docket No. 15-560

By order dated June 17, 2016, the Court granted Appellant's motion for reconsideration solely as to his hostile work environment claim. IT IS HEREBY ORDERED that the appeal is reinstated and the parties shall submit merits briefs. Within 14 days of the date of this order, Appellant must file a Local Rule 31.2 scheduling notification proposing a filing date for his principal brief.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX D Pg. 10

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of September, two thousand and fifteen,

Present: Dennis Jacobs,
Rosemary S. Pooler,
Peter W. Hall,

Circuit Judges.

Otis A. Daniel,

Plaintiff - Appellant,

v.

T&M Protection Resources, LLC,

Defendant - Appellee,

Edward J. Minskoff Equities, Inc, Universal Protection Service,

Defendants.

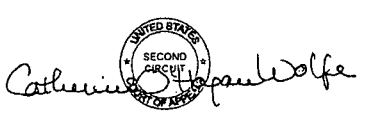
ORDER
Docket No. 15-560

Otis A. Daniel, filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX D pg. 11

APPENDIX

E

2ND Circuit Court of Appeals

Order denied & dismissed appeal

04/30/2015

case No. 15-560-cv

S.D.N.Y. – N.Y.C.
13-cv-4384
Engelmayer, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of April, two thousand fifteen.

Present:

Dennis Jacobs,
Rosemary S. Pooler,
Peter W. Hall,
Circuit Judges.

Otis A. Daniel,

Plaintiff-Appellant,

v. 15-560

T&M Protection Resources, LLC,

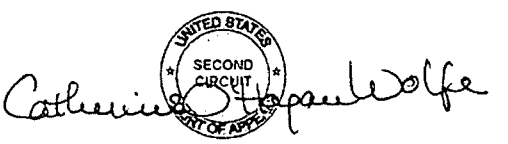
Defendant-Appellee,

Edward J. Minskoff Equities, Inc, Universal Protection Service,

Defendants.

Appellant, pro se, moves for appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX E PG. 12

APPENDIX

F

The United States District Court
for the Southern District of New York
opinion & order granting judgment
07/12/2018
case No. 13 Civ. 4384(PAE)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OTIS A. DANIEL,

Plaintiff,

-v-

T&M PROTECTION RESOURCES LLC,

Defendant.

13 Civ. 4384 (PAE)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This decision sets out the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 following a four-day bench trial on plaintiff Otis Daniel's claim that he was subjected to a hostile work environment by his employer, T&M Protection Resources LLC ("T&M"), in violation of Title VII. Daniel claims that such an environment arose as a result of harassment directed at him by his supervisor, John Melidones, on account of Daniel's race, sexual orientation, and national origin.

The Court heard live testimony from Daniel; Melidones, who supervised Daniel at his worksite, 590 Madison Avenue; three of Daniel's co-workers, Jonathan John, Roy Johnson, and Ronald James; John Aleles, the vice president of administration for T&M; Joseph Greisch, the property manager for 590 Madison and an employee of the building's owner, Edward J. Minskoff Equities; and Toni Scarito, T&M's Human Resources manager. The Court also received into evidence various plaintiff's exhibits ("PX") and defendant's exhibits ("DX").

The findings of fact that follow are based on the Court's review of the entire trial record. Where based in whole or part on a witness's testimony, the Court's findings reflect credibility determinations based on the Court's assessment of, *inter alia*, the relevant witness or witnesses'

APPENDIX F Pg. 13

experience, knowledge, and demeanor and the believability of his or her testimony in light of the other evidence in the case.

I. Factual Background

The Court first sets out the background facts to this dispute. Except as otherwise noted, these facts are not in dispute.

A. Daniel's Hiring and Job Responsibilities

Daniel is a 37-year-old Black man from St. Vincent and the Grenadines, a small island nation in the Caribbean. He moved to the United States in 1994 at age 13. Daniel identifies as gay, although he did not disclose his sexual orientation to his supervisors or coworkers at T&M. Daniel has worked as a security guard since 2005.

In late 2010, Daniel responded to an online advertisement for a fire safety director position with T&M, a global security and investigations firm based in New York City. Tom Dolan, a T&M recruiter, interviewed Daniel and accepted his application. To obtain a site assignment for Daniel, Dolan sent him to interview with various T&M clients, including the managers of the UBS Building on Sixth Avenue and the IBM Building—590 Madison Avenue.

At 590 Madison, Daniel interviewed with Melidones, the security director, and Bill Wood, the assistant property manager. About a week later, Dolan informed Daniel that he had gotten the job. In February 2011, Daniel began working at 590 Madison as an at-will employee. Melidones was his direct supervisor. Daniel initially worked the day shift, from 8 a.m. to 4 p.m. Throughout Daniel's employment, Melidones also worked during the day, from 7 a.m. to 3 p.m.

In September 2011, Daniel transferred to the night shift and began working from 4 p.m. to 12 a.m. Because Melidones continued to work from 7 a.m. to 3 p.m., during the remainder of

APPENDIX F PG. 14

his employment, Daniel saw Melidones in person less frequently and, in general, for shorter periods of time.

Throughout, Daniel's post at 590 Madison remained constant: He was stationed at a security guard podium in the rear lobby of the building, from which point he faced out into the rear lobby and a semi-public atrium beyond. A few feet behind Daniel was a wall, and behind that, the elevators.

B. May 2012

A number of the most significant, and sharply contested, events at issue occurred during a two-week period in May 2012 that culminated in Daniel's termination.

On Friday, May 4, 2012, at around 5 p.m., Daniel, standing at his post, received a call from Melidones, who instructed him that an important tenant, Bain Capital, would be terminating an employee's employment and would need a security guard present. Melidones instructed Daniel to go to Bain's offices on the 42nd floor to meet a particular Bain official.

Daniel, however, instead of going to the 42nd floor, called up to the Bain Capital offices and spoke with a Bain employee other than the one whose name he had been given. Very soon after, Daniel received another call from Melidones. Melidones had received a call from Greisch, the 590 Madison building manager. Greisch was angry that Daniel's seemingly simple task had been mishandled. He reported that Daniel's call had (according to Bain) alerted others at Bain to the forthcoming termination, causing a situation at Bain and leading Bain to excoriate Greisch. On this second call, Melidones was irate. As discussed below, the language Melidones used on this call—in particular, whether Melidones called Daniel a "fucking nigger"—is a central area of dispute.

APPENDIX F Pg 15

On May 7, 2012, the following Monday, Daniel texted Melidones to tell him that he was sick and unable to work. *See* PX 9. Daniel did not work on May 7. Melidones covered his shift. While covering for Daniel, Melidones was approached by a postal worker who asked Melidones to accept, on Daniel's behalf, a package for Daniel. The postal worker explained that Daniel's practice was to receive packages without those packages going to the mailroom. Melidones refused to accept the package. Melidones then inquired among the 590 Madison staff as to whether Daniel had previously received packages directly from the USPS. He learned that Daniel had been receiving packages on a weekly basis. Of particular salience, Melidones learned that, at an earlier date—which the evidence demonstrates was in March 2012—Daniel had received a package at 590 Madison that contained a BB gun that looked like a real gun. Daniel had then overtly displayed that BB gun to his colleagues in the rear lobby.

Daniel returned to work on Tuesday, May 8. While at work that day, Daniel learned from his colleagues that Melidones was angry at him, had refused to accept a package for him, and had inquired about his receipt of packages, including the BB gun. Early in the morning of May 9—*i.e.*, soon after the end of Daniel's shift the night of May 8—Daniel texted Melidones. Daniel wrote,

> I'd like to claim my sick day for yesterday, 05/07/12. I understand you've a personal vendetta against me for maybe what transpired on Friday, 05/04/12 with Bain Capt. and me taking off yesterday due to illness. If this is the case John, please address it with T&M. The use of intimidation, threats, manipulation, and lying about an employee to cause[] him or her to resign or be terminated is unwarranted and unprofessional. I will be notifying T&M of your tactics.

See PX 9. Melidones did not respond.

When Daniel arrived for his shift on the afternoon of May 9, he was told by a colleague, Jonathan John, that Melidones wanted to speak with him at the loading dock. Daniel used his cellphone to surreptitiously record the audio of that meeting. *See* PX 4 (audio recording); PX 5

APPENDIX F PG. 16

(transcript).[1] The recording reflects that the brief meeting was heated. Melidones was at points enraged, faulting Daniel for his handling of the Bain incident, for his package deliveries to 590 Madison, and primarily for the early-hours text to Melidones, which Melidones cast as a threat. Daniel's attempts to parry were repeatedly interrupted by the angry Melidones. At the meeting, Melidones presented to Daniel a disciplinary notice. *See* PX 13. That notice detailed Daniel's alleged infractions, including that he had had "several packages delivered to [the] worksite," that he had been "instructed to stop these deliveries," and that one such delivery included "an 'imitation pistol.'" Melidones directed Daniel to sign the form and leave it on Melidones's desk. He also instructed Daniel that Daniel could write a response to the allegations on the back of the form.

That evening, Daniel wrote his "rebuttal" on the back of the form, made a copy, and faxed a copy to Wood.

C. Disciplinary Hearing

On Monday, May 14, 2012, Melidones texted Daniel instructing him not to come to work and, instead, to contact Carl Capponi, vice president of operations at T&M. *See* PX 9.

On May 15, 2012, Daniel attended a disciplinary hearing at T&M's corporate offices at 230 Park Avenue. At that meeting were Melidones; Scarito, T&M's Human Resources manager; Capponi, Aleles, T&M's vice president of administration; and Steven Gutstein, T&M's in-house counsel. At that meeting Daniel attempted to defend himself against the charge that he had been receiving packages at 590 Madison against T&M policy. Daniel also played for the T&M executives the recording he had made from the May 9 confrontation in the loading dock. While

[1] The Court admitted PX 4 as substantive evidence. The transcript at PX 5 was received solely as an aid in understanding the sometimes elusive words used in the Daniel-Melidones meeting.

APPX F

Pg. 17

the recording played, Daniel stepped out of the room. After it was over, he returned to the conference room. As discussed more fully below, the parties dispute the extent, if any, to which Daniel attempted at the meeting to voice complaints of Melidones's harassment, and whether he was prohibited from doing so.

On May 16, 2012, Daniel returned to T&M's offices to deliver a copy of the recording of the May 9 confrontation.

On May 18, 2012, T&M terminated Daniel's employment.

D. EEOC and DHR

On September 1, 2012, Daniel filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). He asserted claims of discrimination based on race, national origin, sex, and sexual orientation as well as a claim of retaliation. *Id.* Because his sexual orientation claims were (then) cognizable under state but not federal law, the EEOC referred him to the New York State Division of Human Rights ("DHR").

On September 5, 2012, Daniel filed a complaint with the DHR. He asserted claims of discrimination based on race, national origin, and sexual orientation as well as claims of retaliation and sexual harassment. T&M responded that Daniel had been terminated due to his unauthorized package deliveries and possession of a weapon, the BB gun. Based on documentary submissions from Daniel and T&M, DHR concluded that Melidones's statements "may rise to a certain level of insensitivity but not to an actionable degree under discrimination law" and found that T&M had articulated "legitimate and nondiscriminatory business reasons" for Daniel's termination that were neither "pretextual nor otherwise unworthy of credence." On March 4, 2013, the agency therefore issued a determination of "no probable cause" for the

APPX F

Pg. 18

allegations in Daniel's complaint. The DHR's order notified Daniel that he could appeal the agency's decision to the New York Supreme Court within 60 days.

On April 18, 2013, the EEOC adopted the DHR's findings and closed its file on Daniel's complaint. It also issued a "Right to Sue" letter, notifying Daniel that he could file suit in federal or state court within 90 days.

II. Procedural History

A. Daniel's Complaints and the Initial Stages of This Litigation

On June 24, 2013, Daniel filed the original complaint in this action. Dkt. 2. He named both T&M and Edward J. Minskoff Equities ("Minskoff"), the company that manages the 590 Madison property, as defendants. *Id.* On August 19, 2013, Daniel filed an Amended Complaint. Dkt. 11. On September 25, 2013, Minskoff moved to dismiss the Amended Complaint. Dkts. 24–26. On October 7, 2013, Daniel filed his second amended complaint (the "SAC"). Dkt. 31.

On October 28, 2013, Minskoff moved to dismiss the SAC. Dkts. 33–34. On January 15, 2014, after briefing, the Court granted Minskoff's motion as to Daniel's negligence claim but denied it as to all other claims. Dkt. 43, *reported at Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302 (S.D.N.Y. 2014). The Court held, *inter alia*, that the SAC contained sufficient factual allegations to support a plausible inference that Minskoff and T&M jointly employed Daniel and that Melidones was an agent of both companies, such that Minskoff could be held liable for Melidones's allegedly discriminatory conduct. *Id.* at 19, 21. As to Daniel's negligence claim, however, the Court noted that "allegations of employment discrimination cannot be transmuted into tort claims sounding in negligence." *Id.* at 22. The Court therefore dismissed the negligence claim, while preserving Daniel's federal and state employment discrimination claims.

Appx F Pg. 19

On January 29, 2014, the Court granted Daniel's application for pro bono counsel and directed the Office of Pro Se Litigation to seek limited discovery counsel for him. Dkt. 44. On February 11 and March 10, 2014, two attorneys filed notices of appearance indicating that they would serve as pro bono counsel for Daniel. Dkts. 45, 50. In late April 2014, however, Daniel directed his counsel to withdraw and informed the Court that he had decided to proceed *pro se*. *See* Dkts. 53–54, 56. On May 2, 2014, the Court authorized pro bono counsel's withdrawal. Dkt. 57.

On May 9, 2014, Daniel and Minskoff submitted a stipulation of dismissal. Dkt. 61. On May 12, 2014, the Court so-ordered the stipulation, leaving remaining Daniel's claims against T&M only. Dkt. 62.

Several months later, on November 13, 2014, Daniel sought to vacate the stipulation of dismissal. Dkt. 100. Daniel argued that he had been "misled into believing that [Minskoff] as a matter of law could not be held fully liable for any of [his] claims alleged because [Minskoff] was not [his] or [his supervisor's] direct employer" and that he "did not understand the meaning of dismissal with 'prejudice.'" *Id.* at 1. In response, counsel for Minskoff produced their email correspondence with Daniel, which unambiguously demonstrated that Minskoff had not behaved improperly in procuring the settlement agreement. *See* Dkts. 102–03. The Court therefore denied Daniel's motion to vacate the stipulation of dismissal with Minskoff. Dkt. 105.

On July 31, 2014, T&M—the sole remaining defendant—moved for summary judgment. Dkts. 65–66. At Daniel's request, the Court approved an expedited briefing schedule. Dkt. 78. On August 4, 2014, Daniel submitted his opposition. Dkt. 75. On August 21, 2014, T&M filed its reply. Dkt. 80. On September 9, 2014, Daniel requested permission to file a sur-reply; the Court granted his motion, Dkt. 91. On September 23, 2014, Daniel filed his sur-reply. Dkt. 93.

APPX F PG. 20

On October 23, 2014, T&M filed its second reply in support of its motion for summary judgment. Dkts. 97–98.

B. The Court's Summary Judgment Decision

On February 19, 2015, in a 44-page opinion, the Court granted summary judgment to T&M on each of Daniel's claims. Dkt. 106, *reported at Daniel v. T & M Prot. Res. LLC*, 87 F. Supp. 3d 621 (S.D.N.Y. 2015). First, the Court held that Daniel's New York State and City claims were procedurally barred by the election of remedies provisions in the NYSHRL and NYCHRL. 87 F. Supp. 3d at 630–31. Second, the Court held that Daniel had not established a claim for hostile work environment. The Court excluded from its analysis several of Daniel's complaints that it found were unrelated to race, sexual orientation, or national origin, including that Melidones had watched Daniel nap and change clothes in the locker room, asked Daniel about a stolen laptop, and asked Daniel to define large words. *See id.* at 634–35. The Court found that Daniel had provided no evidence suggesting those incidents—while "obnoxious"—were linked to Daniel's race, sexual orientation, or national origin. *Id.* at 635.

The Court assessed the remaining incidents "in the aggregate" through two lenses: (1) under the four factors articulated by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and (2) as compared with other cases in this Circuit in which courts have found hostile work environments. *Id.* As to the first *Harris* factor, frequency, the Court held that the incidents of harassment were too episodic. On the second factor, the severity of the harassment, the Court held that the conduct was insufficiently egregious except for the one incident in which Melidones had allegedly used a racial slur. "That single incident, although reprehensible" the Court reasoned, drawing on Circuit authority, "cannot, by itself, sustain a hostile work environment claim." *Id.* at 636. As to the third factor, the threatening or humiliating nature of

APPX F Pg. 21

the harassment, the Court noted that Daniel did not contend that Melidones's harassment was threatening or humiliating. *Id.* Fourth, as to whether Melidones's harassment interfered with Daniel's work performance, the Court held that the evidence provided "at best limited support for such a finding." *Id.*

The Court then compared Daniel's work environment to others found to be actionably hostile in this Circuit. *See id.* at 637–39. "[M]easured against the standards set by the case law," the Court held, "Daniel's mistreatment does not rise to the level of 'severe or pervasive' harassment so as to create a 'hostile or abusive' work environment." *Id.* at 639.

Next, the Court considered Daniel's claim for discriminatory termination. The Court held that Daniel's claim failed because he had not made out a *prima facie* case of discrimination under the *McDonnell Douglas* burden-shifting framework. Although Daniel had established that he is a member of a protected class, that he was qualified for his position, and that he suffered an adverse employment decision, he had not established that the termination decision occurred under circumstances giving rise to an inference of discrimination. *Id.* at 643. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That was because, "significantly, the decision to terminate Daniel was made unanimously by a five-member disciplinary committee comprised of Melidones and four others—Gutstein, T&M's general counsel; Aleles, the vice president; Capponi, the director of operations; and Scarito, the human resources manager—and was then approved by T&M's CEO." *Id.* at 643. "Accordingly, the evidence about Melidones's behavior does not support an inference that Daniel's termination was discriminatory. Further, the key facts on which the disciplinary committee relied—Daniel's having ordered and caused a BB gun to arrive at the workplace, and having displayed that gun to co-workers—are not disputed." *Id.*

APPX F Pg. 22

The Court next addressed Daniel's claim under the Family and Medical Leave Act. The Court held this claim infirm because Daniel's request for medical leave occurred prior to the date—January 2012—after which he became eligible for FMLA leave. *Id.* at 648. Nor was there evidence that Daniel had actually *requested* such leave at all. *Id.*

Finally, the Court rejected Daniel's negligence claim. As the Court explained, "Daniel's negligence claim [was] essentially that T&M failed to protect him from Melidones's discriminatory harassment," which was "no different from his employment discrimination claims under Title VII, the NYSHRL, and the NYCHRL." *Id.* at 649. "And 'the alleged violations of federal, state, and city anti-discrimination laws are not torts under New York law.'" *Id.* (quoting *Baguer v. Spanish Broad. Sys., Inc.*, No. 04 Civ. 8393 (KMK), 2007 WL 2780390, at *4 (S.D.N.Y. Sept. 20, 2007)).

C. The Second Circuit's Decisions

Daniel appealed the summary judgment decision. The Second Circuit initially dismissed Daniel's appeal as lacking an arguable basis in law or fact. *See* Case No. 15-560, Dkt. 35. Daniel moved for reconsideration of that decision, which the Circuit denied. *See id.*, Dkt 80. The EEOC, appearing as amicus curiae, then moved for clarification of the Circuit's decision denying reconsideration. *See* Dkt. 81. It principally argued that a single use of the word "nigger" could support a hostile work environment claim, and urged the Circuit panel to reinstate that claim. The Circuit panel did so: On June 17, 2016, in response to the EEOC's motion, the court reinstated Daniel's appeal as to the hostile work environment claim only. *Id.*, Dkts. 84, 88. After full merits briefing and argument, the Circuit vacated this Court's decision as to Daniel's

APPX F

Pg. 23

hostile work environment claim and remanded. *Daniel v. T & M Prot. Res., LLC*, 689 F. App'x 1, 2 (2d Cir. 2017).

First, as to the claim of racial harassment, the Circuit disagreed that *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997), on which this Court had relied, compelled the conclusion that a single use of the N-word could not give rise to a hostile work environment. *Schwapp*, the Circuit held, "did not foreclose the possibility that the one-time use of a severe racial slur could, by itself, support a hostile work environment claim when evaluated in the cumulative reality of the work environment." 689 F. App'x at 2. The Circuit noted that it had elsewhere stated, in *dicta*, that "perhaps *no single act* can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Id.* (quoting *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014) (emphasis added)). The Circuit "decline[d] to confront the issue of whether the one-time use of the slur 'nigger' by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment," but nevertheless "conclude[d] that the district court improperly relied on our precedents when it rejected this possibility as a matter of law." *Id.*

Next, the Circuit assessed Daniel's sexual harassment and sexual-orientation harassment claims. It found that this Court had properly considered Daniel's claims as sexual harassment, under *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and as a form of sexual-orientation harassment based on Daniel's perceived failure to conform to gender stereotypes. *Id.* at 2.[2]

[2] As the Circuit noted, its precedent at the time held that "Title VII does not currently protect against discrimination based on sexual orientation." *Id.* (citing *Zarda v. Altitude Express*, No. 15-3775, 855 F.3d 76, 81-83, 2017 WL 1378932, *3-4 (2d Cir. Apr. 18, 2017)). Rather, under

APPX F Pg. 24

The Circuit went on to explain, however, that the summary judgment decision had erred by "failing to include in its analysis some of the complained-of facially neutral incidents of harassment" because "a plaintiff may rely upon facially neutral conduct to bolster a harassment claim when 'the same individual engaged in multiple acts of harassment, some overtly [based on a protected characteristic] and some not.'" *Id.* at 3 (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547–48 (2d Cir. 2010)). Those incidents included Melidones asking Daniel about a stolen laptop and Melidones watching Daniel nap and change his clothes.

In sum, the Circuit held it was error to hold, as a matter of law, that Daniel's harassment as alleged was insufficiently severe to support a claim under Title VII. As the Circuit explained: "Daniel alleged approximately twenty discrete incidents of harassment during his 15-month employment, and at least two incidents strike this Court as severe (being called a 'nigger' by his supervisor, and his supervisor brushing his genitalia against Daniel's buttocks)." *Id.* The Court

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then-binding precedent, Title VII only "offer[ed] protection for discrimination because of the plaintiff's failure to conform to gender norms." *Id.* The Circuit, sitting *en banc,* earlier this year revisited this issue, and held that Title VII's protections include discrimination based on sexual orientation. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (en banc). The Court held:

> As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex.

Id. In light of that intervening change of law in the midst of this case, the Court has considered Daniel's claim for sexual-orientation discrimination under the standard articulated by the *en banc* court in *Zarda*, rather than under the earlier, more narrow conception of Title VII that permitted claims only where discrimination was based on a failure to conform to gender norms.

APPX F Pg. 25

added that "the sexual harassment Daniel faced could be perceived as threatening." *Id.* at 4. And the Court emphasized that, because "'no single factor is required' in order for a hostile work environment claim to survive summary judgment," the fact that Daniel missed only one day of work did not bar his claim. *Id.* (quoting *Harris*, 510 U.S. at 23).

Finally, the Court directed this Court to consider the multiple forms of harassment together. The Court explained that the harassment when "[r]eviewed in the aggregate" could be found to have altered the conditions of Daniel's employment; it instructed that the "evidence that Daniel was harassed on multiple fronts—because of his race, sex, and national origin—should also be considered when evaluating Daniel's work environment as a whole." *Id.* (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000)).

III. Legal Standard on a Hostile Work Environment Claim

To establish a hostile work environment claim, a plaintiff must show (1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Daniel*, 689 F. App'x at 1–2 (internal citations and quotations omitted). "Isolated incidents usually will not suffice to establish a hostile work environment, although [the Second Circuit has] often noted that even a single episode of harassment can establish a hostile work environment if the incident is sufficiently severe." *Id.*

"The Supreme Court has held that a work environment's hostility should be assessed based on the 'totality of the circumstances.'" *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (quoting *Harris*, 510 U.S. at 23). "Factors that a court might consider in assessing the totality of the circumstances include: (1) the frequency of the discriminatory conduct; (2) its severity; (3)

APPX F Pg. 26

whether it is threatening and humiliating, or a mere offensive utterance; and (4) 'whether it unreasonably interferes with an employee's work performance.'" *Id.* (quoting *Harris*, 510 U.S. at 23).

IV. Findings of Fact: Disputed Issues

A. Overview

The Court's task as fact finder in this case is centrally to resolve credibility disputes between Daniel and Melidones. Daniel alleges that Melidones directed several episodes of disquieting harassment towards him. Most of the alleged harassment was verbal, save one instance in which Daniel alleges that Melidones brushed his private parts against Daniel. Melidones denies these claims. For the most part, the incidents that Daniel alleges occurred outside the presence or earshot of others; to the limited extent that other persons were possibly percipient witnesses to these events, no witness at trial corroborated Daniel's claims. And Daniel—despite claiming in a variety of fora about other slights and infractions by Melidones and T&M once his termination loomed in early May 2012—did not report any of these episodes until well after his employment at T&M ended. Further, as developed below, Daniel did not report any of the most serious alleged episodes in his written complaint to DHR. These include the two that the Circuit panel judged as potentially severe—Melidones's having called Daniel a "fucking nigger" on May 4, 2012, and his having deliberately brushed his private parts against Daniel while the two men were in the 590 Madison lobby—and a third which this Court regards also as severe, Melidones's having earlier called Daniel a "gorilla."

An important question for the Court as finder of fact is therefore whether—in the absence of any corroborative evidence, real-time "outcry" witnesses, or reasonably contemporaneous complaints by Daniel—Daniel's claims in this lawsuit of such serious on-the-job misconduct can

APPX F Pg. 27

be credited. Were the episodes Daniel alleges of the kind that one would ordinarily expect an employee victim to complain of in or close to real time, including after termination? What weight is to be attached to Daniel's silence on these points for many months thereafter, including in fora such as the DHR complaint that provided a natural opportunity to complain? And, to the extent that these considerations counsel hesitation before crediting a complainant's claims, did Daniel's testimony about these events at trial inspire sufficient confidence to merit crediting his present account?

