APPENDIX

Appendix A

19-1345-cv
Campbell v. Bottling Group, 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 TO 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 21st day of May, two thousand twenty.

PRESENT: PIERRE N. LEVAL,
RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
Circuit Judges.

BOBBY CAMPBELL, JR.,

Plaintiff-Appellant,

v. No. 19-1345-cv

BOTTLING GROUP, LLC,

*Defendant-Appellee.**

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* The Clerk of Court is directed to amend the caption as set forth above.

FOR PLAINTIFF-APPELLANT:		BOBBY CAMPBELL, JR., *pro se*, Gainesville, FL.
FOR DEFENDANT-APPELLEE:		LINDA T. PRESTEGAARD, Phillips Lytle LLP, Rochester, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (David G. Larimer, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Bobby Campbell, Jr., who is African American and proceeding pro se, appeals a decision of the District Court (Larimer, J.) granting summary judgment in favor of defendant Bottling Group, LLC, on his employment discrimination claims under Title VII and the New York State Human Rights Law (NYSHRL) for race-based discrimination and retaliation. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

As an initial matter, we conclude that Campbell abandoned his failure to promote claim by not raising any arguments relating to that claim in his briefing on appeal. We "liberally construe pleadings and briefs submitted by pro se

litigants . . . to raise the strongest arguments they suggest." McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156 (2d Cir. 2017) (quotation marks omitted). But a pro se appellant must still comply with Federal Rule of Appellate Procedure 28(a), which requires an appellant's brief "to provide the court with a clear statement of the issues on appeal." Moates v. Barkley, 147 F.3d 207, 209 (2d Cir. 1998). Accordingly, we "normally will not[] decide issues that a party fails to raise in his or her appellate brief." Id. Even liberally construing Campbell's brief, he fails to mention the failure to promote claim, thereby abandoning it. We therefore consider only Campbell's claims of discriminatory termination, retaliation, and hostile work environment.

"We review a district court's grant of summary judgment de novo . . . resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." Garcia v. Hartford Police Dep't, 706 F.3d 120, 126–27 (2d Cir. 2013) (quotation marks omitted). Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, "there is no genuine dispute as to any material fact." Id. at 126 (quotation marks omitted). But "conclusory statements or mere allegations [are] not sufficient to

defeat a summary judgment motion . . . ." Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 423 (2d Cir. 2018) (alteration in original) (quotation marks omitted). We analyze Title VII and NYSHRL claims for discrimination and retaliation under the three-step burden-shifting framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, the employee must establish a prima facie case of discrimination or retaliation; second, if he does, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action (here, Campbell's termination); and third, if the employer does so, the employee can defeat summary judgment only by pointing to record evidence that would permit a rational finder of fact to infer that the defendant's proffered reason was a pretext for discrimination or retaliation. See Kirkland v. Cablevision Sys., 760 F.3d 223, 225 (2d Cir. 2014); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305 n.3 (2004).

We affirm the District Court's grant of summary judgment on Campbell's discriminatory termination and retaliation claims because, assuming without deciding that Campbell established a prima facie case, he failed to adduce evidence that rebutted Bottling Group's proffered legitimate reason for

termination, namely, that according to the mileage audit report, Campbell claimed reimbursement for several hundred more miles than he had driven.

Campbell first responds that the mileage audit report was inaccurate and, indeed, falsified; he contends that Jesse Pitts, the supervisor who conducted the audit, intentionally omitted stops that Campbell made. But Campbell, who was required to come forward with "record evidence" to rebut Bottling Group's proffered explanation for terminating him, see Salahuddin v. Goord, 467 F.3d 263, 273 (2d Cir. 2006), never offered any evidence in support of his assertion about Pitts or to show that the audit report was materially false. A general disclaimer in the terms of use for the website used to conduct the audit, and Bottling Group's acknowledgement that the mileage calculation did not "perfectly track[] the actual routes taken by merchandisers," do not support Campbell's conclusory assertions that the report was "fabricated" or "knowingly inaccurate." Appellant Br. at 8; see also Penn, 884 F.3d at 423. For these reasons, the District Court's reliance on the audit report did not amount to an improper factual or credibility determination.

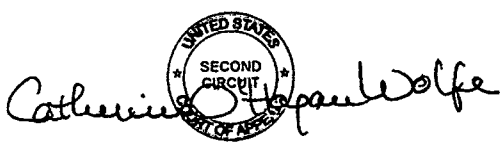
Campbell also attempted to show that the mileage report was not the real reason for his termination by pointing to two white merchandisers who overreported their mileage but were not fired. Evidence that a plaintiff was treated less favorably than similarly situated comparators outside the plaintiff's protected group can raise a question of fact as to pretext. See Cruz v. Coach Stores, Inc., 202 F.3d 560, 567–68 (2d Cir. 2000). But the comparator must have engaged in "comparable conduct" of "comparable seriousness." Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000) (quotation marks omitted); see also Cruz, 202 F.3d at 568. Here, as the District Court pointed out, the white merchandisers were not similarly situated to Campbell because their mileage reports showed that they overreported their mileage by sixty miles or less, whereas Campbell's mileage report showed much more significant overreporting of 577 miles during the same period. Accordingly, we conclude that Campbell failed to sustain his burden of adducing evidence that rebutted Bottling Group's proffered legitimate reason and thus defeat summary judgment on his discriminatory termination and retaliation claims.

Finally, substantially for the reasons stated by the District Court, we agree that Campbell failed to demonstrate that he was subjected to a racially hostile work environment. To establish a claim for hostile work environment, a plaintiff must show discriminatory conduct that was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002) (quotation marks omitted); see also Summa v. Hofstra Univ., 708 F.3d 115, 123–24 (2d Cir. 2013). A plaintiff must show either "a single incident [that] was extraordinarily severe" or "a series of incidents [that] were sufficiently continuous and concerted to have altered the conditions of [his] working environment." Alfano, 294 F.3d at 374 (quotation marks omitted). Viewing the record in Campbell's favor, we agree with the District Court that the incidents to which Campbell points do not rise to the level of being severe or pervasive. For example, Campbell offered evidence that his former supervisor, Robert Flaherty, told him "that there was a 'stink' on him . . . due to [his] performance issues." Sp. App'x 7–8. Even if we assume that the statement had racial overtones, this single remark falls below the "extraordinarily severe"

standard for a hostile work environment claim based on a single incident. Moreover, Campbell's conclusory and generalized allegations of harassment and criticism of his job performance do not establish a nexus to a protected ground. For the first time on appeal, Campbell also asserts that Flaherty called him "kid," a term that Campbell analogized to being called "boy." The analogy is not without basis, but because Campbell's assertion was not previously made to the District Court, we decline to consider it as support for Campbell's hostile work environment claim for the first time on appeal. See Harrison v. Republic of Sudan, 838 F.3d 86, 96 (2d Cir. 2016) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (quotation marks omitted)).

We have considered Campbell's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERTO ANDRES MORALES,

Plaintiff,

v.

BOTTLING GROUP, LLC,

Defendant.

BOBBY CAMPBELL, JR.,

Plaintiff,

v.

BOTTLING GROUP, LLC,

Defendant.

DECISION AND ORDER

16-CV-6597L

16-CV-6600L

INTRODUCTION

Roberto Morales ("Morales") and his brother, Bobby Campbell ("Campbell") (together, the "plaintiffs"), filed separate *pro se* complaints against Bottling Group, LLC ("Bottling Group"),[1] alleging race-and-color-based discrimination, hostile work environment, and retaliation

[1] Bottling Group has consistently maintained that it is the true defendant-in-interest in this case, not "Pepsi Co., Inc.," as originally sued by plaintiffs. In Morales's case, the caption was amended to so reflect. (Dkt. # M41). The Court hereby amends the caption in Campbell's case *sua sponte* to reflect the same.

in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 298, *et seq.*

Pending are Bottling Group's motions for summary judgment. (Dkt. ## M31; C56).[2] Because the allegations, backgrounds, and defenses in both cases are similar, the Court will address both motions in this single decision. For the following reasons, Bottling Group's motions are granted, and Morales's and Campbell's Complaints (Dkt. ## M1; C1), are dismissed in their entirety and with prejudice.

FACTS[3]

A. Bottling Group and the Account Merchandiser Position

Bottling Group is a seller and distributor of Pepsi products, and has a distribution facility in Rochester, New York. (Dkt. ## M31-1 at ¶ 12; C56-1 at ¶ 13). In addition to staff at the facility, Bottling Group employs Bulk Customer Representatives ("BCRs") and Account Merchandisers ("Merchandisers"), both of which service customer stores. (Dkt. ## M31-1 at ¶¶ 13-14; C56-1 at ¶¶ 14-15). BCRs travel daily to customer stores, interface with store managers, order necessary Pepsi products and provide merchandise for the stores. (Dkt. ## M31-1 at ¶¶ 16-17; C56-1 at

[2] Citations to Morales's case will be preceded by an "M," and citations to Campbell's case will be preceded by a "C."

[3] The Court draws the following facts from the parties' Local Rule 56 submissions. Plaintiffs each received the *pro se* summary judgment notice, yet still largely failed to comply with the local rules, or even respond to or otherwise specifically controvert the majority of Bottling Group's statements. *See Cabassa v. Gummerson*, 2006 WL 1559215, *1 (N.D.N.Y. 2006) (noting that to "specifically controvert" a statement of material fact, the party must file a response that "set[s] forth a specific citation to the record where the factual issue arises"), *report and recommendation adopted by*, 2006 WL 1555656 (N.D.N.Y. 2006); *see also Gittens v. Garlocks Sealing Techs.*, 19 F. Supp. 2d 104, 110 (W.D.N.Y. 1998) ("proceeding *pro se* does not otherwise relieve a litigant from the usual requirements of summary judgment"). Accordingly, the Court will deem admitted those statements that plaintiffs have failed to respond to or otherwise controvert, to the extent they are supported by record evidence. *See Hamilton v. Robinson*, 2018 WL 4334769, *2 (W.D.N.Y. 2018).

¶¶ 14-15). Merchandisers—a level below BCRs—act as "back up" for BCRs; they generally cover for BCRs when BCRS are off from work. (Dkt. ## M31-1 at ¶¶ 19-20, 23; C56-1 at ¶¶ 20-21, 24).

Morales and Campbell were both Merchandisers. They were supervised by several people at Bottling Group, including Sean Trottier ("Trottier") and Robert Flaherty ("Flaherty"), who are Caucasian, and James Sapp, Jr. ("Sapp"), who is African American. Trottier, Flaherty, and Sapp were all supervised by Jesse Pitts ("Pitts"), who is Caucasian. (Dkt. ## M31-1 at ¶¶ 60-68; C56-1 at ¶¶ 62-70).

As Merchandisers, plaintiffs had to follow various company policies and procedures, specifically, the "P.R.E.M.I.E.R. In-Store Service Process," which provided guidance on how to service each customer's store. (Dkt. ## M31-1 at ¶¶ 28-41; C56-1 at ¶¶ 29-42). This process required Merchandisers to "scan-in" and "scan-out" at each location, in order to record the time spent at a specific location. (Dkt. ## M31-1 at ¶¶ 30, 42; C56-1 at ¶ 30, 44). Plaintiffs received formal and informal training on P.R.E.M.I.E.R. and failing to follow it was a "serious violation" of company policy. (Dkt. ## M31-1 at ¶¶ 44-46; C56-1 at ¶¶ 45-48).

Bottling Group also reimbursed Merchandisers for their work-related mileage. (Dkt. ## M31-1 at ¶ 47; C56-1 at ¶ 49). Accordingly, Merchandisers were expected to track and submit their mileage to Bottling Group at the end of each work week. (Dkt. ## M31-1 at ¶ 50; C56-1 at ¶ 52). Although there was no formal policy pertaining to tracking mileage, (Dkt. # C64 at 3-4), Trottier discussed, at least to some extent, the need for plaintiffs to track their mileage, (Dkt. ## M36 at ¶ 3; C59 at 2, ¶ 9). Plaintiffs maintain, however, that they were never formally trained on how to track their mileage. (Dkt. ## M36 at ¶ 6; C59 at 2, ¶ 12).

The parties do not seem to dispute the method of tracking mileage. According to Bottling Group, mileage generally "start[ed] with the first scheduled customer store and end[ed] with the

last scheduled customer store, except when, on occasion, Merchandisers [had to] stop at the Rochester facility to attend a meeting, update handhelds, or pick up product displays." (Dkt. ## M31-1 at ¶ 47; C56-1 at ¶ 49). Based on the odometer, Merchandisers submitted the distance traveled from store to store during a shift. (Dkt. ## M31-1 at ¶ 49; C56-1 at ¶ 51). Morales calculated his mileage "starting after arriving at [his] first store or at the plant," (Dkt. # M36 at ¶ 2), and Campbell apparently tracked his mileage beginning and ending at the Rochester facility on occasions when he passed or stopped by that location, (Dkt. # C59 at 2, ¶ 9).

Merchandisers reviewed various company policies at the outset of their employment, including the General Rules of Conduct, the Global Code of Conduct, and the Employee Handbook. (Dkt. ## M31-1 at ¶ 53; C56-1 at ¶ 54). Pursuant to those documents, employees who felt discriminated against, retaliated against, or harassed, could report such conduct to a manager, Human Resource representative, or the company's "Speak Up" line. (Dkt. ## M31-1 at ¶¶ 54-55; C56-1 at ¶¶ 55-56). Company rules also prohibited the "misrepresentation of facts or falsification of Company records or other documents," and the "intentional concealment, alteration, or falsification of information for personal benefit"; violating these rules was deemed to be a "serious infraction." (Dkt. ## M31-1 at ¶¶ 56-57; C56-1 at ¶¶ 57-59).

B. Morales's Employment with Bottling Group

Morales began working as a part-time Merchandiser on June 26, 2013, and became full-time by December 29, 2013. (Dkt. # M31-1 at ¶ 81, 85).

1. The Open BCR Position

In December 2014, Morales applied for an open BCR position and was interviewed by Trottier and Flaherty. (*Id.* at ¶ 99). For these positions, Bottling Group maintained an internal policy to "promote the best suited individual for the job, based upon merit and seniority." (*Id.* at

¶ 101). Based on these criteria, Bottling Group promoted Chuck Jewell—not Morales. (*Id.* at ¶ 102). According to Bottling Group, Jewell was more qualified for the open BCR position because he was already a BCR for another geographical area and had been employed by Bottling Group since 2009. (*Id.* at ¶¶ 97, 102-03). Morales did not apply for Jewell's former BCR position and did not complain then about Bottling Group's decision. (*Id.* at ¶ 104-06).

2. Performance Issues

P.R.E.M.I.E.R. required Morales to obtain a customer's signature, such as the store manager, prior to leaving the store, (*id.* at ¶¶ 37-38), and to fill the store with Pepsi products, (*id.* at ¶ 35). Bottling Group claims that on February 7, 2015, Morales failed to do either these things at a specific store. (*Id.* at ¶¶ 107-08). Morales contends that he was not a regular at that store, that he signed out with who he believed to be the assistant manager, and that there was no more Pepsi products at the store. (Dkt. # M36 at ¶¶ 9-10). On February 9, 2015, Pitts discussed these issues with the customer, who requested that Morales no longer service his store. Morales concedes that this was a "serious violation." (Dkt. # M31-1 at ¶ 109-11). Pitts, therefore, issued Morales a written warning on February 13. (*Id.* at ¶ 110, 112).

In addition, on March 27, 2015, Morales—and Campbell—met with Flaherty and Pitts to discuss the new attendance policy and safety training (the "March 27 Meeting"). (*Id.* at ¶¶ 115-17). During that meeting, Flaherty told plaintiffs that they had a "stink" on them based on, apparently, their recent job performance. (*Id.* at ¶¶ 118-20). Morales understood this to mean "basically that there w[ere] people that didn't like us and that we needed to try to figure out a way to get that stank off." (*Id.* at ¶ 122). Morales also told Flaherty and Pitts that "people were treating . . . [him] differently," (*id.* at ¶ 124), although he failed to provide specific details of this treatment because,

according to Morales, the person who was "treating [him] differently/ discriminating against [him] . . . was at the table and [Morales] didn't feel comfortable," (Dkt. # M36 at ¶ 16).

On April 5, 2015, Pitts learned that another customer had requested that Morales no longer service its store due to performance issues. (Dkt. # M31-1 at ¶ 127). Morales also apparently had told the customer that he was late on a specific day because another store was a higher priority. (Dkt. ## M31-1 at ¶¶ 130-31; M36 at ¶ 18). In Morales's words, the customer "came at . . . [him] with disrespect . . . [and he] answered [the customer] the [same] way[.]" (Dkt. # M31-1 at ¶ 131).

Morales met with Pitts on April 13, 2015, at which Pitts planned to issue Morales a Last Chance Agreement based on customer complaints (the "April 13 Meeting"). (*Id.* at ¶¶ 128, 133). At the meeting, Morales complained that Flaherty was "treating him differently," but failed to provide Pitts with examples (the "April 13 Complaint"). (*Id.* at ¶ 136). Morales claims Pitts barely gave him the opportunity to talk, and that his concerns were "shot down." (Dkt. # M36 at ¶ 20).

Pitts then issued Morales the Last Chance Agreement, which Morales signed on April 13, 2015. (Dkt. # M31-1 at ¶ 137). By doing so, Morales agreed to follow company rules and understood the failure to do so could result in termination. (*Id.* at ¶ 139).

3. Morales's Termination from Bottling Group

Several months later, in June 2015, Sapp reported to Pitts that one Merchandiser had "unusually high mileage reimbursement requests." (Dkt. # M31-1 at ¶ 142). This prompted Pitts to perform a mileage audit of ten Merchandisers[4] from May 24, 2015, through June 28, 2015 (the "Audit"). Pitts used "scan-in" and "scan-out" reports to determine which stores Merchandisers traveled to, used MapQuest to calculate the distance between those stores, and compared that number to the reported mileage. (*Id.* at ¶ 143-46). Pitts completed this process a second time,

[4] Of the ten, seven were Caucasian, two were African American, and one was Hispanic or Latino. (*Id*).

beginning and ending his MapQuest calculation from the Rochester facility, as opposed to the first and last customer store. (*Id.* at ¶ 148). In both instances, Pitts discovered that the same two Merchandisers had reported consistently higher mileage compared to MapQuest's calculations. (*Id.* at ¶¶ 147, 150).

Morales was one of these two Merchandisers (the other was Campbell). (*Id.* at ¶ 151). Pitts determined that although Morales reported 1,595 miles traveled, MapQuest indicated that Morales only drove 1,083 miles, which resulted in a $290.40 reimbursement overpayment. (*Id.* at ¶ 152-53). Morales denies any wrongdoing. In Pitts's view, this conduct violated the rule against misrepresenting facts or falsifying company records or other documents and, in Morales's circumstance, also the Last Chance Agreement. (*Id.* at ¶ 154). As a result, Pitts terminated Morales's employment on July 6, 2015. (*Id.* at ¶ 157).

4. Morales's "Speak Up" Complaint

The following day, July 7, 2015, Morales reported Pitts and Sapp to the "Speak Up" line. (*Id.* at ¶¶ 164, 167). Morales complained that Pitts and Sapp did not show him proof of falsified mileage reports, and believed that the issue was race discrimination. (*Id.* at ¶ 165-66). The HR Department concluded that his termination was justified. (*Id.* at ¶ 168).

C. Campbell's Employment with Bottling Group

Campbell began with Bottling Group on September 7, 2014. (Dkt. # C56-1 at ¶ 84). Prior to that, Campbell worked as a Merchandiser at another Pepsi affiliate, which had similar training and policies, thus obviating the need for such training with Bottling Group. (*Id.* at ¶ 85-88, 90). Campbell did not apply for a promotion or other position at Bottling Group. (*Id.* at ¶¶ 181, 183).

He attended the March 27 Meeting, at which Flaherty discussed the new attendance policy, and told Campbell, as he did Morales, that there was a "stink" on him also due to performance

issues. (*Id.* at ¶ 112). Campbell disputes that he had performance issues. During that meeting, Campbell told Flaherty and Pitts that he was being "treated differently," but did not provide any specific examples of differential treatment. (*Id.* at ¶ 118).

1. Attendance and Performance Issues

The attendance policy prohibited employees from texting supervisors about the need to take off work; rather, employees had to contact supervisors "directly over the phone," and leave a voicemail if the supervisor was unavailable. (*Id.* at ¶ 109; Dkt. # C56-3 at 170). Bottling Group claims that Campbell violated the policy on April 6, 2015, and three times between April 24, 2015, and April 27, 2015, by texting his supervisor that he could not make a scheduled shift. (Dkt. # C56-1 at ¶¶ 120, 124). He did so again on April 28, 2015. (*Id.* at ¶ 125). Campbell also apparently failed to follow P.R.E.M.I.E.R. policy on April 8, 2015, and April 11, 2015, by failing to scan-in and scan-out at one customer store, and failing to check out with another customer before leaving the location. (*Id.* at ¶¶ 121, 123). On May 2, 2015, Campbell left another store without the customer's signature. (*Id.* at ¶ 126).

