17-cv-3779 (LDH)(TAM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VALENTIN KHAZIN,

Plaintiff,

-against-

THE CITY OF NEW YORK, ET AL,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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VALENTIN KHAZIN,

Plaintiff, 17 CV 3779 (LDH)(TAM)

-against-

THE CITY OF NEW YORK, SYLVESTER GE, as Executive Officer, Highway District; JOHN SANFORD, as Captain, Highway Patrol No. 3; MARC LEVINE, as Lieutenant, Highway Patrol No. 3; STEPHEN BRATHWAITE, as Lieutenant, Highway Patrol No. 3; VINCENT GREANY, as Commanding Office, 9th Precinct; MICHAEL LAU, as Lieutenant, 9th Precinct; MICHAEL DIAZ, as Lieutenant, 9th Precinct; and DANIEL BROWN and Lieutenant of Bronx Viper Unit Lawrence Hawkins,

Defendants.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff, a former sergeant with the New York City Police Department, brings this action pursuant to 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), 42 U.S.C. § 1983, New York State Executive Law §§ 296, *et seq.* ("SHRL"), and New York City Administrative Code §§ 8-107, *et seq.* ("CHRL") against the City of New York and individually named defendants Inspector Sylvester Ge, retired Captain John Sanford[1], retired Lieutenant Jonathan Lipke, retired Lieutenant Stephen Braithwaite s/h/a Stephen Brathwaite, Inspector Vincent Greany, Lieutenant Michael Lau,

[1] Upon information and belief, John Sanford was never served in this action and has not made an appearance in the case.

retired Lieutenant Michael Diaz, retired Lieutenant Daniel Brown, and retired Lieutenant Lawrence Hawkins. Plaintiff alleges that defendants denied him the ability to work off-duty employment, subjected him to increased scrutiny and discipline, and transferred him from Highway Unit 3 to the 9th Precinct in retaliation for his protected activity asserted on the behalf a colleague, Police Officer Dana Harge. Following his transfer to the 9th Precinct, plaintiff claims he was subjected to the further acts of retaliation in the forms of denied overtime, delayed overtime, denied requests to work off-duty employment, denied opportunities to advance in his career, discipline, and ultimately suspension and a transfer to Bronx VIPER. Plaintiff further alleges that the command discipline he received while assigned to Bronx VIPER and his constructive discharge were in retaliation for his protected activity.

Plaintiff commenced this action on July 18, 2017, claiming retaliation and Monell violations. See ECF Dkt. No. 1. Defendants answered the 2017 complaint on October 10, 2017. See ECF Dkt. No. 28. Thereafter, plaintiff filed his amended complaint on February 21, 2020, asserting additional claims of retaliation. See ECF Dkt. No. 55. Defendants filed their answer to the amended complaint on March 25, 2020. See ECF Dkt. No. 56.

Defendants now move for summary judgment on all of plaintiff's claims in this action. First, plaintiff cannot establish his retaliation claims. At the outset, plaintiff cannot establish that, while assigned to Highway Unit 3, that he engaged in any protected activity of which defendants had notice. Further, plaintiff cannot demonstrate any causal connection between his protected activity and the complained of employment actions. Moreover, plaintiff cannot demonstrate that the actions of which he complains would deter the reasonable person from engaging in protected activity. Even assuming that plaintiff could establish a *prima facie* case of

discrimination, defendants have articulated legitimate, non-discriminatory reasons for their actions, and plaintiff cannot show any evidence of pretext.

Plaintiff also cannot establish a Monell claim as the record is devoid of any evidence that the City has a policy, practice, or custom that caused the alleged violations of plaintiff's civil rights. See Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Further, plaintiff cannot demonstrate any violation of a constitutional right to implicate municipal liability. Finally, plaintiff cannot establish his claims of failure to train, supervise, discipline, or negligent hiring because plaintiff has adduced no evidence of "deliberate indifference" by the City.

Accordingly, defendants' motion for summary judgment should be granted, and the amended complaint dismissed in its entirety.

STATEMENT OF FACTS

The Court is respectfully referred to Defendants' Statement of Material Facts Pursuant to Local Civil Rule 56.1 ("Defs' 56.1") for a statement of pertinent and material facts[2].

ARGUMENT

POINT I

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S TITLE VII, §1983, SHRL AND CHRL CLAIMS OF RETALIATION

A. The Legal Standard

Plaintiff's retaliation claims under Title VII and § 1983 are governed by the McDonnell Douglas burden-shifting analytical framework. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61-67 (2006); Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010); Radice

[2] All exhibits cited herein are attached to the Declaration of Danielle M. Dandrige in Support of Defendants' Motion for Summary Judgment, dated August 26, 2022.

v. Eastport South Manor Cent. Sch. Dist., 437 F.Supp.3d 198, 209 (E.D.N.Y. 2020). To state a claim for retaliation, a plaintiff must establish (1) participation in a protected activity; (2) defendant's knowledge of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. See Radice, 437 F.Supp.3d at 213-214; Brown v. City of New York, No. 11 Civ. 2915 (PAE), 2013 U.S. Dist. LEXIS 101337 at *43-44 (S.D.N.Y. July 18, 2013). In the retaliation context, such an adverse employment action is an act "that could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co., 548 U.S. at 53. A plaintiff must also establish that his or her protected activity was the "but-for" cause of the employer's challenged action. See Brown, 2013 U.S. Dist. LEXIS 101337 at *43.