In this section, the Court proceeds, first, by detailing Daniel's present allegations; second, by reviewing the complaints that Daniel made and the fora in which he did so; and, third, setting forth the Court's findings of fact. The Court ultimately finds that, as to the central episodes on which Daniel's claim of harassment turns, Daniel has not carried his burden of proof. The Court cannot find, based on a preponderance of the evidence presented here, that the episodes that—if credited—would most powerfully support a claim for a hostile work environment, occurred as Daniel alleges. The Court does credit, however, Daniel's allegations as to certain statements by Melidones, which, although less egregious in nature, were reasonably viewed as upsetting by Daniel.

B. Daniel's Allegations of Harassment

Daniel's allegations span the duration of his tenure at 590 Madison. They relate to his claims of three types of harassment: on the basis of race, national origin, and perceived sexual orientation. The Court catalogues those allegations below.

1. Racial Harassment

In March 2011, Daniel alleges, Melidones first told him that he was "not Black." Melidones said, "You're not Black because you don't [say] 'What's up?' You don't wear your

APPX F

Pg. 28

pants down your waist. You don't swagger." Daniel alleges that Melidones continued to make similar comments throughout the remainder of Daniel's employment.

In July 2011, Daniel alleges, he was at his podium in the rear lobby when Melidones, while walking past Daniel, looked at Daniel and said, "Smile. Why the angry face? Smile. You look like a gorilla." Daniel understood that comment as intended to offend, and Daniel was offended.

In August 2011, Barby Woodard, the general manager of a café located in 590 Madison and an acquaintance of Daniel, walked past Daniel and Melidones. Daniel alleges that Melidones then said, "You know she likes you. She's dating a Black man. She likes her meat dark and big."

In September 2011, Daniel was at his podium in the rear lobby when Melidones approached him. Daniel alleges that Melidones then said to him: "Are you going to vote for your man Obama?" Daniel alleges that he then felt the need to explain to Melidones that he was "not a Democrat" but rather "a registered Republican" and that he "would vote according to my party." To that, Melidones responded, "Oh, yeah? I guess you're right after all." This was the first and only conversation about politics Daniel had with any of his colleagues at 590 Madison.

In December 2011, Daniel was approached by the office manager of a 590 Madison tenant who informed him that a laptop computer had been stolen from the tenant's offices on the 18th floor. Daniel texted Melidones to tell him. The next day, when Daniel arrived for his evening shift, Melidones was still at 590 Madison. Melidones confronted Daniel and allegedly said, "I have a picture of a Black male with a bald head who's said to be the culprit that stole the computer. Did you steal the computer? Because after all, you're a Black male with a bald

APPX F PG. 29

head." Daniel understood this question as an accusation: that Daniel was a "criminal" and that the "likes of [him] are criminals."

Finally, Daniel alleges, on May 4, 2012, the most serious incident of racial harassment occurred. Daniel testified that, that day, he was at his post some time after 4 p.m. when Greisch stopped by to tell him an employee at Bain Capital—a 590 Madison tenant—was going to be terminated that evening. Greisch told Daniel to expect a call from Melidones with instructions. Around 5 p.m. Melidones called Daniel at his podium. As Daniel recounts, Melidones instructed Daniel to "go up to the Bain office on the 42nd floor of the building and speak to its office manager, Ms. Lacy Chelis."

Daniel did not go to the 42nd floor, however, because, Daniel testified, the executive vice president of Minskoff, Jeffrey Sussman, was in the rear lobby and Daniel did not feel it would have been appropriate to leave his post. Instead, Daniel called the Bain offices and asked to speak with Chelis. Daniel told Chelis that he was calling about an employee who was to be terminated. But Chelis was confused—"totally perplexed." Chelis "had no idea what [Daniel] was talking about." Their conversation ended. Soon thereafter, Daniel received another call from Melidones, who "was in a tirade." He was "screaming and yelling, 'Who told you to call? Who told you to call? Shut the fuck up, you fucking idiot. Don't say a fucking word. You fucking idiot.'" In response, Daniel was silent. Daniel alleges that Melidones concluded his "tirade" by saying, "You fucking—don't say a fucking word, you fucking idiot, fucking nigger."

2. National Origin Harassment

Throughout the time Daniel worked the day shift—*i.e.*, until September 2011—Melidones would "frequently" come to Daniel's podium and sing "what I can only liken to a calypso that was sang maybe back in the 1930s or '40s by Harry Belafonte, and it goes 'Day-o,

APPX F Pg. 80

De-e-o.'" That singing, Daniel alleges, was "a mockery of my cultural heritage as a Rastafarian, as a Caribbean person."

Daniel alleges that Melidones further mocked his national origin by repeatedly speaking to him "in an imitated derisive manner by mimicking in English what he thinks is an English accent." In March 2011, in an attempt to disabuse Melidones of the misconception that Daniel was British, Daniel brought his birth certificate to work and showed it to Melidones. *See* PX 6. That document is dated August 1991 and relates back to Daniel's birth in 1980. On the document is a stamp bearing the pictures of Prince Charles and Princess Diana. When Melidones saw that stamp, Daniel alleges, "it was like confirmation to him that I was English." Melidones then persisted in asking Daniel about British politics and culture and repeatedly told him to "go back to England." Although several of Daniel's co-workers spoke with accents, Daniel never heard Melidones mock their accents or speak to them in accented English.

3. Sexual Orientation Harassment

Although Daniel is gay, he has treated his sexuality as an intensely private matter, and never discussed his sexuality with any colleagues at 590 Madison.

In July 2011, Daniel alleges that Melidones approached him at his podium, came behind him at the podium, whispered in his ear, "Are you gay?" and "brushed up against my buttocks with what had to have been his penis." Daniel responded, he alleges, by turning away and saying, "What do you think you are doing?"

Over the next few months—July, August, and September 2011—Melidones repeatedly harassed Daniel, he alleges, on the basis of his sexual orientation. "Almost every day," Melidones would stand next to Daniel's podium, Daniel alleges, and mock the name of Daniel's

APPX F PG 31

co-worker, Manny Perdomo. Melidones would call Perdomo "Manny the homo." Melidones would also whisper the word "homo" to Daniel.

Daniel alleges that Melidones also repeatedly observed Daniel in the locker room at 590 Madison. During his lunch break, Daniel would often go to the locker room to lie down on a bench. During these rests, Melidones would often come to the locker room to watch Daniel, he alleges. Daniel also alleges that Melidones frequently observed Daniel changing his clothes.[3]

In March 2012, Daniel testified, he received a call at his podium at 590 Madison from Melidones. Daniel recounts that the "sole reason" for Melidones's call was to tell Daniel "that he was at a Broadway show called Mary Poppins." As Daniel recalls, Melidones then said, "You'd make a good Mary Poppins. I can see you as Mary Poppins. You'll make a good Mary Poppins."

On May 8, 2012, Daniel's first day back at work following the May 4 incident, Melidones passed by Daniel's podium, he alleges, slapped Daniel on the shoulder, and said, "Man up. Be a man." Melidones had repeatedly told Daniel to "man up" or "be a man." Those comments, Daniel testified, made him "self-conscious of [his] level of masculinity." "How was I not manly enough? What is it about me that makes me less of a man? You know, again, not only was he saying that to me because—maybe because as a Black man I don't portray that hyper-masculine, you know, toughness that stereotypically one expects an African American or

[3] Daniel described Melidones's locker-room observations as the racially motivated surveillance of a distrustful boss. The incident could also be viewed as supporting a claim of sexual-orientation harassment. The Court was prepared to consider this incident, if factually established, for both purposes, and as noted, below, the Court has also considered all established incidents of alleged harassment in the aggregate. But the Court ultimately did not credit Daniel's testimony to the effect that Melidones specifically eyed him in the 590 Madison locker room.

APPX F PG 32

Black American male to behave, but he also—because of his perception of me being gay, I am somehow less of a man."

C. Pre-Litigation Complaints

The Court finds that Daniel did not make any complaints in real time about the most significant events of harassment underlying his claim. Most significant, in the aftermath of the Bain Capital incident, after which Daniel alleges Melidones referred to him in a telephone call as a "fucking nigger," there is evidence that Daniel made other complaints about his employment in multiple fora. These include by setting out his "rebuttal" in a handwritten appendage to T&M's disciplinary charge, by appearing before the disciplinary committee hearing, and by emailing several T&M and Minskoff employees. Strikingly, in none of those instances did Daniel make any mention of Melidones's harassment, either explicitly or by implicit suggestion.

- On May 8, Daniel's first day back at work after the Bain incident, Daniel spoke to Greisch and complained about Melidones's May 4 tirade. Daniel does not recall stating to Greisch that Melidones had used the word "nigger" in that tirade. Nor does Greisch recall Daniel ever making such a claim. The Court finds that Daniel's complaints in that discussion instead related exclusively to Melidones's anger and what Daniel perceived as Melidones's unfair response to Daniel's workplace infractions (the receipt at work of the BB gun and other packages) that had been uncovered.
- On May 9, 2012, Daniel responded to the Notice of Disciplinary Action issued to him by Melidones. As Melidones had directed Daniel, he drafted his "rebuttal" to Melidones's description of Daniel's infractions on the back of the form. In his handwritten rebuttal, Daniel objected to the charges against him. *See* PX 13. He

APPX F Pg. 33

also wrote that he had "witnessed Mr. Melidones screamed [*sic*]/cursing at guards using profane[] languages. Referring to many of the staffs as buffoons, idiots, useless, and incompetents." *Id.* Notably, Daniel did not there claim that Melidones had screamed or cursed at him or referred to him as a buffoon or by any other name.[4]

[4] During the defense case at trial, Daniel sought leave to reopen his case to submit a document that, he claimed, was a letter that he had written and delivered to Melidones's desk on May 9 at the same time that he wrote this rebuttal. *See* PX 20. In its discretion, the Court permitted this letter to be received and for that limited purpose re-opened Daniel's direct case and permitted Daniel to be recalled to testify about the preparation and delivery of the letter. Dated May 9, 2012, the letter captures the core elements of Daniel's harassment claim as formulated in this Court: It references "months of enduring your insults," and Melidones's "calling me gay last summer," having "touched my ass," "making racial remarks about my ethnicity," "watching me change[] into my uniform in the locker room," "and yesterday you hitting me on the shoulder." Daniel testified that he drafted this letter in the evening of May 9, after having left his post and gone up to the T&M/Minskoff offices at 590 Madison. There, Daniel testified, he took a piece of paper from a copy machine and, using a pen he carried with him, quickly wrote the letter to Melidones. Daniel testified that he then used the copy machine in the T&M/Minskoff offices to make a copy of this letter as well as the two-sided disciplinary form and rebuttal. Daniel testified that he left the original of the letter and disciplinary form/rebuttal on Melidones's desk and took with him the copies.

Were Daniel's claim to have written this letter on the date that appears on it credited, PX 20 would be highly probative evidence, akin to a real-time complaint made by a victim to an outcry witness, as it would situate Daniel's claims of harassment (both in general and as to specifics) far earlier in time, and indeed prior to Daniel's termination. For a number of independent reasons, however, the Court cannot credit this testimony. To begin, having observed Daniel attempt to account for the relevant events as to PX 20 on the witness stand, including on cross-examination and in response to questions from the Court, the Court found Daniel's demeanor and shifting answers highly inconsistent with truth-telling. He strongly appeared to the Court to be making up details on the fly. Further, Daniel had never previously testified about this writing or the portion of the events of May 9 relating to it, either in his deposition or earlier in the trial, when Daniel had testified that he had faxed a copy of the rebuttal to Wood at T&M. On the contrary, in response to questions from the Court about the timeline of the night of May 9, Daniel never mentioned this letter or his alleged visit to the T&M/Minskoff offices. Daniel did not offer any persuasive explanation for why the events surrounding the letter had been missing from his earlier accounts. The letter also surfaced conveniently. Daniel filed it on the docket of this case on October 7, 2013, four months after filing suit and six months after the DHR had made a finding of no probable cause to support Daniel's claims. *See* Dkt. 31. In contrast, the Court found highly credible Melidones's firm denial in testimony of having seen PX 20 before. The

APPX F Pg. 34

- In the early morning hours of May 10, 2012, Daniel sent an email to Wood at T&M, in which he noted that he had just faxed the disciplinary report to Wood. *See* PX 11. That email recounted Daniel's view that Melidones had disciplined him "as a form of retaliation." *Id.* Daniel requested to meet with Wood to discuss Melidones's "recent hostile verbal harassment and intimidations towards me." *Id.* The email did not detail that harassment or intimidation, but the statement in the email is most naturally understood in light of the disciplinary rebuttal that it attached, which addressed Melidones's conduct relating to the disciplinary issues only.
- Later that day, Daniel emailed J. Henkin at T&M regarding his request for a sick day on May 7. Daniel explained that he had asked Melidones for a sick day but that Melidones had not responded because of "his personal vendetta against me." Daniel did not elaborate or make any claims of statements or conduct relating to race, sexual orientation, or national origin.
- On May 15, 2012, T&M's disciplinary committee—Gutstein, Scarito, Aleles, and Capponi—along with John Melidones, held a disciplinary hearing. At that hearing, Daniel attempted to explain his receipt of packages. The Court, based on the credible testimony of Aleles and Scarito, finds that Daniel was given an opportunity to air his grievances more broadly, but that Daniel did not recount any

Court is constrained to conclude that Daniel likely created PX 20 shortly before October 7, 2013, and backdated the letter to May 9, 2012, to supply evidence that he had complained of harassment close to the events at issue. This finding is reinforced by the Court's finding that a physically similar document dated May 16, 2012 (PX 21) that also first surfaced on October 7, 2013, and which the Court also permitted Daniel to offer on his re-opened case, was similarly created after the fact. *See infra*, at 24 n.5.

APPX F

Pg. 35

of the acts of harassment by Melidones of which he complains. Daniel chose instead to play for the committee the recording he made of the May 9 confrontation, a recording that captures rage and imperiousness on Melidones's part, but is devoid of slurs or other words of any discriminatory nature. Daniel claimed at trial that Scarito told him that at the hearing he was not allowed to speak about anything other than the packages, and that, when he attempted to do so, he was shut down by Scarito, Gutstein, and Capponi. Scarito and Aleles testified that that was untrue and that Daniel was not precluded from airing other grievances before the committee. Although the Court did not credit as accurate every single aspect of Scarito's testimony—she notably denied that Daniel's audiotape was played for the disciplinary committee, whereas all other evidence was to the contrary—the Court credits their testimony on this particular point because of its consistency and persuasiveness and based on the witnesses' demeanor.[5]

- In the early morning of May 18, 2012, Daniel emailed Gutstein, Scarito, Aleles, and Capponi to transmit further evidence in support of his contention that Melidones had authorized him to receive packages at 590 Madison. *See* PX 13. That email did not make any allegations of harassment.

[5] Daniel also testified that, on May 16, 2012, when he returned to the T&M offices to deliver a copy of the May 9 recording, he also delivered a handwritten letter to Scarito. *See* PX 21. The letter, dated May 16, 2012, states that Scarito and others at the May 15 meeting had "basically shut me down when I tried to bring up John's harassment towards myself and other staff." This letter, too, first surfaced on October 7, 2013, when Daniel filed it on the docket of this case. For reasons similar to those regarding PX 20, *see supra*, at 22 n.4, the Court declines to credit this testimony, and similarly concludes that the letter was likely created and backdated shortly before October 7, 2013. Notably, both Scarito and Alleles, whom Daniel testified both saw the letter in real time, firmly denied having seen it before. The Court credits their testimony on this point.

APPX F

PF. 36

- Later that day, soon after being informed that he had been terminated, Daniel emailed Gutstein, Scarito, Aleles, and Capponi again. He wrote, "You decided to terminate me based on the inappropriate actions of Security Dir. John Melidones." *Id.* Those actions, Daniel, explained, included "[h]im lying about when I had the BB delivered and the manner it was displayed." Daniel objected to Melidones "maliciously" disciplining Daniel two months after the incident. Daniel did not mention any instances of harassment.
- On May 18, 2012, shortly after being terminated from T&M, Daniel emailed T&M's CEO, Robert Tucker. *Id.* In that email, Daniel explained that he had "had a problem with my worksite security director John [Melidones] at 590 Madison Ave." *Id.* Daniel explained further that he had appeared at the disciplinary hearing with proof that "should have exonerate[d] Mr. Melidones['s] claims." The email, however did not describe any claims Daniel might have had against Melidones. On the contrary, it stated that during the one year and five months he had worked for T&M, "I've never had a problem." *Id.*
- On the afternoon of May 18, Daniel emailed Greisch, 590 Madison's building manager, again explaining his basis for objecting to being terminated. He again did not make any claim of harassment. *Id.*
- On May 20, 2018, Daniel emailed Robert DeBenedetto at T&M to request a letter explaining his termination. Daniel explained that he intended to sue Amazon.com (where he had found the BB gun for sale), Zephyr Sports (the merchant from whom he had purchased it), and Melidones. And he represented that he had "already consulted with my local councilman, precinct, district attorney's office,

APPX F Pg 37

city hall, numerous attorneys and law enforcement personnel at 1 Police Plaza" to ensure "that what happened with me never happens to anyone else." That is, he intended to prevent "innocent citizens who are not aware of one's city or state laws" from possessing "what turns out to be illegal to possess." *Id.* Daniel's email again made no mention of harassment or of having complained (whether within T&M or to any of the officials he listed) of harassment.

- On May 23, 2018, Daniel sent a lengthy email to Minskoff executives. In that email, Daniel recounted the events leading up to his termination. He explained that Melidones had "berated" him following the Bain incident. *Id.* And he explained his need to take the day off on Monday, May 7, 2012. Daniel also recounted Melidones's "humiliating" disciplining of Daniel. *Id.* He explained, "Melidones could have handle[d] this matter differently than he did, but he choose [*sic*] this dramatic method to humiliate, embarrass and cause[] me to either quit or be terminated." *Id.* Further, Daniel told the Minskoff executives that Melidones had "a history of berating and insulting many guards at . . . 590 Madison by calling them buffoons, useless, idiots, incompetent and derogatory terms." *Id.* Daniel did not further elaborate, and despite his having recounted these insulting terms, did not allege that any explicitly discriminatory terms had been used.[6]

[6] Daniel also did not avail himself of other internal opportunities to speak out about Melidones's alleged use of this racial slur on the May 4 call. Most notably, T&M had a confidential hotline, of which Daniel acknowledged having been aware. Indeed, he testified at trial that he had left a message on the hotline in August 2011, intending to raise other issues about Melidones, to which he did not receive a response. But Daniel undisputedly did not call the hotline any other time, including after the allegedly racially explicit May 4 call.

APPX F Pg. 38

These assembled communications overwhelmingly reflect that Daniel was indeed angry at, and complaining persistently about, Melidones in May 2012. But, critically, they also reflect that Daniel's expressed grievances against Melidones then involved two intertwined subjects: the prospect of disciplinary action leading potentially to Daniel's termination; and Melidones's harsh, humiliating—and as Daniel perceived it, unfair—treatment of him in connection with the Bain Capital incident and the review of Daniel's workplace violations (*i.e.*, the receipt of the BB gun and other packages at work). Notably, they do not reflect any expressed complaints about race, sexual orientation, or national origin discrimination. Nor do they reflect the shocking claimed incidents of bias by Melidones that Daniel testified about at trial, including the three most serious ones flagged above.

To be sure, the absence of a reference to these incidents in any one of Daniel's real-time communications could easily be explained by the fact that Daniel's clear focus after May 7 was on saving—or reclaiming—his job. And some of these communications occurred in contexts that were less natural fora than others to report a long-running pattern of harassment: Daniel's

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As to Daniel's claim to have left a message on the hotline in August 2011, the Court finds the evidence equivocal. Daniel testified that he had left such a message; the T&M executive responsible for monitoring the hotline, Aleles, testified that he never retrieved any such message from Daniel. Each witness's testimony on this point is problematic. Daniel's overall testimony was sufficiently populated by improbable or contradicted assertions that a thoughtful factfinder cannot simply assume an unsubstantiated claim to this effect to be true. And although Aleles projected as attempting to testify accurately, a key aspect of his account beggared belief. Aleles testified that since the hotline's introduction in July 2011, he has checked the hotline voicemail account virtually daily but has never retrieved a single call by an employee to the hotline during those seven years. It is improbable, given T&M's size (at its largest, 1,760 employees), that no employee during this long period ever attempted to use the hotline or left a message on it. More likely, in the Court's assessment, is that occasional messages were received but either were ignored in real time or are forgotten today. Because Daniel bears the burden of proof, the Court cannot find that Daniel left such a message in August 2011. The Court's verdict, however, would be the same even if it had found the opposite.

APPX F Pg. 39

email to Henkin, for example, mentioned Melidones only glancingly, and was aimed at making the simple request for a sick day.[7] However, others of these communications are such that the absence of a reference to a pattern of discriminatory abuse in general—or to Melidones's having uttered a profane and bigoted slur days earlier, or engaged in other serious conduct redolent of bias—is striking. And Daniel then had strong reasons to notify T&M of such conduct, and particularly so after his termination, as losing his job was no longer a risk. Further, taking as a whole the assembled communications in May 2012 between Daniel and T&M officials, what emerges is a picture of a man who, to his credit, had no difficulty sticking up for himself when he felt wronged. In this context, the absence of any reference to these most serious incidents strongly suggests that these did not occur, and that Daniel did not perceive himself at that time to have been a victim of discriminatory harassment.

The Court next reviews Daniel's writings in the ensuing period, beginning with his initial filing of a claim with the DHR. In this period, too, although Daniel made generalized claims of harassment and discrimination, his complaints still did not refer to the most serious incidents that Daniel claims today. And, as in May 2012, Daniel's predominant claims, as expressed, continued to involve his termination from T&M.

- In September 2012, four months after his firing, Daniel filed a complaint with the New York State Division of Human Rights. *See* DX 19. Asked to identify the ways in which he was discriminated against, Daniel checked the boxes for National Origin, Race/Color or Ethnicity, and Sexual Orientation. Next to each box, he explained the forms of discrimination he experienced. As to national

[7] Several other emails between Daniel and T&M officials similarly do not refer to Melidones. *See, e.g.*, PX 11 pp. 13–18.

APPX F PX-40

origin, Daniel wrote: "Mr. Melidones always spoke to me with an imitated English accent." As to racial discrimination, Daniel wrote: "I was told I'm not Black. Other employees complained about racial remarks made by Mr. Melidones." And as to sexual-orientation discrimination, Daniel wrote, "[My] supervisor asked me if I'm gay and most recently on 5/3/12 said to me to be a man, I need to man up." Daniel also indicated that he had been discriminated against in retaliation for filing a complaint. He stated that when he told his supervisor of his "intention to go to the company, he vindictively served me a disciplinary write up." In a section of the form labeled "Description of Discrimination," Daniel elaborated on his claim of discrimination. He wrote that: Melidones had said to him that most property managers prefer white security guards; Melidones had asked him if he was gay and had told him that his (Melidones's) son is gay; Melidones ignored Daniel's complaint that other guards ignored and undermined him because they believed he was gay; and Melidones slapped him hard on the back and said, "Be a man, man up."

- On October 14, 2012, Daniel emailed Barby Woodard. Daniel told Woodard that he "was being verbally and physically harassed by [his] former supervisor there at 590 Madison partly because of my ethnicity and suspected sexual orientation." PX 11. Daniel asked Woodard to photograph the lobby of 590 Madison to assist him in bringing claims against Melidones and T&M, which Woodard refused to do.
- On December 16, 2012, Daniel emailed the T&M internal affairs complaint hotline. *See* DX 18. The email describes at length Daniel's account of the

APPX F 79.41

circumstances surrounding his termination, including Daniel's receipt of the BB gun at work. Daniel also recounted incidents of alleged harassment, including that Melidones had slapped Daniel on the shoulder and told him to "man up," that Melidones had asked Daniel if he was gay, that Melidones had observed Daniel in the 590 Madison locker room, and that Melidones had spoken to him using an English accent. Daniel also complained that he had "witnessed Mr. Melidones calling and referring to many of the staffs myself included as idiots, assholes, buffoons, stupid and incompetent." This email did not mention Melidones's use of the words "nigger" or "gorilla" or any inappropriate touching of Daniel.

- Later that day, Daniel sent another email, containing substantially the same text, to a large number of T&M executives as well as the executives of several other security companies. *See* DX 17.
- On December 18, 2012, Daniel sent another email, containing substantially the same text, to several Minskoff executives. *See* DX 16.

The Court finds these later writings by Daniel revealing. Although these writings added detail to his theretofore general claims of discriminatory harassment, Daniel, in articulating his grievances, nowhere referenced the most explosive allegations he later came to make against Melidones.

The omission of these allegations from the complaint Daniel filed with the DHR is particularly consequential. Daniel there had every incentive and opportunity to explain his basis for claiming harassment on the basis of race, sexual orientation, and national origin, and indeed took the time to flesh out his claim. Daniel testified that he did not appreciate the significance of this form and that he lacked the opportunity to fill it out in more detail. For various reasons, the

APPX F Pg. 42

Court does not find that excuse credible or persuasive as a reason for Daniel to have omitted his most sensational allegations, were they true. Among other things, the DHR form itself states that the complainant is free to add information on a separate page, and Daniel's allegations on the form did not even fill the space allotted. Further, even if Daniel had believed he was under time or space constraints in completing the form—and the Court does not so find—Daniel's omission of his current most significant allegations is itself notable. Such searing statements and actions would have been readily remembered and recounted.

D. Findings

For the reasons that follow, the Court credits Daniel's claims as to certain workplace conduct by Melidones, but, critically, does not find established the claims as to the most serious acts of misconduct. The Court begins by identifying allegations that it has not found established.