On May 6, 2015, Flaherty and Sapp met with Campbell and issued him two verbal warnings based on the April 28 and May 2 violations. (*Id.* at ¶ 128). After that meeting, Campbell called the "Speak Up" line to report incidents with Flaherty that Campbell felt had happened because "he is black, and Flaherty is white" (the "May 6 Complaint"). (*Id.* at ¶ 129). The following day, Pitts removed both verbal warnings, after learning that the April 28 and May 2 violations stemmed from medical issues. (*Id.* at ¶ 130). Beyond these verbal warnings, Campbell was not disciplined during his time at Botting Group. (*Id.* at ¶ 131-33).

The HR Department investigated the May 6 Complaint and determined that the verbal warnings were removed, and that other Merchandisers were being held accountable for violating

company policies and P.R.E.M.I.E.R. (*Id.* at ¶ 139). Specifically, two Caucasian Merchandisers were on Last Chance Agreements, and one Caucasian Merchandiser had received a verbal warning, for failing to follow P.R.E.M.I.E.R. (*Id.*). Also, Sapp replaced Flaherty as Campbell's supervisor.

2. Campbell's Termination from Bottling Group

On June 22, 2015, Sapp spoke with Campbell after flagging his mileage reimbursement request for 688 miles as "unusually high." (*Id.* at ¶ 146-47, 149). Campbell then texted Pitts that, as a compromise, he would settle to be reimbursed for 420 miles. (*Id.* at ¶ 148).

Campbell was, thereafter, subject to the Audit. Pitts determined that Campbell had submitted for 577 more miles than MapQuest's calculation, which resulted in a $331.78 reimbursement overpayment. (*Id.* at ¶ 163-64). In Pitts's view, as with Morales, this violated Bottling Group's rules against misrepresenting facts or falsifying records or other documents. (*Id.* at ¶ 161, 166). Campbell denies any wrongdoing. Accordingly, and in consultation with the HR Department, Pitts terminated Campbell's employment on July 6, 2015. (*Id.* at ¶ 169).

3. Campbell's "Speak Up" Complaint

Campbell, too, filed a "Speak Up" complaint on July 7, 2015. (*Id.* at ¶ 174). He complained that Pitts had not shown him evidence of his inaccurate mileage reporting, and indicated that he was terminated and "targeted" by Pitts and Sapp because of the May 6 Complaint. (*Id.* at ¶ 175-76). The HR Department concluded that his termination was justified. (*Id.* at ¶ 177).

DISCUSSION

I. Legal Standard for Summary Judgment

Summary judgment will be granted if the record demonstrates that "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."

FED. R. CIV. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material if it "might affect the outcome of the suit under the governing law[.]" *Anderson*, 477 U.S. at 248. A genuine issue of material fact exists only if the record, taken as a whole, could lead a reasonable trier of fact to find in favor of the non-movant. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and the court must view all ambiguities and inferences that may be reasonably drawn from the facts in the light most favorable to the non-moving party, *see Anderson*, 477 U.S. at 255. To defeat a motion for summary judgment, the non-moving party cannot rely "on conclusory allegations or unsubstantiated speculation." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (citation omitted). Rather, the nonmoving party must offer "some hard evidence showing that its version of the events is not wholly fanciful[.]" *Miner v. Clinton Cty., New York*, 541 F.3d 464, 471 (2d Cir. 2008), *cert. denied*, 556 U.S. 1128 (2009).

II. Analysis—Intentional Discrimination

Morales and Campbell allege that Bottling Group intentionally discriminated against them by failing to promote them and, ultimately, firing them because of their race and color in violation

of Title VII and the NYSHRL.[5] Such claims are analyzed pursuant to the three-part, burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under this framework, a plaintiff must first establish a prima facie case of racial discrimination. *Ruiz v. Cty. of Rockland*, 609 F.3d 486, 491 (2d Cir. 2010). A Title VII discrimination claim fails absent this prima facie showing. *See Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004) (Sotomayor, J.). However, if the plaintiff meets this burden, the employer must then provide a legitimate, nondiscriminatory reason or motive for the adverse employment action. *Ruiz*, 609 F.3d at 492. The burden then shifts back to the plaintiff to demonstrate that the employer's stated reasons are merely a pretext for discrimination. *Id.*

1. Discriminatory Termination

In the context of discriminatory termination, a plaintiff establishes a prima facie case if: (1) he or she is member of a protected class; (2) he or she was qualified for the position; (3) he or she was terminated; and (4) the termination occurred under circumstances giving rise to an inference of discrimination. *See Ruiz*, 609 F.3d at 491-92.

A plaintiff can raise an inference of discrimination by showing that an employer treated him or her "less favorably than a similarly situated employee outside his [or her] protected group." *Mandell v. Cty. of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003). The comparator, however, "must be similarly situated to the plaintiff in all material respects." *Ruiz*, 609 F.3d at 494 (quotations omitted). "The question of whether two individuals are similarly situated may present a factual issue for the jury, but a court can properly grant summary judgment where it is clear that no

[5] Title VII and NYSHRL claims require the same analysis for purposes of this motion, and therefore, the Court will only address the Title VII claim. *See Ferraro v. Kellwood Co.*, 440 F.3d 96, 99 (2d Cir. 2006) ("the standards for liability under [the NYSHRL] are the same as those under the equivalent federal antidiscrimination laws").

reasonable jury could find the similarly situated prong met." *Parrilla v. City of New York*, 2011 WL 611849, *8 (S.D.N.Y. 2011) (quotations omitted).

A plaintiff can also raise an inference of discrimination by demonstrating that the employer "criticized plaintiff's performance in 'ethnically degrading terms,' or made 'invidious comments about others in the employee's protected group,' or otherwise demonstrated bias in 'the sequence of events leading to the plaintiff's discharge." *Velez v. SES Operating Corp.*, 2009 WL 3817461, *8 (S.D.N.Y. 2009) (quoting *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001), *cert. denied*, 534 U.S. 993 (2001)).

Moreover, in the discrimination context, "it is not the role of federal courts to review the correctness of employment decisions or the processes by which those decision are made." *Sassaman v. Gamache*, 566 F.3d 307, 314 (2d Cir. 2009). "The law requires courts to respect an employer's decision to hire or fire employees according to its own criteria, so long as they do not include unlawful discrimination." *Velez*, 2009 WL 3817461 at *12.

a. Morales

Morales has failed to establish a prima facie case of discrimination for at least two reasons. First, he has not shown that he was qualified to be a Merchandiser at the time he was terminated in July 2015. Bottling Group had issued Morales the Last Chance Agreement in April 2015 after a series of performance issues, including the fact that *two* different customers had requested he no longer service their stores, and ultimately terminated Morales's employment for violating the terms of the Last Chance Agreement. This is enough to show that Morales was not qualified for the position. *See Williams v. Alliance Nat'l Inc.*, 24 Fed. Appx. 50, 52 (2d Cir. 2001) ("district court properly relied on the performance memoranda detailing the deficiencies of [plaintiff's]

performance . . . to find that she was unqualified for the position at the time of her termination and hence failed to make out a prima facie case [of discrimination]").

Even if Morales could show that he was qualified, however, he clearly cannot raise an inference of discrimination related to his termination. Specifically, Morales has not identified any comparator who was treated more favorably than him, instead alleging that management "treat[ed] minority employees differently than Caucasian employees," and subjected minorities to "unequal terms, conditions, and privileges of employment as compared to non-minority employees." (Dkt. # M1 at 7-8).

Without more, such generalized allegations are insufficient to show that anyone was similarly situated to Morales. *See Graham v. Elmira Sch. Dist.*, 2015 WL 1383657, *5 (W.D.N.Y. 2015) ("Conclusory statements to the effect that similarly situated employees outside of the plaintiff's protected class were treated more favorably than the plaintiff have been held insufficient to defeat summary judgment"; "[b]ecause [p]laintiff has provided no detail about the 'Caucasian principals' whom she references in her Amended Complaint, she cannot establish that they were similarly situated"). Thus, Morales cannot raise an inference of discrimination on this basis.

Nor can Morales establish an inference of discrimination based on how management allegedly treated him leading up to his termination. Flaherty's "stink" comment at the March 27 Meeting cannot support such an inference. The evidence does not suggest that the comment was, in fact, racial, and, in any event, Flaherty neither recommended nor was involved in the decision to terminate Morales. *See Nweze v. New York City Transit Auth.*, 115 Fed. Appx. 484, 485 (2d Cir. 2004) (summary order) (allegedly racist comment made by person not involved with decision to discharge plaintiff could not support a finding that the discharge was based on plaintiff's race).

Moreover, Morales has presented no evidence that the remaining allegations of unfair treatment—job performance scrutiny by Pitts and Sapp, daily harassment from December 14, 2014, to July 6, 2015, and not receiving weekly work emails or being invited to meetings or events—were motivated by Morales's race or color. In the absence of specific evidence showing otherwise, Morales's conclusory allegations and personal speculation, alone, is insufficient to infer discrimination. *See Boise v. New York Univ.*, 2005 WL 2899853, *4 (S.D.N.Y. 2005) ("Personal speculation is insufficient to raise an inference of discrimination."), *aff'd*, 201 Fed. Appx. 796 (2d Cir. 2006) (summary order).

Therefore, Morales's discriminatory termination claim is dismissed.

b. Campbell

Campbell also cannot establish a prima facie case of discrimination. Initially, Campbell appeared to have his own performance issues in early April due to violating the attendance and P.R.E.M.I.E.R. policies, even though Bottling Group did not discipline him for such violations. Bottling Group also terminated him for misrepresenting facts and falsifying records related to mileage reimbursement. Therefore, there is at least a serious question as to whether Campbell was qualified to be a Merchandiser. *See Williams*, 24 Fed. Appx. at 52.

In any event, though, Morales has failed to raise an inference of discrimination. Like Morales, Campbell has not established that non-minority, similarly situated employees were treated more favorably than him. In an effort to do so, Campbell argues that two Caucasian Merchandisers also falsified their mileage reports and were overpaid as a result, yet were not terminated. (Dkt. # C59 at 4, ¶¶ 13-14). It is undisputed, though, that based on the Audit, Campbell reported miles 31% higher than what MapQuest calculated, whereas the two Caucasian Merchandisers only reported miles an average of 9% higher than MapQuest's calculations. (Dkt.

C64 at 22). According to Bottling Group, Pitts accounted for some differential in mileage calculations in the Audit. (*Id.*). Still, Campbell's differential was 577 miles, compared to 36 miles and 56 miles in the case of the two Caucasian employees, respectively. (*Id.* at 23).

The Court does not find this vast difference to be "comparable conduct," and therefore, finds that the two Caucasian employees were not similarly situated to Campbell. *See Ruiz*, 609 F.3d at 493-94; *Parrilla*, 2011 WL 611849 at *8.

Aside from this, Campbell states in general terms that "minority employees [were treated] differently than Caucasian employees[,] [m]inority employees were harassed[, and] [minority employees'] performance was criticized." (Dkt. # C1 at 7). This, too, is insufficient to raise an inference of discrimination. *See Graham*, 2015 WL 1383657 at *5.

Moreover, Flaherty's "stink" comment fails to raise an inference of discrimination, principally because he was not involved in the decision to terminate Campbell. *See Nweze*, 115 Fed. Appx. at 485. Campbell has also not presented evidence that any conduct by Pitts or Sapp—similar in nature to the conduct alleged by Morales—was racially motivated.

For these reasons, Campbell's claim for discriminatory termination is also dismissed.

2. Discriminatory Failure to Promote

To establish a prima facie case under this theory, a plaintiff must show that (1) he or she is a member of a protected class; (2) he or she applied and was qualified for an open position; and (3) he or she was rejected for the open position under circumstances giving rise to an inference of unlawful discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The Court agrees with Bottling Group that neither Morales nor Campbell have established a prima facie case under this theory of discrimination.

a. Morales

Morales attempts to raise an inference of discrimination solely by alleging that "[he] was denied a promotion," (Dkt. # M1 at ¶ 19), and that Bottling Group gave the job to Chuck Jewell, a "Caucasian guy." (Dkt. # M31-5 at 34). Yet the undisputed evidence shows that Jewell and Morales were not "similarly situated in all material respects." *Roa v. Mineta*, 51 Fed. Appx. 896, 899 (2d Cir. 2002) (summary order); *Parrilla*, 2011 WL 611849 at *8.

Bottling Group's internal policy was to "promote the best suited individual for the job, based upon merit and seniority." (Dkt. # M31-1 at ¶ 101). Here, Jewell had been employed as a BCR for another geographical route prior to interviewing for the new BCR position. Morales, on the other hand, was a Merchandiser, which is a level below a BCR. In addition, Jewell had been a Bottling Group employee for nearly four years longer than Morales at the time of the interview.

Clearly, Jewell and Morales were not similarly situated. *See Parrilla*, 2011 WL 611849 at *8. Morales, then, has failed to raise an inference of discrimination related to Bottling Group's decision to promote Jewell over him. *See Wharff v. State Univ. of New York*, 413 Fed. Appx. 406, 408 (2d Cir. 2011) (summary order) ("Where a decision to promote one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of qualifications, no inference of discrimination can be drawn.") (alterations and quotations omitted).

b. Campbell

Campbell also generally alleges that he was "[d]enied [a] promotion [in the] month[s] of May and June 2015." (Dkt. # C1 at 5). At his deposition, Campbell stated that although he explained to Trottier his interest in a BCR position, he did not apply for any promotion or open position because "[t]here wasn't nothing for [him] to apply." (Dkt # C56-3 at 46). Instead, he claims that Bottling Group "stalled" him out by never removing other BCRs to promote him.

Campbell fails to establish a prima facie case of discriminatory failure to promote. He has not shown that there was an open BCR position in May and June 2015 and, significantly, he did not even apply for such a position. *See Matthews v. Corning Inc.*, 77 F. Supp. 3d 275, 288 (W.D.N.Y. 2014) ("[p]laintiff cannot establish a *prima facie* case because she did not specifically apply for any of the positions that she claims she was denied"). Also, his supposed "general request for a promotion" to Trottier is insufficient for this type of claim. *See Romaine v. N.Y.C. Coll. of Tech.*, 2012 WL 1980371, *3 (E.D.N.Y. 2012).

Moreover, Campbell cannot raise an issue of fact based on his own opinion that Bottling Group did not promote him for discriminatory reasons. *See Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 74-75 (2d Cir. 2015) ("a plaintiff's 'feelings and perceptions of being discriminated against' do not provide a basis on which a reasonable jury can ground a verdict").

Accordingly, Campbell's discriminatory failure to promote claim is dismissed.

III. Analysis—Hostile Work Environment

To prove a hostile work environment claim, a plaintiff must show that the conduct "(1) is objectively severe or pervasive in that it 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 characteristic." *Figueroa v. Johnson*, 648 Fed. Appx. 130, 134 (2d Cir. 2016) (summary order).

"The plaintiff must show that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered." *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002). To make this showing, the plaintiff "must demonstrate either that a single incident was extraordinarily severe, or that a series of

incidents were sufficiently continuous and concerted to have altered the conditions of her working environment." *Id.* at 374 (quotations omitted).

a. Morales

Morales alleges several instances he claims amount to a hostile work environment, including being verbally insulted by Flaherty at the March 27 Meeting, "harassed daily" from December 2014 to July 6, 2015, intentionally not emailed about work information, mandatory meetings, or company events, yelled and sworn at by Sapp in June 2015, and scrutinized by Sapp and Pitts. (Dkt. # M1 at 5, 7-8). Bottling Group argues that this conduct was neither racially motivated nor sufficiently severe or pervasive to alter the conditions of Morales's employment. The Court agrees with both of Bottling Group's arguments.

Morales fails to demonstrate that any of the alleged conduct was racially motivated. Regarding Flaherty's "verbal insult," Morales's own testimony suggests he did not perceive it to be racially motivated at the time, (Dkt. # M31-5 at 27) (explaining that he understood the comment to mean that "there was people that didn't like [he and Campbell] and that [they] needed to try to figure out a way to get that stank off"), and that one-time comment is "too infrequent and insufficiently severe" to support his claim. *Wesley-Dickson v. Warwick Valley Cent. Sch. Dist.*, 586 Fed. Appx. 739, 745 (2d Cir. 2014) (summary order).

Indeed, Morales relies only on his speculative self-belief that the remaining allegations of harassment—undue scrutiny, criticism, yelling, and not receiving work emails—were motivated because of his membership in a protected class. That is insufficient to set forth a hostile work environment claim. *See Sharpe v. MCI Commc'ns Servs., Inc.*, 684 F. Supp. 2d 394, 400 (S.D.N.Y. 2010) ("Even assuming [plaintiff] was treated harshly by [employer], the record does not contain sufficient evidence to support a finding that his treatment was racially motivated.").

Moreover, Morales has not demonstrated that the above-allegations were sufficiently pervasive or severe to alter his working conditions. The Second Circuit has described similar types of perceived harassment as "quite minor," and insufficient to amount to a hostile work environment. *Fleming v. MaxMara USA, Inc.*, 371 Fed. Appx. 115, 119 (2d Cir. 2010) (summary order) (finding allegations that employer wrongfully excluded plaintiff from meetings, excessively criticized plaintiff's work, and refused to answer work-related questions to be "quite minor" and not supportive of an environment that was pervasive or severe).

In addition, absent extreme circumstances, which are not present here, "job performance criticism does not create a hostile work environment." *Busby v. Syracuse City Sch. Dist.*, 2017 WL 1380573, *6 (N.D.N.Y. 2017), *aff'd*, 715 Fed. Appx. 63 (2d Cir. 2018) (summary order); *see also Opoku v. Brega*, 2016 WL 5720807, *13 (S.D.N.Y. 2016) (allegations that supervisors wrongfully reprimanded plaintiff, criticized his work or attitude, and overly scrutinized his work could not support a claim for hostile work environment); *Marcus v. Barilla Am. NY, Inc.*, 14 F. Supp. 3d 108, 113 (W.D.N.Y. 2014) ("a series of sporadic, isolated incidents in which managers verbally disagreed with plaintiff or criticized her job performance . . . falls well short, as a matter of law, of describing discriminatory conduct that is objectively threatening, intimidating, humiliating or harassing, let alone so severe or pervasive, as to render [plaintiff's] hostile work environment claims plausible"). Here, Bottling Group's criticism of Morales was based on many alleged performance issues raised by several customers.

Accordingly, Morales has failed to establish a prima facie case for a hostile work environment, and that claim is dismissed.

b. Campbell

Campbell's hostile work environment claim is similarly predicated on allegations that he was "verbally insulted" by Flaherty, "harassed daily" from March 2015 to July 2015, denied weekly communications from April 2015 to June 2015 regarding job duties, written up for being ill and calling in sick, and, generally, that "minority employees were harassed [and their job] performance was criticized." (Dkt. # C1 at 5, 7-8).

For the reasons set forth above, Flaherty's comment at the March 27 Meeting did not create a hostile work environment. *See Wesley-Dickinson*, 586 Fed. Appx. at 745. Also, aside from Campbell's conclusory allegations that he was harassed and criticized for his job performance, he fails to put forth evidence establishing that conduct was motivated by his race or color, which is fatal to his claim. *See Opoku*, 2016 WL 5720807 at *14 ("none of the incidents alleged by [p]laintiff explicitly invoked his race or national origin").

In any event, the verbal warnings Campbell received were based on perceived job performance issues, such as adhering to the attendance and P.R.E.M.I.E.R. policies. As mentioned above, "job performance criticism does not create a hostile work environment." *Busby*, 2017 WL 1380573 at *6; *see also Opoku*, 2016 WL 5720807 at *13; *Marcus*, 14 F. Supp. 3d at 113.

In short, there is no evidence that Pitts's and Sapp's criticism or scrutiny of Campbell was sufficiently pervasive or severe to alter his working conditions, let alone based on his race or color. Therefore, Campbell's hostile work environment claim is dismissed.

IV. Analysis—Retaliation

Discriminatory retaliation claims are analyzed under the *McDonnell-Douglas* burden-shifting analysis. *See Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013). To

establish a prima facie case, a plaintiff must show that "(1) he was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered a materially adverse action; and (4) there was a causal connection between the protected activity and the adverse action." *Rivera v. Rochester Genesee Reg'l Transp.*, 743 F.3d 11, 24 (2d Cir. 2012) (quotations omitted).