Plaintiff's retaliation claims under the SHRL and CHRL have a similar analytical framework. See Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010) (Title VII and SHRL retaliation claims analyzed under same framework); Acosta v. City of N.Y., No. 11 Civ. 8561 (KBF), 2012 U.S. Dist. LEXIS 60460 (S.D.N.Y. Apr. 26, 2012) (applying same analytical framework to claims of retaliation under the CHRL); Williams v. New York City Hous. Auth., 61 A.D.3d 63, 71 (1st Dep't 2009). The CHRL, however, differs from the Title VII and the SHRL in that plaintiff need not demonstrate but-for causation to establish his retaliation claim. See Taylor v. Seamen's Soc'y for Children, No. 112 Civ. 3713 (PAE), 2013 U.S. Dist. LEXIS 176914 at *64-65 (S.D.N.Y. Dec. 17, 2013).

If plaintiff is able to meet his initial burden of establishing a *prima facie* case of retaliation, the burden then shifts to defendant to provide legitimate, non-discriminatory reasons for the complained-of actions. If defendant is able to meet this minimal burden of production, the burden then shifts back to plaintiff to demonstrate that defendant's legitimate business reasons

were pretextual. Ultimately, however, if the record demonstrates conclusively a non-discriminatory reason for defendant's action or if plaintiff can only adduce a weak question of fact as to defendant's motivations, plaintiff's claim of retaliation must fail. See Brown 2013 U.S. Dist. LEXIS 1013337 at *44-45.

B. Defendants' Purported Retaliation against Plaintiff

1. Plaintiff's assignment to Highway 3

Plaintiff, while assigned to Highway 3 from August 12, 2015, to June 6, 2016, claims that he was directed by his supervisors, defendants Sanford, Levine, Braithwaite, Lipke and Ge, to overly scrutinize Police Officer Dana Harge and unreasonably assign him tasks and deny him days off. Plaintiff claims that he refused to follow these directives, which he believed to be motivated by discriminatory and retaliatory animus, and was subjected to retaliation because of his tacit objections. Specifically, he claims his tour was changed, his applications to work off-duty employment were ignored, he was scolded for not following his superiors' directives, he received unwarranted command disciplines, and that he was unjustly transferred from Highway 3 to the 9th precinct in retaliation for his silent objections. See ECF Dkt. No. 55 at ¶¶19-24, 30-38, 45-78; Ex N. Plaintiff claims the retaliation continued at the 9th Precinct after he filed a complaint of retaliation on the behalf of PO Harge on June 29, 2016, with NYPD's Office of Equal Employment Opportunity ("EEO"). See id. at ¶¶79-91; see also Ex. AA.

Plaintiff's claims of retaliation, however, suffer from several fatal errors. At the outset, prior to his June 29, 2016 complaint of retaliation, plaintiff cannot demonstrate that he engaged in protected activity of which the defendants were aware. Protected activity "is action taken to protest or oppose statutorily prohibited discrimination," which is the first element requisite to establish a *prima facie* case of retaliation See Polite v. VIP Cmty. Servs., No. 1:20-cv-7631 (GBD)(SDA), 2022 U.S. Dist. LEXIS 158701 at *21 (S.D.N.Y. Sept. 1, 2022), quoting, Natofsky

v. City of New York, 921 F.3d 337, 354 (2d Cir. 2019). The employee's complaint can be formal or informal and can range from "making complaints to management, writing critical letters, and expressing support of co-workers who have filed formal charges." Bowen Hooks v. City of New York, 13 F.Supp.3d 179, 222 (E.D.N.Y. 2014), quoting, Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000). Whether the complaint is formal or informal, however, it cannot be so generalized, vague, or ambiguous that that the employer could not have reasonably understood that the employee was complaining about statutorily prohibited conduct. See Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 108 (2d Cir. 2011)(internal citation omitted); Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998); Simpson v. MTA/New York City Transit Auth., No. 16-CV-3783 (MKB), 2016 U.S. Dist. LEXIS 115519 at *15 (E.D.N.Y. Aug. 26, 2016) "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 of unfair treatment generally." Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ., No. 09-cv-4675 (JFB)(ARL), 2012 U.S. Dist. LEXIS 139702 at *52 (E.D.N.Y. Sept. 27, 2012); Bowen-Hooks, 13 F.Supp.3d at 224.

Here, prior to the filing of his June 29, 2016 complaint of retaliation with NYPD's EEO, plaintiff did not engage in any protected activity which defendants could have reasonably understood to be opposition to conduct prohibited by Title VII, § 1983, the SHRL, or the CHRL. Namely, plaintiff admits that prior to his June 26, 2016 complaint, he never once voiced or communicated his belief to any of his supervisors at Highway 3. or anyone within NYPD management, that their conduct was racially discriminatory or retaliatory to PO Harge.

Q: Do you believe it was also discriminatory?

A: Yes. I believe retaliation is a form of discrimination.

> Q: Did you ever complain to any individuals we spoke of about their conduct toward Dana Harge.
>
> A: Yes, I did. I complained to EEO.
>
> Q: When did you complain to EEO?
>
> A: In August of 2016[3].
>
> Q: Prior of August 2016, did you complain to any supervisors about their conduct towards Dana Harge?
>
> A: No, I did not.
>
> Q: Did you complain to any other management or executive other EEO about the officers conduct towards Dana Harge?
> A: No.
>
> Q: Prior to August 2016, did you believe this conduct towards Dana Harge to be discriminatory?
>
> A: I haven't fully formed an opinion but it was all leading to there can be no other reason. See Ex. A at 96:18-97:12; see also id. at 78:17-79:2, 89:18-25; Ex. F at 54:9-55:1.