Racial epithet on May 4, 2012: Most significant, the Court does not find that Melidones's telephonic tirade directed at Daniel on May 4, 2012, although likely enraged and profane, included the word "nigger" (or any other discriminatory slur). There is no corroboration of this inflammatory claim; Daniel did not make any such allegation until many months after the fact; and he did not include this claim in any of his many written complaints, including within T&M and to the DHR. Nor did Daniel otherwise memorialize this event in or anywhere close to real time or recount it to any colleague, friend, or medical or mental health professional. Instead, the claim first arose in this lawsuit, filed in June 2013, after Daniel's claims of harassment had been rejected by the DHR as lacking probable cause. These circumstances unavoidably raise questions about the veracity of Daniel's present claim to have been called a "fucking nigger" on May 4, 2012.

APPX F Pg. 43

The Court was open to crediting uncorroborated testimony along these lines. However, the Court, on its considered review, had sufficient questions about Daniel's overall testimony to preclude it from doing so. Daniel's account of his life and challenging personal circumstances was highly sympathetic. There is much to admire about Daniel's resilience and perseverance in the daunting challenges that life has dealt him, as ably developed at trial. He also impressed the Court as a man of considerable dignity. And Daniel's testimony was sure and credible as to certain themes and particulars. However, the Court is constrained, regretfully, to find that Daniel's testimony also had numerous moments of inconsistencies, glibness, excuse-making, and inattention to detail. At times, too, Daniel's testimony betrayed a degree of paranoia and an easy willingness to blame T&M and/or Melidones for dimensions of his life's journey and present circumstances for which it is not credible to assign them blame. The Court therefore does not and cannot find that Daniel has carried his burden of proof as to this critical factual allegation.

Independently, as to this point, the Court found credible Melidones's denial of using this racial slur. That Melidones did not use that slur is also consistent with the uniform testimony of the other witnesses from T&M, including several other lobby guards and fire safety personnel (none of whom currently work for T&M and thus have little incentive to cover for the company). These persons—several of whom self-described as African-American or Caribbean—credibly attested that they had never heard Melidones use such words or, in any way, exhibit racial bigotry.

Other racially explicit statements: For much the same reasons, the Court finds that Daniel has not carried his burden to show that Melidones, earlier in Daniel's employment, called him a "gorilla." Likewise, the Court finds that Daniel has not carried his burden to prove that Melidones made the other alleged charged and racially overt comments in the workplace. These

APPX F Pg. 44

include comments to the effect that Barby Woodard, the café manager at 590 Madison, was dating a Black man and "likes her meat dark and big"; or that Melidones repeatedly told Daniel that, given his dress, comportment, and verbal inflections, he was "not Black." Had they been established, such statements would have been clear instances of racism. They would have lent support to the claim of a racially hostile, noxious workplace environment. On the trial record, however, although the Court cannot rule out that these incidents occurred, the Court cannot affirmatively so find.[8]

Sexual contact with Daniel: The Court also finds that Daniel has not substantiated his claim that Melidones rubbed against Daniel's backside with his penis while Daniel was at his post, while asking Daniel, "Are you gay?" There is no witness (or follow-on outcry witness) to this episode or anything close to it; and this allegation is idiosyncratic, as the balance of Daniel's charges against Melidones involve verbal, not physical, abuse. This allegation too, is tellingly absent from Daniel's various writings and complaints in the days surrounding and the weeks and months that followed his termination. The absence of this claim from Daniel's DHR complaint

[8] The Court notes that one of these allegations—that Melidones told Daniel that he was "not Black"—did appear in Daniel's September 2012 DHR complaint. Among Daniel's claims of explicit racial utterances by Melidones, the Court found this one the most credible. That is both because of Daniel's pre-lawsuit claim to the same effect and because, as noted below, the Court does find that Melidones did take note of—by imitating—Daniel's erudite manner of speech. Although Melidones's imitation of Daniel's manner of speech had no explicit racial dimension and the Court cannot find that it was demonstrably racially motivated, the Court recognizes that, in theory, such imitation could have been intended to contrast Daniel's verbal erudition with a crude racial stereotype. At the same time, as to the claim that Melidones termed Daniel "not Black," there is no corroboration for Daniel's claim that Melidones repeatedly said this in the 590 Madison lobby (the other lobby personnel who testified, and who identified as African-American or Caribbean, uniformly denied hearing such comments). And Daniel did not make this claim in any of his May 2012 writings. Therefore, although the claim that Melidones called Daniel "not Black" presents a closer question, on balance, given the burden of proof and given the hesitations noted above with respect to whether Daniel's trial testimony was consistently accurate, the Court does not find this statement established.

APPX F Pg. 45

is particularly striking. Had any such incident occurred, Daniel likely would have cited it—if not led with it—in recounting his claim of harassment on the basis of sexual orientation. The Court also credited Melidones's emphatic denial of this claim.

"Mary Poppins": The Court also does not credit Daniel's allegation that Melidones told him that he would make a good Mary Poppins. Although this quip is in keeping with Melidones's mockery of Daniel's accent, the Court found credible Melidones's testimony on this point—both that he did not make any such statement to Daniel and that he had not seen and was unaware of the Broadway production *Mary Poppins* to which Daniel inferred Melidones was then referring. The Court also did not find it credible that, as Daniel alleged, Melidones, out of the blue, would have telephoned Daniel for the sole purpose of making this quip.

"Man up": The Court does not credit Daniel's allegation that Melidones told him at times to "man up." There was no other evidence—from Melidones or the other T&M personnel—that Melidones used this phrase. Even if the Court had so found, it would not have found that this common locution—which connotes the need for a person (generally a man) to discharge his duties—to be denigrating, either in general, or in the contexts in which it was allegedly used at 590 Madison in relation to Daniel.

Stolen laptop: The Court credits Daniel that he and Melidones had a discussion about a laptop stolen within 590 Madison Avenue in which it was noted that the surveillance footage reflected that the perpetrator was a balding African-American man. Although it is possible that Melidones made some attempt at humor in this discussion that Daniel misinterpreted, the Court does not credit that Melidones made any statement in that discussion tending to accuse Daniel of this offense or implying that he, by dint of race, was a likely perpetrator.

The Court does, however, credit the following allegations:

APPX F pg. 46

"Manny the homo": The Court finds it more likely than not that Melidones referred to lobby employee Manny Perdomo as either "Manny the homo" or some other derivative using the phrase "homo" and that Melidones did so in the presence of Daniel. Melidones admitted to having a relationship with Perdomo that involved reciprocal teasing based on their respective last names. Perdomo, Melidones testified, would call Melidones "John Melanoma." But Melidones's testimony as to what he called Perdomo was not at all credible. Melidones claimed that his reciprocal jibe to Perdomo was to say to Perdomo: "Manny go home." The Court found this testimony implausible to the point of being ridiculous. Further, even Melidones, trying at trial to articulate the words that he claimed to have used, was unable to present that testimony without slipping. At one point, the Court heard Melidones to say, "Manny go homo." The Court therefore rejects as unworthy of belief Melidones's denial that he ever used the term "homo" in referring to Perdomo. The Court finds that it is more likely than not that the actual phrase Melidones used to make fun of Perdomo's name included the derivative "homo" and was likely, at least at times, "Manny the homo," as Daniel testified. The Court also credits Daniel's testimony that Melidones's and Perdomo's reciprocal name-calling, including the use of "Manny the homo," occurred in Daniel's earshot.[9] The Court does not find, however, that these statements were directed at Daniel or were intended to refer to Daniel's sexual orientation, which, Daniel testified, he kept unknown to his co-workers. Nor does the Court find that Melidones ever called Daniel a "homo."

[9] The Court acknowledges that the other security guards at 590 Madison testified that they did not hear this byplay or the other remarks and conduct that the Court credits were made. While the Court cannot conclusively explain this discrepancy, one explanation is that the guards were stationed far apart from each other and had only sporadic occasions to overhear one other.

Mimicry of Daniel's manner of speech: The Court finds it more likely than not that, at times, Melidones, in interacting with Daniel, mimicked Daniel's accent and distinctive manner of speech. Daniel speaks with an inflection akin to a British accent, with a Caribbean lilt, and is careful in his enunciation. Particularly probative, in reviewing the audio recording that Daniel made of the May 9, 2012 confrontation, *see* PX 4, it was clear to the Court that at least as to certain words—*e.g.*, "Otis" and "ambiguity"—Melidones pronounced those words with an accent far from his own manner of speech, and intended to mimic Daniel's. Melidones was also notably defensive about this subject during trial testimony.

Singing of calypso music: The Court finds it more likely than not that Melidones, at least once, sang calypso music in the lobby of 590 Madison, in Daniel's presence. Melidones denied doing so. But, revealingly, when examined, he admitted being familiar with calypso music from "the end of the movie 'Beetlejuice' where they sing calypso." As Daniel's counsel aptly pointed out in her closing argument, the song featured in that movie is precisely the song that Daniel identified as having been sung by Melidones: "a calypso that was sang maybe back in the 1930s or '40s by Harry Belafonte [that] goes 'Deo, De-e-o." Indeed, the song in "Beetlejuice" was sung by Harry Belafonte.[10]

Big words: The Court credits Daniel's claim that Melidones asked him to define big words. Notably, on the May 9, 2012 recording, Melidones does just that: he asked Daniel whether Daniel knew what "ambiguity" means. The Court credits Daniel's claim that such statements recurred throughout his tenure at 590 Madison. It is not entirely clear to the Court, however, whether such statements were intended to mock Daniel—as Daniel appeared to view

[10] *See* https://pitchfork.com/thepitch/how-a-calypso-anthem-became-the-surreal-centerpiece-of-beetlejuice/ (interviewing Harry Belafonte about David Geffen's request to use Belafonte's recording of "Day-O (The Banana Boat Song)" in *Beetlejuice*).

APPX F PG. 48

them at trial—or as a means of commenting, without judgment, on Daniel's erudition and facility with words.

2012 presidential election: The Court found credible Daniel's testimony that Melidones asked Daniel whether he would be voting for President Obama and that, when Daniel said he was a Republican, Melidones, also a Republican told him he was "all right." Daniel's account of this exchange had the ring of truth. That Melidones did not recall this brief exchange may reflect the passage of time and that, to many, such an exchange would be taken as innocuous.

Locker room: Finally, as to Daniel's allegation that Melidones observed him in the locker room, the Court finds a portion of Daniel's claim true. The Court finds it more likely than not that Melidones did, at least occasionally, cross paths with Daniel in the locker room at 590 Madison, which was used for changing clothes. Such encounters most likely occurred during the first half of Daniel's employment, when he worked the day shift, which overlapped with Melidones's tour of duty. The Court, however, does not find credible Daniel's claim that Melidones particularly watched Daniel in the locker room, deliberately followed him to the locker room, or encountered him in the locker room other than coincidentally. The Court thus finds that while Daniel and Melidones crossed paths from time to time in the locker room, these encounters were uneventful, coincidental, and insignificant in the context of this case.

V. Conclusions of Law

On the facts as found above, the Court concludes that Daniel has not met his burden to establish a hostile work environment that was sufficiently pervasive or severe to support a claim under Title VII.

A. Aggregating

The Court begins with a threshold legal question: whether "a plaintiff may aggregate evidence of racial and sexual harassment to support a hostile work environment claim where neither charge could survive on its own." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 n.7 (2d Cir. 2000).

That question is—explicitly—an open one in this Circuit. *Id.*[11] It is, however, settled law that "different forms of harassment may exacerbate each other," *Donahue v. Asia TV USA Ltd.*, 208 F. Supp. 3d 505, 517 (S.D.N.Y. 2016) (citing *Cruz*, 202 F.3d at 570), "meaning that 'abuse against various different groups—such as both [gender] and [race]— . . . exacerbates the effect of harassment experienced [with respect to each characteristic] individually,'" *Duarte*, 265 F. Supp. 3d at 348–49 (quoting *Boggs v. Die Fliedermaus, LLP*, 286 F. Supp. 2d 291, 298 (S.D.N.Y. 2003)); *see also Cruz*, 202 F.3d at 572 ("Given the evidence of both race-based and sex-based hostility, a jury could find that [defendant's] racial harassment exacerbated the effects of his sexually threatening behavior and vice versa."). Some district courts in this Circuit have held, however, that "aggregation is inappropriate where . . . the claim sought to be buttressed is patently inadequate." *Weiss*, 2009 WL 2132444, at *8; *see Duarte*, 265 F. Supp. 3d at 349.

The Court need not decide here, however, whether, as a general matter, a plaintiff may aggregate evidence of multiple forms of harassment to support a hostile work environment claim where, viewed in isolation, each claim would fail. That is because, for the purposes of this case, that question has effectively been answered by the Second Circuit's decision remanding this case

[11] *See also Duarte v. St. Barnabas Hosp.*, 265 F. Supp. 3d 325, 348–49 (S.D.N.Y. 2017) ("The Second Circuit has . . . expressly reserved decision on 'whether a plaintiff may aggregate evidence of [two types of] harassment to support a hostile work environment claim where neither charge could survive on its own.'" (quoting *Cruz*, 202 F.3d at 572 n.7)); *Weiss v. Hustedt Chevrolet*, No. CIV.A.05-4230, 2009 WL 2132444, at *8 (E.D.N.Y. July 13, 2009) (same).

APPX F Pg. 50

to this Court. The Circuit there instructed that the "evidence that Daniel was harassed on multiple fronts—because of his race, sex, and national origin—should also be considered when evaluating Daniel's work environment as a whole." *Daniel*, 689 F. App'x at 4 (citing *Cruz*, 202 F.3d at 572). The Circuit further noted that, when "[r]eviewed *in the aggregate*, the harassment Daniel allegedly experienced could be found to 'alter the conditions of [his] employment and create an abusive work environment' in violation of Title VII." *Id.* (emphasis added) (quoting *Oncale*, 523 U.S. at 78).

This Court, therefore, has considered below the various conduct to which Daniel was subjected in the aggregate, without regard for whether any subset of claims—sorted by reference to race, sexual orientation, or national origin—would suffice to support a claim for a hostile work environment. For the reasons explained below, the Court holds that, even viewing the conduct found holistically, the facts the Court has found established by a preponderance of the evidence do not support a claim for a hostile work environment as measured by governing case law.

B. Hostile work environment

Title VII "prohibits the creation of a hostile work environment" based on race, color, religion, sex, or national origin. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013). A plaintiff must prove that the complained of conduct: (1) "is objectively severe or pervasive—that is . . . creates an environment that a reasonable person would find hostile or abusive"; (2) creates an environment "that the plaintiff subjectively perceives as hostile or abusive"; and (3) "creates such an environment because of the plaintiff's [protected class]." *Patane*, 508 F.3d at 113 (quoting *Gregory v. Daly*, 243 F.3d 687, 691–92 (2d Cir. 2001) (alterations in original)).

APPX F Pg. 51

"[A] work environment's hostility should be assessed based on the 'totality of the circumstances.'" *Id.* (quoting *Harris*, 510 U.S. at 23). Factors that may be considered include: "[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee's work performance." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 102 (2d Cir. 2010) (quoting *Harris*, 510 U.S. at 23) (internal quotation marks omitted).

Based on the totality of the circumstances of Daniel's employment as adduced at trial through the testimony of Daniel, Melidones, and their co-workers, and based on the Court's findings above as to which episodes are substantiated by a preponderance of the evidence, the Court concludes that Daniel's work environment at 590 Madison was not "hostile" for purposes of Title VII. That conclusion is not, by any means, to be taken as condoning Melidones's behavior. As the Court has found, Melidones subjected Daniel to several denigrating forms of behavior that related to protected characteristics of Daniel's. As to national origin, Melidones mimicked Daniel's distinctive speech pattern, which included a Caribbean lilt, sang a calypso tune in Daniel's presence evocative of Daniel's region of origin, and questioned Daniel about the definition of words in a way that could be read to mock Daniel's erudite manner of locution. As to sexual orientation, although there is no direct evidence that Melidones was aware that Daniel is gay, it is possible that Melidones assumed that Daniel was gay; regardless, Melidones's joking references in Daniel's presence to a co-worker as "Manny the homo" were surely experienced by Daniel as hurtful. As to race, while the Court has not found by a preponderance that Melidones made any of the racially explicit remarks alleged, Daniel reasonably could have taken Melidones's inquiry about whether Daniel would vote to reelect President Obama as a coded reference to Daniel's race. Finally, although the Court finds this behavior to have been

APPX F Pg. 52

unconnected to any protected characteristic of his, Daniel reasonably could—and did—take umbrage at aspects of Melidones's treatment of him during the final days of his employment. As the surreptitious audiotape that Daniel made revealed, Melidones was in turns brusque, haughty, contemptuous, and enraged out of any justifiable proportion at his colleague, Daniel. Notwithstanding his workplace lapses, Daniel, as a dignified and capable professional, deserved better.

Title VII, however, requires more.

First, the Court considers the frequency of the discriminatory conduct. Daniel contends that even if the most severe incidents of harassment are not credited—as the Court has found—the remaining conduct occurred sufficiently frequently to constitute a "pervasive" hostile work environment. The Court disagrees. Critically, the evidence established that after Daniel's shift change in September 2011, Daniel and Melidones rarely saw each other at work. As Melidones testified, and as was corroborated by Roy Johnson, Melidones and Johnson drove together to and from Staten Island and the office every day. Only very rarely did Melidones stay late at work after his shift ended at 3 p.m. such that he overlapped on site with Daniel.

Even during the period before September 2011, when the bulk of the established incidents appear to have occurred, the evidence does not establish that Melidones's harassing acts were frequent. Rather, some of the incidents that the Court has found were isolated, singular events. These include, the Court finds, Melidones's comment about voting for President Obama and Melidones's singing of calypso music in Daniel's presence. As to the other conduct that the Court has found, such conduct, the Court finds, occurred more than once: to wit, the mimicking of Daniel's accent, the references in his presence to "Manny the homo," and the questioning of Daniel as to the meaning of big words. However, while these acts occurred from time to time,

APPX F Pg. 53

the Court does not find that any were persistent. While the incidence of these acts is perforce lost to history, the Court's best assessment is that, during the first months of Daniel's employment at T&M, *i.e.*, through September 2011, these incidents occurred sporadically and occasionally, not frequently. And, the Court finds, after September 2011, given the relative paucity of contact between Daniel and Melidones, such conduct was yet more limited.

Measured against reported cases, this pattern of behavior is insufficiently frequent to support a claim for a hostile work environment. There is no solid evidentiary basis from which the Court can conclude that Melidones made the remarks found any more than sporadically. *See, e.g.*, *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) ("[I]solated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment."); *Alfano v. Costello*, 294 F.3d 365, 380 (2d Cir. 2002) (finding the alleged conduct non-actionable when they were "too few, too separate in time, and too mild . . . to create an abusive working environment"); *Augustin v. Yale Club of N.Y.C.*, No. 03-CV-1924 (KMK), 2006 WL 2690289, at *22 (S.D.N.Y. Sept. 15, 2006) (holding "infrequent and sporadic" remarks "over the course of five years, insufficient, as a matter of law, for Plaintiff to maintain a hostile work environment claim"), *aff'd*, 274 F. App'x 76 (2d Cir. 2008); *Trinidad v. N.Y.C. Dep't of Corr.*, 423 F. Supp. 2d 151, 167–68 (S.D.N.Y. 2006) (finding isolated incidents of defendant calling plaintiff a bitch and making sexual remarks over the course of her five and one-half years of employment insufficient to support a claim of discriminatory harassment); *Pagan v. N.Y. State Div. of Parole*, No. 98 Civ. 5840, 2003 WL 22723013, at *6 (S.D.N.Y. Nov. 18, 2003) (finding four instances of racially derogatory remarks by supervisor in the span of several months did not amount to a hostile work environment).

APPX F Pg. 54

Second, the Court considers the severity of Melidones's harassing conduct. Significant as to this point, the Court has not found any of the most serious acts alleged by Daniel, including that Melidones used a racial slur in his May 4, 2012 tirade or racially explicit language at any point, and that Melidones rubbed his penis against Daniel's backside. Once these episodes are removed from the equation, there is no factual basis from which to find that any harassment of Daniel was severe. The remaining episodes, although by no means trifling, do not rise to the level of severity necessary to support a hostile work environment claim. *See, e.g.*, *Augustin v. The Yale Club of N.Y.C.*, 274 F. App'x 76, 77 (2d Cir. 2008) ("[E]pisodes of name-calling, inappropriate behavior by a supervisor, and other perceived slights . . . do not constitute a hostile work environment."); *see also Fletcher v. ABM Bldg. Value*, No. 14 CIV. 4712 (NRB), 2018 WL 1801310, at *23 (S.D.N.Y. Mar. 28, 2018) (collecting cases).

Third, the Court considers whether Melidones's behavior was humiliating or threatening. As to the former, the Court finds that several areas of conduct which the Court has found to have occurred could have reasonably been experienced, and were by Daniel, as humiliating, to some degree. Melidones's repeated use of the phrase "Manny the homo," while not directed at Daniel personally, surely could have been taken to mock homosexuals. Melidones's mimicry of Daniel's accent could reasonably have been viewed as denigrating Daniel's native land. Melidones's attempts to have Daniel define large words could reasonably have been understood as an attempt to make fun of Daniel for his verbal erudition, perhaps in contrast to Melidones's different expectations for a person of Daniel's nationality and/or race. Finally, Melidones's singing of calypso music could have been taken to make fun of Daniel's Caribbean heritage insofar as it reduced the culture of Daniel's country of origin to a musical trope from a movie.

APPX F Pg. 55

The Court finds, however that the conduct established was not, at all, threatening. Of the conduct alleged, several acts, if found, would have been justifiably perceived as threatening: being watched while changing or napping could be threatening, as could being touched sexually without consent. *See Daniel*, 689 F. App'x at 4 (noting that the "sexual harassment Daniel faced could be perceived as threatening"). But, as reviewed above, the Court has not found that either of these incidents occurred. In contrast, the conduct that the Court has found, such as Melidones's mimicry of Daniel's accent, does not qualify as threatening.

Finally, the Court considers whether the acts found interfered with Daniel's work performance. *See Harris*, 510 U.S. at 23. The Court holds against Daniel on this point. There is no evidence that Melidones's harassment interfered with Daniel's work performance up and until the May 4, 2012 incident. On the contrary, Daniel, by all accounts, was until that day a well-regarded performer to whom Melidones, in fact, had assigned certain supervisory duties.[12] There is, in contrast, considerable evidence that Daniel's performance was impacted by the events of May 4. In particular, Daniel called out sick on Monday, May 7, and, although he returned to work the following day, Daniel was demonstrably apprehensive at the workplace thereafter. However, the Court finds, the events of May 4 and thereafter that gave rise to Daniel's changed affect did not trace to the established conduct that Daniel has claimed were part of a campaign of harassment. The only conduct that the Court finds occurred on May 4 or thereafter within the scope of Daniel's claims was Melidones's brief mimicking of Daniel's accent during the May 9 audio-recorded encounter at the loading dock. That act of mimicry, the Court finds, played no

[12] Daniel testified that other guards ignored Daniel's supervisory directives and that he felt "undermined . . . by the staff." The record did not supply any independent evidence of this and the Court does not credit Daniel's generalized claim on this point. In any event, even crediting *arguendo* this general claim, Daniel does not allege that the other guards ignored him because of Melidones's harassing conduct.

APPX F Pg. 56

part in inspiring fear on Daniel's part. Daniel's fear instead clearly traced to the grave job peril he suddenly found himself in beginning May 4. His supervisor Melidones had, on May 4, called out Daniel for mishandling the Bain Capital assignment, and on May 7, having been alerted to Daniel's receipt of packages including a gun at the workplace, had commenced an investigation into—and was soon well along the road to finding established—these infractions. These events, and the obvious potential they had to lead to Daniel's termination, reassignment, or other sanction, were, the Court finds, the source of Daniel's fear from May 4. The Court therefore concludes that Melidones's harassment of Daniel, to the extent found, did not materially interfere with Daniel's performance.

In sum, considering all of the *Harris* factors, and treating in the aggregate all established incidents of harassment whether on the basis of race, sexual orientation, and national origin, the Court finds that the harassment Daniel suffered does not rise to the level necessary to support a claim for a hostile work environment under Title VII. *See, e.g.*, *Mendez-Nouel v. Gucci Am., Inc.*, 542 F. App'x 12, 13 (2d Cir. 2013) (two incidents of touching, plus sexual banter, did not rise to level of hostile work environment); *Liburd v. Bronx Lebanon Hosp. Ctr.*, 372 F. App'x 137, 139–40 (2d Cir. 2010) (several comments, including "black ass," in combination with additional "crude and contemptible" behavior, did not rise to level of hostile work environment); *Alfano*, 294 F.3d at 376 (five sex-related incidents over four years, including repeated sexual innuendo, combined with harassment not related to sex, insufficient to support a jury verdict for hostile work environment). Most critically, for the reasons above, the incidents of harassment that the Court credits occurred were insufficiently severe or frequent to have materially affected Daniel's employment.

APPX F Pg. 57

CONCLUSION

For the foregoing reasons, the Court hereby awards judgment to T&M. The Clerk of Court is respectfully directed to close this case.[13]

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: July 12, 2018
New York, New York

[13] The Court wishes to compliment counsel for both parties for their professionalism and dedication. The quality of pretrial submissions and trial advocacy was quite high and greatly assisted the Court. The Court particularly wishes to thank plaintiff's counsel, the law firm of Debevoise & Plimpton, for taking on, pro bono, the representation of Mr. Daniel.

APPX F Pg. 58

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OTIS A. DANIEL,

Plaintiff,

-v-

T&M PROTECTION RESOURCES LLC,

Defendant.

----------X

13 **CIVIL** 4384 (PAE)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion & Order dated July 12, 2018, the Court hereby awards judgment to T&M; accordingly, the case is closed.

Dated: New York, New York
July 12, 2018

RUBY J. KRAJICK

Clerk of Court

BY: Kmarago

Deputy Clerk

APPX F PG. 59

APPENDIX

G

The United States District Court

for the Southern District of New York

order unseal motion for reconsideration

08/15/2018

case No. 13 Civ. 4384(PAE)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OTIS A. DANIEL,

Plaintiff,

-v-

T&M PROTECTION RESOURCES LLC,

Defendant.