To constitute "protected activity," a plaintiff's complaint must include "sufficiently specific terms so that the employer is put on notice that the plaintiff believes he or she is being discriminated against on the basis of race . . . or any other characteristic protected by Title VII." *Lehman v. Bergmann Assocs., Inc.*, 11 F. Supp. 3d 408, 417-18 (W.D.N.Y. 2014) (citation omitted). "The onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally." *Hanfland v. Brennan*, 2015 WL 6134177, *11 (W.D.N.Y. 2015) (citation omitted).

A plaintiff can show causation either "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by defendant." *Gordon v. New York City Bd. of Ed.*, 232 F.3d 111, 117 (2d Cir. 2000).

a. Morales

Morales alleges that he complained about differential treatment two times—at the March 27 Meeting and the April 13 Meeting. (Dkt. # M1 at 7). He apparently claims that Bottling Group retaliated against him by issuing the Last Chance Agreement and terminating his employment. (*Id.* at 5, 7-8). Bottling Group argues that Morales cannot establish that he engaged in protected activity, or the requisite causation. The Court agrees.

Morales testified that at the March 27 Meeting, he merely told Pitts and Flaherty that "[p]eople were treating [him] differently." (Dkt. # M31-5 at 28) ("Q: What did you say specifically? A: People were treating [me] differently."). He also admits that he did not specify who was treating him differently or how he was being treated differently. (*Id.* at 29). Moreover, Morales admits that at the April 13 Meeting, he only told Pitts that Flaherty was "treating him unfairly." (Dkt. ## M31-1 at ¶ 136; M36 at ¶ 20). Again, Morales did not provide Pitts with specific examples of this unfair treatment, and at his deposition, only testified that Flaherty "singled [him] out." (Dkt. # M36 at 52-53).

Based on this record, neither of Morales's two complaints put Bottling Group on notice that Morales thought he was being discriminated against because of his race or color. Without further clarity from Morales, those complaints, at best, suggest he was being treated unfairly, generally, which is insufficient to constitute protected activity. *See, e.g.*, *Brummel v. Webster Cent. Sch. Dist.*, 2009 WL 232789, *4-5 (W.D.N.Y. 2009) (complaints that employer did not like plaintiff and was treating her "differently" than other people were not protected activity; "[a]t no time did [plaintiff] allege that she was being treated differently because she was a woman, or that [employer] treated her or other women differently because of their gender") (collecting cases).

Nor is Morales's July 7, 2015, "Speak Up" complaint protected activity for purposes of this claim because he filed it the day after his termination. *See Brummell*, 2009 WL 232789 at *7 ("It is axiomatic that retaliatory activity cannot occur prior to the incident upon which the retaliation is predicated.").

In addition, almost three months elapsed between Morales's April 13 Complaint and his July 6 termination. Under these circumstances, that amount of time precludes an inference of causation. *See Murray v. Visiting Nursing Servs.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007)

("district courts within the Second Circuit have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation") (collecting cases).

Assuming, without deciding, that Morales meets the causation standard based on the temporal proximity between the April 13 Complaint and his termination, Bottling Group clearly has satisfied its burden of identifying a legitimate, non-retaliatory reason for terminating him. Pitts determined, after performing the Audit, that Morales inaccurately reported his miles from May 24, 2015, through June 28, 2015, which resulted in a $290.40 mileage reimbursement overpayment. In Pitts's view, this violated not only company rules against misrepresenting facts and falsifying company records, but also the terms of the Last Chance Agreement, which Pitts issued to Morales based on repeated poor job performance and company policy violations.

In light of Bottling Group satisfying its burden, Morales's only evidence of causation—the somewhat close temporal proximity between the April 13 Complaint and July 6 termination—is insufficient, on its own, to suggest Bottling Group's reason was pretextual. *See Dixon v. Int'l Fed'n of Accountants*, 416 Fed. Appx. 107, 110-11 (2d Cir. 2011) (summary order) ("assuming *arguendo* that [plaintiff] established a *prima facie* case of retaliation, her poor work performance constituted a legitimate, non-retaliatory reason for her termination, and she fails to identify any evidence, apart from temporal proximity, to suggest that this reason was pretextual").

Therefore, Morales's claim for retaliation is dismissed.

b. Campbell

Campbell claims that Bottling Group retaliated against him after the May 6 Complaint. (Dkt. # C1 at 5, 8). Campbell admits that the May 6 Complaint was the only time he ever made an allegation of race discrimination while employed by Bottling Group, and that the verbal

warnings which instigated the May 6 Complaint were removed from his file. (Dkt. # C56-3 at 56, 67). According to Campbell, though, after he complained, the "[h]arassment and discrimination ramped up," (Dkt. # C58 at 10, ¶ 16), and he was eventually fired.

Campbell's vague claim that "[h]arassment and discrimination ramped up" fails to set forth a materially adverse employment action. *See Bickerstaff v. Vassar Coll.*, 354 F. Supp. 2d 276, 280-81 (S.D.N.Y. 2004) ("In order to be considered 'materially adverse,' a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities . . . Exclusions from meetings or social functions do not constitute adverse actions"), *aff'd*, 160 Fed. Appx 61 (2d Cir. 2005) (summary order).

Campbell also fails to establish the requisite causal connection between his May 6 Complaint, which constituted protected activity, and his July 6, 2015, termination. As discussed elsewhere, even after the benefit of discovery, Campbell provides no direct proof of discrimination on the part of Bottling Group, and provides no indirect proof related to other similarly situated employees. Therefore, Campbell only bases causation on the temporal proximity of the May 6 Complaint and his July 6 termination.

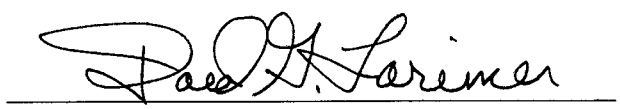
Again assuming, without deciding, that the temporal proximity of two months is sufficient to satisfy Campbell's prima facie case, Bottling Group puts forth a legitimate, non-retaliatory reason for terminating Campbell. Specifically, Pitts determined that Campbell also falsified his miles from May 24, 2015, through June 28, 2015, which resulted in a $331.78 mileage reimbursement overpayment. In Pitts's view, this violated company rules. Therefore, as in Morales's case, the temporal proximity of the May 6 Complaint and termination, alone, cannot establish that Bottling Group's stated reason for Campbell's termination was pretextual. *See Dixon*, 416 Fed. Appx. at 110-11.

Accordingly, Campbell has failed to establish a prima facie case for retaliation under Title VII, and that claim is dismissed.

CONCLUSION

For the above-stated reasons, Bottling Group's motions for summary judgment (Dkt. ## M31; C56) are **GRANTED**. Morales's Complaint (Dkt. # M1) and Campbell's Complaint (Dkt. # C1) are dismissed in their entirety and with prejudice.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
April 15, 2019.

Appendix C

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 8th day of September, two thousand twenty.

Bobby Campbell, Jr.,

Plaintiff - Appellant,

v.

Bottling Group, LLC,

Defendant - Appellee.

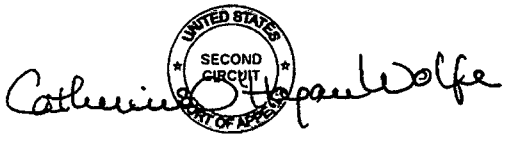
ORDER

Docket No: 19-1345

Appellant, Bobby Campbell, Jr., 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 D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOBBY CAMPBELL, JR.,

Plaintiff,

v.

PEPSI BEVERAGES, INC.,

Defendant.

Civil No.:
6:16-CV-06600 DGL-MWP

COUNTERSTATEMENT TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 56(a) of the Local Rules of Civil Procedure for the Western District of New York, defendant Bottling Group, LLC ("Bottling Group" or the "Company"), incorrectly named herein as Pepsi Beverages, Inc., by and through its attorneys, Phillips Lytle LLP, sets forth in support of its motion for summary judgment the following Counterstatement to Plaintiff's Statement of Material Facts:

As an initial matter, plaintiff Bobby Campbell, Jr.'s ("Campbell") "Opposition to Summary Judgement Motion" (hereinafter, "Plaintiff's Statement of Material Facts") is improper in form and fails to comply with Local Rules of Civil Procedure for the Western District of New York, Rule 56(a)(2) ("Local Rule 56(a)(2)") (as does his counterstatement to Bottling Group's Statement of Undisputed Material Facts). Specifically, Local Rule 56(a)(2) required Campbell to submit an opposing statement, i.e., counterstatement, that contained numbered paragraphs corresponding to the numbered paragraphs set forth in Bottling Group's Statement of Undisputed Material Facts, which

admit or specifically controvert each of the numbered paragraphs set forth in Bottling Group's Statement, "and, if necessary, additional paragraphs containing a short and concise statement of additional material facts as to which it is contended there exists a genuine issue to be tried." Local Rule 56(a)(2). Campbell did not do this. Campbell instead submitted two separate documents - a counterstatement (Campbell's "Dispute of Defendant's Statement of Undisputed Material Facts"), which failed to admit or specifically controvert each of the numbered paragraphs set forth in Bottling Group's Statement, and Plaintiff's Statement of Material Facts (what he referred to as "Opposition to Summary Judgement Motion"), which contained factual allegations unsupported by admissible evidence. Bottling Group therefore objects to the Court's consideration of Plaintiff's Statement of Material Facts.[1]

Additionally, and with regard to the substance of Plaintiff's Statement of Material Facts, Bottling Group generally disputes Campbell's characterization of "material facts." The facts Campbell purports to be "material" are not in fact material to the issues before the Court. Moreover, many of Campbell's factual statements are incomplete or lacking context, and hence mischaracterize the "facts" they purport to state. Many of Campbell's factual statements contain citations to record evidence that fails to support the statements. Further, many of Campbell's factual statements cite to inadmissible evidence, and therefore should not be considered in adjudicating Bottling Group's motion for summary judgment.

Therefore, Bottling Group submits this Counterstatement demonstrating

[1] Without waiver, Bottling Group will address Plaintiff's Statement of Material Facts, in an abundance of caution, so as to provide a comprehensive analysis of all documents Campbell has submitted in opposition to Bottling Group's motion for summary judgment.

that there are no genuine issues of material fact and that Bottling Group's motion for summary judgment should be granted.

The statements below are arranged and numbered to correspond to Plaintiff's Statement of Material Facts.

WRONGFUL TERMINATION

1. PepsiCo Employee Guidebook for the North East Region did not contain a policy pertaining to mileage (reporting) tracking. (Exhibit 1- Def. Answers to Plaintiff Interrogatory, pg. 10 Interrogatory No. 15; Exhibit 2- Def. Response to ADM. pg. 12, req. No. 22-23; Campbell sworn statement #1).

RESPONSE: Admits that the 2014-2015 PepsiCo Employee Guidebook for the Northeast Region did not contain a policy pertaining to tracking mileage. (Bottling Group never claimed that it did.) This fact, however, is immaterial to Campbell's claims. In Campbell's "Sworn Statement," appended to the Affidavit of Bobby Campbell Jr., sworn to April 27, 2018 ("Affidavit"), Campbell states that he was verbally "instructed [on mileage] by former supervisor Sean Trottier." (Doc. No. 59, p. 9, ¶ 5). Further, Campbell admitted that merchandisers must submit the total mileage driven for each shift to Bottling Group for reimbursement. (Doc. Nos. 56-1, ¶ 52).[2] Therefore, Campbell was aware of the mileage policy. No material fact is in dispute.

2. PepsiCo Employee Guidebook for the North East Region did not contain a procedure pertaining to mileage (reporting) tracking. (Exhibit 1- Def. Answers to Plaintiff Interrogatory, pg. 10 Interrogatory No. 15; Exhibit 2- Def. Response to ADM. pg. 12, req. No. 22-23; Campbell sworn statement #2).

[2] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Admits that the 2014-2015 PepsiCo Employee Guidebook for the Northeast Region did not contain a procedure pertaining to tracking mileage. (Bottling Group never claimed that it did.) This fact, however, is immaterial to Campbell's claims. In his "Sworn Statement," appended to his Affidavit, Campbell confirms that he was verbally "instructed [on mileage] by former supervisor Sean Trottier." (Doc. No. 59, p. 9, ¶ 5). Further, Campbell admitted that merchandisers must submit the total mileage driven for each shift to Bottling Group for reimbursement. (Doc. Nos. 56-1, ¶ 52).[3] Therefore, Campbell was aware of the mileage policy. No material fact is in dispute.

3. There was no set number of miles to be driven as a PepsiCo (Bottling Group) merchandiser. (Exhibit 3- Def. Response to ADM. pg. 27, req. No. 70-71; Campbell sworn statement #3).

RESPONSE: Admits that merchandisers were not required to drive a set number of miles. (Bottling Group never claimed that they were.) This fact, however, is irrelevant and immaterial to Campbell's claims. Campbell admitted that merchandisers must submit the total mileage driven for each shift to Bottling Group for reimbursement. (Doc. Nos. 56-1, ¶ 52).[4] Therefore, the amount of miles driven depends on the shift. Further, Exhibit 3, to which Campbell cites in support of the factual allegation, fails to support the allegation. No material fact is in dispute.

4. Campbell was willing to compromise at 420 miles even though Campbell drove 688 miles and management offered him 254 miles. (Exhibit 4- Campbell message to Jesse Pitts).

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[3] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[4] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Denied. Campbell submitted a mileage reimbursement request for 688 miles. (Doc. No 56-1, ¶ 161, Exhibit T).[5] Thereafter, Campbell offered to "compromise" at 420 miles. (Doc. No. 56-1, ¶¶ 148-149)[6] (Campbell sent a text message to Pitts saying "Hopefully ya'll can fix my check before then . . . I settle for 420 miles nothing lower . . . that's compromising."). It is unclear why Campbell offered to compromise his mileage request to 420 miles when he claimed he had driven 688 miles. No material fact is in dispute.

5. Every Merchandiser in Bottling group mileage audit report is incorrect (reported) tracked. (Campbell sworn statement #4; Exhibit 5- Mileage audit report).

RESPONSE: Denied. Bottling Group has not claimed that the mileage calculation Pitts performed using MapQuest perfectly tracked the actual routes taken by merchandisers in servicing stores. For all merchandisers, Pitts used the same method of calculating mileage - that is, Pitts took all merchandisers' scan-in and scan-out reports to determine the stores the merchandisers serviced and in what order they were serviced, and then used MapQuest to calculate the total number of miles driven on each route. (Doc. No. 56-1, ¶¶ 153, 155).[7] In calculating the distance in miles between two locations, MapQuest preselects a route. This does not mean that merchandisers drove that exact route. Thus, a differential in mileage calculation is to be expected. The results of Pitts's audit showed that the mileage reported by Campbell and another merchandiser, Roberto Morales, was an average of 31%

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[5] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[6] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[7] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

higher than what MapQuest had calculated.[8] To contrast, the results of the audit showed that the mileage reported for two other merchandisers (Randy Sheer and Nick Minarich) was an average of 9% higher than what MapQuest had calculated.[9] (Doc. No 56-1, ¶ 161, Exhibit T).[10] It was not unreasonable for Pitts to attribute an average over reporting by 31% to the fraudulent reporting of mileage for reimbursement. No material fact is in dispute.

6. MapQuest website and materials are provided with all faults on an "AS IS" and "AS AVAILABLE" basis. Etc. (Exhibit 6- MapQuest Terms of use pg. 5 Sub section NO WARRANTIES).

RESPONSE: This factual allegation is vague and lacks context. On this basis, it is denied. Further, as written, this factual allegation is immaterial to Campbell's claims. In addition, Exhibit 6, a website printout, to which Campbell cites in support of this factual allegation, is unauthenticated and inadmissible evidence, and should not be considered. Without waiver, even if MapQuest calculations have deviations, this factual allegation fails to controvert Pitts's good faith belief that the results of his comprehensive audit (which used MapQuest) showed that Campbell had fraudulently reported 577 miles for reimbursement. (Doc. No. 56-1, ¶ 151-156, 161-162, 164-165, 167-169).[11] It was not unreasonable for Pitts to use MapQuest as a method to calculate mileage. No material fact is in dispute.

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[8] Over a five-week period, Campbell reported he drove 1,876 miles, and MapQuest showed he drove 1,299 (difference of 577 miles). Over the same five-week period, Morales reported he drove 1,595 miles, and MapQuest showed he drove 1,083 (difference of 512 miles). (Doc. No 56-1, ¶ 161, Exhibit T).

[9] Over a five-week period, Sheer reported he drove 730 miles, and MapQuest showed he drove 694 (difference of 36 miles). Over the same five-week period, Minarich reported he drove 460 miles, and MapQuest showed he drove 404 miles (difference of 56 miles). (Doc. No 56-1, ¶ 161, Exhibit T).

[10] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[11] Campbell made no attempt to respond to or controvert these paragraphs regarding Pitts's audit and discovery of the fraudulent mileage reporting, and therefore they are deemed admitted. *See* Local Rule 56(a)(2).

7. PepsiCo (Bottling Group) Informed Campbell for the first time Jun. 22, 2015 that his current route (Chuck Jewell Route) has a set mileage of 254. (Campbell sworn statement #5; Exhibit 7- Jun. 22, 2015 Audio rec. time 30:45 31:13).

RESPONSE: Denied. Campbell submitted a mileage reimbursement request for 688 miles. (Doc. No 56-1, ¶ 161, Exhibit T).[12] Thereafter, Campbell offered to compromise at 420 miles. (Doc. No. 56-1, ¶¶ 148-149)[13] (Campbell sent a text message to Pitts saying "Hopefully ya'll can fix my check before then . . . I settle for 420 miles nothing lower . . . that's compromising."). Additionally, Exhibit 7, an audio file, to which Campbell cites in support of this factual allegation, is unauthenticated and inadmissible evidence, and should not be considered. No material fact is in dispute.

8. PepsiCo (Bottling Group) management fabricated a mileage policy and sent out to employees after Campbell July 6, 2015 Termination. (Exhibit 8- Memo Mileage policy dates July 10, 2015).

RESPONSE: Denies that PepsiCo or Bottling Group management fabricated any mileage policy, but admits that Bottling Group management created a written mileage policy, and distributed it to employees on July 10, 2015, after Campbell's July 6, 2015 termination. This fact, however, is irrelevant and immaterial to Campbell's claims. Regardless of whether Bottling Group distributed a written mileage policy after Campbell's termination, Campbell was aware of the mileage policy during his employment with Bottling Group. In his "Sworn Statement," appended to his Affidavit, Campbell states that he was verbally "instructed [on mileage] by former supervisor Sean Trottier." (Doc. No. 59,

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[12] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[13] Campbell failed to respond, therefore these paragraphs are deemed admitted. *See* Local Rule 56(a)(2).

p. 9, ¶ 5). Further, Campbell admitted that merchandisers must submit the total mileage driven for each shift to Bottling Group for reimbursement. (Doc. Nos. 56-1, ¶ 52).[14] No material fact is in dispute.

9. Campbell was instructed by former supervisor Sean Trottier "you can start your mileage at the plant and end at the plant so long as your [sic] passing the facility or stop at the plant". (Campbell sworn statement #5).

RESPONSE: Denies knowledge and information sufficient to form a belief as to the truth of the allegation. Notwithstanding same, even if former supervisor Sean Trottier told Campbell that he could start his mileage at the plant and end at the plant as long as he was passing the facility or stopping at the plant, this factual allegation fails to controvert the fact that when calculating mileage for the audit, Pitts assumed that Campbell started at the Rochester facility and ended at the Rochester facility, and the audit still produced results showing that Campbell had consistently over reported mileage. (Doc. No. 56-1, ¶¶ 158-161).[15] Therefore, this factual allegation is immaterial to Campbell's claims. No material fact is in dispute.

10. Campbell was terminated solely for the reason of FALSIFICATION OF COMPANY RECORDS pertaining to mileage July 6, 2015. (Campbell sworn statement #6; Exhibit 9- Termination notice).

RESPONSE: Admits that Campbell was terminated on July 6, 2015 solely for the reason of falsification of company records by fraudulently reporting mileage, but denies the

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[14] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[15] Campbell's counterstatement failed to respond to or specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

remaining allegations in the paragraph. (Doc. No. 56-1, ¶¶ 166-169, 173).[16] No material fact is in dispute.

11. Campbell had no access to company records pertaining to mileage reports. (Exhibit 10- Def. Answers to Plaintiff Interrogatory, pg. 10-11 Interrogatory No. 16).

RESPONSE: This factual allegation is vague and lacks context. On this basis, it is denied. Further, as written, this factual allegation is irrelevant and immaterial to Campbell's claims. There is no relevant or apparent connection between Campbell's claims for racial discrimination, harassment and retaliation and whether or not he had access to company records relating to mileage reports. Campbell's employment was terminated for falsification of company records by fraudulently reporting mileage. (Doc. No. 56-1, ¶¶ 166-169, 173).[17] No material fact is in dispute.