Not only does plaintiff admit that he did not verbalize or otherwise communicate his opposition to the purported discriminatory and retaliatory acts taken against PO Harge prior to plaintiff's June 26, 2016 EEO complaint, but plaintiff further admits that prior to filing his EEO complaint he was not certain that defendants were engaging in discriminatory behavior. As such, to the extent that plaintiff asserts that his tacit opposition was protected activity, such claim must fail given that the opposition would not have been made in good faith in light of plaintiff's admitted doubts about the motivations underpinning defendants' conduct prior to June 29, 2016. See Natofsky, 921 F.3d 337, 353-354 (challenges to an employment action, without any specific

[3] Plaintiff testified to this date in error; plaintiff actually filed his EEO complaint on June 29, 2016. See Exs. AA, BB.

indication that the challenge is protesting discrimination, is not protected activity.); Batchelor v. City of New York, No. 11 CV 20158 (VMS), 2014 U.S. Dist. LEXIS 46921 at *142-145 (E.D.N.Y. Feb. 16, 2014)(generalized complaints of unfair treatment without any implicit or explicit indication that the complaint is in opposition to discrimination or retaliation does not constitute protected activity.); see also Jagmohan v. Long Island R.R. Co., 622 Fed. Appx. 61, 63-62 (2d Cir. 2015)(dismissing plaintiff's claims of retaliation where protected activity, even if made in good faith, were not reasonable); Nicastro v. Runyon, 60 F.Supp.2d 181, 184-185 (S.D.N.Y. 1999)(finding plaintiff did not have a good faith belief when engaging in protected activity when he could not articulate why he was engaging in protected activity).

Further underscoring that plaintiff's tacit opposition does not constitute protected activity is the fact that plaintiff's failure to explicitly or implicitly convey that he was opposing discrimination could not have reasonably put defendants on notice that he was engaging in protected activity. Indeed Inspector Ge testified that he was not aware that plaintiff engaged in protected activity until he was served with the lawsuit commencing this action. See Ex. D at 149:21-150:15. As such, any actions (i.e., granting PO Harge days off and refusing to closely monitor him) taken by plaintiff in connection with PO Harge that occurred prior to June 29, 2016, cannot be deemed to be protected activity of which the defendants could have reasonably been aware. See Defs' 56.1 at ¶¶11, 20-21; see also Natofsky, 921 F.3d at 353-354 (plaintiff's challenge to his negative evaluation and demotion, without more, could not have reasonably led the employer to believe that plaintiff was engaging in protected activity); Wimes v. Kaleida Health, 157 Fed. Appx. 327, 328 (2d Cir. 2005); Benzinger v. Lukoil Pan Ams. 447 F.Supp.3d 99, 126 (S.D.N.Y. 2020)(Plaintiff's complaint of unfair pay during a meeting was too ambiguous to put defendants on notice that she was complaining of national origin discrimination under the SHRL and CHRL);

Ottley-Cousin v. MMC Holdings, Inc., No. 16-CV-00577 (MKB), 2019 U.S. Dist. LEXIS 76229 at *40 (E.D.N.Y. May 6, 2019)(Plaintiff's complaints of being treated harshly and being "picked on" insufficient to alert defendant that she was complaining of race discrimination). For the foregoing reasons, plaintiff cannot establish the first two prongs for his *prima facie* case of retaliation.

Plaintiff further cannot establish the requisite causal connection between the complained of acts and his June 29, 2016 complaint to EEO. While assigned to Highway 3, plaintiff specifically complained about having his tour changed in November 2015, not being granted authorization to work off-duty employment in and before January 2016, being followed by Lt. Lipke in February 2016, being issued command disciplines dated August 22, 2016, and November 2, 2016, and his transfer to the 9th Precinct. See Defs' 56.1 at ¶¶ 27, 42-43, 51-52, 79, 87-88; see also Exs. Q, CC, DD. Each of the complained-about events, however, commenced prior to plaintiff engaging in protected activity; and thus there is no causal connection. The law is clear that a retaliation claim must be dismissed when plaintiff cannot demonstrate that the adverse employment action was taken in response to the protected activity. See Slattery v. Swiss Reinsurance Am. Corp., 248, F.3d 87, 95 (2d Cir. 2001); see also Deebs v. Altstrom Trans., Inc., 346 Fed. Appx. 654, 655-656 (2d Cir. 2009).

Here, plaintiff's protected activity took place on June 29, 2016, but that which he complains of took place before he lodged his complaint. See Exs. AA, BB. Plaintiff's tour change occurred in November 2015 – six (6) months before he complained to EEO. See Defs' 56.1 at ¶¶42-43. Similarly, plaintiff not being granted authorization to work off-duty employment took place before he filed his EEO complaint. See id. at ¶52; Ex. B at 270:17-274:11. And while his command disciplines issued after he filed his EEO complaint, the investigations that led to the

command disciplines commenced prior to plaintiff being served with them. Specifically, in December 2015, Lt. Lipke began to investigate plaintiff following a complaint from Sgt. Georgia Madorus that plaintiff was engaging in unauthorized off-duty employment and using a police vehicle to do so. Lt. Lipke concluded his investigation on March 30, 2016, and a report was generated on March 31, 2016, substantiating several findings against plaintiff, that were later memorialized in the August 22, 2016 command discipline. Moreover, the March 31, 2016 report also recommended that plaintiff be transferred out of Highway. See Defs' 56. 1 at ¶¶73-75.