13 Civ. 4384 (PAE)

ORDER

PAUL A. ENGELMAYER, District Judge:

The Court hereby unseals the Motion for Reconsideration, Dkt. 193, sealed by this Court's July 27, 2018 Order, Dkt. 195. The Court has received Otis Daniel's letter, Dkt. 196, which provides redacted copies of certain pages of the Motion for Reconsideration and its exhibits. With the Clerk of Court, the Court has replaced Dkt. 193 with those redacted versions. Now, in redacted form, Dkt. 193 may be, and hereby is, unsealed.

This case remains unclosed.

SO ORDERED.

Paul A. Engelmayer
United States District Judge

Dated: August 15, 2018
New York, New York

APPX G Pg. 60

APPENDIX

H

The United States District Court
for the Southern District of New York
opinion & order granting
summary judgment to T&M
02/19/2015
case No. 13 Civ. 4384(PAE)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OTIS A. DANIEL,

Plaintiff,

-v-

T&M PROTECTION RESOURCES LLC,

Defendant.

13 Civ. 4384 (PAE)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Pro se plaintiff Otis Daniel, a former fire safety director at 590 Madison Avenue in Manhattan ("590 Madison") brings claims of discrimination against the company that directly employed him there, T&M Protection Resources ("T&M"). Daniel alleges that he was subjected to a hostile work environment throughout his employment and ultimately terminated because of his race, perceived national origin, and/or perceived sexual orientation, and/or in retaliation for his complaints about the discriminatory treatment he experienced, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and New York State and New York City anti-discrimination statutes. Daniel also alleges that T&M violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, by denying him medical leave, and committed common law negligence by subjecting him to the discriminatory conduct of the building's security director.

Pending now is T&M's motion for summary judgment on all claims pursuant to Federal Rule of Civil Procedure 56. For the following reasons, T&M's motion is granted.

I. Background[1]

A. Daniel's Employment at T&M

Daniel is a 34-year-old black man from St. Vincent and the Grenadines, a small island in the Caribbean. Daniel Dep. 9–10. He moved to the United States at age 13. *Id.* at 10. Daniel identifies as gay, although he did not disclose his sexual orientation to his supervisors or co-workers at T&M. *Id.* at 247–48.

Daniel has worked as a security guard since 2005. *Id.* at 13. In late 2010, Daniel responded to an online advertisement for a fire safety director position with T&M, *id.* at 46–47, a global security and investigations firm based in New York City, T&M 56.1 ¶ 1. Tom Dolan, a T&M recruiter, interviewed Daniel and accepted his application. Daniel Dep. 46–47. To obtain a site assignment for Daniel, Dolan sent him to interview with various T&M clients including the managers of the UBS building and 590 Madison. *Id.* at 47–48.

At 590 Madison, Daniel interviewed with John Melidones, the security director, and Bill Wood, the assistant property manager. *Id.* at 48–51. About a week later, Dolan informed Daniel

[1] This account of the facts is drawn from the parties' submissions in support of and in opposition to T&M's motion for summary judgment, including Daniel's Second Amended Complaint ("SAC") (Dkt. 31); the Affidavit of Steven I. Gutstein in Support of T&M's Motion for Summary Judgment ("Gutstein Aff.") (Dkt. 67); the Affidavit of John Melidones in Support of T&M's Motion for Summary Judgment ("Melidones Aff.") (Dkt. 68); the Affidavit of Clinton Lisk in Support of T&M's Motion for Summary Judgment ("Lisk Aff.") (Dkt. 69); the Affidavit of Carmen Negron in Support of T&M's Motion for Summary Judgment ("Negron Aff.") (Dkt. 70); T&M's Rule 56.1 Statement ("T&M 56.1") (Dkt. 71); the Declaration of Meredith Cavallaro in Support of T&M's Motion for Summary Judgment ("Cavallaro Decl.") (Dkt. 73), and the attached transcript of Daniel's deposition ("Daniel Dep."); Daniel's Affirmation in Opposition to T&M's Motion for Summary Judgment ("Daniel Aff.") (Dkt. 75); Daniel's Sur-Reply in Further Support of his Opposition to T&M's Motion for Summary Judgment ("Daniel Sur-Reply"), which includes Daniel's Rule 56.1 Statement ("Daniel 56.1") (Dkt. 93); and the Declaration of Leonard Weintraub in Support of T&M's Motion for Summary Judgment ("Weintraub Decl.") (Dkt. 98). Citations to a party's 56.1 Statement incorporate by reference the documents cited therein.

that he had gotten the job. *Id.* at 49. Daniel replaced a white Caucasian male who had been fired for being rude to tenants. *Id.* at 81. In February 2011, Daniel began working at 590 Madison as an at-will employee. *Id.* at 52; SAC p. 13. Melidones was his direct supervisor. *Id.* at 166. Daniel initially worked the day shift, from 8 a.m. to 4 p.m. Daniel Dep. 51. Throughout Daniel's employment, Melidones also worked during the day, from 7 a.m. to 3 p.m. *Id.* at 55.

Daniel testified that he experienced significant harassment based on his race, perceived national origin, and perceived sexual orientation. During Daniel's first week on the job, for example, Melidones told him that property managers near 590 Madison generally "prefer to hire white security personnel" and that he was "paying [Daniel] too much." *Id.* at 81, 103. Another incident occurred in July 2011, when Melidones told Daniel "smile; you look like a gorilla; why the angry face, smile." *Id.* at 90. Daniel also testified that, in addition to various other racially motivated comments and behaviors, Melidones made statements related to his (incorrect) belief that Daniel is from England: He imitated Daniel's accent, asked Daniel to define large words, and told Daniel to "go back to England." *Id.* at 91, 92, 109. According to Daniel, Melidones also harassed Daniel based on his perception that Daniel is gay: In June or July 2011, for example, Melidones brushed up against Daniel's buttocks, asked about Daniel's sexual orientation, and informed Daniel that his son is gay. *Id.* at 230.

In September 2011, Daniel transferred to the night shift and began working from 4 p.m. to 12 a.m. *Id.* at 57–58. Because Melidones continued to work from 7 a.m. to 3 p.m., Daniel saw Melidones in person less frequently and for shorter periods of time. *See id.* at 67–68, 71, 150. However, Daniel testified that Melidones's harassment continued. In March 2012, for example, Melidones called Daniel around 6 or 7 p.m. and told him "I am at the Broadway show Mary Poppins. . . . I can see you as Mary Poppins; you will make a good Mary Poppins." *Id.* at

234. Similarly, on one occasion in May 2012, Melidones slapped Daniel on the back and said "man up, be a man." *Id.* at 149. Melidones categorically denies using any discriminatory language or otherwise harassing Daniel. Melidones Aff. ¶ 9.

Tensions between Daniel and Melidones came to a head on Friday, May 4, 2012. On that date, Melidones instructed Daniel to go upstairs to Bain Capital and speak with Bain's office manager about an employee who was going to be terminated. Daniel Dep. 112. Instead of going upstairs to the Bain office, Daniel called the office manager on the telephone. *Id.* at 113. Seconds later, Melidones called Daniel and launched into a "screaming, belligerent, profanity-laced tirade." *Id.* at 114. In the course of berating Daniel, Melidones called him a "fucking idiot" and "fucking nigger." *Id.* at 114–15.

On Monday, May 7, 2012, Daniel remained extremely upset about Melidones's conduct and felt physically unable to go to work. *See id.* at 117. Accordingly, he sent Melidones a text message claiming that he was sick. *Id.* No other fire safety directors were available that day, so Melidones worked Daniel's shift himself. Melidones Aff. ¶ 18. During the shift, a mail delivery person attempted to deliver a package for Daniel. *Id.* Because T&M forbids security guards from receiving mail or packages at their worksites, Melidones rejected the delivery and commenced an investigation. *Id.* ¶¶ 18–20. From speaking with other security guards, Melidones learned that Daniel had received multiple packages at the worksite, including a BB gun that had been delivered in March 2012. *Id.* ¶ 20.

On May 8, 2012, Daniel returned to work and learned about Melidones's investigation. Daniel Dep. 122, 205. Late that night, he sent Melidones a text message that said:

> I'd like to claim my sick day for yesterday 5/7/12. I understand you've a personal vendetta against me for maybe what transpired on Friday 5/4/12 with Bain Capital and me taking off yesterday due to illness. If this is the case John, please address it with T&M. The use of intimidation, threats, manipulation and lying about an

APPX H PG. 64

> employee causing him/her to resign or be terminated is unwarranted and unprofessional. I will be notifying T&M of your tactics.

Id. at 150–51; Daniel Sur-Reply, Ex. 2, at 58–60. The next day, May 9, 2012, Melidones served Daniel with a disciplinary write-up accusing him of having packages delivered to the worksite, including a package containing an imitation pistol. Daniel Dep. 207–08.

Daniel acknowledges that he had personal packages delivered to 590 Madison. *See, e.g.*, *id.* at 197 (discussing 17 packages Daniel had delivered to 590 Madison); SAC p. 16 ("I did not and will not dispute having personal packages delivered to the worksite."). He also concedes that the items delivered to his worksite included a Smith & Wesson BB gun that looked like a real gun, Daniel Dep. 177, 201, and that his possession of the BB gun may have run afoul of T&M's firearms policy, *id.* at 168–69, 174–75. In his defense, Daniel argues that he was not aware of T&M's unwritten policy prohibiting employees from receiving personal packages at work. *Id.* at 172. In fact, he testified, Melidones had affirmatively authorized his receipt of personal packages at 590 Madison. *Id.* at 183–85. Daniel also testified that he ordered a "toy gun" and had no idea that it would look so realistic or would qualify as a firearm. *Id.* at 177.

On May 15, 2012, Daniel appeared before a disciplinary committee composed of Melidones and four other T&M executives. *Id.* at 215. Daniel attempted to prove that Melidones had known about his personal package deliveries all along and was simply looking for an excuse to terminate him. *Id.* at 215–16. The committee was unreceptive to his arguments and recommended that Daniel be terminated. *Id.* at 216–17, 230; Gutstein Aff. ¶ 26.

On May 18, 2015, T&M's human resources director Toni Scarito notified Daniel of his termination via telephone. Gutstein Aff. ¶ 27. A "separation of service" form completed by Melidones states that Daniel "was having his personal pkgs and mail delivered to the lobby of his

APPX H Pg. 65

worksite" and "accepted delivery of an extremely realistic looking Smith and Wesson BB Gun." Daniel Sur-Reply, Ex. 22, at 192.

B. The DHR and EEOC Actions

On September 1, 2012, Daniel filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 125–28. He asserted claims of discrimination based on race, national origin, sex, and sexual orientation as well as a claim of retaliation. *Id.* Because his sexual orientation claims are cognizable under state but not federal law, the EEOC referred him to the New York State Division of Human Rights ("DHR"). SAC p. 21.

On September 5, 2012, Daniel filed a complaint with the DHR. Daniel Sur-Reply, Ex. 22, at 16–20. He asserted claims of discrimination based on race, national origin, and sexual orientation as well as claims of retaliation and sexual harassment. *Id.* T&M responded that Daniel had been terminated due to his unauthorized package deliveries and possession of a weapon. *Id.* at 131–35. Based on documentary submissions from Daniel and T&M, DHR concluded that Melidones's statements "may rise to a certain level of insensitivity but not to an actionable degree under discrimination law" and found that T&M had articulated "legitimate and nondiscriminatory business reasons" for Daniel's termination that were neither "pretextual nor otherwise unworthy of credence." *Id.* at 3–5. On March 4, 2013, the agency therefore issued a determination of "no probable cause" for the allegations in Daniel's complaint. *Id.* at 3. The DHR's order notified Daniel that he could appeal the agency's decision to the New York Supreme Court within 60 days. *Id.* at 4–5.

On April 18, 2013, the EEOC adopted the DHR's findings and closed its file on Daniel's complaint. SAC p. 44. It also issued a "Right to Sue" letter, notifying Daniel that he could file suit in federal or state court within 90 days. *Id.*

APPX H PG. 66

C. Procedural History of this Action

On June 24, 2013, Daniel filed the original complaint in this action. Dkt. 2. He named both T&M and Edward J. Minskoff Equities ("Minskoff"), the company that manages the 590 Madison property, as defendants. *Id.* On August 19, 2013, Daniel filed an Amended Complaint. Dkt. 11. On September 25, 2013, Minskoff moved to dismiss the Amended Complaint. Dkt. 24–26. On October 7, 2013, Daniel filed the SAC. Dkt. 31.

On October 28, 2013, Minskoff moved to dismiss the SAC. Dkt. 33–34. Minskoff argued, among other things, that: (1) this Court lacks jurisdiction to hear Daniel's Title VII claim against Minskoff because Daniel filed his DHR and EEOC claims against only T&M, not Minskoff; (2) the federal and state statutory claims should be dismissed because Minskoff was not Daniel's employer and because the SAC failed to adequately allege wrongdoing by Minskoff; and (3) the common law negligence claim should be dismissed because Minskoff did not have a duty to protect Daniel, the SAC alleges no negligent conduct by Minskoff, and the SAC alleges only emotional harm.

On January 15, 2014, after briefing, the Court granted Minskoff's motion as to Daniel's negligence claim but denied it as to all other claims. Dkt. 43, *reported at Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302 (S.D.N.Y. 2014). The Court held, *inter alia*, that the SAC contained sufficient factual allegations to support a plausible inference that Minskoff and T&M jointly employed Daniel and that Melidones was an agent of both companies, such that Minskoff could be held liable for Melidones's discriminatory conduct. *Id.* at 19, 21. As to Daniel's negligence claim, however, the Court noted that "allegations of employment discrimination cannot be transmuted into tort claims sounding in negligence." *Id.* at 22. The Court therefore

dismissed Daniel's negligence claim, while preserving his federal and state employment discrimination claims.

On January 29, 2014, the Court granted Daniel's application for pro bono counsel and directed the Office of Pro Se Litigation to seek limited discovery counsel for him. Dkt. 44. On February 11 and March 10, 2014, two attorneys filed notices of appearance indicating that they would serve as pro bono counsel for Daniel. Dkt. 45, 50. In late April 2014, however, Daniel directed his counsel to withdraw and informed the Court that he had decided to proceed *pro se*. Dkt. 53–54, 56. On May 2, 2014, the Court authorized pro bono counsel's withdrawal. Dkt. 57.

On May 9, 2014, Daniel and Minskoff submitted a stipulation of dismissal for the Court's approval. Dkt. 61. On May 12, 2014, the Court so-ordered the stipulation. Dkt. 62.

Several months later, on November 13, 2014, Daniel sought to vacate the stipulation of dismissal. Dkt. 100. Daniel argued that he was "misled into believing that [Minskoff] as a matter of law could not be held fully liable for any of [his] claims alleged because [Minskoff] was not [his] or [his supervisor's] direct employer" and that he "did not understand the meaning of dismissal with 'prejudice'" *Id.* at 1. In response, counsel for Minskoff produced their email correspondence with Daniel, which unambiguously demonstrated that they had not behaved improperly in procuring the settlement agreement. *See* Dkt. 102–03. The Court therefore denied Daniel's motion to vacate the stipulation of dismissal with Minskoff. Dkt. 105.

On July 31, 2014, T&M—the sole remaining defendant—moved for summary judgment. Dkt. 65, 66 ("T&M Br."). At Daniel's request, the Court approved an expedited briefing schedule. Dkt. 78. On August 4, 2014, Daniel submitted his opposition. Dkt. 75 ("Daniel Aff."). On August 21, 2014, T&M filed its reply. Dkt. 80 ("T&M First Reply"). On September 9, 2014, Daniel requested permission to file a sur-reply, Dkt. 90, and the Court granted his

APPX H Pg. 68

motion, Dkt. 91. On September 23, 2014, Daniel filed his sur-reply. Dkt. 93 ("Daniel Sur-Reply"). And on October 23, 2014, T&M filed its second reply in support of its motion for summary judgment. Dkt. 97–98 ("T&M Second Reply").

II. Applicable Legal Standards

To prevail on a motion for summary judgment, the movant must "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

To survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). Those materials "'must be admissible themselves or must contain evidence that will be presented in admissible form at trial.'" *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 169–70 (2d Cir. 2014) (quoting *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001)). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," because "conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (alterations in original) (citation omitted). Only disputes over "facts that might affect the outcome of the suit under the governing law" will preclude a grant of summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). In determining whether there are genuine issues of material fact, the Court is "'required to resolve all ambiguities and draw all

APPX A Pg. 69

permissible factual inferences in favor of the party against whom summary judgment is sought.'" *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

In considering T&M's motion, the Court is mindful that Daniel is a *pro se* litigant whose submissions must be construed to "raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (citation and emphasis omitted). However, this forgiving standard "does not relieve plaintiff of his duty to meet the requirements necessary to defeat a motion for summary judgment." *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003) (citation omitted). "[B]ald assertion[s]" by a *pro se* litigant, "'completely unsupported by evidence, [are] not sufficient to overcome a motion for summary judgment.'" *Geldzahler v. N.Y. Med. Coll.*, 746 F. Supp. 2d 618, 620 n.1 (S.D.N.Y. 2010) (quoting *Lee v. Coughlin*, 902 F. Supp. 424, 429 (S.D.N.Y. 1995)).

III. Discussion

Daniel asserts numerous claims under federal and state law. The Court first addresses Daniel's state and city statutory claims, which the Court finds procedurally barred. The Court then addresses, in turn, Daniel's Title VII claims, his FMLA claim, and his common law negligence claim.

A. State Statutory Claims

Daniel asserts claims under New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL") for race, national origin, and sex discrimination as well as retaliation. *See* SAC p. 1–3. T&M argues that these claims are procedurally barred by the "election of remedies" provisions in the NYSHRL and NYCHRL. T&M Br. 5. Those statutes provide that a person who files a complaint with either the DHR or the New York City

APPX H Pg. 70

Commission on Human Rights ("Commission") thereby waives his right to sue in court. *See* N.Y. Exec. Law § 297(9) ("Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction . . . *unless* such person had filed a complaint hereunder or with any local commission on human rights." (emphasis added)); N.Y. City Admin. Code § 8-502(a) (similar). Accordingly, courts are required to dismiss suits if the plaintiff previously lodged a complaint with the DHR or the Commission. *See id.* This bar applies in federal as well as state court. *See York v. Ass'n of the Bar of City of N.Y.*, 286 F.3d 122, 127 (2d Cir. 2002); *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 74 n.3 (2d Cir. 2010) ("[A] state law depriving its courts of jurisdiction over a state law claim also operates to divest a federal court of jurisdiction to decide the claim.").

Here, Daniel's complaint to the DHR expressly included claims of race discrimination, national origin discrimination, sexual orientation discrimination, sexual harassment, and retaliation—the same claims Daniel asserts in this lawsuit. *See* Daniel Sur-Reply, Ex. 22, at 17. After reviewing evidence submitted by Daniel and by T&M, the DHR concluded that there was "no probable cause" to believe that any unlawful conduct occurred. *Id.* at 3. "When the [DHR] has issued a finding of no probable cause . . . plaintiff's claims . . . are barred by the [NYSHRL and NYCHRL] election of remedies provisions because [plaintiff] has already litigated the claims before the [DHR]." *Guardino v. Vill. of Scarsdale Police Dep't*, No. 09 Civ. 8599 (CM), 2011 WL 4000999, at *2 (S.D.N.Y. Sept. 6, 2011); *see also, e.g., Desardouin v. City of Rochester*, 708 F.3d 102, 106 (2d Cir. 2013) ("The District Court properly ruled that [plaintiff's] NYSHRL claim was barred on the basis of election of remedies," which "precludes resort to courts after claims have been filed with a local commission on human rights."). Accordingly, the Court must dismiss all of Daniel's claims brought under the NYSHRL and NYCHRL.

B. Title VII Hostile Work Environment Claims

1. Relevant Facts

Daniel alleges that throughout his employment at T&M, he was harassed based on his race, perceived national origin, and perceived sexual orientation. SAC pp. 23–30. At his deposition, Daniel testified that this pattern of harassment began during his first week on the job, when Melidones told him that property managers in the "Plaza District," the area around 590 Madison, "prefer to hire white security personnel" and that Melidones believed he was "paying [Daniel] too much." Daniel Dep. 81, 103. Between February and September 2011, when Daniel and Melidones worked overlapping shifts, Melidones repeatedly told Daniel "you are not black because you don't wear your pants down your waist; you don't swagger; or you don't what up." *Id.* at 89–90. Similarly, in July 2011, Melidones told Daniel "smile; you look like a gorilla; why the angry face, smile." *Id.* at 90. And at some point in 2012, Melidones asked Daniel "are you going to vote for your man, Obama?" *Id.* at 109.

In addition to these comments, Melidones repeatedly watched Daniel nap and change clothes in the locker room. *Id.* at 105. Daniel believes that Melidones wanted to "keep track" of him because he was a "black male in this building that houses millionaires." *Id.* at 106. Also, in December 2011, a laptop computer was stolen from a business that rented space at 590 Madison. *Id.* at 106–07. The video footage showed a black male with a bald head taking the laptop, and Melidones asked Daniel if it was him. *Id.* at 107.

According to Daniel, the final instance of race-based harassment occurred on May 4, 2012. On that date, Melidones instructed Daniel to go upstairs to Bain Capital and speak with Bain's office manager about an employee who was going to be terminated. *Id.* at 112. Instead of going upstairs, Daniel called Bain's office manager on the telephone. *Id.* at 113. Seconds

later, Melidones called Daniel and launched into a "screaming, belligerent, profanity-laced tirade." *Id.* at 114. In the course of berating Daniel, Melidones called him a "fucking idiot" and "fucking nigger." *Id.* at 114–15. Daniel later learned that Bain had instructed T&M executives to handle the termination discretely, so no one—including Daniel—should have been told about it. *Id.* at 140. Daniel therefore inferred that he had been "set up." *Id.* at 143.

Daniel also testified that Melidones harassed him based on his perceived national origin. Although Daniel is from St. Vincent and the Grenadines, an island in the Caribbean, Melidones believed, based on Daniel's accent, that he is from England. *Id.* at 9–10, 91. Accordingly, Melidones often spoke in an "imitated English accent," asked Daniel if he knew "the meaning of large words," and told Daniel to "go back to England." *Id.* at 91, 92, 109. When Daniel showed Melidones his birth certificate in an effort to correct Melidones's misperception and bring an end to his harassing behavior, Melidones asked Daniel why he came to "this country" rather than staying in his "own country." *Id.* at 109. Later, Melidones sang calypso to Daniel at least once. *Id.* at 132.

As to Daniel's perceived sexual orientation, the first offensive comment was made by Joe Greisch, the property manager of 590 Madison. *Id.* at 74. Soon after Daniel began working there, Greisch "made a reference to the clothes [Daniel] was wearing." *Id.* Daniel interpreted this comment as related to Greisch's "perception of [Daniel's] sexual orientation." *Id.* Daniel therefore began entering the building through a back entrance to avoid encountering Greisch. *Id.* In a similar vein, Melidones once came into the locker room while Daniel was changing and said, "I didn't hire you to be beautiful; I want a supervisor, not a God." *Id.* at 234. Several months later, in March 2012, Melidones simultaneously targeted Daniel's perceived national origin and sexual orientation: He called Daniel around 6 or 7 p.m., during Daniel's shift, and

told him "I am at the Broadway show Mary Poppins. . . . I can see you as Mary Poppins; you will make a good Mary Poppins." Daniel Dep. 234.

Daniel also objects to a pattern of crude banter between Melidones and another T&M employee, Manny Padermo. During a recorded conversation with Daniel, Padermo explained that he "used to goof on [Melidones's] name." Daniel Sur-Reply, Ex. 10, at 4. Melidones would respond by calling Padermo "Manny the homo," mocking Padermo's last name. *Id.*; *see also* Daniel Dep. at 232. Daniel felt that Melidones was directing the slur at him. Daniel Sur-Reply, Ex. 10, at 4. At some point, Melidones also "lean[ed] into [Daniel], into [his] right ear and sa[id], 'homo.'" Daniel Dep. 232.

On another occasion, Melidones "brushed up against [Daniel's] buttocks" with "his genitalia" and asked Daniel "are you gay?" *Id.* at 230. When Melidones "saw how upset [Daniel] was, he tried to appease [Daniel] by saying his son, Anthony Melidones," who later began working at 590 Madison, "is gay." *Id.* After that incident, Daniel interpreted Melidones's pattern of watching him nap and change clothes in the locker room as a form of sexual harassment rather than racially motivated harassment. *See id.* at 231. Relatedly, when a "gay hotel" opened in Times Square in March 2012, Anthony Melidones asked Daniel if he was going to go. *Id.* at 249. The last instance of alleged anti-gay harassment occurred on May 8, 2012. Reacting to the Bain Capital incident that had occurred the previous week, Melidones "slapped [Daniel] physically hard on [his] . . . right shoulder and said to [Daniel], 'man up, be a man.'" *Id.* at 133; *see also id.* at 149.

Melidones categorically denies making these statements. *See* Melidones Aff. ¶ 9. Daniel testified that no one witnessed Melidones's harassing comments and behavior towards him, *see* Daniel Dep. at 86, 243, and that none of the discriminatory statements were made in writing or

during an audio recording, *see id.* at 115. Daniel also concedes that, aside from one anonymous phone call in August 2011, he never complained about Melidones's behavior during his tenure at T&M. *See id.* at 119, 261. Accordingly, in an attempt to corroborate his testimony, Daniel submitted certified transcripts of recorded phone conversations he had with former co-workers. Their statements, however, provide limited support for Daniel's account of Melidones's conduct: Even after being fired from his job at 590 Madison, former T&M security guard Mo Agbaje emphatically stated that Melidones had never used racial or ethnic slurs against him. Daniel Sur-Reply, Ex. 12, at 4.[2] Another former T&M employee, Paul Sylvio, stated that Melidones made racial remarks—specifically, jokes about Sylvio's Haitian heritage—about "two times" during his three or four years of employment. *Id.* Ex. 11, at 2–4. To be sure, Padermo stated that he agreed with Daniel that Melidones used "racial slurs" and "ethnic jokes" to "belittle people." *Id.* Ex. 10, at 3–4. But Padermo's statement is potentially impeachable, insofar as, in the recorded conversation, Padermo insisted that Daniel "cannot use anything [from the conversation] without [his] authorization." *Id.* at 10. Whether Padermo would provide the same testimony if under oath is unknown.