12. Campbell was not trained by Jesse Pitts, Robert Flaherty or James Sapp Jr. pertaining to mileage. Campbell sworn statement #7; Exhibit 11- Def. undisputed fact pg. 15 No. 87, pg. 16 No. 88-91).

RESPONSE: Denied. Sapp, Jr. discussed proper mileage reporting with Campbell on or about June 22, 2015. (Doc. No. 59-1, ¶ 147).[18] Further, this factual allegation is irrelevant and immaterial to Campbell's claims. In his "Sworn Statement," appended to his Affidavit, Campbell states that he was verbally "instructed [on mileage] by former supervisor Sean Trottier." (Doc. No. 59, p. 9, ¶ 5). Further, Campbell admitted that

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[16] Campbell's counterstatement failed to respond to or specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[17] Campbell's counterstatement failed to respond to or specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[18] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

merchandisers must submit the total mileage driven for each shift to Bottling Group for reimbursement. (Doc. Nos. 56-1, ¶ 52).[19] Therefore, Campbell was aware of the mileage policy. No material fact is in dispute.

13. You can not FALSIFY a mileage number that did not exist. (Campbell sworn statement #8).

RESPONSE: This factual allegation is nonsensical. On this basis, it is denied. Further, as written, this factual allegation is immaterial to Campbell's claims. There is no relevant or apparent connection between Campbell's claims for racial discrimination, harassment and retaliation and whether you can "falsify a mileage number that did not exist." No material fact is in dispute.

14. Campbell reported miles he drove based on Campbell's vehicle trip A or trip B odometer reading. (Campbell sworn statement #9).

RESPONSE: Denied. This factual allegation is vague and incomplete. Without waiver, even if "Campbell reported miles he drove based on Campbell's vehicle trip A or trip B," this factual allegation fails to controvert the fact that Pitts's audit showed that Campbell had over reported 577 miles for reimbursement. (Doc. No. 56-1, ¶ 151-156, 161-162, 164-165, 167-169).[20] Campbell's factual allegation contains no information concerning where he started or ended the "trip A or trip B odometer reading." No material fact is in dispute.

15. Campbell mileage was never questioned or an issue prior to June 21, 2015. (Campbell sworn statement #10).

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[19] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[20] Campbell made no attempt to respond to or controvert these paragraphs, therefore they are deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Admits that Bottling Group did not become aware of Campbell's unusually high mileage reimbursement requests until June 2015, when in the course of collecting and processing mileage reimbursement requests, Sapp, Jr. noticed that Campbell had unusually high mileage reimbursement requests, and that on or about June 22, 2015, Sapp, Jr. discussed Campbell's mileage reporting and the proper mileage reporting and reimbursement procedure with Campbell, and otherwise denies the remaining allegations. (Doc. No. 56-1, ¶¶ 146-147).[21] This fact, however, is immaterial to Campbell's claims. The factual assertion fails to controvert the fact that the audit results showed that Campbell had over reported 577 miles for reimbursement. (Doc. No. 56-1, ¶ 151-156, 161-162, 164-165, 167-169).[22] No material fact is in dispute.

16. During Campbell July 6, 2015 termination Campbell was not allowed to defend himself against Jesse Pitts accusations, Campbell was provided no documentation showing the MapQuest audit and was told by Jesse Pitts 'Its [sic] not up for discussion". (Campbell sworn statement #11).

RESPONSE: Admits that Campbell was not provided audit documents during his July 6, 2015 termination meeting with Pitts and Sapp, Jr., and otherwise denies the remaining allegations. Bottling Group could not and did not "prevent" Campbell from "defending" himself during his July 6, 2015 termination meeting with Pitts and Sapp, Jr. Campbell's factual allegation, however, is irrelevant and immaterial to Campbell's claims. The factual allegation fails to controvert the fact that Pitts terminated Campbell's employment based on his good faith belief that the results of the audit showed that

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[21] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[22] Campbell made no attempt to respond to or controvert these paragraphs, therefore they are deemed admitted. *See* Local Rule 56(a)(2).

Campbell had fraudulently reporting 577 miles for reimbursement, in violation of company policy. (Doc. No. 56-1, ¶ 151-156, 161-162, 164-165, 167-169).[23] Further, Campbell availed himself of the company's reporting policy by filing a "Speak Up" complaint the day after he was terminated. (Doc. No. 56-1, ¶¶ 174-175).[24] No material fact is in dispute.

RETALIATION

1. Campbell made complaints to Jesse Pitts March 27, 2015 after a team meeting Robert Flaherty was in attendance. (Campbell sworn statement #12).

RESPONSE: Admits that Campbell told Pitts after a team meeting on March 27, 2015 that he was being "treated differently" by customers, but denies the remaining allegations. (Doc. No. 56-1, ¶ 117).[25] Although Pitts asked Campbell to provide examples of customers or incidents so that he could better understand and rectify the situation, if necessary, Campbell provided no further information. (Doc. No. 56-1, ¶ 118).[26] Campbell's conclusory allegation that he "made complaints" fails to identify what or who he made complaints about, or whether the complaints were in any way connected to Campbell's race or color. Therefore, Campbell's factual allegation cannot establish a protected activity and is immaterial to his retaliation claim. No material fact is in dispute.

2. March 28, 2015 Campbell received a call from Flaherty about allegedly not communication with a merchandiser. (Campbell sworn statement #13; Exhibit 12-message to Derek Sipple).

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[23] Campbell made no attempt to respond to or controvert these paragraphs, therefore they are deemed admitted. *See* Local Rule 56(a)(2).

[24] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[25] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[26] Campbell's counterstatement failed to specifically controvert this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Denies knowledge and information sufficient to form a belief as to the truth of this allegation. Campbell's factual allegation, however, is irrelevant and immaterial to Campbell's claims. The nature of the work at Bottling Group - servicing customers and handling customer needs as they arise - made regular communication between Bottling Group supervisors and merchandisers necessary. (Doc. No. 56-1, ¶ 75).[27] Campbell's factual allegation concerns a single job-related phone call, and fails to provide any support for Campbell's claims of race-based discrimination, harassment and retaliation. Further, Exhibit 12, the exhibit to which Campbell cites as support for the allegation, is an unauthenticated and inadmissible "screenshot," which should not be considered. No material fact is in dispute.

3. Campbell found himself being on the receiving end of his concerns he stated at the meeting on March 27, 2018 from Flaherty. (Campbell sworn statement #14).

RESPONSE: This factual allegation is nonsensical, vague and conclusory. On this basis, it is denied. Further, as written, this factual allegation is immaterial to Campbell's claims. There is no relevant or apparent connection between Campbell's factual assertion and his claims for racial discrimination, harassment and retaliation. No material fact is in dispute.

4. Campbell made a complaint to the company Speak UP Line May 6, 2015 that he felt several incidents were happening to him because Campbell is black. (Exhibit 13- May 6, 2015 Ethics and Compliance Reporting).

RESPONSE: Admits that Campbell made a complaint to Bottling Group's "Speak Up" line on May 6, 2015, wherein he reported incidents with Flaherty that he felt had

[27] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

"happened to him because he is black, and Flaherty is white," and otherwise denies the remaining allegations. (Doc. No. ¶ 129).[28] No material fact is in dispute.

5. Campbell made complaint to Pitts May 7, 2015 about "I'm trying to get off radar". (Campbell sworn statement #15; Exhibit 14- May 7, 2015 Audio rec. time 06:06-06:22).

RESPONSE: Admits that Campbell stated to Pitts that he was "trying to get off radar," and otherwise denies the remaining allegations. Campbell's allegation that he told Pitts he was "trying to get off radar," is insufficient to demonstrate that the statement "trying to get off radar" is actually a complaint, and is also insufficient to demonstrate that any such alleged "complaint" related to Campbell's race or color. Therefore, Campbell's factual allegation cannot establish a protected activity and is immaterial to his retaliation claim. Further, Exhibit 14, the exhibit to which Campbell cites as support for the allegation, is an unauthenticated and inadmissible audio file, which should not be considered. No material fact is in dispute.

6. Harassment and Discrimination ramped up after May 6, 2015 complaint. (Campbell sworn statement #16).

RESPONSE: Denied. This allegation is vague and conclusory, and does not provide a fact requiring a response. Such a vague and conclusory allegation of general "harassment and discrimination" cannot support Campbell's claims for discrimination, harassment, or retaliation. Therefore, this allegation is immaterial to Campbell's claims. No material fact is in dispute.

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[28] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

7. May 2, 2015 Campbell collapsed in a customer store and was written up May 6, 2015 by Robert Flaherty for not obtaining a signature from the proper decision maker in violation of P.R.E.M.I.E.R. (Exhibit 15- Def. undisputed fact pg. 22 No. 127-128; Exhibit 16- verbal warning).

RESPONSE: Bottling Group admits that on May 6, 2015, Flaherty issued verbal warnings to Campbell for Campbell's failure to comply with the attendance policy, and for Campbell's failure to check out with a proper decision maker at a customer store on May 2, 2015 in violation of P.R.E.M.I.E.R., and otherwise denies all remaining allegations. (Doc. No. ¶ 128).[29] Although Campbell told Bottling Group supervisors that he had collapsed in a customer store on May 2, 2015, Bottling Group is unaware of whether Campbell did in fact collapse in a customer store on May 2, 2015, as no Bottling Group employees or supervisors were present when Campbell allegedly collapsed. On May 7, 2015, Pitts removed both verbal warnings from Campbell's file. (Doc. No. ¶¶ 130-131).[30] No material fact is in dispute.

8. On May 26, 2015 Robert Flaherty told HR he did not know that Campbell collapsed in the store on May 2, 2015. "Robert Flaherty said that in hindsight, when he realized Campbell collapsed in the store and that is why he didn't check out, Robert Flaherty said that he shouldn't have written Campbell up for not following P.R.E.M.I.E.R. and checking out of the store". (Exhibit 17- Fast Track Speak up closing report pg. 7 par. 4 Def. Doc D00915).

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[29] Campbell's counterstatement failed to specifically controvert this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

[30] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Admits that on May 26, 2015, Flaherty reported to the Bottling Group Human Resources Department that he did not know that Campbell collapsed in the store on May 2, 2015, and that in hindsight, when he realized that Campbell had collapsed in the store and that is why Campbell did not check out, he should not have written Campbell up for not following P.R.E.M.I.E.R. and checking out of the store, and otherwise denies the remaining allegations. Campbell's factual allegation, however, is immaterial to Campbell's claims. Campbell's factual allegation fails to support his race-based discrimination, harassment, and retaliation claims. Further, corrective action was taken following issuance of the verbal warnings to Campbell. Pitts removed both verbal warnings from Campbell's file the day after they had been issued. (Doc. No. ¶¶ 130-131).[31] Moreover, Bottling Group coached Flaherty regarding the verbal warnings he issued to Campbell, explaining that he should not have administered the verbal warnings to Campbell on a day that Campbell went to the hospital. (Doc. No. ¶ 140).[32] No material fact is in dispute.

9. On May 6, 2015 Robert Flaherty admitted to Campbell that he knew Campbell collapsed in the customer store and offered to take Campbell to the hospital. (Exhibit 18- May 6, 2015 Audio rec. time 9:38-10:04).

RESPONSE: Denied. Exhibit 18, to which Campbell cites as support for this factual assertion, is an unauthenticated and inadmissible audio file, and therefore should not be considered. Notwithstanding same, and without waiver or prejudice, in the audio file, Campbell states "Like you said, I pretty much collapsed in that store." Flaherty never told Campbell that he knew Campbell collapsed in the customer store. Regardless, Campbell's

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[31] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[32] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

factual allegation fails to support Campbell's race-based discrimination, harassment, or retaliation claims. Therefore, the factual allegation is immaterial to Campbell's claims. No material fact is in dispute.

10. Less than 60 days Campbell was terminated for alleged falsification of company records July 6, 2015. (Campbell sworn statement #17; Exhibit 9- Termination notice).

RESPONSE: This factual allegation is vague. Notwithstanding same, and without waiver or prejudice, Bottling Group admits that Campbell was terminated for falsification of company records on July 6, 2015. (Doc. No. ¶¶ 169, 173).[33] No material fact is in dispute.

DISCRIMINATION

1. Campbell race is black. (Campbell sworn statement #18); Exhibit 19- Def. Doc D01637).

RESPONSE: Upon information and belief, admits that Campbell's race is black. No material fact is in dispute.

2. Campbell was considered "the best merchandiser" in the Pepsi Rochester facility. (Campbell sworn statement #19; Exhibit 7- Jun 22, 2015 Audio rec. time 29:06).

RESPONSE: Denied. Exhibit 7, to which Campbell cites as support for this factual assertion, is an unauthenticated and inadmissible audio file, and therefore should not be considered. Notwithstanding same, and without waiver or prejudice, Campbell has selectively referenced a portion of the audio file favorable to his case, but neglected to include the fact that the statement Campbell referenced is within the context of a discussion between Sapp, Jr. and Campbell concerning Campbell's failure to properly service a Tops

[33] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

store. In the discussion, Sapp, Jr. states to Campbell: "I did a survey on Tops, the coolers weren't touched," and "You said you're the best merchandiser and have the best standards, but today Bobby Campbell wasn't the best . . ..."). No material fact is in dispute.

3. Campbell was employee of the month the month of November 2015 2 months after arriving in the Pepsi Rochester facility. (Campbell sworn statement #20; Exhibit 20- Employee of the month photo).

RESPONSE: Exhibit 20, to which Campbell cites as support for this factual assertion, is an unauthenticated and inadmissible photograph, and therefore should not be considered. Notwithstanding same, and without waiver or prejudice, Bottling Group admits that Campbell was employee of the month in November 2014, which followed Campbell's approximate start date (at Bottling Group) of September 7, 2014, and otherwise denies the remaining allegations. (Doc. No. ¶¶ 84, 98).[34] At the time Campbell was employee of the month, that title was given to the Bottling Group employee whose name was randomly selected in a drawing. An employee's name would be added to the drawing as an award for assisting someone on the job or for performing a task well. (Doc. No. ¶ 98).[35] No material fact is in dispute.

4. Chuck Jewell is white. (Exhibit 21- Def. Response to ADM. pg. 22 No. 51).

RESPONSE: Upon information and belief, admits that Chuck Jewell is white. No material fact is in dispute.

5. Campbell was in charge (covering) Chuck Jewell route the week of Jun. 14, 2015. (Exhibit 22- Email schedule week).

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[34] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[35] Campbell's counterstatement failed to respond to this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: Exhibit 22, to which Campbell cites as support for this factual assertion, fails to support the factual allegation, and is an unauthenticated and inadmissible e-mail, and therefore should not be considered. Without waiver, Bottling Group admits that Campbell was assigned Chuck Jewell's route for the week of June 14, 2015, and otherwise denies the remaining allegations. No material fact is in dispute.

6. Campbell work performed was highlighted on the compay [sic] Territory Leader Scoreboard for the week of Jun. 14, 2015. (Exhibit 23- Scoreboard photo).

RESPONSE: This factual allegation is vague and lacks context. Additionally, Exhibit 23, to which Campbell cites as support for this factual assertion, fails to support the factual allegation, and is an unauthenticated and inadmissible photograph, and therefore should not be considered. Notwithstanding same, and without waiver or prejudice, Bottling Group admits that Exhibit 23 appears to be a photograph depicting photographs posted at the Bottling Group Rochester facility, but otherwise denies knowledge and information sufficient to form a belief as to the content or context of the photograph, or the date the photograph was taken. Further, this factual allegation fails to support Campbell's claims of race-based discrimination, harassment and retaliation. Therefore, Campbell's factual assertion is immaterial to his claims. No material fact is in dispute.

7. Chuck Jewell was given credit of Campbell hard work he did not do the week of Jun. 14, 2015. (Exhibit 23- Scoreboard photo; Exhibit 7- Jun. 22, 2015 Audio rec. time 50:52-50:55).

RESPONSE: This factual allegation is vague and confusing, conclusory, and lacks context. On this basis, it is denied. Additionally, Exhibits 7 and 23, to which Campbell cites as support for this factual assertion, are an unauthenticated and inadmissible audio file,

and an unauthenticated and inadmissible photograph, respectively, and therefore should not be considered. As written, this factual allegation is immaterial to Campbell's claims. Without waiver, even if "Chuck Jewell was given credit of Campbell hard work," this vague and conclusory allegation fails to identify who allegedly gave Chuck Jewell such credit, or in what context such alleged credit was given. No material fact is in dispute.

8. No merchandiser of color (minority) has been given credit for worked [sic] performed by a white (majority) BCR. (Campbell sworn statement #21).

RESPONSE: This factual allegation is vague and confusing, conclusory, and lacks context. On this basis, it is denied. Without waiver, even assuming, *arguendo*, it is true, the posting of a scoreboard photograph does not affect the terms and conditions of a merchandiser's employment. No material fact is in dispute.

9. Campbell was Terminated July 6, 2015 due to high mileage and overpayment pertaining to alleged falsification of company records of mileage reimbursement. (Exhibit 9- Termination notice; Exhibit 24- Def. undisputed fact pg. 30 No. 173).

RESPONSE: Admits that Campbell's employment was terminated on July 6, 2015 for falsification of company records by fraudulently reporting 577 miles for reimbursement, and otherwise denies the remaining allegations. (Doc. No. 56-1, ¶¶ 166-169, 173).[36] No material fact is in dispute.

10. Campbell allegedly drove the difference of 577 extra miles. (Exhibit 25- Def. undisputed fact pg. 28 No. 164).

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[36] Campbell's counterstatement failed to respond to or specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: This factual allegation is vague and confusing, conclusory, and lacks context. On this basis, it is denied. Pitts's mileage audit showed that there was a 577 mile difference between what Campbell reported for his mileage and what MapQuest calculated his mileage to be based upon his scan-in and scan-outs at customer stores. (Doc. No. 56-1, ¶¶ 153-156, 163-164).[37] It is unclear how Campbell's factual allegation supports his claims. No material fact is in dispute.

11. Campbell was told by James Sapp that Chuck Jewell drove 304.5 miles and his route calls for 254. (Exhibit 7- May 6, 2015 Audio rec. time 29:30).

RESPONSE: Denies knowledge and information sufficient to form a belief as to the truth of the allegation. Exhibit 7, an audio file, to which Campbell cites in support of this factual allegation, is unauthenticated and inadmissible evidence, and should not be considered. This factual allegation fails to support Campbell's race-based discrimination, harassment and retaliation claims. Therefore, this factual allegation is immaterial to Campbell's claims. No material fact is in dispute.

12. Jesse Pitts MapQuest Audit show [sic] 4 merchandisers allegedly falsified miles and were overpaid. (Exhibit 5- Mileage audit report).

RESPONSE: Denied. For all merchandisers, Pitts used the same method of calculating mileage - that is, Pitts took all merchandisers' scan-in and scan-out reports to determine the stores the merchandisers serviced and in what order they were serviced, and then used MapQuest to calculate the total number of miles driven on each route. (Doc. No.

[37] Campbell's counterstatement failed to respond to or specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

56-1, ¶¶ 153, 155).[38] In calculating the distance in miles between two locations, MapQuest preselects a route. This does not mean that merchandisers drove that exact route. Thus, a differential in mileage calculation is to be expected. The results of Pitts's audit showed that the mileage reported by Campbell and another merchandiser, Roberto Morales, was an average of 31% higher than what MapQuest had calculated. To contrast, the results of the audit showed that the mileage reported for two other merchandisers (Randy Sheer and Nick Minarich) was an average of 9% higher than what MapQuest had calculated. It was not unreasonable for Pitts to view an average over reporting of 31% as an unreasonable differential (and thus fraudulent). No material fact is in dispute.

13. Two merchandisers were terminated for overpayment pertaing [sic] to mileage, Bobby Campbell (black) and Roberto Morales (Hispanic). (Exhibit 24- Def. undisputed fact pg. 30 No. 172-173).

RESPONSE: Admits that Bottling Group terminated two merchandisers, Bobby Campbell, who is upon information and belief, black, and Roberto Morales, who is upon information and belief, Hispanic, for falsification of company records by fraudulently reporting over 500 miles (each) for reimbursement, and otherwise denies the remaining allegations. (Doc. No. 56-1, ¶¶ 161, 163-173).[39] No material fact is in dispute.

14. Merchandisers Randy Sheer (white) and Nicholas Minarich (white) was [sic] not terminated for overpayment in mileage reimbursement. (Exhibit 26- Plaintiff Interragtory [sic], pg. 12 No. 18-19; Exhibit 19- Def. Doc D01637).