Likewise, with respect to the events memorialized in plaintiff's April 19, 2017 command discipline, the investigation into the events commenced before plaintiff filed his June 29, 2016 complaint of retaliation. Specifically, Inspector Ge began to monitor the movements of plaintiff in June 2016 on suspicion that plaintiff was engaging in off-duty employment while on duty. In connection with that investigation, on June 2, 2016, Inspector Ge noticed plaintiff was off-post, as was PO Harge, and directed Lt. Lipke to conduct a further investigation. See id. at ¶¶ 84-86. Indeed, plaintiff testified that he filed his first EEO complaint *because of* the investigation that culminated in the November 2016 CD. And the EEO complaint specifically references events that stemmed from the June 2, 2016 incident. See Ex. A at 97:13-98:11, Exs. AA, BB. And there is no requirement that an employer suspend a planned action simply because an employee had engaged in protected activity. See Colon v. Fashion Inst. of Tech., 983 F. Supp.2d 277, 289-90 (S.D.N.Y. 2013)(citations omitted). Accordingly, plaintiff cannot demonstrate a causal connection between the employment actions that occurred while plaintiff was assigned to Highway 3 and his June 29, 2016 EEO complaint. See Antrobus v. New York City Dep't of Sanitation, No. 11 CV 5434 (CBA)(LB), 2016 U.S. Dist. LEXIS 24111 at *27 (E.D.N.Y. Feb. 25, 2016); Jenkins v. Holder, No. 11-CV-0268 (NGG)(CLP), 2014 U.S. Dist. LEXIS 42520 at *34-36 (E.D.N.Y. Mar.

28, 2014) (Notwithstanding the two year delay between the commencement of the investigation into plaintiff's conduct and the termination that resulted from that investigation, there was no causal connection because the disciplinary action commenced before the protected activity.)

Defendants also had legitimate business reasons for their actions. With respect to plaintiff's November 2015 tour change, the decision was preceded by plaintiff's admission that he had been verbally admonished for not heeding his supervisor's directives and falsifying a business record. And there is no evidence of pretext given that Captain Sanford later returned plaintiff to his desired tour at plaintiff's request. See Defs' 56.1 at ¶¶44-50. Defendants' investigation into, and discipline of, plaintiff for working off-duty employment was warranted given that plaintiff not only admitted to knowing that he needed authorization to work off-duty employment, but that he worked four different off-duty jobs without having obtained said permission. See id. at ¶¶66-73. Further, defendants had a legitimate reason to investigate plaintiff's whereabouts on June 2, 2016, given that there had been a radio call of an unattended person walking in a busy highway, which was not timely responded to. Plaintiff's failure to supervise the timely respond to that radio run was a dereliction of his duties and could have resulted in an injury to a civilian. See id. at ¶¶83-85; Ex. D at 94:3-97:2, 97:22-98:7, 114:4-118:5; 121:3-122:2; Ex. E at 130:12-134:4; 141:3-16; Ex. SSS. Given the foregoing, defendants had legitimate business reasons to discipline plaintiff. Plaintiff certainly cannot demonstrate the "but-for" his protected activity he would not have been subject to the complained of employment actions in light of his admissions to the misconduct for which he was disciplined. Accordingly, defendants are entitled to summary judgment on plaintiff's retaliation claims under the § 1983, Title VII and the SHRL.

Although the but-for causation standard applicable to plaintiff's § 1983, Title VII, and SHRL claims does not apply to his CHRL claim, under the CHRL, "a plaintiff must still

establish that there was a causal connection between [his] protected activity and the employer's subsequent action, and must show that a defendant's legitimate reason for [his] termination was pretextual or 'motivated at least in part by an impermissible motive.'" Pena-Barrero v. City of New York, No. 14-CV-9550 (VEC), 2017 U.S. Dist. LEXIS 47983 at *52 (S.D.N.Y. Mar. 30, 2017), quoting, Russo v. New York Presbyterian Hosp, 972 F.Supp. 2d 429, 456 (E.D.N.Y. 2013); see also Ferraro v. New York City Dep't of Educ., No. 13-CV-5837 (LDH) (JO), 13-CV-1117 (LDH) (JO), 2017 U.S. Dist. LEXIS 161799 at *55-57 (E.D.N.Y. Sept. 30, 2017). As set forth above with respect to all of plaintiff's retaliation claims, defendants are entitled to summary judgment on his CHRL retaliation claim because he cannot establish that he engaged into protected activity prior to June 29, 2016, of which defendants could reasonably be aware. Furthermore, plaintiff's repeated misconduct and violation of rules justified defendants' increasingly punitive disciplinary measures. Plaintiff has adduced no evidence to demonstrate that defendants' reasons are pretextual. Accordingly, no triable issue of fact exists for plaintiff's retaliation claims under Title VII, § 1983, the SHRL or the CHRL.