For the purpose of resolving T&M's motion for summary judgment, however, the Court assumes that a jury would credit Daniel's testimony about each incident of harassment he experienced and would reject all contrary evidence. The decisive question is whether, accepting Daniel's account of the facts, a reasonable jury could find in Daniel's favor on his hostile work environment claims. If so, Daniel has presented a genuine issue of material fact, and the Court must deny T&M's motion for summary judgment on these claims.

[2] Daniel also produced an email from Barby Woodward, the manager of a restaurant in 590 Madison, which stated that "[i]f I had witnessed the inappropriate treatment I would definitely testify as such as it would be the right thing to do but I did not." Daniel Sur-Reply, Ex. 1, at 21.

2. Applicable Legal Standards

Title VII "prohibits the creation of a hostile work environment" based on race, color, religion, sex, or national origin.[3] *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013). The Second Circuit has described the elements of a hostile work environment as follows:

> To state a claim for a hostile work environment . . . , a plaintiff must plead facts that would tend to show that the complained of conduct: (1) "is objectively severe or pervasive—that is, . . . creates an environment that a reasonable person would find hostile or abusive"; (2) creates an environment "that the plaintiff subjectively perceives as hostile or abusive"; and (3) "creates such an environment because of the plaintiff's [protected class]."

Patane v. Clark, 508 F.3d 106, 113 (2d Cir. 2007) (quoting *Gregory v. Daly*, 243 F.3d 687, 691–92 (2d Cir. 2001)). Importantly, Title VII "does not set forth 'a general civility code for the American workplace.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale*, 523 U.S. at 80). Courts must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). To be actionable, "conduct must be extreme to amount to a change in the terms and conditions of employment." *Id.*

"[A] work environment's hostility should be assessed based on the 'totality of the circumstances.'" *Patane*, 508 F.3d at 113 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). The Court considers Daniel's allegations "cumulatively in order to obtain a realistic view of the work environment." *Aulicino v. N.Y. City Dep't of Homeless Servs.*, 580 F.3d 73, 83

[3] The Court construes Daniel's sexual orientation discrimination claims as sexual harassment claims. Under Title VII, "workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (approvingly citing *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997)). This includes "male-on-male sexual harassment." *Id.*

(2d Cir. 2009) (citation omitted). Factors that may be considered include: "[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee's work performance." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 102 (2d Cir. 2010) (quoting *Harris*, 510 U.S. at 23) (internal quotation marks omitted).

3. Discussion

As a threshold matter, some of the conduct Daniel complains of does not appear to be related to his race, perceived national origin, or sex. Such incidents "must be removed from consideration." *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002). Even if "they can support an inference that [Daniel] was mistreated, they do not support an inference that this was because of" his membership in a protected class. *Id.*; *see also Vito v. Bausch & Lomb Inc.*, 403 F. App'x 593, 595 (2d Cir. 2010) (summary order) ("[I]t is axiomatic that in order to establish a . . . hostile work environment . . . a plaintiff must demonstrate that the conduct occurred because of her [membership in a protected class]." (alterations and omissions in original) (citation omitted)).

In particular, the Court discounts Daniel's testimony that Melidones repeatedly watched him nap and change clothes in the locker room. Daniel speculates that Melidones did so because of his race, *see* Daniel Dep. 105–06, or as a form of sexual harassment, *see id.* at 231. However, Daniel has provided no evidence (*e.g.*, contemporaneous or even after-the-fact statements by Melidones) to support the inference that Melidones's watching him in this workspace, not an act inherently indicative of hostility or bias, was driven by prohibited animus. And there is record evidence of a neutral motive that could account for Melidones's presence: ensuring that Daniel, who had issues with lateness, began his shift on time. *See* Daniel Sur-Reply, Ex. 2, at 34 (text from Melidones to Daniel stating: "The lateness . . . must stop. I need consistency. I gave u the

4x12 so u could handle ur personal business during the day."); *id.* at 53 (text from Melidones to Daniel stating: "Please don't be late."). Likewise, Melidones had an obviously reasonable, non-discriminatory basis for asking Daniel if he had stolen a laptop in December 2011: The footage from the security camera showed that the thief was a bald black male; Daniel was in the building at the time of the theft and fit that profile. *See* Daniel Dep. at 107. Other statements—for instance, asking Daniel to define large words, *id.* at 92, or vaguely commenting on his clothing, *id.* at 74—may well be viewed as obnoxious, but, on this record, they have no apparent link to Daniel's membership in a protected class. Daniel has not provided any evidence to support an inference that these statements were made because of his race, national origin, or sex, or that employees with different demographic characteristics were not subjected to similarly obnoxious treatment. To the contrary, Daniel testified that Melidones routinely called "many" T&M employees names such as "buffoons, idiots, useless and incompetent." *Id.* at 211.

As to the remaining incidents, the Court considers them in the aggregate. Two modes of analysis are useful. First, the Court analyzes these incidents with attention to the four factors articulated by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Second, to assess whether there was a hostile work environment, the Court compares the environment to which Daniel was subjected to those at issue in cases in which Second Circuit and other courts have made such an assessment.

The first factor identified in *Harris* is frequency. *See* 510 U.S. at 23. "For racist comments, slurs, and jokes to constitute a hostile work environment, there must be 'more than a few isolated incidents of racial enmity,' meaning that '[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.'" *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (alteration in original) (citations omitted). But, as recounted by Daniel,

APPX H Pg. 78

the incidents ostensibly motivated by his protected characteristics occurred sporadically and relatively infrequently. *See, e.g.*, Daniel Dep. 132 (characterizing Melidones's harassment as "random" and, even in May 2012, "unexpected"). The "episodic" incidents Daniel endured were not "sufficiently continuous and concerted in order to be deemed pervasive." *Alfano*, 294 F.3d at 374. *Compare Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (finding triable issue as to whether "discriminatory intimidation, ridicule, and insult" was "pervasive" where incidents were "routine" and occurred "almost daily"); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 70, 75–76 (2d Cir. 2001) (finding a triable issue where a supervisor touched plaintiff in unwelcome manner "constantly," at least on a "daily basis," and frequently engaged in other harassing behavior), *with Rios v. Buffalo & Fort Erie Pub. Bridge Auth.*, 326 F. App'x 612, 614 (2d Cir. 2009) (summary order) (finding no triable issue where plaintiff was exposed to "sexually explicit and ethnically derogatory literature" on an "occasional and episodic" basis); *Negron v. Rexam Inc.*, 104 F. App'x 768, 770 (2d Cir. 2004) (summary order) (finding no triable issue where "on a handful of occasions [plaintiff's] coworker addressed him using a racial epithet, including once over the loudspeaker").

As to the second *Harris* factor, severity, it is difficult to draw a clear line between conduct that is merely inappropriate and conduct that is sufficiently serious to support a hostile work environment claim. *See Harris*, 510 U.S. at 23. However, it is relevant that the most severe incidents were isolated, whereas Melidones's more frequent behavior toward Daniel was comparatively benign. *See Curtis v. Airborne Freight Corp.*, 87 F. Supp. 2d 234, 247 (S.D.N.Y. 2000) ("As a general rule, hostile work environment claims in the Second Circuit have survived summary judgment in cases where the record reflects either a continuous and repeated pattern of explicit racial slurs or a few particularly severe incidents of discrimination."). For instance,

APPX H Pg. 79

Melidones used a racial slur while yelling at Daniel on one occasion. Daniel Dep. 115. That single incident, although reprehensible, cannot, by itself, sustain a hostile work environment claim. *See Schwapp*, 118 F.3d at 110; *see also Augustin v. Yale Club of N.Y. City*, No. 03 Civ. 1924 (KMK), 2006 WL 2690289, at *22 (S.D.N.Y. Sept. 15, 2006) (collecting cases), *aff'd*, 274 F. App'x 76 (2d Cir. 2008) (summary order). And the harassing behavior Melidones engaged in multiple times—namely, telling Daniel he is "not black," Daniel Dep. 89–90, and speaking in an imitated English accent, *id.* at 91—are less egregious. Considering the evidence favoring Daniel cumulatively, "the allegations against [T&M] involve episodes of name-calling, inappropriate behavior by a supervisor, and other perceived slights, which, however regrettable, do not constitute a hostile work environment." *Augustin*, 274 F. App'x at 77.

As to the third *Harris* factor, Daniel does not claim that Melidones's behavior was threatening or humiliating. *See Harris*, 510 U.S. at 23. To the contrary, Daniel testified that Melidones never threatened him, Daniel Dep. 154,[4] and never harassed him in front of others, *id.* at 86, 243. Accordingly, while summary judgment might be inappropriate if Melidones had physically threatened Daniel or humiliated him in front of his co-workers, *see, e.g.*, *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 21, 23–24 (2d Cir. 2012) (grant of summary judgment for defendant vacated where plaintiffs were insulted in front of co-workers and threatened with physical violence); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70–71 (2d Cir. 2000) (grant of summary judgment reversed where at least one racially motivated comment was "physically threatening"); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 439 (2d Cir. 1999) ("Perhaps no single act can more quickly alter the conditions of

[4] Daniel did testify that Melidones threatened to terminate him if he took too many days off, *id.* at 152–54, but that threat is unrelated to Daniel's hostile work environment claim.

APPX H Pg. 80

employment and create an abusive working environment than the use of an unambiguously racial epithet such as nigger by a supervisor *in the presence of his subordinates*." (emphasis added) (citation omitted)), *abrogated on other grounds by Burlington*, 548 U.S. 53, Daniel's testimony supports the conclusion that the harassment he experienced, although certainly not trivial, was not sufficiently severe to sustain a hostile work environment claim.

The fourth *Harris* factor is whether the alleged harassment interfered with the employee's work performance. *See Harris*, 510 U.S. at 23. The evidence here gives at best limited support for such a finding. Daniel does not allege that Melidones directly undermined him, for instance by subjecting him to "disproportionately burdensome work assignments" or "sabotage." *Raniola v. Bratton*, 243 F.3d 610, 621 (2d Cir. 2001); *see also, e.g., Howley v. Town of Stratford*, 217 F.3d 141, 154–56 (2d Cir. 2000) ("diminishing the respect accorded [plaintiff] by subordinates and thereby impairing her ability to lead" contributes to a hostile work environment); *Carrero v. N.Y. City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (denying plaintiff "adequate training" contributes to a hostile work environment because plaintiff is deprived "of a fair and equal opportunity to succeed at her position"). Nor does Daniel claim that Melidones's conduct was so unsettling that he could not successfully complete his job responsibilities.[5] *See Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 59 (2d Cir. 2004) (finding no triable issue where plaintiff did not claim "that the incidents were physically threatening or humiliating, or that they interfered with her ability to do her job"). And, given Daniel's testimony that he experienced only sporadic harassment, the Court has no other basis on which to infer that Melidones's conduct could have unreasonably interfered with Daniel's work performance.

[5] With one exception: Daniel testified that he felt unable to go to work on one occasion—the first workday after Melidones used a racial slur on May 4, 2012—but he returned to work, apparently without issue, the day after that. *See* Daniel Dep. 115–17.

APPX H PG. 81

Stepping back from this analysis of discrete factors, it is useful to measure the conduct to which Harris was subjected—essentially that of Melidones—against the conduct at issue in cases in this Circuit in which a hostile work environment has (and has not been) found. This analysis confirms that Melidones's conduct, viewed in totality, although offensive and inappropriate, did not rise to the level of being sufficiently "severe or pervasive," *Patane*, 508 F.3d at 113, to "amount to a change in the terms and conditions of employment," *Faragher*, 524 U.S. at 788, so as to support a finding of a hostile work environment.

The Second Circuit's decision in *Rivera v. Rochester Genesee Regional Transportation Authority*, 743 F.3d 11 (2d Cir. 2012), is particularly instructive. There, a plaintiff testified that a co-worker repeatedly called him a "spic" both in and out of his presence and frequently led other co-workers in a chant that referred to plaintiff as a "fat f***" and a "Taco Bell." *Id.* at 16. Several co-workers also harassed, bullied, and threatened the plaintiff on a regular basis, including by tampering with his time card and swerving a car at him. *Id.* at 16–17. This conduct "interfered with his ability to do his job." *Id.* at 20. The Second Circuit found that these facts presented "a close call." *Id.* The Circuit ultimately held that the plaintiff had provided "(barely) enough evidence" to survive summary judgment, *id.* at 23, because: (1) plaintiff's co-workers repeatedly used ethnic slurs in a way that created an abusive working environment; (2) plaintiff's testimony was corroborated by other witnesses; and (3) the harassment included "extensive bullying and physical harassment" as opposed to "mere offensive utterance[s]." *Id.* at 21 (alteration in original) (citation omitted). The facts here are substantially less stark. In particular, (1) Daniel testified that Melidones used a racial slur during a single isolated incident, and directed an anti-gay slur at him on one other occasion; (2) Daniel has not offered any corroborating evidence; and (3) apart from the isolated incidents in which Melidones brushed

against Daniel's buttocks and slapped him on the shoulder, Daniel did not testify that he was subjected to threats, assaults, or other physical harassment. Because Daniel's evidence is far weaker than the evidence presented in *Rivera*, a case the Second Circuit found "a close call," it is not sufficient to survive T&M's motion for summary judgment.

Further confirmation comes from comparing the facts here to the facts of hostile work environment cases in this Circuit in which summary judgment has been granted for defendant employers. In a number of such cases, the plaintiff employee experienced equally substantial or meaningfully greater harassment than Daniel did.

In *Mendez-Nouel v. Gucci Am., Inc.*, for example, the plaintiff experienced "two instances of touching, . . . workplace banter about a supervisor's sexual orientation and nightlife, and a single occasion where a supervisor told [plaintiff] he was gay but '[y]ou just don't know it.'" 542 F. App'x 12, 13 (2d Cir. 2013) (summary order). This Court concluded that the episodes plaintiff complained of were "too episodic" and "insufficiently serious" to have materially altered the conditions of plaintiff's employment and therefore granted summary judgment for the employer. *Mendez-Nouel v. Gucci Am., Inc.*, No. 10 Civ. 3388 (PAE), 2012 WL 5451189, at *11 (S.D.N.Y. Nov. 8, 2012); *see also id.* (collecting cases). The Second Circuit affirmed, noting that, "[t]aken together, the alleged conduct does not rise to the level of a hostile work environment." *Mendez-Nouel*, 542 F. App'x at 13.

Similarly, in *Liburd v. Bronx Lebanon Hospital Center*, the District Court granted summary judgment, and the Second Circuit affirmed, where the plaintiff's supervisor:

> (1) ignored and spoke to her harshly at meetings; (2) scolded her for not following the chain of command in seeking consent to attend a conference; (3) threatened transfer to another department; (4) denied transfer to the supervisor of her choice; (5) gave her extra duties . . . ; (6) stripped her of certain duties; (7) referred to her as "black ass" on three occasions; (8) closely monitored her; (9) gave unrealistic time periods to [complete tasks]; (10) eliminated programs . . . that Plaintiff had implemented . . . ;

APPX H Pg. 83

> (11) declined to rebid for [plaintiff's program]; and (12) ultimately terminated Plaintiff and replaced her with . . . a white female.

No. 07 Civ. 11316 (HB), 2009 WL 900739, at *1 (S.D.N.Y. Apr. 3, 2009), *aff'd*, 372 F. App'x 137 (2d Cir. 2010) (summary order). Viewing the circumstances as a whole, the District Court held that "the evidence merely shows that [plaintiff's supervisor] did not treat her well; it does not, however, rise to the level necessary to make out a hostile work environment claim." *Id.* at *8. The Second Circuit agreed that, "notwithstanding the crude and contemptible character of what is alleged," the supervisor's conduct was "not sufficient to raise a genuine issue to be tried as to severity or pervasiveness." *Liburd*, 372 F. App'x at 140.

Likewise, in *Lewis v. City of Buffalo Police Department*, plaintiff claimed that she was subjected to "inappropriate and hostile comments" on a "daily, or nearly daily" basis. No. 02 Civ. 0735 (CF), 2007 WL 4191810, at *11 (W.D.N.Y. Nov. 21, 2007), *aff'd*, 311 F. App'x 417 (2d Cir. 2009) (summary order). As part of this "barrage" of insults, plaintiff's supervisor called her "Queen Bee," meaning "Queen Bitch," and referred to her daughter as "Kizzy," the name of a fictional runaway slave. *Id.* The District Court granted summary judgment for the employer, and the Second Circuit affirmed: The Circuit found that, although plaintiff's supervisor's pattern of referring to plaintiff by "vulgar or derogatory names" was "unprofessional," it was insufficient "to show that her workplace 'was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment.'" *Lewis*, 311 F. App'x at 421–22 (quoting *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004)).

Similarly, in *Figueroa v. City of New York*, the District Court granted summary judgment, and the Second Circuit affirmed, where plaintiff experienced "five potentially inappropriate comments, two pranks, a few acts of mistreatment of her property and threats of violence, and at least ten adverse personnel decisions." 118 F. App'x 524, 525 (2d Cir. 2004)

APPX H Pg. 84

(summary order). During some of the most serious incidents of harassment, plaintiff's co-workers threatened to beat her, and one co-worker attempted to hit her with his car. *Figueroa v. City of New York*, 198 F. Supp. 2d 555, 565 (S.D.N.Y. 2002). The Circuit held that these "offensive" incidents were "'too few, too separate in time, and too mild . . . to create an abusive working environment.'" *Figueroa*, 118 F. App'x at 526 (quoting *Alfano*, 294 F.3d at 380) (omission in original).

And in *Fraser v. Fiduciary Trust Co. International*, plaintiff's supervisor called him a "nigger," and his co-workers made various inappropriate remarks about African-Americans, for instance "that African-Americans are lazy and on welfare." No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *8 (S.D.N.Y. Aug. 25, 2009), *aff'd*, 396 F. App'x 734 (2d Cir. 2010) (summary order). The District Court acknowledged that plaintiff's supervisor's remarks "may denote racial hostility" but held that the "offensive utterances . . . fall below the threshold of a Title VII hostile work environment claim." *Id.* The Second Circuit affirmed, finding that plaintiff's arguments "lack[ed] merit." *Fraser*, 396 F. App'x at 735.

In sum, as in these cases, Daniel's testimony indicates that he was mistreated—based in part on his race, perceived national origin, and perceived sexual orientation. The Court should not be taken as countenancing such "crude and contemptible" conduct. *See Liburd*, 372 F. App'x at 140. However, measured against the standards set by the case law, Daniel's mistreatment does not rise to the level of "severe or pervasive" harassment so as to create a "hostile or abusive" work environment. *Patane*, 508 F.3d at 113. On his Title VII claim of such an environment, therefore, T&M's motion for summary judgment must be granted.

APPX H Pg. 85

B. Discriminatory Termination

1. Relevant Facts

In late 2010, Daniel responded to an online advertisement for a fire safety director position with T&M. Daniel Dep. 46–47. In December 2010, T&M recruiter Dolan interviewed Daniel and accepted his application. *Id.* at 46–47. Dolan then sent Daniel to interview with various T&M clients, including the managers of 590 Madison. *Id.* at 47–48.

In January 2011, Daniel interviewed with and was hired by Melidones, T&M's security director for 590 Madison, and Wood, the assistant property manager. *Id.* at 48–52; Daniel Aff. p. 8. Daniel replaced a white Caucasian male who had been fired because of unprofessional conduct; T&M had received "numerous complaints of him being rude to tenants." Daniel Dep. 81. At that time, "the majority of the staff that worked at 590 Madison Avenue were minorities of some kind." *Id.* at 103. According to T&M, the staff was comprised of nearly 80 security guards and fire safety directors, of whom about one-third were African-American, and two-thirds were non-white. Gutstein Aff. ¶ 8; *id.* Ex. C. In February 2011, Daniel began working at 590 Madison with Melidones as his direct supervisor. Daniel Dep. 52, 166.

At some point in 2011, Daniel, according to his own testimony, began having problems receiving his personal mail at home. *Id.* at 183. He therefore had packages and some other mail delivered to 590 Madison. *Id.* On January 25, 2012, after Daniel had received "numerous" packages at his worksite, Daniel received a letter from Capital One. *Id.* On the envelope, Melidones had written, "don't fucking make this happen again; this is fucking unacceptable" in red ink. *Id.* at 183–84. Daniel asked Melidones about the letter and told him that "going forward, I will not be receiving any personal packages anymore." *Id.* at 183. Melidones responded, according to Daniel, that Daniel was not permitted to receive mail at work but could

"continue receiving packages as long as it's not a hundred packages or more." *Id.* at 184. Daniel explained that this distinction was sensible because mail was delivered to the Minskoff offices, while packages were delivered to the lobby or messenger center. *Id.* at 186–87.

Additionally, as recounted above, Daniel claims that Melidones continually harassed him based on his race, perceived national origin, and perceived sexual orientation. *See* pp. 12–15, *supra*. As noted, a particularly serious incident occurred on Friday, May 4, 2012. On that date, Melidones instructed Daniel to go upstairs to the Bain Capital offices and speak with Bain's office manager about an employee who was going to be terminated. Daniel Dep. 112. Instead of physically going to Bain's offices, Daniel called the office manager on the telephone; she sounded "confused" and "perplexed." *Id.* at 113. Seconds later, Melidones called Daniel and launched into a "screaming, belligerent, profanity-laced tirade." *Id.* 114. Daniel later learned that Bain had instructed T&M executives to handle the termination discretely, so no one—including Daniel—should have been told about it. *Id.* at 140. In the course of berating Daniel, Melidones called him a "fucking idiot" and "fucking nigger." *Id.* at 114–15.

On Monday, May 7, 2012, Daniel testified, he felt he "physically could not work at that site anymore" because he "could not face the sight of John [Melidones]." *Id.* at 117. He therefore sent Melidones a text message claiming that he was "sick" with a "head col[d], headache, runny nose, soar [sic] throat." Daniel Sur-Reply, Ex. 2, at 54. After some back-and-forth about who was responsible for finding a replacement, Melidones grudgingly approved Daniel's request to take the day off. *Id.* at 54–58; Daniel Dep. 122.

No other fire safety directors were available that day, so Melidones worked Daniel's shift himself. Melidones Aff. ¶ 18. During the shift, a delivery person attempted to deliver a package for Daniel. *Id.* Because T&M forbids its employees from receiving personal mail or packages at

APPX H Pg. 87

their worksites,[6] Melidones sent Daniel's package back and commenced an investigation. *Id.* ¶¶ 18–20. Melidones spoke with at least five security guards, who all told him that Daniel had received other packages at 590 Madison. *Id.* ¶ 20.

Most relevant here, Melidones learned that Daniel had received a package containing a BB gun while on duty in March 2012 and had shown the gun to other employees at the worksite.[7] *Id.* Consistent with this, Daniel testified that he had ordered a Smith & Wesson M&P semiautomatic BB pistol with a black finish from Zephyr Sports through Amazon.com; he stated that he thought that it was a "toy gun." Daniel Dep. 177–81, 201; *see also* Daniel Aff p. 2; Daniel Sur-Reply, Ex. 19, at 5. When the BB gun arrived, Daniel was surprised that it "look[ed] so realistic." Daniel Dep. 177. He showed the BB gun to co-workers Anthony (not supervisor John) Melidones, Klaudio Tresova, and Edgardo Vias because he believed they might know where to purchase the necessary pellets and air canister, or how to load and operate the gun. *Id.* at 177–78; Daniel Sur-Reply, Ex. 20, at 28–29.

On May 8, 2012, Daniel returned to work and learned about Melidones's investigation. *See* Daniel Dep. 205. Based on the information gleaned from his co-workers, Daniel believed

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[6] The T&M Employee Handbook does not expressly forbid the receipt of personal packages at worksites, although it does state that "using client equipment for personal use" is "prohibited behavior that may lead to disciplinary action and/or termination." Daniel Sur-Reply, Ex. 4, at 12–13. Regardless, multiple T&M employees affirmed that they had received oral notification of T&M's policy. *See* Melidones Aff. ¶ 19. Daniel contends that that he was unaware of the policy at the relevant times, but he does not contest its existence. *See* Daniel Dep. 205.

[7] Daniel testified that he believes that Melidones knew about the BB gun long before May 2012, *see* Daniel Dep. 184, 205–06, whereas Melidones stated that he learned about the BB gun for the first time on May 7, 2012, Melidones Aff. ¶ 20. It is, of course, possible that Daniel's co-workers told Melidones about the BB gun when it arrived in March 2012. However, Daniel has not provided admissible evidence to support that claim. Because "[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Hicks*, 593 F.3d at 166, the Court accepts Melidones's testimony as to this point.

APPX H #5.88

that Melidones was looking for an excuse to fire him. *Id.* at 151–52. At 12:39 a.m. on May 9, 2012, after completing his May 8 shift, Daniel sent Melidones a text message that said:

> I'd like to claim my sick day for yesterday 5/7/12. I understand you've a personal vendetta against me for maybe what transpired on Friday 5/4/12 with Bain Capital and me taking off yesterday due to illness. If this is the case John, please address it with T&M. The use of intimidation, threats, manipulation and lying about an employee causing him/her to resign or be terminated is unwarranted and unprofessional. I will be notifying T&M of your tactics.

Id. at 150–51; Daniel Sur-Reply, Ex. 2, at 58–60. At some point on May 8 or 9, 2012, Daniel complained to Greisch, the property manager of 590 Madison, about Melidones's harassing behavior, specifically, that Melidones had slapped him on the back and told him to "man up." Daniel Dep. 149.