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[38] Campbell's counterstatement failed to respond to these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[39] Campbell made no attempt to respond to or controvert these paragraphs, therefore they are deemed admitted. *See* Local Rule 56(a)(2).

RESPONSE: The exhibits to which Campbell cites in support of this factual allegation fail to support the allegation. Without waiver, Bottling Group admits that merchandisers Randy Sheer, who is upon information and belief white, and Nicholas Minarich, who is upon information and belief, white, were not terminated for overpayment in mileage reimbursement, and otherwise denies the remaining allegations. Pitts's mileage audit revealed that the only two merchandisers who had significantly over reported mileage for reimbursement were Roberto Morales and Campbell. (Doc. No. 56-1, ¶ 161, Exhibit T).[40] There was a difference of 577 miles between Campbell's reported mileage and the mileage calculated through MapQuest, and a difference of 512 miles between Roberto Morales's reported mileage and the mileage calculated through MapQuest.[41] (Doc. No. 56-1, ¶¶ 161, 164, 170-171).[42] To contrast, the results of the audit showed that there was a difference of 36 miles between Sheer's reported mileage and the mileage calculated through MapQuest, and a difference of 56 miles between Minarich's reported mileage and the mileage calculated through MapQuest.[43] (Doc. No 56-1, ¶ 161, Exhibit T).[44] It was not unreasonable for Pitts to view an average over reporting of 31% as an unreasonable differential (and thus fraudulent). No material fact is in dispute.

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[40] Campbell made no attempt to respond to or controvert this paragraph, therefore it is deemed admitted. *See* Local Rule 56(a)(2).

[41] Campbell's and Morales's reported mileage was an average of 31% higher than what MapQuest had calculated. (Doc. No 56-1, ¶ 161, Exhibit T).

[42] Campbell made no attempt to respond to or controvert these paragraphs, therefore they are deemed admitted. *See* Local Rule 56(a)(2).

[43] Sheer's and Minarich's reported mileage was an average of 9% higher than what MapQuest had calculated. (Doc. No 56-1, ¶ 161, Exhibit T).

[44] Campbell made no attempt to respond to or controvert this paragraph, therefore it is deemed admitted. *See* Local Rule 56(a)(2).

15. PepsiCo Law Dept. told the EEOC "at no time did the company retaliate or discriminate against Charging Party with respect to his race or any other protected category". (Exhibit 27- Def. Doc D00977 at sub section POSITION SUMMARY).

RESPONSE: Admits that Bottling Group stated in a letter to Jean E. Mulligan, Investigator, U.S. Equal Employment Opportunity Commission, that: "At no time did the Company retaliate or discriminate against Charging Party with respect to his race or any other protected category," and otherwise denies the remaining allegations. No material fact is in dispute.

16. Campbell was intentionally left out from receiving store priorities, which is? [sic] crucial to executing his job duties. (Exhibit 28- Email screen shot).

RESPONSE: Denied. Campbell admitted to receiving job-related communications from his supervisors and testified that he obtained job-related information from Jose Mendez, a Hispanic merchandiser. (Doc. No. 56-1, ¶¶ 196-97) (citing to Campbell Dep. p. 248, at 7-9, 16-20 and Campbell's responses to Bottling Group's First and Second Requests to Admit).[45] Campbell also testified that part of his harassment claim is that he did not receive BCR emails after a certain point, but that Merchandisers did not normally receive BCR emails anyway. (Doc. No. 56-1, ¶ 197) (citing to Campbell Dep. p. 248, at 7-9, 16-20).[46] Campbell cannot now attempt to refute his prior deposition testimony for purposes of this motion for summary judgment. Further, Exhibit 28, to which Campbell cites in support of this factual allegation, is an unauthenticated and inadmissible "screenshot," and should not be considered. No material fact is in dispute.

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[45] Campbell's counterstatement failed to specifically controvert these paragraphs of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, they are deemed admitted. *See* Local Rule 56(a)(2).

[46] Campbell's counterstatement failed to specifically controvert this paragraph of Bottling Group's Statement. (See Doc. Nos. 56-1; 59-1). Therefore, it is deemed admitted. *See* Local Rule 56(a)(2).

Dated: Rochester, New York
May 25, 2018

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Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOBBY CAMPBELL, JR.,

Plaintiff,

v.

Civil No.:
6:16-CV-06600 DGL-MWP

PEPSI BEVERAGES, INC.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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PRELIMINARY STATEMENT

Bottling Group, LLC ("Bottling Group" or "Company"), incorrectly named herein as Pepsi Beverages, Inc., submits this memorandum of law in support of its motion for summary judgment pursuant to Fed. R. Civ. P. 56(a) ("Motion") dismissing plaintiff Bobby Campbell, Jr.'s ("Campbell" or "Plaintiff") Discrimination Complaint filed August 29, 2016 ("Complaint").

There are no issues of material fact in this matter requiring a trial. Campbell's deposition testimony, responses to Bottling Group's Request to Admit, and other evidence conclusively demonstrate that Campbell's employment was terminated for falsification of company records in July 2015 only after a thorough investigation into mileage reimbursement requests revealed that Campbell had fraudulently submitted 577 miles for reimbursement. The evidence also demonstrates that aside from Campbell's fraudulent submission of mileage, Campbell's general attendance and performance at Bottling Group in 2015 was unsatisfactory, and that Campbell received coaching from Bottling Group supervisors regarding his performance. Moreover, the evidence shows that following Campbell's "Speak Up" complaint to Bottling Group in May 2015, the Company removed verbal warnings that Campbell had recently received, conducted a full investigation into said complaint, and coached the supervisor who issued the verbal warnings to Campbell. Campbell has not and cannot proffer evidence creating a material issue of fact requiring a trial. Campbell has neither identified similarly situated individuals who were treated differently than him, nor demonstrated racial/retaliatory animus. Consequently, Bottling Group is entitled to judgment as a matter of law. Therefore, Bottling Group respectfully requests that the Court grant its Motion and dismiss the Complaint in its entirety.

STATEMENT OF FACTS

Bottling Group is a seller and distributor of Pepsi products. (Declaration of Jesse Pitts dated March 30, 2018 ("Pitts Decl."), ¶ 6, attached to Defendant's Statement of Undisputed Material Facts as Appx. Exh. 2). The Company employed Campbell as an Account Merchandiser ("Merchandiser"), from approximately September 7, 2014 through July 6, 2015, when Campbell's employment was terminated for falsification of company records. (Pitts Decl., ¶¶ 74, 150). When Campbell started his position as Merchandiser, he received the Equal Employment Opportunity Policy and General Rules of Conduct (contained within the Employee Guidebook), the Global Code of Conduct (containing the Anti-Harassment, Anti-Discrimination and Non-Retaliation policies), and training on job duties and policies and procedures. (Pitts Decl., ¶ 77; Campbell's responses to Bottling Group's first Request to Admit ("Campbell First Responses"), nos. 2-10, relevant portions of which are attached as Exh. B to Declaration of Linda Prestegaard dated March 30, 2018 ("Prestegaard Decl."), attached to Defendant's Statement of Undisputed Material Facts as Appx. Exh. 1).[1] In the course of his employment, Campbell was also advised on Bottling Group's procedure for reporting and requesting mileage reimbursement and the Company's attendance policy.[2] (Pitts Decl., ¶¶ 79, 95, 99, 129; Deposition of Bobby Campbell, Jr., November 9, 2017 ("Campbell Dep.") p. 181, at 7-17; p. 180, at 9-25; p. 181, at 2-3, relevant portions of which are attached as Exh. A to Prestegaard Decl.; Campbell's responses to Bottling Group's Second Request to Admit ("Campbell Second Responses"), no. 6, relevant

[1] One of the General Rules of Conduct, for example, provides that "misrepresentation of facts or falsification of Company records or other documents" is prohibited. (Pitts Decl., ¶ 49).

[2] Mileage reimbursement is provided for mileage traveled from the first store serviced to the next store, to all stores serviced in between, ending with the final store serviced in a workday. (Pitts Decl., ¶ 43). The attendance policy requires that notification of any absence from work must be through direct contact with a Bottling Group supervisor, and that "text messaging is not allowed" as a means of communicating an absence. (Pitts Decl., ¶ 98).

portions of which are attached as Exhibit C to Prestegaard Decl.).

As a Merchandiser, Campbell worked out of the Bottling Group's Rochester, New York distribution plant, and was responsible for merchandising Pepsi products within large volume stores, such as grocery stores. (Pitts Decl., ¶¶ 74, 82; Campbell Dep. p. 123 at 16-22; p. 124, at 2-22; p. 125, at 8-14; Dep. Exh. C1). Campbell's Merchandiser job duties included, but were not limited to, ordering product for customer stores, when necessary, stocking shelves, rotating shelved product, setting up displays, complying with operating procedures such as scan-in/scan-out and following designated routes, servicing stores during designated times established by management, and regular and reliable attendance. (Pitts Decl., ¶¶ 83-84; Campbell Dep. p.123 at 16-25; p. 124, at 2-22; p. 125, at 8-14; Dep. Exh. C1).

In connection with such job duties, all Merchandisers, including Campbell, were required to follow the P.R.E.M.I.E.R. In-Store Service Process ("P.R.E.M.I.E.R.") at each customer store. (Pitts Decl., ¶¶ 22, 85; Campbell Dep. p. 42, at 3-21; p. 130, at 2-13). The satisfactory execution of the P.R.E.M.I.E.R. process is critical to Bottling Group's success; accordingly, all Merchandisers, including Campbell, received training and regular coaching on P.R.E.M.I.E.R. (Pitts Decl., ¶¶ 70-71, 81, 86). Failure to properly execute P.R.E.M.I.E.R. is a serious violation of Company policy, for which discipline may be issued. (Pitts Decl., ¶¶ 40,169).

As regular and reliable attendance was also required of Merchandisers, Merchandisers were required to follow the Company's attendance policy. (Pitts Decl., ¶¶ 19, 96; Campbell Dep. p. 123 at 16-22; Exh. C1; p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4). Discipline may be issued for failure to comply with the attendance policy. (Pitts

Decl., ¶ 97; Campbell Dep. p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4).

As part of their duties, Merchandisers travel between assigned stores with their own vehicles and submit mileage requests for reimbursement based upon mileage traveled from the first store to the last store on each shift. (Pitts Decl., ¶ 41). Merchandisers are expected to calculate mileage starting with the first scheduled customer store and ending with the last scheduled customer store, except when, on occasion, Merchandisers must stop at the Rochester facility to attend a meeting, update handhelds, or pick up product displays. (Pitts Decl., ¶ 41). Under no circumstances, however, are Merchandisers required or allowed to stop at the Rochester facility on a daily basis. (Pitts Decl., ¶ 42).

Upon arrival at each customer store, Merchandisers must check-in to the store by using an iPhone or an iPad to scan a special barcode located at the store. (Pitts Decl., ¶ 24; Campbell Dep. p. 42, at 3-21). Upon leaving a customer store, Merchandisers must check-out of the store in the same way. (Pitts Decl., ¶ 34; Campbell Dep. p. 42, at 3-21). At the end of a shift, Merchandisers will then have an electronic record, through scanning in and out using their iPhones or iPads, that shows the start times and end times at each customer store serviced during that shift. (Pitts Decl., ¶ 36). Such scan-in/scan-out data is also accessible to Bottling Group management, and is used by management to track numerous data points, such as how quickly stores are serviced, whether the Merchandiser actually scanned-in and scanned-out as required, the order in which the Merchandiser serviced the assigned stores, and whether the Merchandiser obtained an electronic signature from the store manager or receiver upon ending the account visit, as required. (Pitts Decl., ¶ 37).

Campbell was supervised by several different managers during the course of his employment. (Pitts Decl. ¶¶ 54, 56, 59, 63). From September 2014 through Campbell's termination on July 6, 2015, Campbell was supervised by Sean Trottier (Caucasian), Robert Flaherty (Caucasian) and James Sapp, Jr. (African American). (Pitts Decl. ¶¶ 54-63). Trottier, as Sales District Leader for Bottling Group, supervised Campbell between September 2014 and March 2015. (Pitts Decl. ¶ 54). Flaherty, as Large Format Sales District Leader, supervised Campbell between October 2014 and May 2015. (Pitts Decl. ¶ 59). From May 2015 through July 6, 2015, Campbell was supervised by James Sapp, Jr., as Sales District Leader. (Pitts Decl. ¶¶ 56, 126). In turn, Trottier, Flaherty, and Sapp, Jr. were supervised by Jesse Pitts, Unit Sales Manager. (Pitts Decl., ¶ 61). However, Pitts was also responsible for the overall supervision and management of Merchandisers. (Pitts Decl., ¶ 63). As managers and supervisors, Trottier, Flaherty, Sapp, Jr. and Pitts all received Code of Conduct training (which includes training on the Company's equal employment, anti-harassment, and anti-retaliation policies), and were familiar with the provisions of the Employee Guidebook. (Pitts Decl., ¶ 64)

Early in his employment at the Rochester facility of the Bottling Group, Campbell received an annual raise and was awarded "Employee of the Month," which he received for assisting someone on the job and/or for performing a task well. (Pitts Decl., ¶¶ 87-88; Campbell Dep. p. 198, at 4-5). Campbell's annual raise, issued in December 2014, was approved by Flaherty. (Pitts Decl., ¶¶ 89-90; Campbell First Responses, no. 1).

However, in 2015, Campbell struggled with attendance and performance issues. Specifically, on April 6, 2015, Campbell requested off from work via text message, right before his scheduled shift, violating Bottling Group's attendance policy. (Pitts Decl.,

¶ 107; Campbell Dep. p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4). The attendance policy required Campbell to notify his supervisor of his personal day by proper means (text messaging was not allowed) and to obtain approval for such personal day. (Pitts Decl., ¶¶ 96, 98; Campbell Dep. p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4). Furthermore, Campbell violated the attendance policy on at least four other occasions by text messaging the notifications of his absences. (Pitts Decl., ¶¶ 111-112; Campbell Dep. p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4; p. 135, at 23-25; p. 136, at 2-21; Dep. Exh. C9). Campbell left a fellow Merchandiser at a customer store without informing the Merchandiser that he was leaving, which forced the Merchandiser to work at the store longer than anticipated. (Pitts Decl., ¶¶ 91-92). Additionally, Campbell failed to scan-in and scan-out of customer stores and obtain proper signatures from customers, in violation of P.R.E.M.I.E.R. (Pitts Decl., ¶¶ 108-110). Finally, Campbell was not at an Accounts Merchandised as Scheduled ("AMAS") level of ninety-five percent (95%) or above, the minimum requirement for AMAS. (Pitts Decl., ¶ 127).

On March 27, 2015, Flaherty and Pitts held a quarterly team meeting, to which Campbell, and a Merchandiser by the name of Roberto Morales (Campbell's brother), were late. (Pitts Decl., ¶ 93). Campbell and Morales met with Flaherty and Pitts after the team meeting ended to discuss safety training and the new attendance policy, among other things. (Pitts Decl., ¶¶ 94-95; Campbell Second Responses, no. 6). During this meeting, Flaherty coached Campbell and Morales regarding their performance, commenting that they had a "stink" on them that they needed to get off, as their recent performance had left some team members with a negative perception of them. (Pitts Decl., ¶¶ 100-101). Flaherty explained to Campbell and Morales that he himself previously had

performance issues and had to get the "stink" off of himself.[3] (Pitts Decl., ¶ 103). In response, Campbell and Morales told Flaherty and Pitts that they were being "treated differently" by customers, but when asked by Pitts to provide examples of customers or incidents, Morales only told Pitts that he thought a customer did not like him, and Campbell provided no further information. (Pitts Decl., ¶¶ 104-105). Flaherty also asked Campbell whether Campbell's failure to properly check out at a customer store in accordance with P.R.E.M.I.E.R. was because he felt uncomfortable with the customer, or that he was being "treated differently" by the customer. (Pitts Decl., ¶ 106). Campbell did not say he was uncomfortable with the customer and otherwise provided no reason for failing to follow the P.R.E.M.I.E.R. check out process that related to his relationship with the customer. (Pitts Decl., ¶ 106).

On April 28, 2015, Campbell text messaged management that he was not going to make it to work the following day, on April 29, 2015. (Pitts Decl., ¶ 112). This was the fourth time that Campbell had notified Bottling Group management of an absence via text message, despite the attendance policy's prohibition against notification by text message. (Pitts Decl., ¶¶ 98, 111-112; Campbell Dep. p. 128, at 20-25; p. 129, at 2-3; Dep. Exh. C4; p. 135, at 23-25; p. 136, at 2-21; Dep. Exh. C9). On May 2, 2015, Campbell left an account without obtaining a signature from the proper decision maker at the customer store, in violation of P.R.E.M.I.E.R. (Pitts Decl., ¶ 113).

On May 6, 2015, Flaherty, with Sapp, Jr. present, issued a verbal warning to Campbell for his failure to comply with the attendance policy by texting his supervisor

[3] Campbell testified that Flaherty said: "You guys got a stink on you that you need to get off," and that Flaherty used the same remark "on himself." (Campbell Dep. p. 245, at 4-10). Campbell also testified that Flaherty talked about himself at the meeting, and, relating to the "stink" remark, how Flaherty was one of the worst managers or had one of the worst scores as a manager. (Campbell Dep. p. 173, at 2-25; p. 174, at 2-5).

regarding his expected absence on April 29, 2015, and another verbal warning for Campbell's failure to check out with a proper decision maker at a store on May 2, 2015, in violation of P.R.E.M.I.E.R. (Pitts Decl., ¶ 115). Later in the day on May 6, 2015, Campbell called Bottling Group's "Speak Up" line, to report incidents with Flaherty that he felt had "happened to him because he is black, and Flaherty is white."[4] (Pitts Decl., ¶ 116; Campbell Dep. p. 276, at 5-15; Dep. Exh. C33).

The next day, on May 7, 2015, Pitts met with Campbell and removed both verbal warnings from his file, as Campbell provided a doctor's note for his April 29, 2015 absence, and brought it to Pitts's attention that he went to the hospital on May 2, 2015 (and that was his reason for leaving the store without checking out).[5] (Pitts Decl., ¶ 117). Bottling Group's decision to rescind these warnings from Campbell's file in May 2015 belies any discriminatory or retaliatory inference with respect to his termination months later. While meeting on May 7th, Pitts and Campbell also discussed the fact that Campbell's May 2, 2015 failure to properly check out of the customer store was not the first time he failed to properly check out of a store. (Pitts Decl., ¶ 118).

Bottling Group's Human Resources Department promptly began an investigation of Campbell's "Speak Up" report, and interviewed Campbell, a witness Campbell identified in the report, and Flaherty and Sapp, Jr.[6] (Pitts Decl., ¶ 121). The

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[4] Campbell admitted that he never made an allegation of race discrimination "other than on the Speak Up line." (Campbell Dep. p. 281, at 7-9).

[5] Campbell admitted that the verbal warnings were removed. (Campbell Dep. p. 264, at 7-14).

[6] Campbell testified that "Pepsi HR" investigated his "Speak Up" complaint and spoke with him over the telephone about the "Speak Up" complaint. (Campbell Dep. p. 275, at 20-24; p. 276, at 16-19; p. 283, at 10-14). Campbell further testified that when he spoke to the Bottling Group Human Resources Department representative, he "didn't want to reveal the whole race thing," so he "was speaking in code with a lot of stuff." (Campbell Dep. p. 280, at 6-25; p. 281, at 13-24).

investigation revealed that the verbal warnings Flaherty issued to Campbell were removed because Campbell provided a doctor's note for his April 29th absence and he informed Bottling Group that he left early on May 2nd to go to the hospital. (Pitts Decl., ¶ 123). The investigation also revealed that Campbell was not the only Merchandiser who was being held accountable to Company policies and standards, including P.R.E.M.I.E.R. (Pitts Decl., ¶ 123). Specifically, out of fifteen Merchandisers at the Rochester facility, three Merchandisers (two of whom - Randy Sheer and Tom Ferris - are Caucasian), were on Last Chance Agreements, and one Merchandiser (Nick Minarich, who is Caucasian), had received a verbal warning for failure to follow P.R.E.M.I.E.R. (Pitts Decl., ¶ 123). Ultimately, Flaherty was coached on May 26, 2015 regarding the verbal warnings he issued to Campbell, and the fact that he should not have administered the verbal warnings to Campbell on a day that Campbell went to the hospital. (Pitts Decl., ¶ 124). Additionally, Sapp, Jr. was reassigned to serve as Campbell's direct supervisor.[7] (Pitts Decl., ¶ 126). Bottling group management believed that reassigning Sapp, Jr. to serve as Campbell's direct supervisor would provide Campbell the best opportunity for success in the Company, as Campbell had a better relationship with Sapp, Jr., than with Flaherty. (Pitts Decl., ¶ 126).