2. Plaintiff's assignment to the 9th Precinct.

Plaintiff transferred to the 9th Precinct on June 6, 2016. See Defs' 56.1 at ¶89. While assigned to the 9th Precinct, plaintiff engaged in the following protected activity: 1) plaintiff filed a complaint of retaliation on the behalf of PO Dana Harge with the NYPD's EEO on June 29, 2016; 2) on November 1, 2016, plaintiff filed his second EEO complaint alleging retaliation for his June 29, 2016 complaint; 3) plaintiff supplemented his November 1, 2016 complaint on December 19, 2016 asserting further acts of retaliation; 4) on December 19, 2016, plaintiff filed a charge of retaliation with the United States Employment Opportunity Commission; 5) on February 24, 2017, plaintiff filed another complaint of retaliation with the NYPD's EEO division;

and 6) plaintiff commenced the instant action on July 18, 2017. See Defs' 56.1 at ¶¶25, 92, 98, 111,152, 153.

Plaintiff alleges that the following adverse actions are retaliatory: 1) following his June 2016 complaint, he was denied training, besmirched by Lt. Lipke to Captain Greany, deprived of overtime, and served with charges and specifications (See id. at ¶¶90, 93); 2) following his November 1, 2016 EEO complaint, he was not allowed to attend meetings, he was placed on performance monitoring and day tours, he was overly scrutinized and given undesirable assignments, and received decreased overtime (See id. at ¶¶96, 98); and 3) following his December 19, 2016 EEO complaint and EEOC charge, he received three minor violations, was subjected to increased scrutiny of his overtime, and received delayed overtime payments (See id. at ¶¶109, 112-113); and 4) following his February 24, 2017 EEO complaint and/or the commencement of the instant lawsuit, he did not receive a desired transfer to the Central Park precinct, he received a negative evaluation for 2016, he was served with charges and specifications on March 27, 2018 and October 24, 2018, and was placed on a 30-day suspension on October 11, 2018. See id at ¶¶120, 126, 127, 133, 141, 143).

These retaliation claims also warrant dismissal. First, plaintiff cannot establish that much of which he complains constitutes as an adverse employment action. The record is devoid of any evidence that plaintiff requested training or was denied said training much less the reasons for denial or even that the training was the type of training plaintiff would be entitled to receive. Given the paucity of evidence, a jury could not reasonably conclude that this purported denial of unidentified training would deter a reasonable person from engaging in protected activity. In contrast to plaintiff's claim of denied training, plaintiff's claims that he was besmirched by Lt. Lipke and was denied overtime is belied by the record. At the outset, plaintiff only bases his

belief that Lt. Lipke called and/or visited the 9th Precinct to speak badly about plaintiff on the hearsay statement of another. Plaintiff has no independent knowledge that Lt. Lipke spoke to Captain Greany about plaintiff and, in fact, Lt. Lipke denies speaking to Captain Greany about plaintiff. See Ex. A at 50:4-21; Ex. E at 156:5-157:10. Notwithstanding the foregoing, public reprimands, if they were, in fact, uttered, have been found not to be adverse employment actions in the retaliation context. See Ragin v. E. Ramapo Cent. Sch. Dist., No. 05 Civ. 6496 (PGG), 2010 U.S. Dist. LEXIS 32576 at *57-58 (S.D.N.Y Mar. 31, 2010). The record also establishes that plaintiff was granted overtime while assigned to the 9th Precinct albeit, for a period, that overtime was reduced. At the time plaintiff's overtime was reduced so, too, was the overtime of other sergeants due to a department-wide directive that overtime be reduced. See Defs' 56.1 at ¶¶106-108. Notably, any suggestion of retaliatory animus is negated by the fact that plaintiff earned more overtime than several of his sergeant colleagues during that period reduction. See Ex. KK.

The record also establishes the negative evaluation that plaintiff received was in fact simply a lesser rating than the one he desired and after he appealed the rating, it was increased to a rating he had received prior to engaging in any protected activity. See Ex A at 29:2-34:25, 37:23-39-12; see also De Jesus-Hall v. New York State Unified Court Sys., No. 18 CV 1241 (LMS), 2020 U.S. Dist. LEXIS 34804 at * 38-40 (S.D.N.Y. Feb. 27, 2020); Ragin, 2010 U.S. Dist. LEXIS 32576 at *52-55. Of note, the individual who increased plaintiff's rating was Captain Greany – one of the many individuals plaintiff accuses of retaliation – negating any suggestion of retaliatory animus. Similarly, when plaintiff sought a transfer to the Central Park precinct, it was Captain Greany who approved the transfer. The record, however, is otherwise silent as to why plaintiff was not granted the transfer just as it is silent as to why plaintiff was not given the positions he sought. There is no evidence in the record that there was an open position that plaintiff could

transfer into or that plaintiff was qualified, much less more qualified than others, for any of the positions he sought. Further there is no evidence that the denied transfer materially affected plaintiff's employment. See Witek v. City of New York, No. 12 Civ. 981 (CBA), 2019 U.S. Dist. LEXIS 229703 at *26-27 (E.D.N.Y. Mar. 12, 2019). Due to this lack of evidence, or indisputably contradictory evidence, plaintiff cannot establish that the above referenced actions are adverse employment actions.