During Daniel's shift on May 9, 2012, Melidones served Daniel with a notice of disciplinary action. *Id.* at 207. Melidones told Daniel that he had learned about the package deliveries, including of the "imitation pistol," from checking the security cameras and speaking with Daniel's co-workers. Daniel Sur-Reply, Ex. 7. The notice stated that Daniel "has had several packages delivered to the worksite," including an "imitation pistol. . . . He did open package and showed this item to several other staff members." *Id.* Ex. 22, at 137; Gutstein Aff., Ex. J. The notice also stated that Daniel had been "instructed to stop package deliveries" on April 4, 2012. *Id.* Attached to the notice were five statements written and signed by Daniel's co-workers, who each claimed to have witnessed his receipt of personal packages at the workplace. *Id.* Ex. N. Both Anthony Melidones and Klaudio Tresova affirmed that Daniel had shown them the BB gun at work, and Carmen Negron, who worked in the mailroom, reported that Daniel had informed her that he had received a package containing a BB gun. *Id.* Two other co-workers, Clinton Lisk and Sindia Maldonado, claimed to have seen someone reprimand

APPX H pg. 89

Daniel for his package deliveries. *Id.* Daniel contends that all of these statements were fabricated. Daniel Dep. 206.

Daniel's initial response, written on the back of the disciplinary notice, stated:

> This write up has no merit. It was issued to me vindictively and out of pure spite by security director John Melidones. . . . I've personally witnessed Mr. Melidones screamed/cursing at guards using profaned languages. Referring to many of the staffs as buffoons, idiots, useless and incompetents. . . . The toy gun I'd delivered to me via the building's messenger courier, was showed to his son A.J. and Klaudio (guard) for operational purposes only. At no point was it displayed to them out of the delivered packaging or out of the box.

Gutstein Aff., Ex. K; Daniel Sur-Reply, Ex. 22, at 138.

At 3:17 a.m. on May 10, 2012, Daniel emailed Wood to complain about Melidones's behavior. Daniel Sur-Reply, Ex. 1, at 7. The email requested a meeting "to discuss Mr. John Melidones recent hostile verbal harassment and intimidations" and asserted that the disciplinary write-up was "a form of retaliation." *Id.* Daniel claims that Wood never responded to the email; instead, he called Daniel and informed him of the upcoming disciplinary hearing. *Id.*

On May 15, 2012, T&M held a disciplinary hearing. Daniel Dep. 215. The disciplinary committee consisted of John Melidones; Steven Gutstein, T&M's general counsel; John Aleles, the vice president; Carl Capponi, the director of operations; and Toni Scarito, the human resources manager. *Id.* at 215, 217; Daniel Sur-Reply, Ex. 3, at 6. Daniel acknowledged that he had numerous personal packages delivered to 590 Madison, including the BB gun. *See* Daniel Dep. 197, 215–16; Daniel Sur-Reply, Ex. 9, at 2 (list of 15 personal packages delivered to 590 Madison from Amazon.com). In his defense, Daniel testified, he "attempt[ed] to show the disciplinary committee that Mr. Melidones knew that [he] was receiving packages" and had authorized those deliveries, but he "was not allowed to explain" those facts. Daniel Dep. 215–16. Rather, he "was only allowed to explain . . . why [he] was receiving packages." *Id.* at 216.

APPX H PG. 90

After the hearing, the disciplinary committee unanimously recommended that Daniel be terminated because he possessed a BB gun at his worksite and repeatedly received personal packages there. Gutstein Aff. ¶ 26. T&M's CEO accepted that recommendation and authorized Daniel's termination. *Id.*

On May 18, 2015, Scarito notified Daniel via telephone that T&M had decided to terminate him. Daniel Dep. at 217–18; T&M 56.1 ¶ 67. She told him that the sole basis for his termination was his receipt of the BB gun. Daniel Sur-Reply, Ex. 1, at 14. Similarly, a "separation of service" form completed by Melidones states that Daniel "was having his personal pkgs and mail delivered to the lobby of his worksite" and "accepted delivery of an extremely realistic looking Smith and Wesson BB Gun." *Id.* Ex. 22, at 192.

Daniel thereafter requested a letter explaining the reason for his termination. *Id.* at 190. On May 23, 2012, Gutstein responded that Daniel was "an at-will employee" and was therefore "terminable without cause." *Id.* at 190–91. Setting that fact aside, Gutstein explained that Daniel "acknowledged that [he] had a 'bb' gun delivered to [him] at a T&M Client's premises and [he] displayed the 'bb' gun to others at that location." *Id.* at 190. This behavior "violated T&M policy," "appears to have violated a provision of the New York Administrative Code" that prohibits possession of air pistols, and "demonstrated egregiously poor judgment." *Id.*

2. Applicable Legal Standards

Title VII makes it unlawful for an employer "to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Discrimination claims brought under Title VII are analyzed under the three-step burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Bucalo v.*

Appx H Pg. 91

Shelter Island Union Free Sch. Dist., 691 F.3d 119, 128 (2d Cir. 2012) (applying the *McDonnell Douglas* burden-shifting framework).

Under the *McDonnell Douglas* test, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. To do so, a plaintiff must show that: (1) he was a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *Bucalo*, 691 F.3d at 129. "This burden is not a heavy one." *Gorzynski*, 596 F.3d at 107. However, "'purely conclusory allegations of discrimination' that are devoid of 'concrete particulars' do not suffice to avoid summary judgment." *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 119 (2d Cir. 2010) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985)).

Where the plaintiff can establish a *prima facie* case, "the burden shifts to the defendant employer to provide a legitimate, non-discriminatory reason for the action." *Raspardo v. Carlone*, 770 F.3d 97, 125 (2d Cir. 2014). "If the employer is able to satisfy that burden, the inquiry then returns to the plaintiff, to demonstrate that the proffered reason is a pretext for discrimination." *United States v. City of New York*, 717 F.3d 72, 102 (2d Cir. 2013). At this stage, "the plaintiff can no longer rely on the *prima facie* case, but may still prevail if []he can show that the employer's determination was in fact the result of discrimination." *Gorzynski*, 596 F.3d at 106. However, "if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact [as to pretext] and there [i]s abundant and uncontroverted independent evidence that no discrimination ha[s] occurred," then the employer is entitled to summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *see also Richardson v. Comm'n on Human Rts.*

APPX H PG. 92

& Opportunities, 532 F.3d 114, 125–26 (2d Cir. 2008) (concluding that "overwhelming evidence" of legitimate reason for dismissal warranted grant of summary judgment).

3. Discussion

To support his *prima facie* case, Daniel testified that he is a black man from St. Vincent and the Grenadines, Daniel Dep. 9–10; that he was qualified for the fire safety director position, *id.* at 60–61, 272–73; and that he was terminated, *id.* at 216–18. Daniel has therefore satisfied the first three elements of the *prima facie* case. *Bucalo*, 691 F.3d at 129. Accordingly, the first question for the Court to resolve is whether Daniel's termination "occurred under circumstances giving rise to an inference of discrimination." *Id.*

The evidence on which Daniel relies for this point is the harassing and discriminatory conduct by Melidones, reviewed above. *See* pp. 12–15, *supra*. But, significantly, the decision to terminate Daniel was made unanimously by a five-member disciplinary committee comprised of Melidones and four others—Gutstein, T&M's general counsel; Aleles, the vice president; Capponi, the director of operations; and Scarito, the human resources manager—and was then approved by T&M's CEO. Daniel Dep. at 215, 217; Gutstein Aff. ¶ 26. Daniel does not allege, let alone provide evidence to support, that Gutstein, Aleles, Capponi, or Scarito discriminated against him or had any motive to do so. Nor has he provided a basis for imputing Melidones's alleged motivation to the other members of the disciplinary committee. For example, Melidones did not make any discriminatory statements in front of the other executives, *see* Daniel Dep. 86, 243, and Daniel did not report Melidones's conduct to them, *see id.* at 119, 261. Accordingly, the evidence about Melidones's behavior does not support an inference that Daniel's termination was discriminatory. Further, the key facts on which the disciplinary committee relied—Daniel's having ordered and caused a BB gun to arrive at the workplace, and having displayed that gun to

co-workers—are not disputed. They were established by evidence (including the testimony of Daniel himself) other than Melidones's testimony. Any discriminatory motive of Melidones's thus did not materially infect the disciplinary committee's judgment.

Although the disciplinary committee's independent decision alone warrants granting summary judgment on this claim, for several reasons the Court separately concludes that, to the extent Melidones was responsible for the decision to terminate Daniel, Daniel has not provided sufficient evidence to support a finding that Melidones was motivated by racial animus when he supported firing Daniel.

First, the "evidence of discrimination is undermined by the 'same actor inference.' When the same actor hires a person already within the protected class, and then later fires that same person, 'it is difficult to impute to [him] an invidious motivation that would be inconsistent with the decision to hire.'" *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000) (quoting *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997)). Daniel acknowledges that Melidones, along with Wood, hired him in January 2011. Daniel Dep. 48–52; Daniel Aff. p. 8. After interviewing Daniel in person, Melidones was undoubtedly aware that Daniel is black and speaks with an accent. It is therefore difficult to infer that Melidones later fired Daniel because of his race, perceived national origin, or sex. *See Ruane v. Cont'l Cas. Co.*, No. 96 Civ. 7153 (LBS), 1998 WL 292103, at *8 (S.D.N.Y. June 3, 1998) ("[I]t is suspect to claim that the same manager who hired a person in the protected class would suddenly develop an aversion to members of that class."). And although the same-actor inference "is less compelling when a significant period of time elapses between the hiring and firing," the 16-month period from January 2011 to May 2012 is still "a relatively short time." *Carlton*, 202 F.3d at 137–38; *see also id.* (favorably citing cases holding that the same actor inference applies to intervals of less

than two years); *Dellaporte v. City Univ. of N.Y.*, 998 F. Supp. 2d 214, 227 (S.D.N.Y. 2014) (finding same-actor inference "particularly strong" where the same persons hired plaintiff and then "fired him less than two years later"); *Altman v. New Rochelle Pub. Sch. Dist.*, No. 13 Civ. 3253 (NSR), 2014 WL 2809134, at *13 (S.D.N.Y. June 19, 2014) (similar).

Second, Daniel's testimony belies his claim that he was singled out for discriminatory treatment. Daniel testified that "John mistreated everyone," Daniel Dep. 98, 156, for instance, by "referring to many of the staff as buffoons, idiots, useless and incompetent," *id.* at 211. And, Daniel testified, Melidones improperly terminated his predecessor, who was white. *See id.* at 81, 245. Accordingly, although Daniel's testimony supports an inference that Melidones was, at times, unprofessional or disrespectful to his staff and made racially inappropriate comments, it does not support an inference that Melidones sought to terminate Daniel because of his race or national origin.[8]

[8] Daniel separately argues that Melidones terminated him in retaliation for the text message Daniel sent at 12:39 a.m. on May 9, 2012. In that message, Daniel stated, in relevant part, "I understand you've a personal vendetta against me . . . . The use of intimidation, threats, manipulation and lying about an employee causing him/her to resign is unwarranted and unprofessional. I will be notifying T&M of your tactics." Daniel Sur-Reply, Ex. 2, at 58–60. To establish a *prima facie* case of retaliation, a plaintiff must show: "(1) that she participated in an activity protected by Title VII, (2) that her participation was known to her employer, (3) that her employer thereafter subjected her to a materially adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action." *See Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010). Daniel's claim of retaliation founders for the reason discussed above, that the decision to terminate him was unanimously made by a disciplinary committee, as to whom Daniel claims misconduct only as to Melidones. In addition, Daniel cannot establish a *prima facie* case of retaliation under Title VII because he did not engage in "protected activity"—he complained to Melidones about a "personal vendetta," "intimidation," and other "unprofessional" behavior, but not about discriminatory conduct on the basis of a legally protected characteristic. *See Kirkland v. Cablevision Sys.*, 760 F.3d 223, 225 (2d Cir. 2014) ("To state a *prima facie* case of retaliation under Title VII, a plaintiff must proffer evidence that he engaged in a protected activity, such as complaining about race discrimination.").

APPX H PG. 95

Even if Daniel had established a *prima facie* case, the next step would be to determine whether T&M has "provided a legitimate, non-discriminatory reason" for Daniel's termination. *Raspardo*, 770 F.3d at 125. T&M has consistently maintained that Daniel's termination was based on his receipt of personal packages at 590 Madison, in particular of the BB gun. *See* Gutstein Aff., Ex. J, Daniel Sur-Reply, Ex. 22, at 137 (notice of disciplinary hearing); Gutstein Aff., Ex. B, Daniel Sur-Reply, Ex. 22, at 192 (separation of service form); Daniel Sur-Reply, Ex. 1, at 14 (email from Daniel recounting his termination call from Scarito); Gutstein Aff., Ex. O, Daniel Sur-Reply, Ex. 22, at 190–91 (termination letter); Gutstein Aff. ¶ 26; Melidones Aff. ¶ 24. And Daniel admits that he received "numerous" personal packages at 590 Madison, that those packages included a Smith & Wesson BB gun that looked like a real pistol, and that he showed the BB gun to multiple co-workers at the worksite. *See* Daniel Dep. 177–78, 183, 197.

Daniel also acknowledges that his conduct violated at least two provisions of the T&M Employee Handbook, which Daniel testified that he had read and signed. *Id.* at 168. First, the "code of conduct" states that "carrying or possessing unauthorized weapons—guns, knives, mace or other weapons" is "prohibited behavior" that "may lead to disciplinary action and/or termination of employment." Daniel Sur-Reply, Ex. 4, at 12–14. Second, the "possession of firearms" provision states:

> NO EMPLOYEE IS AUTHORIZED TO BRING A FIREARM ONTO A CLIENT PROPERTY, EXCEPT THOSE ON ARMED ASSIGNMENT, WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE CHAIRMAN OF T&M OR HIS DESIGNEE. VIOLATION OF THIS DIRECTIVE MAY RESULT IN IMMEDIATE TERMINATION.

Id. at 15 (emphasis in original). In addition to violating T&M policy, Daniel's possession in the workplace of the CO_2-powered BB gun may have violated the New York City Administrative Code, which prohibits possession of "any air pistol or air rifle or similar instrument." N.Y. City

APPX H Pg. 96

Admin. Code § 10-131(b); *see also* Gutstein Aff., Ex. O, Daniel Sur-Reply, Ex. 22, at 190–91 (termination letter stating, in relevant part, that Daniel's conduct "appears to have violated a provision of the New York Administrative Code").

Further, Daniel himself initially conceded that he had been fired because he received an unlawful weapon at work: On May 22, 2012, Daniel wrote to the New York State Attorney General's Office to complain about Zephyr Sports and Amazon.com's sale of the "illegal" BB gun that he "thought was a toy." Daniel Sur-Reply, Ex. 19, at 3. Daniel explained that "[o]n March 16, 2012, [he] ordered and had delivered to [his] worksite here in Manhattan a 'BB Gun' from Amazon.com. My employer fired me on 5/18/12 *because of this purchase and delivery*." *Id.* (emphasis added). As such, the evidence that T&M terminated Daniel for a legitimate, non-discriminatory reason—his possession and display of the BB gun—is compelling. It is not offset by non-speculative evidence of an alternative motivation.

The third and final stage in the *McDonnell Douglas* analysis is to consider whether "the proffered reason is a pretext for discrimination." *City of New York*, 717 F.3d at 102. Daniel asserts that the "real reason" for his termination "was because [he is] a black man who [was] being paid too much money for the work that [he did]." Daniel Dep. 144. Daniel bases this claim on his testimony that Melidones told him that property managers in the area around 590 Madison "prefer to hire white security personnel" and that Melidones believed he was "paying [Daniel] too much." *Id.* at 81, 103. As noted, however, statements made solely by Melidones do not support an inference that the five-member disciplinary committee had invidious motivations. Further, according to Daniel, Melidones made this statement in February 2011, 15 months before Daniel was fired. *Id.* The connection between Melidones's statement and Daniel's termination is too attenuated to support an inference of discrimination or to overcome the legitimate, non-

discriminatory reason T&M provided for Daniel's termination. *Cf. Self v. Dep't of Educ. of the City of N.Y.*, 844 F. Supp. 2d 428, 437 (S.D.N.Y. 2012) ("[E]ven assuming [plaintiff's supervisor] uttered these words, they are too attenuated in time from the decision to discipline [plaintiff] to conclude that the disciplinary charges were a pretext.").[9]

Daniel also argues that he was not aware of T&M's policy forbidding receipt of personal packages at the worksite, Daniel Dep. 205, that Melidones authorized his receipt of packages at 590 Madison, *id.* at 183–85, and that he believed that the BB gun he ordered online was a toy, not a firearm or unlawful weapon, *id.* at 177–81, 201. These arguments could support a conclusion that T&M's decision to terminate Daniel was unfair. But an unfair decision is not necessarily an illegal one. Because Daniel was an at-will employee, T&M had the right to terminate him for any reason, or for no reason at all, as long as the decision-makers were not motivated by discriminatory animus. *See Guilbert v. Gardner*, 480 F.3d 140, 151 (2d Cir. 2007) ("[A]n at-will employment relationship can be terminated by either party for any reason or without reason."). Daniel's lack of awareness of the relevant policies does not support an inference that the five members of the disciplinary committee were secretly motivated by racism, xenophobia, or sexism.

D. Denial of Medical Leave

In addition to his state and federal law discrimination claims, Daniel claims he was denied medical leave in violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601

[9] Daniel also claims that Melidones, who is white, routinely carried a firearm on his person at the worksite and was not disciplined or terminated. Daniel Aff. p. 2. This allegation, if true, could support an inference of disparate treatment, if Melidones was not authorized to do so. However, T&M responds that Melidones *was* authorized to carry a firearm at 590 Madison, *see id.* Ex. A, at 10, and Daniel has not provided evidence to the contrary.

APPX # pg. 98

et seq. *See* SAC pp. 30–32. This claim is premised on Daniel's own need for medical leave as well as his need to attend to his ill father.

1. Relevant Facts

Daniel testified that on "numerous occasions" he was sick and needed medical attention. Daniel Dep. 221; *see also* Daniel Sur-Reply, Ex. 16 (medical records). In February 2011, shortly after Daniel began working at T&M, he developed an abscess in his right leg and was hospitalized for three days. Daniel Dep. 220, 288; *see also* Daniel Sur-Reply, Ex. 16, at 1–2. Later on, between July 2011 and December 2011, he became ill from a "foul odor" emitted from the ventilation system at 590 Madison. Daniel Dep. 221. In December 2011, the building engineers discovered a ruptured sewer pipe and resolved the problem. *Id.* at 223. Also in December 2011, Daniel discovered that he needed a root canal. *Id.*; *see also* Daniel Sur-Reply, Ex. 16, at 10–15. Because Melidones had "previously made threats" to fire Daniel if he "were to take a day off work," Daniel felt he "could not take a day off work to attend to" his dental crisis. Daniel Dep. 222; *see also* Daniel Sur-Reply, Ex. 16, at 11.

Daniel also testified that his father suffers from renal failure and heart complications. *Id.* at 228. In November and December 2011, Daniel requested some days off to care for his father, but his request was denied. *Id.*; *see also* Daniel Sur-Reply, Ex. 16, at 18 (photograph of Daniel's father in the hospital on November 21, 2011).

T&M policy requires that requests for FMLA leave be made in writing at least 30 days in advance. Melidones Aff. ¶ 6. Daniel testified that he did not request leave in writing; rather, he made the requests to Melidones verbally. Daniel Dep. 228–29. Melidones, for his part, disputes this claim. In an affirmation, he stated that he has no recollection of Daniel's ever requesting medical leave and has no knowledge of any medical conditions of Daniel's. Melidones Aff. ¶ 7.

Melidones recalls granting Daniel's requests for occasional days off. *Id.* ¶ 8. For the purpose of resolving T&M's motion for summary judgment, the Court accepts Daniel's testimony as to the relevant facts.

2. Applicable Legal Standards

The FMLA entitles covered employees to take up to 12 weeks of leave per year to care for the employee's own "serious health condition that makes the employee unable to perform the functions of [his] position" or to care for a parent, spouse, or child who "has a serious health condition." 29 U.S.C. § 2612. An "eligible employee" is one "who has been employed for at least 12 months by the employer." *Id.* § 2611(2)(A). "The term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." *Id.* § 2611(11)(A)(B).

To make out a *prima facie* case under the FMLA, a plaintiff must establish five elements: "'(1) that she is an eligible employee under the FMLA; (2) that defendants constitute an employer under the FMLA; (3) that she was entitled to leave under the FMLA; (4) that she gave notice to defendants of her intention to take leave; and (5) that defendants denied her benefits to which she was entitled by the FMLA.'" *Kim v. Goldberg, Weprin, Finkel Goldstein, LLP*, 862 F. Supp. 2d 311, 317 (S.D.N.Y. 2012) (quoting *Roberts v. Ground Handling, Inc.*, 499 F. Supp. 2d 340, 351 (S.D.N.Y. 2007)).

3. Discussion

Daniel's claims stumble on the first element of the *prima facie* case, namely, whether he was eligible for FMLA leave when he requested time off work. As noted, Daniel became eligible for FMLA leave only after he had "been employed for at least 12 months." 29 U.S.C.

APPX H Pg. 150

§ 211(2)(A). Daniel testified that he interviewed at 590 Madison during the week of January 17, 2011 and was hired some time the following week. Daniel Dep. 47–52; Daniel Aff. p. 8. He therefore became eligible for FMLA leave in late January 2012. Accordingly, Daniel's requests for leave in February 2011 or December 2011, whether granted or denied, are not actionable because they occurred before the 12-month mark. Daniel does not make any FMLA claim based on denial of leave that occurred after the 12-month mark.

Separately, Daniel's testimony as to the fourth and fifth elements—whether he requested and was denied medical leave—is unclear. At first, Daniel asserted that he "was not allowed to take days off to attend to my illness" and that this occurred on "numerous occasions." Daniel Dep. 220–21. When pressed to identify a specific instance on which he had requested medical leave, however, Daniel provided only three concrete examples: (1) in February 2011, when he was hospitalized for an abscess in his leg and did not come to work for three days, *id.* at 220, 226; (2) when he needed a root canal in December 2011, before he became eligible for FMLA leave; and (3) on May 7, 2012, when Daniel felt ill because of his altercation with Melidones the previous week, *id.* at 225, and when Melidones ultimately granted his request for the day off, *id.* at 122; Daniel Sur-Reply, Ex. 2, at 52–54. Daniel then testified as follows:

> Daniel: [K]nowing John's stance on me taking off based on that prior email that I read earlier here in record in which Mr. Melidones said to me I have already taken off more days combined than any other FSDs . . . , I was not going to jeopardize my job by requesting to John to take a day off.
>
> Cavallaro: I understand. So your testimony is you did not request time off and were not denied requests of time off because you were afraid to ask?
>
> Daniel: I could not. I could not, yes.
>
> . . .
>
> Cavallaro: After December 2011, was there any point in time that you requested time off for medical reasons?

APPX H pg. 101

> Daniel: I could not request because I knew what the response was and so the answer is no.

Daniel Dep. 224, 227–28. But the FMLA requires employees to ask their employers for medical leave. *See Kim*, 862 F. Supp. 2d at 317. Daniel "could not simply assume that [his] request would be denied and so decline to ask." *Pellegrino v. County of Orange*, 313 F. Supp. 2d 303, 319 (S.D.N.Y. 2004). Daniel's FMLA claim therefore must be denied.

D. Negligence

1. Relevant Facts

Daniel alleges that T&M acted negligently by failing to address complaints about Melidones's harassing and discriminatory conduct. SAC p. 32. Because of T&M's refusal to discipline, transfer, or terminate Melidones, Daniel experienced "immense emotional, physical, and psychological suffering, distress, and/or anguish." *Id.* Daniel also suffers from depression, severe panic attacks, fatigue, chest pain, headaches, muscle weakness, high blood pressure, sleep apnea, insomnia, and intensified nicotine addiction as a result of to the abuse he endured while employed at T&M. *Id.* at 33.

Daniel also alleges that T&M's counsel was negligent during this litigation. At 12:03 a.m. on September 24, 2013, Daniel emailed attorneys Meredith Cavallaro and Alicia Valenti stating, among other things, that his "anti-depressant medication must not be effective" because he felt that the "only means of escaping this emotional, financial and psychological pain and suffering (turmoil) is to kill [him]self." Daniel Sur-Reply, Ex. 16, at 16. In response, T&M's counsel urged Daniel "to call 1-800-SUICIDE or 1-800-273-TALK, which are free hotlines that may be able to further assist you." *Id.* They also notified the NYPD of Daniel's suicidal threats. Daniel Aff., Ex. A, at 13. At 11:15 a.m. on September 24, 2013, more than 15 NYPD officers

APPX H Pg. 102

and EMTs arrived at the apartment where Daniel then lived with his father and stepmother, questioned Daniel and his father, and took Daniel to a psychiatric emergency room. SAC p. 34. This incident enraged Daniel's father, who thereafter threw Daniel out of the apartment. *Id.* at 34–35.

2. Applicable Legal Standards

Under New York law, "a plaintiff must establish three elements to prevail on a negligence claim: '(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.'" *Alfaro v. Wal–Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir. 2000) (quoting *Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 333 (1981)). Breach occurs when an individual fails to exercise "reasonable care under the circumstances" and in light of the foreseeable risks. *Philip v. Deutsche Bank Nat. Trust Co.*, No. 11 Civ. 8960 (PGG), 2014 WL 4953572, at *5 (S.D.N.Y. Sept. 30, 2014) (quoting *Scurti v. City of New York*, 40 N.Y.2d 433, 437 (1976)).

3. Discussion

As the Court explained in its January 16, 2014 Opinion resolving Minskoff's motion to dismiss, allegations of employment discrimination cannot be transmuted into tort claims sounding in negligence. Daniel's negligence claim is essentially that T&M failed to protect him from Melidones's discriminatory harassment. SAC pp. 32–33. But this is no different from his employment discrimination claims under Title VII, the NYSHRL, and the NYCHRL. And "the alleged violations of federal, state, and city anti-discrimination laws are not torts under New York law." *Baguer v. Spanish Broad. Sys., Inc.*, No. 04 Civ. 8393 (KMK), 2007 WL 2780390, at *4 (S.D.N.Y. Sept. 20, 2007); *see also, e.g.*, *Treanor v. Metro. Transp. Auth.*, 414 F. Supp. 2d 297, 303 (S.D.N.Y. 2005) ("New York cases reason[] that a discrimination claim is not a tort

APP X H Pg. 103

because it is 'a new statutory cause of action which was not cognizable at common law.'" (quoting *Picciano v. Nassau Cnty. Civil Serv. Comm'n*, 736 N.Y.S. 2d 55, 60 (2d Dep't 2001))).