In June 2015, in the course of reviewing and processing mileage reimbursement requests, Sapp, Jr. noticed that Campbell had unusually high mileage reimbursement requests, and reported this issue to Pitts. (Pitts Decl., ¶ 128). On or about June 22, 2015, Sapp, Jr. discussed Campbell's mileage reporting and the proper mileage

[7] Campbell testified that during his call with "Pepsi HR," he was "informed . . . that James Sapp was going to be . . . [his] new supervisor." (Campbell Dep. p. 278, at 5-8).

reporting and reimbursement procedure with Campbell.[8] (Pitts Decl., ¶ 129). Later that day, Campbell sent a text message to Pitts acknowledging his earlier conversation with Sapp, Jr., and attempting to "compromise" his mileage reimbursement: "Hopefully ya'll can fix my check before then . . . I settle for 420 miles nothing lower . . . that's compromising."[9] (Pitts Decl., ¶ 130; Campbell Dep. p. 143, at 14-25; p. 144, at 2-4; p. 146, at 2-25; Dep. Exh. C13).

The following week, Sapp, Jr. and Pitts noticed that Campbell once again had an unusually high request for mileage reimbursement. (Pitts Decl., ¶ 132). It was at this point that Pitts performed an audit of mileage reimbursement requests for ten different Merchandisers,[10] of whom seven are Caucasian, two are African American, and one is Hispanic. (Pitts Decl., ¶ 133). In performing the audit, Pitts reviewed the mileage all ten Merchandisers had reported for the period May 24, 2015 through June 28, 2015, as well as the reports of customer store scan-in and scan-out times for each Merchandiser during the same period, via the Power4Merch "app."[11] (Pitts Decl., ¶ 135). Based upon the Merchandisers' store stops, as logged through scanning-in and scanning-out of stores, Pitts tracked the Merchandisers' travels for the period May 24, 2015 through June 28, 2015, and ran MapQuest directions from store to store to determine the number of miles traveled. (Pitts Decl., ¶ 136). Pitts added mileage for travel from the Rochester facility to the first

[8] Campbell testified that he discussed mileage reimbursement with Sapp, Jr. in June 2015. (Campbell Dep. p. 180, at 9-25; p. 181, at 2-3)

[9] Notably, Campbell had submitted a mileage reimbursement request for 688 miles. (Pitts Decl., ¶ 131).

[10] Only Merchandisers who had iPhones containing the Power4Merch "app" (which allows Merchandisers to scan-in and scan-out of customer stores and tracks their scans) were selected for the mileage audit. (Pitts Decl., ¶ 134).

[11] Campbell testified that the scans Pitts pulled were "absolutely" a business record. (Campbell Dep. p. 221, at 5-7).

customer store, and from the last customer store to the Rochester facility, for each shift, for each Merchandiser, to give all Merchandisers the benefit of the doubt.[12] (Pitts Decl., ¶¶ 139-140). Pitts then compared the mileage that the Merchandisers had reported with the number of miles that Pitts had calculated through MapQuest, and logged the difference between the two. (Pitts Decl., ¶¶ 137, 141).

Pitts ultimately discovered that Campbell had consistently reported higher mileage than provided by MapQuest. (Pitts Decl., ¶¶ 141-142). Campbell had reported that he drove 1,876 miles between May 24, 2015 and June 28, 2015, but MapQuest calculated that Campbell had driven only 1,299 miles during that period.[13] (Pitts Decl., ¶ 143). The difference of 577 miles resulted in an overpayment in mileage reimbursement to Campbell in the amount of $331.78. (Pitts Decl., ¶ 144). Campbell's conduct violated the Company rule against "misrepresentation of facts or falsification of Company records or other documents."[14] (Pitts Decl., ¶ 145). In consultation with the Human Resources Department, Pitts made the decision to terminate Campbell's employment effective July 6, 2015. (Pitts Decl., ¶ 146).

Campbell was ultimately terminated by Pitts, with Sapp, Jr. present, in Pitts's office at the Rochester facility, on July 6, 2015. (Pitts Decl., ¶ 150; Campbell Dep. p. 274, at 8-15; Dep. Exh. C32). The following day, July 7, 2015, Campbell called the Company's "Speak Up" line to report Sapp, Jr. and Pitts. (Pitts Decl., ¶ 151; Campbell First Responses,

[12] Mileage reimbursement is provided for mileage traveled from the first store serviced to the next store, to all stores serviced in between, ending with the final store serviced in a workday. (Pitts Decl., ¶¶ 41-42).

[13] Campbell admitted that when Pitts ran a MapQuest based on scans, the miles were "pretty off." (Campbell Dep. p. 221, at 8-12). Campbell also admitted that week after week he had higher mileage than the MapQuest demonstrated from his scans. (Campbell Dep. p. 225, at 22-25; p. 226, at 2).

[14] Campbell admitted that misrepresentation of facts or falsification of company records or other documents is "absolutely" serious misconduct, and that such misconduct may "absolutely" result in immediate termination. (Campbell Dep. p. 131, at 9-21).

no. 24). Campbell alleged that he had been terminated for falsification of mileage documents, that Sapp, Jr. and Pitts refused to show him the MapQuest route, that his termination resulted from the previous report he made to the "Speak Up" line, and that he believed he had been "targeted" by Sapp, Jr. and Pitts since he made the report. (Pitts Decl., ¶¶ 152-154; Campbell First Responses, no. 24).

The Company's Human Resources Department investigated the "Speak Up" complaint and ultimately concluded that termination following Campbell's fraudulent reporting of mileage was warranted. (Pitts Decl., ¶ 155). Although Bottling Group's Human Resources Department offered Campbell paperwork to appeal the termination, Campbell refused the paperwork and made no attempt to appeal his termination pursuant to the Employee Appeals Process set forth in the Employee Guidebook. (Pitts Decl., ¶ 156).

Ultimately, high performance and consistent adherence to Bottling Group policies, procedures, and rules was required of all Merchandisers, as it was required of Campbell, and it was Flaherty, Sapp, Jr., and Pitts's duty as supervisors and managers to enforce Bottling Group's policies, procedures, and rules, including its rule against "misrepresentation of facts or falsification of Company records or other documents." (Pitts Decl., ¶¶ 171-172). While Campbell was employed by Bottling Group, Pitts issued a written warning and suspension to a Caucasian Merchandiser, who had failed to meet P.R.E.M.I.E.R. standards and had been asked by a customer to no longer service its store, and a Last Chance Agreement to a Caucasian Merchandiser for engaging in unprofessional conduct in a store. (Pitts Decl., ¶¶ 169-170). Furthermore, in 2009, Pitts terminated a Caucasian Merchandiser's employment for falsification of company records by misrepresenting time on a time card. (Pitts Decl., ¶ 168).

On the other hand, high performance and adherence to Company policies, procedures, and rules is rewarded at Bottling Group. (Pitts Decl., ¶ 173). In 2015, Rashaad Scott, an African American Merchandiser, was promoted to the Bulk Customer Representative position, based upon his high performance and adherence to Company policies, procedures and rules. (Pitts Decl., ¶ 174).

PROCEDURAL HISTORY

Campbell commenced this action on August 29, 2016 with the filing of his Complaint (Doc. No. 1), asserting claims of discrimination, harassment, and retaliation based on his race and color, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018) ("Title VII"). (Doc. No. 1, pp. 1, 4). Bottling Group filed its Answer on November 10, 2016, denying all allegations of discrimination. (Doc. No. 6). All necessary fact discovery has been completed for purposes of this Motion. (Prestegaard Decl., ¶ 19). Because the evidence establishes that there are no issues of fact requiring a trial, Bottling Group now moves this Court for an order granting summary judgment dismissing the Complaint.

ARGUMENT

Summary judgment is a recognized remedy in employment discrimination cases, and appropriate where the materials in the record, including depositions, admissions, and declarations, "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), (c); *see, e.g., Ruiz v. Cty. of Rockland,* 609 F.3d 486 (2d Cir. 2010) (affirming summary judgment on race discrimination case).

While the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact," if the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 325 (1986). Then, the burden shifts to the nonmoving party to demonstrate that a trier of fact reasonably could find in his favor. *Id.* at 322-25.

However, the nonmoving party "may not rest upon mere allegation or denials of [the movant's] pleading, but must set forth specific facts showing that there is a genuine issue" of material fact as to each issue upon which he would bear the ultimate burden of proof at trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986); *Giordano v. City of N.Y.*, 274 F.3d 740, 749 (2d Cir. 2001) ("'[s]peculation and conjecture' . . . will not suffice 'to defeat a motion for summary judgment'")(alteration in original)(quoting *Giordano v. City of N.Y.*, No. 99 Civ. 3649 AGS, 2001 WL 204202, at *4 (S.D.N.Y. Mar. 1, 2001), *aff'd* in part, *rev'd* in part on other grounds, 274 F.3d 740 (2d Cir. 2001)). Thus, the argued existence of a factual dispute will not defeat an otherwise properly supported motion. *See Anderson,* 477 U.S. at 248. Further, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249, 252 (citations omitted) ("[A] judge must ask [herself]. . . whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]").

POINT I

CAMPBELL CANNOT ESTABLISH DISCRIMINATION BASED UPON DISPARATE TREATMENT

As the Court is well aware, disparate treatment-based discrimination claims under federal law are subject to the three-step burden-shifting standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), under which "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Betterson v. HSBC Bank, USA, N.A.*, 139 F. Supp. 3d 572, 585 (W.D.N.Y. 2015), *aff'd*, 661 F. App'x 87 (2d Cir. 2016) (recognizing the *McDonnell Douglas* standard applies to disparate treatment race discrimination claims). The plaintiff has the initial burden to establish a prima facie case. *See McDonnell Douglas Corp.*, 411 U.S. at 802-04. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *See id.* Once the defendant meets its burden of production, the presumption of discrimination arising from the *prima facie* case drops from the picture and the plaintiff must then prove by a preponderance of the evidence that the defendant's articulated reason is both false and a pretext for discrimination. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000).

A. Campbell Cannot Establish Race-or Color-Based Discrimination in Connection with His Termination

Campbell has alleged that minority employees were "targeted and discriminated against," and that he was "accused and terminated for white collar crime July 6, 2015." (Doc. No. 1, pp. 5, 8). Campbell cannot establish that he was discriminated against based on his race or color in connection his termination in July 2015, because he has

failed to show that he was qualified for his job at the time of his termination, and that his termination occurred under circumstances giving rise to an inference of discrimination. *See Ruiz*, 609 F.3d at 492.

However, even if Campbell could establish a *prima facie* case, Campbell could not establish that his termination was mere pretext, because: 1) Pitts, Campbell's manager, terminated Campbell's employment for falsification of company records only after conducting a full and comprehensive mileage audit of ten different Merchandisers (most of whom are Caucasian); 2) Campbell admitted that falsification of company records is "absolutely" serious misconduct which may result in immediate termination and that he had received the Employee Guidebook containing the policy against "falsification of company records;" 3) Pitts had terminated a Caucasian employee for falsification of company records; 4) Campbell's verbal warnings had been removed from his file by Pitts and an investigation conducted by Bottling Group Human Resources Department in connection with Campbell's May 6, 2015 "Speak Up" complaint; 5) Campbell failed to appeal his termination pursuant to the available employee appeals process; and 6) Sapp, Jr., who alerted Pitts to the mileage issue, discussed proper mileage reporting and reimbursement procedure with Campbell, and was present for Campbell's termination, is the same race as Campbell - African American. (Pitts Decl., ¶¶ 58, 77, 117-123, 128-144, 150, 156, 168; Campbell Dep. p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p. 126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-21; Dep. Exh. C6; p. 264, at 7-14; p. 275, at 20-24; p. 276, at 16-19; p. 283, at 10-14).

1. Campbell Cannot Establish a *Prima Facie* Case

In order to establish a prima facie case of discriminatory discharge based upon race or color under Title VII, Campbell must show: 1) that he is a member of a protected class; 2) that he was qualified for the position he held; 3) he suffered an adverse employment action; and 4) the adverse action took place under circumstances giving rise to an inference of discrimination. *Ruiz*, 609 F.3d at 492.

Campbell cannot establish that he was qualified for the position he held at the time of his termination on July 6, 2015, because Campbell had job performance and attendance issues in 2015, and a late June 2015 audit had revealed that Campbell fraudulently reported over 577 miles for reimbursement. (Pitts Decl., ¶¶ 91-92, 107-111, 127, 133-144; Campbell Dep. p. 138, at 24-25; p. 139, at 2-18; Dep. Exh. C10; p. 140, at 16-25; p. 141, at 2-13; Dep. Exh. C11; p. 141, at 14-25; p. 142, at 2-6; Dep. Exh. C12; p. 147, at 14-25; p. 148, at 2-18; Dep. Exh. C15; p. 150, at 7-17; Dep. Exh. C17); *Williams v. All. Nat'l Inc.*, 24 F. App'x 50, 52 (2d Cir. 2001) (plaintiff could not make out prima facie case where performance memoranda detailing deficiencies of plaintiff's job performance demonstrated that plaintiff was unqualified for the position at the time of termination). Campbell's mere averment that his performance "was satisfactory" is insufficient to establish he was qualified for his position. (Doc. No. 1, p. 7); *Davis v. Avaya, Inc.*, 295 F. App'x 380, 381-82 (2d Cir. 2008) (summary judgment affirmed for employer, despite plaintiff's claim that she had previously received positive employee evaluations); *Khan v. Abercrombie & Fitch, Inc.*, No. 01 Civ. 6163 (WHP), 2003 WL 22149527, at *6 (S.D.N.Y. Sept. 17, 2003) (plaintiff's self-assessment of her performance could "not serve as a basis to establish satisfactory performance under the *McDonnell Douglas* framework").

Additionally, Campbell cannot establish that his termination took place under circumstances giving rise to an inference of discrimination, as Campbell has failed to identify a similarly situated employee outside the relevant protected group who was allowed to maintain his/her employment, despite engaging in the same conduct for which Campbell was terminated. (Doc. No. 1); *Ruiz,* 609 F.3d at 493 (inference of discrimination may be raised by demonstrating that an employer treated the plaintiff less favorably than a similarly situated employee outside of the protected group); *Carter v. New Venture Gear, Inc.,* 310 F. App'x 454, 457 (2d Cir. 2009) (plaintiff failed to present genuine issue of material fact where he provided no evidence that similarly situated black workers were treated differently than white coworkers for actual, comparable incidents); *Davis,* 295 F. App'x at 382 (summary judgment affirmed for employer where plaintiff failed to show that similarly situated coworkers received disparate treatment); *Whethers v. Nassau Health Care Corp.,* 956 F. Supp. 2d 364, 379 (E.D.N.Y. 2013) ("These allegations . . . do not provide sufficient evidence that defendants treated [plaintiff] less favorably than similarly situated employees because plaintiff fails to name similarly situated individuals with similar job titles and responsibilities."), *aff'd,* 578 F. App'x 34 (2d Cir. 2014) (summary order).

Furthermore, the allegations Campbell made against Pitts, the manager who made the decision to terminate Campbell's employment, either describe Pitts's neutral, non-discriminatory conduct, are conclusory in nature, and/or fail to cite to admissible evidence revealing discriminatory animus: 1) Pitts "directed" that Campbell "be micromanaged;" 2) Pitts "targeted and discriminated against minority employees;"[15] and 3) Campbell did not

[15] As set forth more fully in the Statement of Facts, *supra*, the undisputed record evidence reveals that Pitts has terminated a Caucasian Merchandiser for falsifying documents.

receive weekly communications "to do [his] job properly,"[16] and was excluded from Company events/meetings or invited "extremely late."[17] (Doc. No. 1, at pp. 5, 8). Moreover, the record is devoid of allegations that Pitts made any derogatory comments toward Campbell regarding his color or race. As such, none of the allegations Campbell made regarding Pitts give rise to an inference of discrimination based upon Campbell's race or color. *See Carter*, 310 F. App'x at 458 (no indication that note reading "get out we do not want you here" was racially motivated, and otherwise conclusory allegations fail to reveal conduct was racially motivated); *Sharpe v. MCI Commc'ns Servs., Inc.,* 684 F. Supp. 2d 394, 400 (S.D.N.Y. 2010) (plaintiff failed to establish that a berating by supervisor on weekly or bi-weekly basis and supervisor's harsh yelling at plaintiff were motivated by plaintiff's membership in a protected class); *Williams v. N.Y.C. Dep't of Sanitation,* No. 00 Civ. 7371(AJP), 2001 WL 1154627, at *15 (S.D.N.Y. Sept. 28 2001) (alleged "'unfair' treatment or personal animosity is not actionable, only discriminatory treatment is").

Campbell's allegations against Sapp, Jr., the African-American supervisor who alerted Pitts to the mileage issue, discussed mileage reporting and reimbursement requirements with Campbell following discovery of the mileage issue, and attended Campbell's termination meeting, also fail to establish that Campbell's termination took

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[16] Although the Complaint does not directly connect Pitts to this alleged conduct. (Doc. No. 1, p. 5). Bottling Group management sent Campbell job-related communications. (Pitts Decl. ¶ 184; Campbell Second Responses, nos. 1, 3, 4; Campbell First Responses, nos. 17, 18). Further, Campbell admitted that Jose Mendez, a Hispanic Merchandiser, received emails regarding "store priorities," and that Campbell would obtain such store priority information from Mendez. (Campbell Dep. p. 251, at 2-11, 15-25; p. 252, at 9-16). Additionally, Campbell testified in his deposition that part of his claim is that he did not receive BCR emails after a certain point, but admitted that Merchandisers did not normally receive BCR emails anyway. (Campbell Dep. p. 247, at 22-25; p. 248, at 7-9, 16-20). Notably, Campbell never alleged failure to receive communications in his "Speak Up" complaints or his EEOC/NYSDHR complaint. (Pitts Decl. ¶¶ 182-183).

[17] The Complaint does not directly connect Pitts to this alleged conduct. (Doc. No. 1, p. 5). Flaherty and Sapp, Jr. informed Campbell of meetings and Campbell attended meetings. (Pitts Decl. ¶ 187; Campbell First Responses, no. 35).

place under circumstances giving rise to an inference of discrimination. Campbell's allegations either describe Sapp, Jr.'s neutral, non-discriminatory conduct, are conclusory in nature, and/or fail to cite to admissible evidence revealing a discriminatory animus: 1) Sapp, Jr. "targeted and discriminated against minority employees;" 2) Campbell was "harassed daily from the months of March 2015 to July 2015;"[18] and 3) Campbell did not receive weekly communications, and was excluded from Company events/meetings or invited "extremely late."[19] (Doc. No. 1, pp. 5, 8). As such, none of the allegations Campbell made regarding Sapp, Jr. give rise to an inference of discrimination based upon Campbell's race or color. *See Carter*, 310 F. App'x at 458; *Sharpe,* 684 F. Supp. 2d at 400; *Williams,* 2001 WL 1154627, at *15; *Baguer v. Spanish Broad. Sys., Inc.*, No. 04 Civ. 8393(RJS), 2010 WL 2813632, at *11 (S.D.N.Y. July 12, 2010), *aff'd*, 423 F. App'x 102 (2d Cir.2011) ("Courts draw an inference against discrimination where the person taking the adverse action is in the same protected class as the affected employee.").

Furthermore, Flaherty's alleged conduct is insufficient to give rise to an inference of discrimination, because Flaherty was not involved in the mileage audit or the decision to terminate Campbell's employment. *Nweze v. N.Y.C. Transit Auth.*, 115 F. App'x 484, 486 (2d. Cir. 2004) (discharge was not based on race where supervisor who made alleged race-based statement was not shown to have recommended plaintiff's discharge). Regardless, Flaherty's alleged "stink" comment is race-neutral as a matter of law. *See Dimps v. Human Res. Admin. of City of N.Y.*, No. 99 CUV 4909 DC, 2001 WL 1360235, at *2, *11

[18] The Complaint does not directly connect Sapp, Jr. to this alleged conduct, although Campbell testified that the alleged harassment was "only with . . . Flaherty" until Sapp, Jr. "got in the picture" in May 2015. (Doc. No 1, p. 5; Campbell Dep. p. 240, at 10-14; p. 255, at 20-25; p. 256, at 2-5).

[19] The Complaint does not directly connect Sapp, Jr. to this alleged conduct. (Doc. No. 1, p. 5). Further, Bottling Group management sent Campbell job-related communications, and Flaherty and Sapp, Jr. informed Campbell of meetings and Campbell attended the meetings. (Pitts Decl. ¶ 187; Campbell Second Responses, nos. 1, 3, 4; Campbell First Responses, nos. 17, 18, 35).