Second, plaintiff cannot establish a causal connection between his protected activity and a number of the complained-of actions. "It is well-settled that an adverse employment action cannot serve as the basis for a retaliation claim if the action was set in motion before a plaintiff engaged in protected activity." Cayemittes v. City of N.Y. Dep't of Hous. Pres. & Dev., 974 F. Supp. 2d 240, 262 (S.D.N.Y. 2013) (collecting cases). "In that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct." Talwar v. Staten Island Univ. Hosp., No. 12-CV-33 (CBA), 2016 U.S. Dist. LEXIS 43943, at *40–41 (E.D.N.Y. Mar. 30, 2016) (internal quotation marks omitted). Accordingly, with respect to his claims that he was subjected to increased scrutiny, particularly with respect to his off-duty employment, served with charges and specifications on April 19, 2017, or received delayed overtime payments they, as a matter of law, cannot be considered retaliatory acts as they clearly occurred before his first protected activity.

With respect to the April 19, 2017 charges and specifications, they arose only because plaintiff declined the recommended penalty in the November 6, 2016 CD. See Defs' 56.1 at ¶¶35, 87-88. As noted in Point I(b)(1), *supra*, the November 6, 2016 CD stemmed from an investigation that commenced on or about June 2, 2016 into plaintiff's activities and commenced weeks before plaintiff engaged in his first protected activity. See id at ¶¶83-88. As for plaintiff's

delayed overtime, contrary to his assertions that his receipt of late overtime payments on three occasions in January and February 2017, was an anomaly, the evidence demonstrates that plaintiff's overtime was routinely delayed as early as January 2015. For example, plaintiff was not paid for overtime that he earned on January 2, 2015, until January 30, 2015, and June 19, 2015. See Ex. LL at DEF003869. Later that year, plaintiff did not receive the overtime he earned on July 29, 2015, until September 29, 2015. See id. at DEF003873. Likewise in 2016, plaintiff did not receive overtime he earned on February 12th, 19th, and 29th until March 25, 2016. See id. at DEF003874. Later in 2016, plaintiff did not receive overtime that he earned on November 9th, 14th and 15th until December 2, 2016. See id. at DEF003876. In short, the record evidence clearly establishes that plaintiff's receipt of delayed overtime payment occurred long before he first engaged in protected activity on June 29, 2016. See Ex. LL at See Slattery v. Swiss Reinsurance Am. Corp, 248 F.3d 87, 95 (2d Cir. 2001); Porter v. Potter, 366 Fed. Appx. 195, 197 (2d Cir. 2010); Romano v. Stora Enso Corp., No. 07 Civ. 4293, 2010 U.S. Dist. LEXIS 24937, at *68-70 (E.D.N.Y. Feb. 12, 2010); Nielsen v. N.Y. City Dep't of Educ., No. 04 Civ. 2182, 2009 U.S. Dist. LEXIS 8866, at *19 (E.D.N.Y. Feb. 4, 2009) (citing Slattery); Ballard v. Children's Aid Society, 781 F. Supp.2d 198, 207-208 (S.D.N.Y. 2011)(no retaliation where plaintiff's receipt of lower salary preceded protected activity by six months).

Similarly, plaintiff cannot establish a causal connection between his last protected activity and his March 27, 2018, or October 24, 2018 charges and specifications or the October 11, 2018 suspension as there is no temporal proximity between the protected activity and the employment acts. Pertinently, eight (8) months separate plaintiff's receipt of the charges and specifications from his commencement of the instant action, and 15 months separate his receipt of the October 2018 charges and specifications and suspension from his last protected activity. See

Natofsky, 921 F.3d 337 at 353 (no temporal proximity where close to a year separated plaintiff receipt of a counseling memo and negative performance evaluation from his protected activity); Ball v. Marriott Int'l, Incl, No. 19-cv-10593 (LJL), 2022 U.S. Dist. LEXIS 164266 at *57 (S.D.N.Y. Sept. 12, 2022)(Nine months between the employment act and protected activity severed the causal link); Williams v. Block Inst., Inc., No 17-CV-7318 (NGG)(JO), 2020 U.S. Dist. LEXIS 87263 at *20-21 (E.D.N.Y. May 18, 2020)(No temporal proximity where five months and 16 months separated the adverse employment actions and the protected activity).

Second, even if plaintiff could somehow satisfy the elements of a prima facie case of retaliation, defendants have legitimate non-retaliatory reasons for their actions, and plaintiff cannot offer any evidence that their reasons are a pretext for retaliation. With respect to all disciplinary acts taken, defendants had repeated issues with plaintiff not following departmental rules and regulations notwithstanding numerous efforts to correct his behavior. Finally, plaintiff cannot show that his protected activity was the "but-for" cause of defendants' issuing him additional command disciplines, issuing him minor violations, serving with charges and specifications, placing him on performance monitoring or suspending him. Concomitant with being placed on performance monitoring, plaintiff was placed on day tours in order to better scrutinize his performance and correct any problems, which is the purpose of performance monitoring. Notably, other individuals who were on performance monitoring were also placed on day tours so plaintiff cannot demonstrate that defendants' action was pretextual. See Defs' 56.1 at ¶¶99-104. As noted, *infra*, plaintiff admitted to committing a number of the infractions for which he was disciplined and thus cannot show that, but-for his protected activity, he would have not been disciplined. Specifically, plaintiff admits to working off-duty employment repeatedly without authorization, working off-duty employment while on sick leave from the NYPD; and

filing a false anonymous complaint against his supervisor which negates any suggestion of either retaliatory animus or pretext. See Ex. TTT; see also Pinede v. New York City Dep't of Envtl. Prot., No. 12-CV-6344 (CBA)(LB) 2015 U.S. Dist. LEXIS 91621 at *33-35 (E.D.N.Y. July 10, 2015). Accordingly, defendants are entitled to summary judgment on plaintiff's retaliation claims under the Title VII, § 1983, and the SHRL.