Daniel's claim against T&M's counsel is also unavailing. His allegations indicate that Cavallaro and Valenti responded to his alarming threats of self-harm as any reasonable person would—by urging Daniel to seek help and by alerting the authorities. Further, the regrettable aftermath of the NYPD's visit to Daniel's apartment was not foreseeable to someone in opposing counsel's position. Accordingly, although the psychological and physical distress Daniel has experienced as a result of his employment and this litigation is understandable, the SAC does not thereby state an actionable claim for negligence.

CONCLUSION

For the foregoing reasons, T&M's motion for summary judgment is granted. The Clerk of Court is respectfully directed to terminate the motion pending at docket number 65, and to close this case.

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: February 19, 2015
New York, New York

APPX H PG. 104

APPENDIX

I

The United States District Court
for the Southern District of New York
opinion & order denied motion
for reconsideration
02/24/2015
case No. 13 Civ. 4384(PAE)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OTIS A. DANIEL,

Plaintiff,

-v-

T&M PROTECTION RESOURCES LLC,

Defendant.

13 Civ. 4384 (PAE)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

On February 19, 2015, the Court granted defendant T&M Protection Resources, LLC's motion for summary judgment on *pro se* plaintiff Otis Daniel's claims that he had been subjected to a hostile work environment, discriminatory termination, Family Medical Leave Act violations, and common law negligence. Dkt. 106 ("February 19 Opinion"), *reported at Daniel v. T&M Protection Resources LLC*, No. 13 Civ. 4384 (PAE), 2015 WL 728175 (S.D.N.Y. Feb. 19, 2015). The Court assumes familiarity with the underlying facts of this case and with the February 19 Opinion. On February 23, 2015, Daniel filed a motion for reconsideration. Dkt. 111 ("Motion"). On February 24, 2015, Daniel filed a letter clarifying the bases for his motion for reconsideration. Dkt. 113 ("Letter"). For the following reasons, the motion is denied.

The standard governing motions for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted). Such a motion is "neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have been previously advanced." *Associated Press v. U.S. Dep't of Def.*, 395 F. Supp. 2d 17, 19 (S.D.N.Y.

2005); *see also Goonan v. Fed. Reserve Bank of N.Y.*, No. 12 Civ. 3859 (JPO), 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5, 2013) ("Simply put, courts do not tolerate such efforts to obtain a second bite at the apple."). Rather, reconsideration is appropriate "only when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). Here, Daniel does not identify a change in controlling law, nor does he allege that new evidence has become available. Accordingly, the Court construes Daniel's motion as seeking reconsideration to prevent manifest injustice.

Daniel's motion includes a numbered list of 17 arguments, which fall into roughly three categories: legal and factual conclusions, criticism of the defendants, and identifications of facts the Court did not address. Daniel's letter presents another 21 arguments, which are similar to the arguments listed in the motion. The Court addresses each category of argument in turn.

First, Daniel asserts various legal and factual conclusions. *See* Motion ¶¶ 2, 5, 10, 12, 13, 14, 16, 17; Letter ¶¶ 1, 13, 17, 21. For instance, Daniel claims that his termination "was motivated by [his] protected class" and by "malice," and that T&M's proffered explanation for his termination "was pretextual." Motion ¶¶ 2, 5, 16, 17. Daniel also claims that T&M received numerous complaints about John Melidones's conduct, Letter ¶ 13, and that witness statements provided by T&M were "fabricated" or "forged," Motion ¶¶ 10, 12, 14, 16. Finally, Daniel argues that he "did nothing wrong" and "did not violate any policies of T&M." Motion ¶ 13; Letter ¶¶ 1, 14, 21. Daniel does not cite any evidence to support these claims. And the Court, having carefully reviewed all of the materials submitted by both parties, has already rejected these claims. In particular, the Court relied on the testimony Daniel gave under oath at his

APPX I Pg. 106

deposition, where he admitted that he had a Smith & Wesson BB gun that looked like a real gun delivered to his workplace, Daniel Dep. 177, 201, and acknowledged that his possession of the BB gun may have violated T&M's firearms policy, *id.* at 168–69, 174–75. As the Court explained at length in its February 19 Opinion, the evidence indicates that Daniel was terminated for this legitimate non-discriminatory reason, not because of his race, national origin, or sex. *See* February 19 Opinion, at 26–38.

Second, Daniel complains about certain conduct by T&M and its counsel. *See* Motion ¶¶ 7, 8; Letter ¶¶ 2, 4, 8, 10, 11, 14, 16. Specifically, Daniel claims that T&M did not respond to his sur-reply and 56.1 statement. Motion ¶ 7. That is simply untrue: T&M, with the Court's permission, filed a response to Daniel's sur-reply on October 23, 2014. Dkt. 97–98. Daniel also claims that T&M's disciplinary committee did not allow him to discuss Melidones's discriminatory and harassing behavior during his disciplinary hearing. Motion ¶ 8; Letter ¶ 4. That fact, although taken as true for the purpose of resolving T&M's motion for summary judgment, does not prove that T&M discriminated against Daniel. Daniel had many other opportunities to report Melidones's conduct, and Melidones did not fire him—the decision to terminate Daniel was made by a five-member disciplinary committee and approved by T&M's CEO. *See* February 19 Opinion, at 30–31 (discussing the disciplinary hearing), 33–34 (discussing Daniel's termination).

In his letter, Daniel also complains about Melidones's conduct and the behavior of T&M management more generally. Letter ¶¶ 2, 8, 10, 11, 14, 16. Daniel explains that Melidones's comments "were severely offensive and hurtful"; that "Melidones repeatedly expressed his utter disgust or disdain of the security staff"; and that Melidones used "vile, profane, [and] insulting language." Letter ¶¶ 2, 8, 10, 11. The Court does not doubt that Melidones's conduct was

APPX I Pg. 107

offensive and hurtful. Under federal employment law, however, it is not enough to prove that Daniel was mistreated or abused while at work. Rather, to state a claim for discrimination, he must establish that he was mistreated because of his membership in a protected class. *See* February 19 Opinion, at 17–18. Daniel's allegations that Melidones treated the entire staff badly—that he abused men and women of all races—certainly provide ample basis to condemn Melidones. Those allegations do not, however, suggest that Melidones singled Daniel out for harassment based on his race, national origin, or sex. Likewise, Daniel complains that T&M "took advantage" of its at-will employment policy and fabricated reasons to fire its employees because the at-will "doctrine gives them the legal right to do it." Letter ¶¶ 14, 16. These arguments may provide an apt critique of at-will employment law, but they do not indicate that T&M did anything unlawful—indeed, Daniel concedes that T&M had the right to terminate him without cause and that his conduct, in fact, provided good cause.

Third, Daniel identifies a range of factual propositions that, he alleges, the Court did not address in its February 19 Opinion. Motion ¶¶ 1, 3, 4, 6, 9 11, 15; Letter ¶¶ 5, 6, 12, 15, 18, 19, 20. Daniel is certainly correct that "[i]n the Court's opinion and order on 2/19/15 many facts were stated and other facts were omitted or were not addressed." Motion ¶ 1. Daniel submitted hundreds of pages of briefing and evidence, as did T&M. *See* February 19 Opinion, at 2 n.1, 8–9 (listing the submissions the court considered in resolving the motion for summary judgment). The Court assures the parties that it thoroughly reviewed every page. In its 44-page Opinion, however, the Court discussed only the facts and arguments most relevant to Daniel's claims. The Court did not, for example, discuss Daniel's allegation that "NYPD officers harass[ed] and intimidate[ed] [him] after [his] employment termination." Motion ¶ 6; Letter ¶ 18. Even assuming the truth of that allegation, which is not supported by evidence in the record,

APPX I Pg. 108

information about the NYPD's conduct did not help the Court resolve whether T&M discriminated against Daniel, denied him medical leave, or acted negligently. Similarly, the Court did not address Daniel's allegation that "T&M management did not follow or adhere to its own policies." Motion ¶ 15; Letter ¶ 15. That may well be true, and it may suggest that T&M's management is disorganized or unfair, but it does not prove that T&M's management behaved in a discriminatory or otherwise unlawful fashion. The Court also did not address the lack of video evidence in the case.. Motion ¶ 4; Letter ¶ 20. Daniel testified under oath that he possessed a BB gun at the worksite. *See* Daniel Dep. 177–78, 183, 197. Video footage to further confirm that fact was not necessary, and T&M was not required to provide it.

Daniel emphatically argues that all packages he received at the worksite were accepted by his co-workers. Motion ¶¶ 3, 9, 11; Letter ¶¶ 5, 6. The Court accepts that fact as true. Daniel's co-workers all so represented in their written statements. However, it is not relevant. As the Court has explained, that Daniel's co-workers knew about his personal package deliveries does not establish that Melidones knew about those deliveries. *See* February 19, 2015 Opinion, at 28 & n.7. Nor does it prove that Daniel was allowed to receive packages at work. Notably, Daniel's co-workers stated that they knew that he was violating T&M policy, *see id.* at 29–30, and apparently declined to report him, perhaps out of friendship or to avoid being a "snitch." Nor does it prove that Daniel was unfairly singled out for punishment. The record does not reflect what, if any, disciplinary actions Daniel's co-workers faced. Even assuming they faced minimal or no repercussions, it is reasonable to punish the employee who received the packages (and later displayed the gun that had been within one of them) more harshly than employees who merely accepted them.

APPX I Pg. 109

Daniel also argues that "the Court did not address the fact that T&M did not have a policy prohibiting package delivery to the work site" and that "Mr. Melidones during [Daniel's] employment never instructed [him] to stop package delivery." Motion ¶¶ 3, 9; Letter ¶ 19. The Court did, in fact, address these issues. *See* February 19 Opinion, at 28 & n.6 (discussing T&M's policy prohibiting package delivery); *id.* at 26–27 (recounting Daniel's conversation with Melidones about T&M's policy). More important, however, Daniel's arguments miss the broader point: The Court held that Daniel's termination was legitimate and non-discriminatory because it was based on his possession of a realistic-looking Smith & Wesson BB gun at work, which violated T&M's policies regarding unauthorized weapons and possession of firearms. *See id.*, at 36–37. Even if Daniel was allowed to receive personal packages in general—for instance, packages containing books or clothing—he was not allowed to receive a package that contained a prohibited weapon.[1]

Finally, Daniel's letter presents a slew of new allegations that do not appear anywhere in the record and in fact contradict testimony Daniel gave under oath at his deposition. Letter ¶¶ 3, 7, 9, 10, 11. For example, Daniel now claims that he "repeatedly expressed to Mr. Melidones how I felt and asked him to stop." Letter ¶ 3. During his deposition, however, Daniel testified that, apart from one anonymous phone call to a T&M hotline in August 2011, he never complained about Melidones's behavior during his tenure at T&M. *See* Daniel Dep. 119, 261. Similarly, Daniel—for the first time—claims that Melidones "physically threatened members of the staff with bodily harm" and "violently reprimanded staff members." Letter ¶¶ 10, 11. This

[1] Similarly, Daniel recounts the incident in which Melidones told Daniel that he was paid too much. Letter ¶ 12. As the Court explained, that comment, although offensive and inappropriate, does not establish a hostile work environment or support an inference that Daniel's termination was discriminatory. *See* February 19 Opinion, at 3, 12, 37 (discussing Melidones's statement); *id.* at 17–25, 33–38 (explaining the Court's decision on Daniel's Title VII claims).

claim is inconsistent with Daniel's statements at his deposition. There, Daniel testified that Melidones never physically threatened him, Daniel Dep. 154, and that the only physical contact consisted of isolated incidents in which Melidones brushed against Daniel's buttocks and slapped him on the shoulder, *id.* at 133, 149, 230. Daniel never mentioned physically threatening or violent conduct directed as his co-workers, and their statements do not support Daniel's allegation that such conduct occurred. Because Daniel does not identify any record evidence that supports his new arguments, the Court cannot consider them.

For the foregoing reasons, Daniel's motion for reconsideration is denied. The Clerk of Court is directed to terminate the motion pending at docket number 111.

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: February 24, 2015
New York, New York

APPX I Pg. 111

APPENDIX

J

The United States District Court
for the Southern District of New York
opinion & order grant motion
to dismiss amended complaints
01/15/2014
case No. 13 Civ. 4384(PAE)(HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OTIS A. DANIEL, Plaintiff,	:	13 Civ. 4384 (PAE)
-v-	:	OPINION & ORDER
T&M PROTECTION RESOURCES, INC., EDWARD J. MINSKOFF EQUITIES, Defendants.	:	

PAUL A. ENGELMAYER, District Judge:

Otis Daniel, a former Fire Safety Director at 590 Madison Avenue, New York, NY ("590 Madison"), brings this lawsuit *pro se* against the company that directly employed him there, T&M Protection Resources ("T&M"), and the property manager of the building, Edward J. Minskoff Equities ("Minskoff"), alleging that they harassed and fired him because of his race, national origin, and sexual orientation, violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq*, and committed common law negligence by subjecting him to the discriminatory conduct of their agent, the building's security director, John Melidones. Minskoff now moves to dismiss on the grounds that: (1) the Title VII claim against it is not cognizable because Daniel's charge from the New York State Department of Human Rights did not mention Minskoff; (2) the Complaint in any event does not state a claim for employment discrimination or under the FMLA because it fails and also because Minskoff was not his employer; and (3) the Complaint does not state a claim for common law negligence. Minskoff also argues that if the federal claims against it are dismissed, this Court should decline to exercise supplemental jurisdiction over Daniel's claims brought under state law. For the reasons that follow, the

motion to dismiss is denied as to the Title VII, FMLA, NYSHRL, and NYCRL claims against it, and granted as to the negligence claim.

I. Background[1]

A. The Parties

Minskoff is the property manager and a co-owner of 590 Madison, also known as the IBM Building, a 42-story commercial office building in midtown Manhattan. SAC ¶¶ 2–4. T&M has a contract with Minskoff to provide security services at 590 Madison. *Id.* ¶¶ 9, 14, 17. Daniel worked as a Fire Safety / Emergency Action Plan (EAP) director at 590 Madison between February 1, 2011 and May 18, 2012. *Id.* ¶¶ 35, 52. Daniel avers that he was an exceptional employee who did his work with little to no need for supervision. SAC Claim 1 ¶ 7.

B. Daniel's Employment at 590 Madison

On December 28, 2010, Daniel was interviewed and hired by a security personnel recruiter at T&M, Tom Dolan. SAC ¶ 32. In December 2010 and January 2011, Dolan sent Daniel to interview for Fire Safety and/or EAP positions with a number of T&M clients. *Id.* ¶ 33. In late January, Dolan sent Daniel to 590 Madison to be interviewed by William Woods, Minskoff's assistant property manager, and John Melidones, the building's security director. *Id.* ¶ 34.

On February 1, 2011, Daniel started work at 590 Madison as a Fire Safety / EAP director. *Id.* ¶¶ 35–36. Melidones delegated supervisory duties to Daniel and another fire safety / EAP

[1] For the purpose of resolving the motion to dismiss, the Court assumes all facts pled in the Second Amended Complaint ("SAC"), Dkt. 31, to be true, drawing all reasonable inferences in favor of the plaintiff. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

Separately, the Court notes that each section of the Complaint numbers its paragraphs anew. Thus, the section labeled "Statement of Claims" has paragraphs numbered 1–57, the section labeled "Claim 1: Termination of My Employment" has paragraphs numbered 1–41, etc. When referring to paragraphs of the Complaint other than the initial Statement of Claims section, the Court notes in which section the paragraphs are contained.

APPX J

pg. 113

director. *Id.* ¶ 35. Daniel's duties were to: (1) monitor and respond to the fire command station in the rear lobby of 590 Madison; (2) make announcements over the public address system regarding potential fire emergencies, including their affected areas and routes of escape; (3) act as a liaison between first responders and tenants; (4) assist with or conduct fire drills; and (5) inspect equipment such as fire extinguishers and alarms. *Id.* ¶ 36. Daniel was stationed at a work podium in the rear lobby.

Melidones told Daniel that he would receive a pay raise if he passed an on-site test mandated by the Fire Department, City of New York (FDNY). *Id.* ¶ 35. On August 11, 2011, an FDNY Inspector came to 590 Madison and administered to Daniel an oral, written, and visual on-site fire safety director examination. *Id.* ¶ 37. In September 2011, Daniel learned he had passed the exam. *Id.* The FDNY then issued him a license bearing his photograph, certifying him as a fire safety director at 590 Madison. *Id.*

On December 1, 2011, Joseph Greisch, Minskoff's building manager, wrote to the FDNY to schedule a second examination for Daniel, this time as an EAP director. *Id.* ¶ 38; *id.* Ex. A, p. 5. The fire safety director license is a prerequisite for the EAP director license. *Id.* ¶ 38. Greisch's letter referred to Daniel as "an employee of T&M Protection in good standing." *Id.* Ex. A, p. 5. Daniel appears to have obtained his EAP license. *Id.* ¶ 38; *id.* Ex. A, p. 6.

C. The Alleged Denial of Leave for Family and Medical Reasons

The SAC alleges that, during the course of Daniel's employment, Melidones frequently denied Daniel's requests for leave to enable him to deal with his own illnesses or his father's diabetes and renal failure and ensuing hospitalizations. SAC Claim 7 ¶ 1. The SAC states that Greisch, after seeing or hearing how sick Daniel was, instructed Melidones to grant Daniel days off on numerous occasions. *Id.* ¶ 2. The SAC alleges that the denials and delayed approvals of

Daniel's leave requests by Melidones "and or" Griesch caused his medical condition to worsen and caused him extreme emotional and mental anguish as a result of worrying about his father's health condition. *Id.* ¶ 3.

On February 7, 2011, during Daniel's second week on the job, he found himself in excruciating pain, unable to walk or stand for long periods. *Id.* Melidones and Greisch saw that Daniel was in pain. *Id.* ¶ 2. After work, Daniel went to the emergency room at St. Luke's-Roosevelt Hospital, where he was told that an abscess in his thigh was causing an infection to spread throughout his body and affect his kidneys. *Id.* He was placed on antibiotics and kept in the hospital for three days. *Id.* During that time, Melidones threatened, by both phone and text message, to fire Daniel if his illness had been fabricated, and demanded a doctor's note before Daniel could return to work. *Id.* Although the doctor told Daniel that he would be ready to return to work on Monday, February 14, 2011, Daniel appears to have returned to work earlier, on Thursday, February 10, 2011, because he felt that he otherwise risked losing his job. *Id.* Some time in February 2011, perhaps during his hospitalization, Melidones told Daniel, contrary to company policy, that if Daniel needed to take off work, he would need to find his own replacement. *Id.* ¶¶ 4–5. In August 2011, Melidones repeated this directive to Daniel. *Id.* ¶ 4. This forced Daniel to rely on a single replacement, who was available only on certain days of the week. *Id.* ¶ 5.

Between June 2011 and December 2011, there was a foul odor in the lobbies of 590 Madison. *Id.* ¶ 2. The odor emanated from the ceiling vents, below which Daniel and other security personnel directly stood. *Id.* In December 2011, building engineers discovered that the odor was caused by a badly corroded and ruptured sewer pipe. *Id.* Daniel alleges that the odor caused him to be sick. *Id.*

APPX J Pg. 115

In December 2011, Daniel was suffering from excruciating pain in his teeth and gums. SAC Claim 8 ¶ 16. Because he was unable to take off work, he had to see a dentist "on an emergency basis." *Id.*

D. The Alleged Harassment Based on Sexual Orientation

Daniel, a gay man of African descent from St. Vincent and the Grenadines, in the West Indies, alleges that Melidones repeatedly harassed him on the basis of his race, sexual orientation, and nationality. SAC ¶ 39. Daniel also alleges that Melidones harassed other workers and that all such workers who attempted to complain to T&M or Minskoff management about the harassment were fired. *Id.*

Daniel alleges that almost every day between June and September 2011, Melidones watched Daniel change his clothes or nap in the male locker room. SAC Claim 3 ¶ 2. One day in July 2011, at around 2 p.m., Melidones came to Daniel's work podium, brushed his genitals against Daniel's buttocks, and asked Daniel if he was gay. *Id.* ¶¶ 3–4. When Daniel did not respond, Melidones told him that his son was gay. *Id.* ¶ 3.

Between July 2011 and September 2011, almost every day after Daniel returned from work, Melidones came up behind him at his podium and said, apparently in reference to nearby co-worker Manual Perdomo, "Manny the Homo, Manny the Homo, Homo." *Id.* ¶ 5. In September 2011, Daniel changed work shifts to the 4 p.m. to midnight shift, primarily to avoid working with Melidones. *Id.* ¶ 7.

Between September 2011 and May 2012, Melidones repeatedly told Daniel "be a man, man up." SAC Claim 5 ¶ 1. Daniel believes that Melidones said this to him in reference to his sexual orientation. *Id.* These comments made Daniel "feel emasculated, not masculine or manly enough." *Id.*

APPX J Pg. 116

In March 2012, Melidones called Daniel at his workstation to inform Daniel that he, Melidones, was at a Broadway show, Mary Poppins, and remarked "I can see you as Mary Poppins, you'll make a good Mary Poppins." *Id.* ¶ 6.

Daniel alleges that T&M and Minskoff management knew about this harassment but did nothing. *Id.* ¶ 8; SAC Claim 3 ¶ 14.

E. The Alleged Harassment Based on National Origin

During Daniel's employment, Melidones frequently spoke to him in an imitated English accent, told him he was not black, asked him about British affairs, and told him to go back to his country of England. SAC Claim 6 ¶¶ 1–3. Daniel believed that Melidones relentlessly questioned him about British affairs because Daniel speaks with an accent and Melidones believed he was English. *Id.* ¶ 2. Greisch and Lisa Migliore, Minskoff's office manager, also repeatedly spoke to Daniel in an imitated English accent. *Id.* Melidones also randomly asked Daniel the meaning of large words. *Id.* ¶ 4. Daniel believed that Melidones did this to belittle him. *Id.*

In March 2011, Daniel, a naturalized citizen, SAC Claim 4 ¶ 14, showed Melidones a copy of his birth certificate, stating that he was born in St. Vincent and the Grenadines. Melidones responded by asking him why he came to the United States rather than "stay in your own country." SAC Claim 6 ¶ 1.

In July 2011, Melidones repeatedly came to Daniel's workstation podium and sang calypso, in a manner that Daniel felt was mocking his cultural and national origin as a Vincentian. *Id.* ¶ 5.

Daniel alleges that T&M and Minskoff management knew about Melidones's behavior but did nothing. *Id.* ¶ 6.

APPX J

PG. 117

F. The Alleged Harassment Based on Race

In February 2011, during Daniel's first week on the job, Melidones told him that "building owners in the area prefer to hire white security personnel" and that "the only reason you got the job is because Bill Woods liked you. It's mostly Blacks, Indians, Hispanics doing this type of job nowadays." SAC Claim 4 ¶¶ 1–2. Also that month, Melidones told Daniel, "Aren't you lucky to be making this type of money, I think I'm paying you too much." *Id.* ¶ 3. Daniel, who was paid $20 per hour, believed that if he were white, Melidones would not have made this comment. *Id.*

In March 2011, Melidones began telling Daniel that "you're not black." *Id.* ¶ 4. Daniel believed that Melidones said this because of his accent, physical mannerisms, and perceived national origin in England. *Id.*

In July 2011, Melidones likened Daniel to a gorilla. *Id.* ¶ 6.

In August 2011, before Daniel took the FDNY fire safety director exam, Melidones said to him, "you better pass the test or you're fired." *Id.* ¶ 9. When Melidones found out that Daniel had passed, he told Daniel "you're lucky." *Id.* Melidones fired an African-American co-worker of Daniel's, Larry Saunders, who failed the test. *Id.* ¶ 10. Daniel believes that if he and Saunders had been white males, Melidones would not have made those remarks, and would have given the Saunders a second opportunity to take the test. *Id.* ¶¶ 11–12.

Also in August 2011, Melidones told Daniel, referring to a white female tenant named Barby Woodard, that "she likes you, you know she's dating a black man, she likes her meat dark and big." *Id.* ¶ 13.

APPX J PG. 118

In September 2011, Melidones asked Daniel if he was "going to vote for your man Obama." *Id.* ¶ 14. When Daniel informed Melidones that he was a registered Republican, Melidones replied, "you're, really, I guess you're alright after all." *Id.*

In December 2011, a laptop was stolen from a building tenant, and security obtained a picture of the suspect, a black male with a bald head. Melidones asked Daniel if he had stolen the laptop, saying that "I've a picture of a black male, with bald head that looks like you, after all you are a black male with a bald head." *Id.* ¶ 8.

Daniel alleges that T&M and Minskoff management knew of Melidones's behavior and did nothing. *Id.* ¶ 19.

G. Daniel's Termination

On Friday, May 4, 2012, Greisch mentioned to Daniel that Bain Capital, a tenant, was planning to terminate an employee that day, and that Melidones would call Daniel later with more details. SAC ¶ 40. Melidones later called Daniel and told him that he should go speak to Bain's office manager to get more information about the person Bain fired. *Id.* ¶ 41. Instead of physically going to the Bain office on the 42nd floor, Daniel called Bain's office manager, who sounded confused by his inquiry. *Id.* ¶ 42. Less than a minute later, Melidones called Daniel back and screamed at him, "'who told you to call? who told you to call? You fucking idiot, shut the fuck up, don't say a fucking word you fucking idiot, nig' (nigger)." *Id.* ¶ 43. Melidones then slammed the phone down and hung up.

The incident on May 4 made Daniel sick with fear. *Id.* He was afraid that he would lose his job and that if he lost his job he might become homeless. *Id.* He also believed that complaining would jeopardize his job. *Id.* ¶ 44.