(S.D.N.Y. Nov. 5, 2001) (defendant's motion for summary judgment granted where plaintiff provided no evidence tending to show that the notes plaintiff received while employed, one of which read "Stink Bitch," were sent because of plaintiff's national origin); *Bhatti v. Provident Funding Assocs., L.P.*, No. 2:11CV1149, 2013 WL 3994739, at *5 (D. Utah Aug. 5, 2013) (plaintiff's allegation that supervisor called him "stank" was "insufficient to qualify as being racial"); *Robinson v. AFA Serv. Corp.*, 870 F. Supp. 1077, 1082 (N.D. Ga. 1994) (summary judgment awarded where plaintiff failed to establish pretext, despite alleging that a supervisor said that plaintiff's "personality stunk"); *Carter*, 310 F. App'x at 458 (no indication that note reading "get out we do not want you here" was racially motivated, and otherwise conclusory allegations fail to reveal conduct was racially motivated); *Washington v. Valspar Indus. Coatings Grp.*, No. 01-60458, 2002 WL 753503, at *2 (5th Cir. Apr. 9, 2002) (plaintiff's allegation that he was called "stinky" was insufficient to support age discrimination claim, where the quality of malodorousness did not relate to age); *cf. Willis v. Wal-Mart Stores, Inc.*, No. C06-648P, 2007 WL 1724327, at *4 (W.D. Wash. June 14, 2007) (supervisor's reference to plaintiff as "stinking Austrian" was evidence of discriminatory animus). Further, "stray remarks, even if made by a decisionmaker, do not constitute sufficient evidence to [support] a case of employment discrimination." *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998).

Otherwise, Campbell's allegations either describe Flaherty's neutral, non-discriminatory conduct, are conclusory in nature, and/or fail to cite to admissible evidence revealing a discriminatory animus: 1) Flaherty treated "minority employees differently than Caucasian employees;" 2) Flaherty repeatedly tried to discipline Campbell;[20] 3) Flaherty

[20] Campbell was "never given a warning or disciplined during . . . [his] employment." (Doc. No. 1, p. 7).

"attempted to discipline and discharge . . . [Campbell] for alleged violations of the company's attendance policy;" 4) Flaherty "targeted and discriminated against minority employees;" 5) Campbell was "written up for being ill and call ins due to sickness;"[21] 6) Campbell was "harassed daily from the months of March 2015 to July 2015;"[22] and 7) Campbell did not receive weekly communications, and was excluded from Company events/meetings or invited "extremely late."[23] (Doc. No. 1, pp. 5, 8). As such, none of the allegations Campbell made regarding Flaherty give rise to an inference of discrimination based upon Campbell's race or color. *See Carter*, 310 F. App'x at 458; *Sharpe,* 684 F. Supp. 2d at 400; *Williams,* 2001 WL 1154627, at *15.

In the absence of a showing that Campbell was qualified for his job at the time of his termination, and that his termination occurred under circumstances giving rise to an inference of discrimination, Campbell cannot establish his *prima facie* case. *Ruiz*, 609 F.3d at 492; *Williams*, 24 F. App'x at 52; *Carter*, 310 F. App'x at 457. Therefore, Bottling Group respectfully requests that the Court grant summary judgment in favor of the Company.

2. Bottling Group's Legitimate Non-Discriminatory Reason

Bottling Group's Employee Guidebook provides that "misrepresentation of facts or falsification of Company records or other documents" is prohibited, and Campbell

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[21] Campbell admitted that the verbal warnings were removed. (Campbell Dep. p. 264, at 7-14).

[22] The Complaint does not directly connect Flaherty to this alleged conduct, although Campbell testified that the alleged harassment was "only with . . . Flaherty" until Sapp, Jr. "got in the picture" in May 2015. (Doc. No 1, p. 5; Campbell Dep. p. 240, at 10-14; p. 255, at 20-25; p. 256, at 2-5).

[23] Although the Complaint does not directly connect Flaherty to this alleged conduct. (Doc. No. 1, p. 5). Bottling Group management sent Campbell job-related communications, and Flaherty and Sapp, Jr. informed Campbell of meetings and Campbell attended the meetings. (Pitts Decl. ¶¶ 184, 187; Campbell Second Responses, nos. 1, 3, 4; Campbell First Responses, nos. 17, 18, 35).

received a copy of the Employee Guidebook. (Pitts Decl., ¶ 77; Campbell Dep. p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p. 126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-8; Dep. Exh. C6). Further, Campbell was trained on Company policies and procedures, and discussed with management how to report and submit mileage driven on the job for reimbursement. (Pitts Decl., ¶¶ 79, 129; Campbell Dep p. 180, at 9-25; p. 181, at 2-3, 7-17; Campbell First Responses, nos. 2-10). Mileage reimbursement is provided for mileage traveled from the first store serviced to the next store, to all stores serviced in between, ending with the final store serviced in a workday. (Pitts Decl., ¶¶ 41-45).

Following a thorough audit involving ten different Merchandisers, most of whom are Caucasian, Pitts discovered that Campbell had falsely reported the number of miles he had driven on the job.[24] (Pitts Decl., ¶¶ 133-144). After consulting with Bottling Group's Human Resources Department, Pitts made the decision to terminate Campbell's employment based upon Campbell's falsification of company records. (Pitts Decl., ¶¶ 145-146, 150).

Thus, Campbell's employment was terminated for a legitimate, nondiscriminatory reason - Campbell's falsification of company records by fraudulently reporting mileage. (Pitts Decl., ¶¶ 155, 167, 200, 204); *see Ruiz*, 609 F.3d at 492 ("misconduct may certainly provide a legitimate and non-discriminatory reason to terminate an employee") (quoting *Owens v. N.Y.C. Hous. Auth.*, 934 F.2d 405, 409 (2d Cir. 1991)); *Kolesnikow v. Hudson Valley Hosp. Ctr.*, 622 F. Supp. 2d 98, 111 (S.D.N.Y. 2009) (alteration and ellipsis in original) (quoting *Baur v. Rosenberg, Minc, Falkoff & Wolff*, No. 07

[24] Campbell admitted that when Pitts ran a MapQuest based on scans, the miles were "pretty off." (Campbell Dep. p. 221, at 8-12). Campbell also admitted that week after week he had higher mileage than the MapQuest demonstrated from his scans. (Campbell Dep. p. 225, at 22-25; p. 226, at 2).

CIV. 8835 (GEL), 2008 WL 5110976, at *5 (S.D.N.Y. Dec. 2, 2008)) ("Where a plaintiff has been terminated for misconduct, the question is not 'whether the employer reached a correct conclusion in attributing fault [to the plaintiff] . . ., but whether the employer made a good-faith business determination.'").

3. Campbell Cannot Establish Pretext

Any inference of pretext surrounding Campbell's termination is negated by the fact that Pitts terminated Campbell's employment for falsification of company records only after conducting a full and comprehensive mileage audit of ten different Merchandisers, most of whom are Caucasian, based upon information provided by Sapp, Jr., who is African American. (Pitts Decl., ¶¶ 128-146). "Courts draw an inference against discrimination where the person taking the adverse action is in the same protected class as the affected employee." *Baguer*, 2010 WL 2813632, at *11. In this case, Sapp, Jr., who is African American, like Campbell, alerted Pitts to the mileage issue, discussed mileage reporting and reimbursement requirements with Campbell, and was present at Campbell's termination. (Pitts Decl., ¶¶ 58, 128-129, 150; Campbell Dep. p. 180, at 9-25; p. 181, at 2-3).

In addition, Campbell admitted that falsification of company records is "absolutely" serious misconduct which may result in immediate termination and that he received the Employee Guidebook containing the policy against "falsification of company records," thereby negating any inference of pretext surrounding Campbell's termination. (Pitts Decl., ¶ 77; Campbell Dep. p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p. 126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-21; Dep. Exh. C6). Notably, Campbell chose not to appeal his termination through the employee appeals process that was available to him. (Pitts Decl., ¶ 156).

Moreover, any inference of pretext surrounding Campbell's termination is negated by the fact that Pitts had previously terminated a Caucasian employee for falsification of company records, the same conduct in which Campbell had engaged. (Pitts Decl., ¶ 168). Further, any inference of pretext is also negated by the fact that Bottling Group readily and thoroughly investigated Campbell's May 6, 2015 "Speak Up" complaint, and Pitts had, within twenty-four (24) hours of Campbell's "Speak Up" complaint, removed the verbal warnings from Campbell's file. (Pitts Decl., ¶¶ 116-117 121-123; Campbell Dep. p. 264, at 7-14; p. 275, at 20-24; p. 276, at 16-19; p. 283, at 10-14). Finally, Campbell's conclusory and unsupported allegations regarding a general practice of discrimination are insufficient to establish pretext. (Doc. No. 1); *Williams,* 24 F. App'x at 53.

As Bottling Group satisfied its burden of producing a legitimate, non-discriminatory reason for Campbell's termination, and Campbell cannot establish pretext, Campbell has not met his burden of proof and cannot establish discrimination in connection with his termination. *See Tex. Dep't of Cmty. Affairs*, 450 U.S. at 253; *Taylor v. Family Residences & Essential Enters., Inc.,* Civ. Action No. 03-6122(DRH), 2008 WL 268801, at *10 (E.D.N.Y. Jan. 30, 2008) ("Title VII is not a guarantor of fairness. It is not a court's role to second-guess an employer's personnel decisions, even if foolish or unfair, so long as they are non-discriminatory."); *Bennett v. Verizon Wireless,* No. 04-cv-6314(CJS), 2008 WL 216073, at *5 (W.D.N.Y. Jan. 24, 2008) ("unless the termination is based on a reason the law forbids, its wisdom is not for the Court to judge"), *aff'd*, 326 F. App'x 9 (2d Cir. 2009). Therefore, summary judgment should be granted in favor of Bottling Group, dismissing Campbell's claims of discrimination in connection with his termination.

B. Campbell Cannot Establish Race-or Color-Based Discrimination in Connection with a Failure to Promote

Campbell has alleged that minority employees were "targeted and discriminated against," and that he was "denied [a] promotion month of May and June 2015." (Doc. No. 1, pp. 5, 8). Campbell cannot establish that Bottling Group denied him a promotion based upon his race or sex, because he has failed to show that he applied for an available position, was qualified for the position, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination. *Tex. Dep't of Cmty. Affairs,* 450 U.S. at 253.

1. Campbell Cannot Establish a *Prima Facie* Case

In order to establish a prima facie case of discriminatory failure to promote based upon race or color under Title VII, Campbell must show: 1) that he is a member of a protected class; 2) that he applied for an available position for which he was qualified; and 3) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *Id.* Campbell failed to allege that he applied for an available position, an essential element of his *prima facie* case. (Doc. No. 1); *Tex. Dep't of Cmty. Affairs,* 450 U.S. at 253. This is because Campbell did not apply for any available position at Bottling Group.[25] Bottling Group posts all positions open to internal candidates on a Company website, and candidates apply for such positions through the website. (Pitts Decl., ¶ 177). Bottling Group received no applications from Campbell while Campbell was employed. (Pitts Decl., ¶¶ 176, 178).

Further, Campbell failed to allege he was qualified for the position(s) for which he allegedly applied, an essential element of his *prima facie* case. (Doc. No. 1); *Tex.*

[25] Campbell admitted that there was no available position. (Campbell Dep. p. 238, at 15-18, 24-25; p. 239, at 2).

Dep't of Cmty. Affairs, 450 U.S. at 253. Regardless, Campbell could not establish that he was qualified, as his job performance and attendance were unsatisfactory in 2015. (Pitts Decl., ¶¶ 91-92, 107-111, 127, 142-145); *Williams*, 24 F. App'x at 52 (plaintiff could not make out prima facie case where performance memoranda detailing deficiencies of plaintiff's job performance demonstrated that plaintiff was unqualified for the position). Campbell's mere averment that his performance "was satisfactory" is insufficient to establish he was qualified for his position. (Doc. No. 1, p. 7); *Davis,* 295 F. App'x at 381-82 (summary judgment affirmed for employer, despite plaintiff's claim that she had previously received positive employee evaluations); *Khan*, 2003 WL 22149527, at *6 (plaintiff's self-assessment of her performance could "not serve as a basis to establish satisfactory performance under the *McDonnell Douglas* framework").

Finally, Campbell failed to establish that he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination, such as by showing that the individual who was offered the alleged available position was less qualified, or by showing that the supervisor who made the decision to reject Campbell for the position had discriminatory animus. *See Tex. Dep't of Cmty. Affairs,* 450 U.S. at 253; *Roa v. Mineta*, 51 F. App'x 896, 899 (2d Cir. 2002) ("An inference of discrimination may be drawn from a showing that a similarly situated individual that is not in the plaintiff's protected class was more favorably treated"); *Rivera v. Nat'l Westminster Bank USA*, 801 F. Supp. 1123, 1131 (S.D.N.Y. 1992) (evidence of actions or remarks by employer showing discriminatory animus may establish an inference of discriminatory intent). Campbell neither identified a similarly situated employee outside the relevant protected group, nor alleged any conduct demonstrating discriminatory animus. (Doc. No. 1).

In the absence of a showing that Campbell applied for an available position for which he was qualified, and was rejected for the position under circumstances giving rise to an inference of unlawful discrimination - essential elements of a failure to promote discrimination claim - Campbell cannot establish his *prima facie* case. *Tex. Dep't of Cmty. Affairs,* 450 U.S. at 253.

POINT II

CAMPBELL CANNOT ESTABLISH HOSTILE WORK ENVIRONMENT HARASSMENT

Campbell alleges that he was harassed by Flaherty and Sapp, Jr.[26] In his Complaint, Campbell alleged that: 1) he was "harassed daily from the month of March 2015 to July 2015;"[27] 2) he was "verbally insulted" by Flaherty on March 27, 2015; 3) during a meeting, Flaherty said that there was a "stink" on Campbell that he needed to get off; 4) "minority employees were harassed . . . performance was criticized" by Flaherty; 5) Flaherty repeatedly tried to discipline Campbell; 6) Campbell was "written up for being ill and call ins due to sickness;" 7) Flaherty "attempted to discipline and discharge . . . [Campbell] for alleged violations of the company's attendance policy;" 8) Flaherty "targeted and discriminated against minority employees;" and 9) Campbell did not receive weekly communications "to do [his] job properly," and was excluded from Company events/meetings or invited "extremely late." (Doc. No. 1, pp. 5, 7-8). In his deposition, Campbell testified that Sapp, Jr. allegedly harassed him by "always" telling him "you didn't do this and this person said that you did that" and "you're not going in there and you're not

[26] Campbell testified that the alleged harassment was "only with . . . Flaherty" until Sapp, Jr. "got in the picture" in May 2015. (Campbell Dep. p. 240, at 10-14; p. 255, at 20-25; p. 256, at 2-5).

[27] Campbell never alleged that he was "harassed daily" in his "Speak Up" complaints or his EEOC/NYSDHR complaint. (Pitts Decl., ¶ 181).

communicating with the BCRs." (Campbell Dep. p. 258, at 3-5, 18-25). Further, Campbell testified that he "always experienced a phone call from Robert Flaherty saying, 'oh, this BCR said you didn't fill the coolers or this BCR said you didn't build the display."[28] (Campbell Dep. p. 241, at 2-8; p. 247, at 6-10). Campbell cannot establish his hostile work environment harassment claim because Campbell cannot demonstrate that the alleged conduct was racially motivated, or that the alleged conduct was sufficiently severe or pervasive to alter the conditions of his work environment. *Nweze,* 115 F. App'x at 485; *Carter*, 310 F. App'x at 457.

To establish hostile work environment harassment, Campbell must show "that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of [the] working environment," and that a specific basis exists for imputing the alleged conduct to Bottling Group. *Nweze,* 115 F. App'x at 485 (alteration in original) (quoting *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002)); *Carter*, 310 F. App'x. at 458 ("A hostile work environment claim may be based on one incident, but . . . 'the incident [must] constitute an 'intolerable alteration' of the plaintiff's working conditions, so as to substantially interfere with or impair his ability to do his job'") (quoting *Mathirampuzha v. Potter*, 548 F.3d 70, 79 (2d Cir. 2008)).

In the absence of an extraordinarily severe incident, it must be shown that "the ... workplace was 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.'" *Distasio v. Perkin Elmer Corp,* 157 F.3d 55, 56 (2d Cir. 1998) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993); *Snell v. Suffolk Cty.*,

[28] Campbell admitted that part of his job was to fill the coolers. (Campbell Dep. p. 241, at 11-12).

782 F.2d 1094, 1102-03 (2d Cir. 1986) ("'a . . . work environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' may constitute a violation of Title VII") (quoting *Vaughn v. Pool Offshore Co., A Div. Of Pool Co. Of Tex.*, 683 F.2d 922, 924 (5th Cir. 1982)). The alleged hostile work environment must be both objectively hostile or abusive and subjectively perceived by the alleged victim as abusive. *Carter*, 310 F. App'x at 457. Of course, Campbell must also show that the alleged harassment is based on his race or color (which he cannot do). *Nweze,* 115 F. App'x at 485; *Carter*, 310 F. App'x at 458.

A. Campbell Cannot Establish the Alleged Conduct was Racially Motivated

Notably, none of Campbell's allegations demonstrate that the alleged conduct was racially motivated, a necessary element of a hostile work environment claim. (Doc. No. 1; Campbell Dep. p. 241, at 2-8; p. 247, at 6-10; p. 258, at 3-5, 18-25); *Nweze,* 115 F. App'x at 485; *Carter*, 310 F. App'x at 458. Campbell does not allege that Flaherty or Sapp, Jr. made racist remarks. (Doc. No. 1). The only specific remark that Campbell alleges was made to him was a race-neutral remark by Flaherty - that there was a "stink" on Campbell. *See id.* There is no indication that the word "stink" has racial context. *See Dimps*, 2001 WL 1360235, at *2; *Bhatti*, 2013 WL 3994739, at *5; *see also supra* pp. 20-21. Otherwise, Campbell's allegations describe neutral, non-discriminatory conduct, are conclusory in nature, and/or fail to cite to admissible evidence revealing discriminatory animus. (Doc. No. 1); *Carter*, 310 F. App'x at 458 (no indication that note reading "get out we do not want you here" was racially motivated, and otherwise conclusory allegations fail to reveal conduct was racially motivated); *Nweze,* 115 F. App'x at 485 (plaintiff failed to establish supervisor's "yelling and requests for errands" was race-based); *Sharpe,* 684 F. Supp. 2d at

400 (plaintiff failed to establish plaintiff 's berating by supervisor on weekly or bi-weekly basis and supervisor's harsh yelling at plaintiff were motivated by plaintiff's membership in a protected class). Further, "[c]ourts draw an inference against discrimination where the person taking the adverse action is in the same protected class as the affected employee." *Baguer*, 2010 WL 2813632, at *11. In the present case, an inference against discrimination should be drawn because Sapp, Jr., who is African American, like Campbell, alerted Pitts to the mileage issue, discussed mileage reporting and reimbursement requirements with Campbell, and was present at Campbell's termination. (Pitts Decl., ¶¶ 58, 128-129, 150; Campbell Dep. p. 180, at 9-25; p. 181, at 2-3).

As Campbell cannot establish that the alleged conduct was based on race or color, Campbell cannot establish a hostile work environment harassment claim. *Nweze,* 115 F. App'x at 485; *Carter*, 310 F. App'x at 458.

B. Campbell Cannot Establish the Alleged Conduct Was Sufficiently Severe or Pervasive to Have Altered the Conditions of His Employment

Even if it could be established that the alleged conduct was racially motivated, Campbell has not and cannot establish that the alleged conduct was sufficiently severe or pervasive so as to have altered the conditions of Campbell's employment. (Doc. No. 1); *Brown v. Coach Stores, Inc.,* 163 F.3d 706, 713 (2d Cir. 1998) (*prima facie* case not established where plaintiff failed to allege that remarks unreasonably interfered with job performance); *Nweze,* 115 F. App'x at 485 (even if supervisor's "yelling and requests for errands" was race-based, it did not establish workplace permeated with discriminatory intimidation, ridicule, and insult or alter conditions of employment); *see also Snell*, 782 F.2d at 1103 ("[t]o establish a hostile [work environment claim,] plaintiff[ ]must prove more than a few isolated incidents of racial enmity").

Campbell claims that the first alleged discriminatory act occurred on March 27, 2015, when he was allegedly "verbally insulted" by Flaherty. (Doc. No. 1, pp. 3, 5). On March 27, 2015, Flaherty told Campbell that there was a "stink" on him that he needed to get off. (Pitts Decl., ¶ 101). Flaherty's lone, racially-neutral remark, however, is insufficient to establish a "workplace ... permeated with 'discriminatory intimidation, ridicule and insult.'" *See Distasio,* 157 F.3d at 56 (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993)); *Dimps*, 2001 WL 1360235, at *2; *Bhatti*, 2013 WL 3994739, at *5.