Plaintiff's CHRL retaliation claim is to be construed more broadly than federal and state law retaliation claims. See Pena-Barrero, 2017 U.S. Dist. LEXIS 47983 at *52. As set forth above with respect to all of plaintiff's other retaliation claims, defendants are entitled to summary judgment on his CHRL retaliation claim because much of which he complains either is only a petty slight or trivial inconvenience or otherwise does not arise to the level of an adverse employment action and he cannot establish a causal connection the disciplinary actions and his protected activity. Furthermore, plaintiff's repeated misconduct and violation of rules justified defendants' increasingly punitive disciplinary measures. Plaintiff has adduced no evidence to demonstrate that defendants' reasons are pretextual. Accordingly, no triable issue of fact exists for plaintiff's CHRL retaliation claims.

3. Plaintiff's transfer to Bronx VIPER and his "constructive discharge"

To the extent that plaintiff claims that his transfer to Bronx VIPER and the command discipline he received while assigned to Bronx VIPER is retaliatory, the record evidence does not support his claims. Plaintiff cannot establish his November 11, 2018 transfer to Bronx VIPER or the November 26, 2018 command disciple was causally connected to either his last internal complaint of retaliation, which plaintiff filed with NYPD's IAB on February 24, 2017, or the commencement of the herein action on July 18, 2017. There is no temporal proximity between the plaintiff's protected activity and the adverse employment actions as the events are separated, respectively by 16 months and 21 months. See Nuchman v. City of New York, No. 09-CV-2392

(CBA), 2015 U.S. Dist. LEXIS 198934 at *32 (E.D.N.Y. Aug. 25, 2015)("…a passage of more than two or three months between the protected activity and the adverse employment action does not allow for an inference of causation.")(internal citations omitted). The same holds true to the extent that plaintiff is attempting to link his constructive discharge (i.e., plaintiff's resignation from the NYPD on March 15, 2019) to either the 2017 internal complaint of retaliation or the commencement of this lawsuit. With respect to the former, over two years separate the two events which clearly negates any suggestion of temporal proximity. Additionally, close to 20 months separate plaintiff's resignation and the filing of his federal complaint in July 2017. As the events are simply too far removed in time for plaintiff to be able to raise any retaliatory motive, his retaliation claims must fail. See Wein v. N.Y. City Dep't of Educ., No. 18 Civ. 11141 (PAE); 2020 U.S. Dist. LEXIS 150136 at *39-40 (S.D.N.Y. Aug. 19, 2020)(No causal connection where adverse actions took place 15 months after protected activity); Russell v. New York Univ., No. 15-cv-2185 (GHW) 2017 U.S. Dist. LEXIS 111209 at *105-108 (S.D.N.Y. July 17, 2017)(no temporal proximity where six months separated the time from when plaintiff filed her lawsuit and her termination), aff'd, 739 Fed. App'x 28 (2d Cir. 2018).

Even if plaintiff were somehow able to establish a prima facie case of retaliation with respect to the actions taken following his return from suspension, defendants can amply demonstrate they had legitimate business reasons for these decisions. Plaintiff's transfer to Bronx VIPER was warranted as he was placed on modified assignment upon his return from suspension. And as noted above, plaintiff's placement on suspension stemmed from plaintiff's own admissions of serious misconduct – the he worked authorized off-duty employment while on sick leave, that he also worked several unauthorized off-duty job, and that he filed a false anonymous complaint against his supervisor accusing his supervisor of criminal acts. The latter admission was deemed

so egregious that it was referred to the District Attorney's office for possible prosecution, which the Assistant District Attorney later deferred for departmental handling. It was also determined that given the degree to which plaintiff admittedly violated departmental rules and regulations, that charge and specifications would issue. See Exs. JJJ, KKK, TTT. Setting aside that plaintiff admitted to the misconduct, it was rational for defendants to transfer plaintiff out the 9th Precinct to a different assignment given that Lt. Lau, the individual plaintiff falsely accused of engaging in a hit and run while intoxicated was still assigned to the 9th Precinct. Further, following the issuance of the command discipline by Lt. Hawkins, plaintiff opted to reject the recommended penalty of one (1) vacation day, which automatically results in the issuance of charges and specifications. See Exs. G, NNN. It should further be noted that there is no evidence in the record that Lt Hawkins, the individual who issued plaintiff the November 2018 command discipline, had any prior knowledge of plaintiffs' protected activity, such that his actions could somehow be inferred to be retaliatory. Plaintiff cannot point to a scintilla of evidence demonstrating that defendants' reasons were pretextual given his admissions and his lengthy discipline history.

With respect to plaintiff's constructive discharge claim, that, too must fail. "An employee is constructively discharged when [his] employer, rather than discharging [him] directly, intentionally creates a work atmosphere so intolerable that he is forced to quit involuntarily" Terry v. Ashcroft, 336 F.3d 128, 151-51 [2d Cir. 2003]). The Supreme Court recently explained that a constructive discharge claim consists of "two basic elements." Green v. Brennan, __ U.S. __, __, 136 S. Ct. 1769, 1777 (2016). First, a plaintiff must prove "that he was discriminated against by [his] employer to the point where a reasonable person in his position would have felt compelled to resign" Second, he "must show that he actually resigned". Id.; see also Anyachebelu v. Brooklyn Hosp. Ctr., No. 16 CV 3159 (DLI)(VMS), 2017 U.S. Dist. LEXIS 114290 at *43-467 (E.D.N.Y.