APPX J Pg. 119

On the next work day, Monday, May 7, 2012, Daniel asked Melidones for a day off. *Id.* ¶ 44. He seriously contemplated quitting, because he could not stand looking or being in Melidones's presence. *Id.* When he told Melidones of his intention to resign, Melidones encouraged him to quit. *Id.*

The next day Daniel came into work was Tuesday, May 8, 2012. At 4:15 p.m., as Melidones walked past Daniel's work podium, Melidones slapped Daniel "very, very hard on my right shoulder and said, 'man up, be a man!'" *Id.* ¶ 46. At 4:20 p.m., two co-workers told Daniel that, the previous day, Melidones had made derogatory remarks about him and asked co-workers if Daniel was needed on the job and whether they knew of anything that Melidones could use to get Daniel fired. *Id.* ¶ 47; SAC Claim 1 ¶ 36. At 4:30 p.m., Daniel told Greisch, Minskoff's building manager, about the May 4 incident, to which Greisch replied, "I'll talk to [Melidones], I've spoken to him before about watching his words, I'll speak to him again." SAC ¶ 48.

On May 7 or 8, 2012, Melidones deleted all sent emails from the computer at Daniel's workstation, many of which contained complaints by former employee Paul Sylvio to Greisch, Woods, and Melidones's boss at T&M about inappropriate ethnic comments and racial epithets that Melidones had directed at Sylvio. SAC Claim 4 ¶ 18.

On Wednesday, May 9, 2012, at 12:39 a.m., Daniel sent Melidones a text message informing him that Daniel intended to report his harassment and intimidation to T&M. SAC ¶ 49. Later that day, at 4 p.m., Melidones served Daniel with a disciplinary letter that accused him of having unauthorized packages delivered to him at 590 Madison. *Id.* ¶ 50; *id.* Ex. C., p. 7. The letter further alleged that one such package contained an "imitation pistol," and that Daniel opened this package and showed the imitation pistol to several staff members. *Id.* Ex. C., p. 7.

APPX J Pg. 120

Melidones also orally accused Daniel of coming to work late two dozen times in the last two months. *Id.* ¶ 50. This was the first time Daniel had received a disciplinary warning from T&M. SAC Claim 1 ¶ 6.

On Monday, May 14, 2012, at 7:44 a.m., Melidones sent Daniel a text message telling him not to show up at work. SAC ¶ 51. On Friday, 18, 2012, Toni Scarito, T&M's Human Resources Director, told Daniel by telephone that he was fired because he was an at-will employee, he had violated T&M and Minskoff's policies, and he had had violated New York City Administrative Code § 10-131(b)(1) by possessing and selling toy air pistols and air rifles. SAC ¶ 52.

Daniel claims that the reasons given for his firing were pretextual. SAC Claim 1 ¶ 10. He insists that his receipt and possession of the BB gun, which Amazon delivered to him at work on March 16, 2012, *Id.* ¶ 20, *id.* Ex. C., p. 29, was not illegal, SAC Claim 1 ¶¶ 22–26. Daniel also asserts that the T&M Employee Handbook does not state that it is unacceptable for employees to accept deliveries at their worksite, SAC ¶ 53; that Melidones, Greisch, Woods, and others had long known that he had been receiving packages at 590 Madison, *id.* ¶ 55; and that contrary to T&M's later representation, he had not been told to stop ordering packages for delivery at his worksite, SAC Claim 1 ¶ 28.

H. The Emotional Impact on Daniel

Daniel alleges that these events caused him to suffer from depression, including strong suicidal thoughts, feelings of worthlessness, and feelings of defeat and powerlessness. SAC Claim 8 ¶ 6. In January 2012, his doctor prescribed him an anti-depressant medication, Celexa. *Id.* ¶ 7. He also alleges that these events caused him to suffer severe panic attacks, physical fatigue, chest pains, migraine headaches, muscle weakness, sleep apnea, difficulty sleeping, and

APPX J Pg. 121

a worsening of his preexisting high blood pressure condition. *Id.* ¶¶ 7–10. After losing his job, Daniel became homeless. *Id.* ¶¶ 13–15.

I. Procedural History

On September 5, 2012, Daniel went to the Equal Employment Opportunity Commission ("EEOC") to file a complaint. SAC ¶ 41. Because his sexual orientation claims are cognizable under state but not federal law, the EEOC referred him to the New York State Division of Human Rights (DHR). *Id.* That same day, Daniel went to the DHR and filed a complaint against T&M and Melidones. SAC p. 40. He listed Melidones and Greisch under the heading "Individual people who discriminated against me." *Id.* On September 14, 2012, T&M responded. SAC Ex. C, p. 1. On March 4, 2013, DHR issued a letter concluding that there was no probable cause to believe that T&M had engaged in the unlawful practices of which Daniel complained. SAC pp. 41–43. On April 18, 2013, the EEOC adopted the DHR's findings and issued a "Right to Sue" letter. *Id.* p. 44.

On June 24, 2013, Daniel filed the original complaint in this action. Dkt. 2. On August 19, 2013, he filed an Amended Complaint. Dkt. 11. On August 20, 2013, Daniel requested pro bono counsel. Dkt. 12. On September 10, 2013, the Court referred the case to Magistrate Judge Pitman for general pretrial supervision, Dkt. 22, and denied Daniel's application for pro bono counsel without prejudice to renewal, Dkt. 23. On September 25, 2013, Minskoff moved to dismiss the Amended Complaint. Dkt. 24.

On October 7, 2013, Daniel filed the SAC. Dkt. 31. It alleged that T&M and Minskoff had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), New York State Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* ("NYSHRL"), and New York City Human Rights Law, N.Y. City Admin. Code §§ 8-101 *et*

APPX J Pg. 122

seq. ("NYCHRL"). It alleged that their discriminatory conduct included termination, retaliation, and harassment, including sexual harassment. The SAC alleged that defendants discriminated against him on the basis of race, sexual orientation, and national origin. It also alleged that they violated the FMLA and committed common law negligence.

On October 28, 2013, Minskoff moved to dismiss the SAC, Dkt. 33, and filed an accompanying memorandum of law. Dkt. 34 ("Def. Br."). Minskoff argued that (1) this Court lacks jurisdiction to hear Daniel's Title VII claim against Minskoff, because Daniel filed his DHR and EEOC claims against only T&M, not Minskoff; (2) the Title VII, NYSHRL, NYCHRL, and FMLA claims should be dismissed because Minskoff was not Daniel's employer and because the SAC failed to adequately allege wrongdoing by Minskoff; (3) the common law negligence claim should be dismissed because Minskoff did not have a duty to protect Daniel, the SAC alleges no negligent conduct by Minskoff, and the SAC alleges only emotional harm; and (4) once both federal law claims are dismissed, the NYSHRL and NYCHRL claims should be dismissed for lack of jurisdiction,

On October 29, 2013, Daniel filed a three-page Affirmation in Opposition to Motion. Dkt. 36 ("Pl. Br."). Later that day, the Court issued an Order clarifying that if Daniel wanted to supplement his opposition, he had until November 12, 2013 to do so. Dkt. 37. On November 4, 2013, Daniel filed a second Affirmation in Opposition. Dkt. 38 ("Pl. Supp. Br."). On November 26, 2013, Minskoff replied. Dkt. 39 ("Def. Reply Br.").

On December 5, 2013, Daniel again requested pro bono counsel. Dkt. 40. On December 9, 2013, Magistrate Judge Pitman denied Daniel's request for pro bono counsel. Dkt. 41.

APPX J Pg. 123

II. Applicable Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim will only have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. Accordingly, a district court must accept as true all well-pleaded factual allegations in the complaint, and draw all inferences in the plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. A pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

District courts are "obligated to construe *pro se* complaint[s] liberally," *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), interpreting them "to raise the strongest arguments that they suggest," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). Courts may not, however, read into *pro se* submissions claims inconsistent with the *pro se* litigant's allegations, *Phillips v. Girdich*, 408 F.3d 124, 127 (2d Cir. 2005) (citation omitted), or arguments that the submissions themselves do not "suggest," *Pabon v. Wright,* 459 F.3d 241, 248 (2d Cir. 2006). *Pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir. 1983) (citation omitted).

APPX J Pg. 124

III. Discussion

A. Daniel's Failure to Name Minskoff in his DHR Complaint

Minskoff argues that Daniel's Title VII claim should be dismissed because the complaint he lodged with the DHR failed to name Minskoff. "A complainant must file a charge against a party with the EEOC or an authorized state agency before the complainant can sue that party in federal court under Title VII." *Vital v. Interfaith Med. Ctr.*, 168 F.3d 615, 619 (2d Cir. 1999) (citing 42 U.S.C. § 2000e–5(f)(1), which limits the aggrieved party's right to sue to "the respondent named in the charge"). "The charge serves to notify the charged party of the alleged violation and also brings the party before the EEOC, making possible effectuation of the Act's primary goal of securing voluntary compliance with its mandates." *Id.* (citation omitted).

The charge that Daniel filed with the DHR did not name Minskoff. SAC p. 40. Daniel concedes as much. Pl. Supp. Br. ¶ VIII. Similarly, the EEOC's "Right To Sue" letter, which adopted the DHR's findings, included only T&M as a respondent. SAC p. 41.

Contrary to Minskoff's suggestion, however, Daniel's failure to literally name Minskoff in his DHR charge does not end the matter. "Because these charges generally are filed by parties not versed in the vagaries of Title VII and its jurisdictional and pleading requirements, [the Second Circuit has] taken a flexible stance in interpreting Title VII's procedural provisions, so as not to frustrate Title VII's remedial goals." *Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991) (citation omitted). "Thus, courts have recognized an exception to the general rule that a defendant must be named in the EEOC complaint." *Id.* "This exception, termed the 'identity of interest' exception, permits a Title VII action to proceed against an unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge." *Id.*; *accord Pajooh v. Dep't of Sanitation*, No. 12-4252-CV, 2013 WL

APPX J

Pg. 125

6570706, at *1 (2d Cir. Dec. 16, 2013). The Second Circuit has recognized four factors that should be considered in determining whether an identity of interests exists:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Vital, 168 F.3d at 619 (quoting *Johnson*, 931 F.2d at 209–10). "In addition to these four factors, numerous courts have found that the Second Circuit in *Johnson* had also implied that another consideration is relevant to the identity-of-interest inquiry—whether, although not named as a respondent in the caption, the defendant is named in the body of the charges as having played a role in the discrimination." *Zustovich v. Harvard Maint., Inc.*, 73 Fed. R. Serv. 3d 462, at *8 (S.D.N.Y. 2009); *accord Hanley v. Chicago Title Ins. Co.*, 12 No. Civ. 4418 (ER), 2013 WL 3192174, at *5 (S.D.N.Y. June 24, 2013); *Tout v. Erie Comm. College*, 923 F. Supp. 13, 16 (W.D.N.Y. 1995); *Bridges v. Eastman Kodak Co.*, 822 F. Supp. 1020, 1025 (S.D.N.Y. 1993); *see Johnson*, 931 F.2d at 210 (distinguishing a case in which the court allowed a defendant to be sued although not named in the agency complaint because "several factual statements in the EEOC complaint could be read to afford notice" from the instant case, in which "[t]he factual statements in Johnson's [agency] complaint do not implicate the [defendant] in any way"). "This multi-factor test is not a mechanical one, and no single factor is dispositive." *Zustovich*, 73 Fed. R. Serv. 3d 462, at *8.

APPX J

#9.126

The first factor weighs against Daniel, because he was fully aware of Minskoff's role at the time he filed his charge. For example, he listed Greisch on the complaint form under the heading "Individual people who discriminated against me." SAC p. 40.

The second factor, similarity of interests, weighs in Daniel's favor. It is true that Minskoff and T&M are separate entities, with generally distinct interests. Minskoff is not an "agent[] or employee[]" of T&M. *See Tout*, 923 F. Supp. at 16. But Minskoff has contractually delegated to T&M substantial responsibility for the security of 590 Madison, including staffing decisions. Thus, "for the purpose of obtaining voluntary conciliation and compliance" in Daniel's case, "it would be unnecessary to include" Minskoff in the DHR proceedings. *Vital*, 168 F.3d at 619. For the purposes of that proceeding, the interests of Minskoff and T&M were similar. In addition, T&M and Minskoff's later use of common legal counsel in these proceedings, *see* Dkt. 7, 17, evidences their shared interest. *See Hanley*, 2013 WL 3192174, at *5; *Wills v. Key Food Stores Co-operative, Inc.*, No. 95 Civ. 5333 (SJ), 1997 WL 168590, at *7 (E.D.N.Y. Apr. 9, 1997); *Goyette v. DCA Advertising, Inc.*, 830 F. Supp. 737, 748 (S.D.N.Y. 1993).

The third factor also favors Daniel: Minskoff was not prejudiced by its absence from the DHR proceeding, because the DHR took no action to remedy Daniel's complaint. *See Zustovich*, 73 Fed. R. Serv. 3d 462, at *9 ("Courts have found the third factor of the identity-of-interest analysis to be satisfied where the agency in which the plaintiff filed his or her administrative charge took no conciliatory action."). In addition, Minskoff has made no showing of actual prejudice.

The fourth factor also weighs in Daniel's favor, because Minskoff had represented to Daniel that its relationship with him was to be through T&M. The pleadings do state that Daniel

APPX J

#F.127

worked in concert with both Minskoff and T&M staff. But, as to hiring, firing, and related employment matters, the SAC pleads that his employment relationship was directly with T&M, and any relationship with Minskoff was only indirect. *See* SAC ¶¶ 32 (hiring by T&M), 52 (firing by T&M), Ex. I p. 5 (email from Greisch to Daniel stating that, "[u]nfortunately there is not anything I can do regarding your termination of employment here at 590 as it was a T&M issue"). Indeed, Minskoff has cited to these pleadings, without disagreement, in an effort to show that it was not Daniel's employer. *See* Def. Br. 17 (summarizing, without disagreeing, that "Plaintiff alleges that he was hired by T&M, disciplined by T&M, paid by T&M and fired by T&M. Plaintiff does not allege that Minskoff exercised authority to make any employment decisions with respect to Plaintiff.") (citations omitted). Thus, on the record before it the Court finds that Minskoff had represented to Daniel that its relationship with him was to be through T&M. *See also Zustovich*, 73 Fed. R. Serv. 3d 462, at *9 ("In this case, the affiliation among Sage, SPC and Harvard was in the nature of a contactor-subcontractor relationship. This in itself is likely sufficient, at this early stage, to satisfy the fourth factor.").

As to the fifth factor, although the Court does not have the body of Daniel's charges before it, the single-page complaint form lists Greisch, along with Melidones, under the heading "Individual people who discriminated against me," and gives his title, "property manager." SAC p. 40. "Although individuals may not be held liable under Title VII, the naming of [Greisch], a[ ] [Minskoff] employee, in the agency complaint should have given [Minskoff] notice that it was potentially liable for [Greisch's] conduct." *Zustovich*, 73 Fed. R. Serv. 3d 462, at *9.

After carefully considering these five factors, four of which weigh in Daniel's favor, the Court concludes that, in the administrative proceeding, there was a sufficient identity of interest between T&M and Minskoff such that Daniel's failure to name Minskoff as a respondent in the

APPX J Pg. 128

administrative proceeding should not bar him from naming Minskoff as a defendant in his Title VII claim before this Court. Daniel's failure may have deprived Minskoff of actual notice—the record before this Court does not make clear whether T&M actually notified Minskoff of Daniel's complaint against T&M—but it did not undermine "the Act's primary goal of securing voluntary compliance with its mandates." *Vital*, 168 F.3d at 619. Accordingly, the Court denies Minskoff's motion to dismiss the Title VII claim for failure to exhaust administrative remedies.[2]

B. Minskoff's Status as Daniel's Employer

Minskoff next argues that the Title VII, NYSHRL, NYCHRL, and FMLA claims should be dismissed because such claims can be brought only against an employer, and Minskoff was not Daniel's employer. Again, at first blush, Minskoff's argument has appeal: It was never, literally, Daniel's employer. But, once again, Minskoff does not raise or seek to rebut the relevant exception to this rule, here, the joint employer doctrine, under which "an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer." *Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 198 (2d Cir. 2005).

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[2] "Some courts, including district courts in this Circuit, have also recognized a separate exception to the requirement that a party be named in the administrative complaint in cases in which, from the facts in the EEOC charge, 'the agency could have inferred the named defendant and unnamed defendant were part of a common discriminatory scheme.'" *Zustovich*, 73 Fed. R. Serv. 3d 462, at *7 n.3 (quoting *Bright v. Le Moyne College*, 306 F. Supp. 2d 244, 257 (N.D.N.Y. 2004)); *see also Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977), *cert denied*, 449 U.S. 949 (1980)); *Coleman v. Bd. of Educ.*, No. 96 Civ. 4293 (LAP), 1997 WL 452029, at *3 (S.D.N.Y. Aug. 7, 1997); *Gilmore v. Local 295*, 798 F. Supp. 1030, 1038 (S.D.N.Y. 1992), *aff'd*, 23 F.3d 396 (2d Cir. 1994). Because the Court finds that T&M and Minskoff had a sufficient identity of interest in the administrative proceedings, it need not reach this issue.

APPX J pg. 129

The joint employer inquiry is "functional[ ]," *see Laurin v. Pokoik*, No. 02 Civ. 1938 (LMM), 2004 WL 513999, at *8 (S.D.N.Y. Mar. 15, 2004), and factual, *see id.* at *4–*9 (fact questions existed as to whether sole proprietorship where plaintiff worked and corporation that employed proprietor were single employer and/or joint employers); *Nelson v. Beechwood Org.*, No. 03 Civ. 4441 (GEL), 2004 WL 2978278, at *4–*5 (S.D.N.Y. Dec. 21, 2004) (fact question existed as to whether subcontractor and contractor were functionally joint employers of plaintiff). "Here, courts look at commonality of hiring, firing, discipline, pay, insurance, records, and supervision to determine whether an entity is a joint employer." *Lima v. Addeco*, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009) *aff'd sub nom. Lima v. Adecco &/or Platform Learning, Inc.*, 375 F. App'x 54 (2d Cir. 2010) (citations omitted). "The joint employer doctrine has been applied to temporary employment or staffing agencies and their client entities; it has also been applied to contractors and subcontractors and other scenarios where two separate entities have control over an employee's employment." *Id.*

The SAC alleges, and at this stage the Court must take as true, that Minskoff exercised a measure of control over the hiring, firing, supervision, leave, and discipline of T&M employees working at 590 Madison. *See* SAC ¶ 31 (Minskoff "often asserts its authority to terminate and/or hire security personnel at 590 Madison Ave"). Daniel alleges that he believes that the job he interviewed for at 590 Madison was available because Minskoff had demanded the termination of his predecessor. SAC Claim 4 ¶ 2. And before Daniel could begin working at 590 Madison, he was interviewed by Woods, Minskoff's assistant property manager. SAC ¶ 34. Once hired, Daniel would, with some frequency, provide updates on work matters to Woods and Greisch, Minskoff's property manager. SAC ¶ 23; *id.* Ex. A. pp. 5, 9–11. Indeed, Melidones, Daniel's direct supervisor and a T&M employee, sat in the Minskoff management office on the 26th floor.

APPX J pg. 130

Id. ¶ 5. Greisch would sometimes intervene on Daniel's behalf with Melidones, instructing him to grant Daniel days off when sick, *id.* Claim 7 ¶ 1, and, after Melidones's May 4 alleged racially charged explosion, telling Daniel that "I'll talk to [Melidones], I've spoken to him before about watching his words, I'll speak to him again," SAC ¶ 48. And Melidones often conferred with Greisch and Wood before disciplining security personnel at 590 Madison. SAC Claim 1 ¶ 13.

By means of these detailed allegations, the SAC adequately pleads that Minskoff and T&M were joint employers. This is especially true in light of this Court's obligation "to construe *pro se* complaint[s] liberally," *Harris*, 572 F.3d at 72, interpreting them "to raise the strongest arguments that they suggest," *Triestman*, 470 F.3d at 474. The Court therefore denies Minskoff's motion to dismiss the Title VII and FMLA claims for lack of an employer-employee relationship.

C. The SAC's Allegations Against Minskoff

Minskoff next argues that the Title VII, NYSHRL, NYCHRL and FMLA claims against Minskoff should be dismissed because the SAC does not allege any wrongdoing, adverse employment actions, or denials of leave by Minskoff. Ironically, these arguments by Minskoff as to Daniel's asserted threadbare pleading are themselves so sparse as to be barely noticeable. *See* Def. Br. 13, 17 n.5, 19 n.6.

The SAC does not specifically allege that any personnel clearly employed by Minskoff, such as Woods or Greisch, were involved in Daniel's termination or denials of leave. As to Minskoff and these men, the SAC merely alleges that they were sometimes involved in hiring and firing T&M personnel, and that they could have prevented Daniel's firing, but not that they were involved in causing Daniel's firing. The SAC also alleges in general terms that, with respect to the May 4 incident with Bain Capital, Daniel believes that he was "set up" by

APPX J PG. 131

Melidones and Greisch, SAC 4 ¶ 16, and that Melidones "and or" Greisch denied or delayed approval for him to take off work for family and medical reasons, SAC Claim 7 ¶ 3, but these allegations are so vague and conclusory that they cannot be the basis for a reasonable inference that Minskoff is liable for the misconduct alleged.

However, although the SAC is far from clear on this matter, there is a basis to read it to allege that Melidones, who it plainly alleges had a hand in Daniel's termination and denial of leave, was an agent or employee of Minskoff as well as T&M. On the one hand, the SAC implies that Melidones was, at least, primarily affiliated with T&M. The SAC states that T&M is Melidones's "direct employer," SAC Claim 8 ¶ 3, and implies that he is a member of T&M's management team, SAC ¶ 54. Melidones's boss works for T&M. SAC Claim 4 ¶ 18. The SAC also includes a letter that Melidones wrote, on T&M letterhead, to the security staff at 590 Madison, which casts him as part of T&M. The letter begins "Congratulations!!! T and M Protection has been awarded the contract here at 590 Madison for another year. This will be *our* 6th year, as most of you know in world of New York City Security Services this is unheard of. In keeping with *our* commitment of excellence, I believe *we* must 'tighten up' or increase *our* focus on *our* services here at 590." SAC Ex. I p. 3 (emphases added). The letter concludes, "I cannot let the action of a few employees jeopardize the whole staff." *Id.*

On the other hand, the SAC also suggests that Melidones may have played a dual role. The SAC states that Melidones's job titles are "(1) security director (EJME) [Minskoff], (2) account manager / supervisor (T&M), and (3) fire safety / EAP dir[rector] (EJME) [Minskoff]." *Id.* ¶ 24.[3] Other portions of the SAC refer to Melidones using Minskoff titles. *See* SAC Claim 1 ¶ 4 ("African American and Hispanic security personnel were and I believe still are unfairly

[3] The SAC uses the acronym EJME to refer to Edward J. Minskoff Equities (Minskoff). SAC ¶ 1.

APPX J Pg. 132

targeted by T&M onsite account manager and EJME security director Mr. John Melidones and EJME property manager Mr. Joseph Griesch."); *id.* ¶ 17 (referring to Melidones as a member of T&M's disciplinary committee and "EJME security director/deputy fire safety/EAP director and T&M account manager"); *cf.* SAC ¶ 34 (somewhat ambiguously referring to Melidones's title as follows: "Tom Dolan sent me to 590 Madison Avenue to be interviewed by EJME assistant property manager Mr. William Woods and security director Mr. John Melidones.").

In sum, the SAC can fairly be read to plead that Melidones was an agent of Minskoff, and it certainly alleges that Melidones was involved in T&M's decision to fire Daniel. Accordingly, the Court cannot conclude that the SAC fails to state claims against Minskoff for violations of Title VII, NYSHRL, NYCHRL, and the FMLA. Minskoff's motion to dismiss these claims is therefore denied.

D. Negligence

Finally, Minskoff moves to dismiss Daniel's last claim, for common law negligence, on the grounds that, *inter alia*, allegations of employment discrimination cannot be transmuted into tort claims sounding in negligence. Def. Br. 20–21. As to this point, Minskoff is correct. Daniel's negligence claim is essentially that T&M and Minskoff failed to protect him from Melidones's harassment and then retaliated against him. SAC Claim 8 ¶¶ 1–16. But this is no different from his employment discrimination claims under Title VII, NYSHRL, and NYCHRL. And "the alleged violations of federal, state, and city anti-discrimination laws are not torts under New York law." *Baguer v. Spanish Broad. Sys., Inc.*, No. 04 Civ. 8393 (KMK), 2007 WL 2780390, at *4 (S.D.N.Y. Sept. 20, 2007); *accord Treanor v. Metro. Transp. Auth.*, 414 F. Supp. 2d 297, 303 (S.D.N.Y. 2005) ("New York cases reason [ ] that a discrimination claim is not a tort because it is 'a new statutory cause of action which was not cognizable at common law.'"

APP X J Pg. 133

(quoting *Picciano v. Nassau Co. Civil Serv. Comm'n*, 736 N.Y.S.2d 55, 60 (2nd Dep't 2001)). Accordingly, Minskoff's motion to dismiss the negligence claim is granted.

CONCLUSION

Minskoff's motion to dismiss the SAC is denied as to the Title VII, FMLA, NYSHRL, and NYCRL claims against it, and granted as to the negligence claim. Because the Court denies Minskoff's motion to dismiss the Title VII claim, it need not address Minskoff's argument that, were the Court to dismiss the Title VII claim, it should decline to exercise supplemental jurisdiction over the state law claims.

The Clerk of Court is respectfully directed to terminate the motions pending at docket numbers 24 and 33.

SO ORDERED.

Paul A. Engelmayer
United States District Judge

Dated: January 15, 2014
New York, New York

APPX J Pg. 134

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

OTIS A. DANIEL — PETITIONER
(Your Name)

vs.

T & M PROTECTION RESOURCES LLC — RESPONDENT(S)

PROOF OF SERVICE

I, OTIS DANIEL, do swear or declare that on this date, SEPT. 18, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

MR. LEONARD WEINTRAUB
1251 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPT. 18, 2019

OTIS A. DANIEL
(Signature)