Furthermore, although Campbell claims that he was "written up for being ill and call ins due to sickness," and that Flaherty repeatedly tried to discipline him and "attempted to discipline and discharge . . . [him] for alleged violations of the company's attendance policy," it is undisputed that Flaherty only issued verbal warnings to Campbell on one occasion - May 6, 2015 - when he issued a verbal warning for Campbell's failure to follow P.R.E.M.I.E.R., and a verbal warning for Campbell's failure to comply with the attendance policy, and that both verbal warnings were removed from Campbell's file the following day, on May 7, 2015. (Doc. No. 1; Pitts Decl., ¶¶ 115, 117; Campbell Dep. p. 264, at 7-14). Flaherty's one-time issuance of verbal warnings, which were immediately removed the following day, is insufficient to establish a "workplace ... permeated with 'discriminatory intimidation, ridicule and insult.'" *See Distasio,* 157 F.3d at 56 (quoting *Harris,* 510 U.S. at 21).

Additionally, Campbell has failed to establish that the alleged "daily harassment," which he has identified as phone calls from Flaherty about work-related issues, was "sufficiently severe or pervasive to alter the conditions of [his] employment and

create an abusive working environment."[29] (Doc. No. 1; Campbell Dep. p. 240, at 10-14; p. 241, at 2-8; p. 247, at 6-10); *Distasio,* 157 F.3d at 56 (quoting *Harris*, 510 U.S. at 21). Moreover, Campbell has failed to establish that Sapp, Jr. "always" telling him "you didn't do this and this person said that you did that" and "you're not going in there and you're not communicating with the BCRs" was "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment."[30] (Campbell Dep. p. 258, at 3-5, 18-25); *Distasio,* 157 F.3d at 56 (quoting *Harris*, 510 U.S. at 21).

Finally, Campbell has failed to establish that Flaherty and Sapp, Jr.'s alleged failure to provide him with weekly communications "to do [his] job properly,"[31] and Flaherty and Sapp, Jr.'s alleged exclusion of Campbell from Company events/meetings, was "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Distasio,* 157 F.3d at 56 (quoting *Harris*, 510 U.S. at 21). Campbell admitted that he attended Company meetings and received email and text message communications from Bottling Group supervisors between March and July 2015. (Campbell Dep. p. 121, at 13-25; Campbell First Responses, nos. 17, 18, 35; Campbell Second Responses, nos. 1, 3, 4, 6, 9). Additionally, Campbell testified that he obtained work-related information from other Merchandisers, such as Jose Mendez, who is Hispanic, and had received such work-related communications. (Campbell Dep. p. 251, at 2-11, 15-25; p. 252, at 9-16; Pitts Decl. ¶ 185).

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[29] Bottling Group supervisors were in regular communication with Merchandisers, whether through telephone calls, text messages, or e-mails, and the nature of the work made regular communication with Merchandisers necessary. (Pitts Decl., ¶¶ 166-167).

[30] Campbell admitted that he was not communicating with the BCRs. (Campbell Dep. p. 258, at 3-6).

[31] Campbell testified in his deposition that part of his claim is that he did not receive BCR emails after a certain point, but admitted that Merchandisers did not normally receive BCR emails anyway. (Campbell Dep. p. 247, at 22-25; p. 248, at 7-9, 16-20).

As Campbell cannot establish that the alleged conduct was based on race or color, and sufficiently severe or pervasive so as to have altered the conditions of his employment, Campbell cannot establish a *prima facie* case of hostile work environment harassment. *Nweze,* 115 F. App'x at 485*; Carter*, 310 F. App'x at 457; *Cosgrove v. Sears, Roebuck & Co,* 9 F.3d 1033, 1042 (2d Cir. 1993) (summary judgment on harassment claim affirmed where plaintiff failed to demonstrate that the alleged conduct affected a term, condition or privilege of employment). Therefore, summary judgment should be granted in favor of Bottling Group, dismissing Campbell's claims of harassment.

POINT III

CAMPBELL CANNOT ESTABLISH RETALIATION

In his Complaint, Campbell alleged that he "stated" that he was "treated differently because of . . . [his] race" at an April 2015 meeting with Flaherty, Pitts, and Sapp, Jr. and that he made a report to the "Speak Up" line on May 6, 2015. (Doc. No. 1, pp. 5, 8). However, Campbell did not complain of race discrimination at any April 2015 meeting and has admitted that he never made an allegation of race discrimination "other than on the Speak Up line."[32] (Campbell Dep. p. 281, at 7-9). It is undisputed that Campbell made his first "Speak Up" complaint on May 6, 2015, and his second and last "Speak Up" complaint on July 7, 2015, following his termination. (Pitts Decl. ¶¶ 116, 151; Campbell Dep. p. 276, at 5-15; Dep. Exh. C33; Campbell First Responses, no. 24). As Campbell's last "Speak Up" complaint was made post-termination, only Campbell's May 6, 2015 "Speak Up" complaint is relevant to this analysis.

[32] Pitts only remembers a meeting on March 27, 2015, at which Campbell and Morales said that they were being "treated differently" by customers, but Morales only told him that he thought a customer did not like him, and Campbell provided no further information. (Pitts Decl. ¶¶ 93-95, 104-106).

Campbell claims that he was retaliated against for making his May 6, 2015 "Speak Up" complaint, and that he was "written up for being ill and call ins due to sickness," Flaherty "repeatedly" tried to "discipline," excluded from meetings, and Campbell's employment was ultimately terminated. (Doc. No. 1, pp. 5, 8). Campbell cannot establish that his May 6, 2015 verbal warnings (which were subsequently removed) were an act of retaliation for his May 6, 2015 "Speak Up" complaint, because his May 6, 2015 verbal warnings were issued *prior to* Campbell making his May 6, 2015 "Speak Up" complaint. (Pitts Decl. ¶¶ 115-116; Campbell Dep. p. 264, at 7-14; p. 276, at 5-15; Dep. Exh. C33).

Further, Campbell cannot establish that his alleged exclusion from meetings and Flaherty's alleged attempts to "discipline" Campbell (allegations that Bottling Group vehemently denies) constituted adverse employment actions. (Doc. No. 1); *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). Campbell also cannot establish that there was a causal connection between his May 6, 2015 "Speak Up" complaint and Flaherty's alleged attempts to "discipline" Campbell, Campbell's alleged exclusion from meetings, and Campbell's termination. (Doc. No. 1); *Gordon v. N.Y. City Bd. of Educ.,* 232 F.3d 111, 117 (2d Cir. 2000).

However, even if Campbell could establish that there were adverse employment actions and a causal connection, i.e., a *prima facie* case of retaliation (which he cannot), Campbell cannot not establish that pretext existed because: 1) Campbell's falsification of company records by fraudulently reporting 577 miles for reimbursement in May and June 2015 constituted an intervening event between Campbell's May 6, 2015 "Speak Up" complaint and termination on July 6, 2015; 2) Campbell had performance and

attendance issues in 2015, for which he was coached by Bottling Group supervisors; 3) Pitts terminated Campbell's employment for falsification of company records only after conducting a full and comprehensive mileage audit of ten different Merchandisers (most of whom are Caucasian), based upon information provided by Sapp, Jr., who is African American; 4) Campbell admitted that falsification of company records is serious misconduct which may result in immediate termination and that he received the Employee Guidebook containing the policy against "falsification of company records;" 5) Pitts had previously terminated a Caucasian employee for falsification of company records; 6) Bottling Group readily and thoroughly investigated Campbell's May 6, 2015 "Speak Up" complaint; 7) Campbell failed to appeal his termination pursuant to the available employee appeals process; and 8) Other Merchandisers, including a Merchandiser who is Hispanic, received communications regarding meetings and attended meetings. (Pitts Decl., ¶¶ 91-92, 107-111, 116, 121-122, 127-150, 156, 168, 185; Campbell Dep., p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p. 126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-21; Dep. Exh. C6; p. 251, at 2-6, 15-25; p. 252, at 9-16; p. 275, at 20-24; p. 276, at 16-19; p. 283, at 10-14).

As with disparate treatment claims, claims of retaliation are analyzed using the burden-shifting *McDonnell Douglas* standard, in the absence of direct evidence of retaliation. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000), *superseded by regulation on other grounds as stated in, Jones v. N.Y.S. Metro D.D.S.O.*, 543 F. App'x 20 (2d Cir. 2013); *Brown v. Xerox Corp.*, 170 F. Supp. 3d 518, 524 (W.D.N.Y. 2016).

1. Campbell Cannot Establish a *Prima Facie* Case

To establish retaliation, Campbell must show that: 1) he was engaged in a protected activity; 2) Bottling Group was aware of that activity; 3) Campbell suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Distasio,* 157 F.3d at 56. A "protected activity" is an "action taken to protest or oppose statutorily prohibited discrimination." *Cruz,* 202 F.3d at 566. Importantly, "[t]he onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally." *Aspilaire v. Wyeth Pharms., Inc.,* 612 F. Supp. 2d 289, 308-09 (S.D.N.Y. 2009).

To establish that he suffered an adverse employment action, Campbell must show that the alleged employment action materially and adversely affected the terms and conditions of his employment. *Galabya,* 202 F.3d at 640 ("To be 'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'")(quoting *Crady v. Liberty Nat'l Bank & Tr. Co. of Ind.*, 993 F.2d 132,136 (7th Cir. 1993)). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Galabya,* 202 F.3d at 640 (ellipsis in original)(quoting *Crady,* 993 F.2d at 136).

To establish a causal connection between the protected activity and the adverse employment action, Campbell must demonstrate either: 1) that the protected activity was followed closely by retaliatory treatment, or that there is other circumstantial

evidence such as disparate treatment of fellow employees engaged in such conduct; or 2) that there was retaliatory animus directed against the plaintiff by Bottling Group. *Gordon,* 232 F.3d at 117. However, "temporal proximity alone is not necessarily dispositive of a causal connection evidencing a retaliatory motive." *Philippeaux v. Fashion Inst. of Tech.*, No. 93 CIV 4438 (SAS), 1996 WL 164462, at *9 (S.D.N.Y. Apr.9, 1996), *aff'd*, 104 F.3d 356 (2d Cir. 1996).

a. Campbell Cannot Establish That His Alleged Exclusion From Meetings and Flaherty's Alleged Attempted Discipline Constituted Adverse Employment Actions

Campbell cannot establish that his alleged exclusion from meetings constituted adverse employment actions because Campbell received notices for and attended meetings between March and July 2015, Campbell was never disciplined for his failure to attend meetings, and Campbell has not otherwise alleged that he suffered adverse consequences as a result of his alleged exclusion from meetings. (Doc. No. 1; Pitts. Decl. ¶¶ 187, 189; Campbell First Responses, no. 35; Campbell Second Responses, nos. 6, 9); *Galabya*, 202 F.3d at 640.

Campbell also cannot establish that Flaherty's alleged attempted discipline constituted adverse employment actions because, as Campbell admitted, Flaherty did not actually present Campbell with any write-ups, and Campbell has not alleged that he suffered adverse consequences as a result of Flaherty's alleged attempted discipline. (Doc. No. 1; Campbell Dep. p. 264, at 7-14); *see Henry v. N.Y.C. Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 407 (S.D.N.Y. 2014) ("the threat of disciplinary action, without more, does not constitute an adverse employment action."); *Gaidasz v. Genesee Valley Bd. of Coop. Educ. Sys. (Boces)*, 791 F. Supp. 2d 332, 337 (W.D.N.Y. 2011) (noting that negative performance evaluations,

formal reprimands, and counseling memoranda are not adverse employment actions unless accompanied by negative repercussions); *Workneh v. Pall Corp.*, 897 F. Supp. 2d 121, 135 (E.D.N.Y. 2012) ("[i]ncreased responsibilities and excessive scrutiny, without more, do not constitute an adverse employment action.").

As Campbell cannot establish that his alleged exclusion from meetings and Flaherty's alleged attempted discipline constituted adverse employment actions, Campbell cannot establish a *prima facie* case of retaliation with respect to the alleged exclusion from meetings and Flaherty's alleged attempted discipline. *Distasio,* 157 F.3d at 56.

b. Campbell Cannot Establish a Causal Connection Between the May 2015 "Speak Up" Complaint and the Verbal Warnings, Alleged Exclusion from Meetings, Alleged Attempted Discipline, and Termination

First, Campbell cannot establish that his May 6, 2015 verbal warnings (which were subsequently removed) were an act of retaliation for his May 6, 2015 "Speak Up" complaint, because his May 6, 2015 verbal warnings were issued *prior to* Campbell making his May 6, 2015 "Speak Up" complaint. (Pitts Decl. ¶¶ 115-116; Campbell Dep. p. 264, at 7-14; p. 276, at 5-15; Dep. Exh. C33); *Distasio,* 157 F.3d at 56.

Further, even if Campbell could establish there were adverse employment actions and that such adverse employment actions were temporally proximate to his May 6, 2015 complaint, Campbell could not establish adequate causation to satisfy the "causal connection" element of his claim, because he otherwise fails to demonstrate retaliatory animus or disparate treatment of fellow employees engaged in such conduct. *Distasio,* 157 F.3d at 56; *Gordon,* 232 F.3d at 117; *Padob v. Entex Info. Serv.*, 960 F. Supp. 806, 814 (S.D.N.Y. 1997) (mere temporal proximity is insufficient to establish causal connection, without more). Campbell does not allege that his supervisors made racist remarks. (*See*

Doc. No. 1). The only specific remark that Campbell alleges was made to him was a race-neutral remark - that there was a "stink" on Campbell. *See id.* There is no indication that the word "stink" has racial context. *See Dimps*, 2001 WL 1360235, at *11, *supra,* at pp. 20-21. Additionally, Campbell has failed to identify a similarly situated employee outside the relevant protected group. (*See* Doc. No. 1).

Therefore, as Campbell cannot establish that there was a causal connection between his May 6, 2015 "Speak Up" complaint and the verbal warnings issued May 6, 2015, his alleged exclusion from meetings, Flaherty's alleged attempted discipline, and Campbell's July 6, 2015 termination, Campbell cannot establish a *prima facie* case of retaliation with respect to the May 6, 2015 "Speak Up" complaint. *Distasio,* 157 F.3d at 56; *Gordon,* 232 F.3d at 117. Bottling Group respectfully requests that Campbell's retaliation claim be dismissed.

2. Bottling Group's Legitimate Non-Discriminatory Reason

Bottling Group's decision to terminate Campbell was for a legitimate, non-discriminatory reason - falsification of company records. (Pitts Decl., ¶¶ 142-146). Following a thorough audit involving ten different Merchandisers, most of whom are Caucasian, Pitts discovered that Campbell had falsely reported the number of miles he had driven on the job. (Pitts Decl., ¶¶ 133-144). After consulting with Bottling Group's Human Resources Department, Pitts made the decision to terminate Campbell's employment based upon Campbell's falsification of company records. (Pitts Decl., ¶ 146). Bottling Group's Employee Guidebook, of which Campbell received a copy, provides that "misrepresentation of facts or falsification of Company records or other documents" is prohibited. (Pitts Decl., ¶¶ 49, 77; Campbell Dep. p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p.

126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-8; Dep. Exh. C6). Further, Campbell was trained on Bottling Group's policies and procedures, discussed with management how to report and submit mileage driven on the job for reimbursement, and was reminded about those procedures by Sapp, Jr. in June 2015. (Pitts Decl., ¶¶ 77, 79, 129; Campbell Dep p. 180, at 9-25; p. 181, at 2-3, 7-17; Campbell First Responses, nos. 2-10).

To the extent that Flaherty allegedly attempted to issue discipline to Campbell, it was for a legitimate, non-discriminatory reason - Campbell's performance issues. (Pitts Decl., ¶¶ 91-92, 107-111, 127). It was the duties of all Bottling Group supervisors to enforce Bottling Group's policies, procedures, and rules. (Pitts Decl., ¶ 171). Finally, to the extent that Campbell was allegedly excluded from meetings, any such failure on Bottling Group's part to send communications to Campbell was a mistake - a legitimate, non-discriminatory reason. (Pitts Decl., ¶ 190).

3. Campbell Cannot Establish Pretext

Even if Campbell could establish a *prima facie* case of retaliation (which he cannot), any inference of pretext or causation relating to Campbell's termination is negated by Campbell's fraudulent reporting of mileage for reimbursement, an "intervening event." *Nolley v. Swiss Reinsurance Am. Corp.,* 857 F. Supp. 2d 441, 461 (S.D.N.Y. 2012), *aff'd,* 523 F. App'x 53 (2d Cir. 2013) ("[a]n intervening event between the [alleged] protected activity and the adverse employment action may defeat the inference of causation where temporal proximity might otherwise suffice to raise the inference"). Campbell's fraudulent reporting of mileage for reimbursement occurred between Campbell's May 6, 2015 "Speak Up" complaint and his July 6, 2015 termination. (Pitts Decl. ¶¶ 116, 133-144, 150). Therefore,

any inference of pretext or causation in connection with Campbell's May 6, 2015 "Speak Up" complaint and his termination is negated. *Gubitosi v. Kapica*, 154 F.3d 30, 33 (2d Cir. 1998) (plaintiff failed to carry her burden of showing that the defendant engaged in retaliatory termination, even where there was a "short period of time between" the protected activity and termination, given "the significant intervening events between these two dates," including plaintiff's disobedience of an order from her superior and false written statement).

Moreover, any inference of pretext is negated by the fact that Campbell's employment was terminated for falsification of company records only after a full and comprehensive mileage audit of ten different Merchandisers (most of whom are Caucasian) was conducted, based upon information provided by Sapp, Jr., who is African American.[33] (Pitts Decl., ¶¶ 128-144); *Baguer*, 2010 WL 2813632, at *11. Notably, Campbell admitted that falsification of company records is "absolutely" serious misconduct which may result in immediate termination and that he had received the Employee Guidebook containing the policy against "falsification of company records." (Campbell Dep. p. 124, at 14-16; p. 125, at 15-21; p. 126, at 6-10; Dep. Exh. C2; p. 126, at 11-13; p. 127, at 11-25; p. 128, at 3-5; Dep. Exh. C3; p. 130, at 14-23; p. 131, at 4-21; Dep. Exh. C6). Tellingly, Campbell failed to appeal his termination pursuant to the available employee appeals process. (Pitts Decl., ¶ 156). Furthermore, any inference of pretext is negated by the fact that Pitts had previously terminated a Caucasian employee for falsification of company records, just as Pitts terminated Campbell's employment for the same conduct. (Pitts Decl., ¶¶ 150, 168).

[33] Campbell admitted that when Pitts ran a MapQuest based on scans, the miles were "pretty off." (Campbell Dep. p. 221, at 8-12). Campbell admitted that week after week he had higher mileage than the MapQuest demonstrated from his scans. (Campbell Dep. p. 225, at 22-25; p. 226, at 2).

Additionally, the fact that Bottling Group readily and thoroughly investigated Campbell's May 6, 2015 "Speak Up" complaint negates any inference of pretext. (Pitts Decl., ¶¶ 121-122; Campbell Dep. p. 275, at 20-24; p. 276, at 16-19; p. 283, at 10-14). Flaherty was coached on May 26, 2015 regarding the verbal warnings he issued to Campbell and Campbell was assigned Sapp, Jr. as a new supervisor, because Bottling Group believed it would provide Campbell the best opportunity for success in the Company. (Pitts Decl., ¶¶ 124, 126; Campbell Dep. p. 278, at 5-8). Further, any inference of pretext or causation is negated by the fact that Campbell had performance and attendance issues in 2015, for which he was coached by Bottling Group supervisors. (Pitts Decl., ¶¶ 91-92, 107-111, 127). Finally, the fact that other Merchandisers, including a Merchandiser who is Hispanic, received communications regarding meetings and attended meetings, negates any inference of pretext. (Pitts Decl., ¶ 185; Campbell Dep. p. 251, at 2-6, 15-25; p. 252, at 9-16).

As Bottling Group satisfied its burden of producing legitimate, non-discriminatory reasons for Campbell's termination, Campbell's alleged exclusion from meetings, and Flaherty's alleged attempted discipline, and Campbell cannot establish pretext, Campbell has not met his burden of proof and cannot establish a *prima facie* case of retaliation. *Distasio,* 157 F.3d at 56. Therefore, summary judgment should be granted in favor of Bottling Group, dismissing Campbell's claims of retaliation.

CONCLUSION

For the foregoing reasons, the Court should grant Bottling Group's motion for summary judgment and dismiss the Complaint in its entirety with prejudice.

Dated: Rochester, New York
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