July 20, 2017)(constructive discharge analysis applies to constructive discharge claims brought under the SHRL and the CHRL). "The standard for constructive discharge is demanding and it 'cannot be proven merely by evidence that an employee … preferred not to continue working for that employer... [or that] the employee's working conditions were difficult or unpleasant." Rogers v. Union Free Sch. Dist., No. 09-CV-3862 (MKB), 2012 U.S. Dist. LEXIS 175385 at *11 (E.D.N.Y. Dec. 7, 2012), quoting, Madray v. Long Island Univ., 789 F. Supp.2d 403, 409-10 (E.D.N.Y. 2011).

Fatal to plaintiff's claim is the absence of any evidence demonstrating that at the time of the plaintiff's resignation on March 15, 2019, that the defendants created a work environment that was so intolerable the reasonable person would feel compelled to retire. Plaintiff claims that he felt forced to retire because he believed that the retaliatory acts of defendants would not cease and because a therapist, who plaintiff saw only once for an hour, recommended that he retire. See Defs' 56.1 at ¶¶ 150-151. The record is devoid of any evidence that any actions taken by defendants in 2018 or 2019 could legally, or logically, be perceived as retaliatory given that plaintiff's last protected activity took place in 2017. Further undermining plaintiff's claims is the fact that he admitted to the much of the misconduct that led to his discipline. It is utterly ludicrous for plaintiff to claim that defendants were making his work environment so intolerable by catching on to plaintiff's misconduct, asking him about it, eliciting an admission from plaintiff, and then disciplining plaintiff thereafter. It stands to reason that plaintiff could have avoided the "intolerable work environment" by simply not repeatedly violating departmental rules. But defendants are not responsible for plaintiff's own actions and thus should not be held accountable for plaintiff's resignation. Further, while plaintiff testified that he believed termination to be imminent, the record reflects that plaintiff was only going to be served with charges and

specifications after which plaintiff could either settle the charges or proceed to a departmental hearing for resolution. See Ex. C at 45:11-25, 105:1-25; Ex. I, Ex. RRR. As there no imminent threat of termination, plaintiff's resignation was, at best, precipitous. See Tassy v. Buttigieg, No. 21 Civ. 577 (BMC), 2023 U.S. Dist. LEXIS 4506 at *10, 16-17 (E.D.N.Y. Jan. 10, 2023) Plaintiff does not claim nor is there any evidence that plaintiff was subjected to the requisite level of hostility to establish a constructive discharge claim. Accordingly, plaintiff's constructive discharge claim warrants dismissal.

POINT II

PLAINTIFFS' MONELL CLAIMS FAIL

To make out a claim for municipal liability pursuant to Monell v. Dep't of Social Services, 436 U.S. 658 (1978), a plaintiff must plead three elements: "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional rights." Simms v. City of New York, 480 F. App'x 627, 629 (2d Cir. 2012) (citation and internal quotation marks omitted). Here, while plaintiff conclusorily alleges the existence of a custom or policy, he cannot demonstrate, and indeed the record is devoid of any evidence, that the City has a policy, practice, or custom that caused the alleged violations of plaintiff's constitutional rights. Moreover, for the reasons set forth above in Point I, plaintiff cannot demonstrate that any of the actions about which he complains in this lawsuit were taken in retaliation for his complaints. Thus, he has not made out a Monell claim against the City. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

Further, plaintiff cannot demonstrate his claims of failure to train, supervise, or discipline or negligent hiring because plaintiff has adduced no evidence of "deliberate indifference" by the NYPD's personnel that plaintiff's constitutional rights would be violated. See Bertuglia v. City of New York, 133 F. Supp.3d 608, 649-653 (S.D.N.Y. 2015); Spillman v. City of Yonkers No. 07 Civ. 2164 (DAB)(KNF), 2010 U.S. Dist. LEXIS 1838 at *21-23 (S.D.N.Y.

Jan. 8, 2010). To establish "deliberate indifference," plaintiff "must demonstrate that: (i) a policymaker knows to 'a moral certainty that her employees will confront a given situation; (ii) the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and (iii) the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." Spillman, 2010 U.S. Dist. LEXIS at *22, quoting, Walker v. City of New York, 974 F.2d 293, 297-298 (2d Cir. 1992)(internal quotations omitted). Plaintiff must also identify a specific deficiency in the training program or supervision that led to the injury. See id. at *22-23. Here, plaintiff had adduced no evidence as to the identity of the operative policymaker, much less what he or she knew to a "moral certainty," or that there is a history of employees mishandling any of the situations complained about by plaintiff. Plaintiff has adduced no evidence of the training or supervision protocols of the NYPD much less any deficiency in said protocols. For these reasons, plaintiff cannot demonstrate deliberate indifference on the part of the City and his claims of negligent training, hiring, supervision, and discipline fail.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court issue an order granting defendants' motion for summary judgment and dismissing the amended complaint its entirety, with prejudice, and awarding defendants such other and further relief as the Court deems just and proper.

Dated: New York, New York
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