Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

CORNELL D. WALKER,

Complainant,

v.

EASTMAN KODAK COMPANY,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10198786

Federal Charge No. 16GB901307

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on May 21, 2024, by Michael T. Groben, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE DENISE M. MIRANDA, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENT:

- The phrase in the Recommended Order reading "[v]ague complaints about 'discrimination' or 'harassment' do not qualify as protected activity" is not

adopted hereby. The ALJ did not find credible Complainant's testimony that he complained to Fagan about discrimination and harassment. *See* Finding of Fact 49. Because Complainant did not complain about a practice covered by the Human Rights Law, his complaints to Fagan were not protected activity. It is on this basis that his retaliation claim is properly dismissed. The Recommended Order is otherwise fully adopted.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: 10/02/2024
Bronx, New York

DENISE M. MIRANDA
ACTING COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

CORNELL D. WALKER,
Complainant,

v.

EASTMAN KODAK COMPANY,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10198786**

Federal Charge No. 16GB901307

SUMMARY

Complainant alleged that Respondent employer unlawfully discriminated against him due to his race, color, and disability, and retaliated against him for opposing discrimination. Respondent denied the allegations. Complainant has failed to sustain his burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 2, 2019, Complainant filed a complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Virtual public hearing sessions were held on October 17 and 18, 2022.

Complainant and Respondent appeared at the hearing. The Division was represented by Catherine Ostrowski-Martin, Senior Attorney. Respondent was represented by Nixon Peabody LLP (by Todd R. Shinaman, Esq., and Michael Lingle, Esq.).

Permission to file post-hearing briefs was granted. Respondent filed a post-hearing brief, which was considered, and where appropriate, adopted.

FINDINGS OF FACT

1. Complainant is African American. (Tr. 16)

2. Complainant has a knee injury. (Tr. 16)

3. Respondent is a corporation which operates chemical manufacturing facilities in Rochester, New York. (Tr. 141-42; ALJ Exhibits 3 and 4)

Respondent's Personnel and Operations

4. Carol Fagan ("Fagan"), who is White, is the operations manager for Respondent's Special Chemicals, Ink and Dispersions operations. Her duties involve managing labor, equipment, and ensuring the health and safety of employees. (Tr. 141, 152, 170-71)

5. Fagan oversees Respondent's chemical manufacturing plants in Rochester, New York.

One such plant is known as "Building 325." (Tr. 141-42)

6. Six building supervisors, known as area managers, report to Fagan. (Tr. 142, 152, 165)

7. In 2018, Michael Bell ("Bell"), who is White, was the area manager of Building 325. (Tr. 32, 36, 128, 132, 143, 164, 214)

8. Bell's predecessor at Building 325, Scott Wohlschlegel ("Wohlschlegel"), who is White, was area manager in 2017 and left Respondent's employ during the first quarter of 2018.[1] (Tr. 19-20, 28, 108, 132, 143, 164)

9. In 1993, Complainant began employment with Respondent as a chemical operator, manufacturing photographic chemicals at Building 325. (Tr. 17, 20-21, 25-26, 142)

10. Jim Wilson ("Wilson"), who is White, is a chemical operator in Building 325. (Tr. 172)

11. In 2008, Complainant and Wilson argued, and Wilson "cursed out" Complainant. (Tr. 57, 63-64)

12. During the time relevant to the complaint, Respondent maintained four crews of chemical operators at Building 325, each with a group leader. (Tr. 143)

13. Group leaders are responsible for monitoring the work of chemical operators, scheduling, informing each chemical operator of their daily assignment, obtaining materials for use in manufacturing chemicals, maintenance, and job safety. (Tr. 21-22, 143-44, 155, 164-65)

14. Group leaders are selected after training and interviews with a group of Respondent's upper level managers. (Tr. 131)

15. Complainant's crew of chemical operators worked 12 hour rotating shifts: two days from 5:30 a.m. to 6:00 p.m., followed by two nights from 5:30 p.m. to 6:00 a.m., and then

---

[1] Wohlschlegel's name is incorrectly spelled in the transcript. (Complainant's Exhibit 3)

followed by four days off. (Tr. 125-26, 167, 169)

16. Building 325 operated 24 hours per day, seven days per week. (Tr. 143)

17. Group leaders were required to meet with the group leader of the previous shift at the start of their own shift, and then, at the end of their shift, with the group leader of the oncoming shift. This duty was known as a "crossover." (Tr. 143-44)

18. Group leaders were required to arrive at work 45 minutes before the start of their shift to meet with the outgoing group leader. (Tr. 126)

19. James Coopenberg ("Coopenberg"), who is White, is a group leader at Building 325. He was Complainant's group leader during the time relevant to the complaint. (Tr. 38, 40, 67-68, 118, 124-25)

20. Each crew of chemical operators also had a backup group leader or "BUGL," a chemical operator who is responsible for performing the duties of a group leader when the group leader is absent. A chemical operator in training to become a backup group leader is referred to as a trainee or an "acting" backup group leader. (Tr. 21-22, 126-27, 143-45)

21. Backup group leader is not an official title. (Tr. 144)

22. Group leaders, backup group leaders, and acting backup group leaders all are paid the same as chemical operators. (Tr. 98, 104-05, 144-45, 165-66)

Complainant's Training and Performance

23. In 2017, Complainant began training as a backup group leader. (Tr. 19-20, 22, 128, 145; Complainant's Exhibit 1)

24. A backup group leader trainee undergoes training by the group leader for approximately six weeks. During that time the trainee must arrive for work 45 minutes early for the crossover

to "shadow" the group leader throughout the shift. (Tr. 25, 127, 132-33, 167-68)

25. Coopenberg instructed Complainant to arrive early as per the training requirements. Complainant did not do so. (Tr. 106, 128, 134, 233-235; Respondent's Exhibit 11)

26. On one occasion when Coopenberg was absent and Building 325 was closed for maintenance, Complainant acted as backup group leader. He was able to do so on this one occasion because normal chemical manufacturing operations were shut down and his group leader functions were limited. (Tr. 129-30, 133, 154, 172)

27. Complainant never again performed as backup group leader and he never performed the full duties of a backup group leader. (Tr. 172, 202-03)

28. At the end of 2017, Complainant and Wohlschlegel drew up a "Year End Assessment" covering the period January 1 to December 31, 2017. Complainant described his backup group leader training as a "work in progress," and Wohlschlegel commented that Complainant needed to "take a more active role in his BUGL training in arranging to make himself available for learning shift change procedures" and other responsibilities. (Tr. 108-09, 169-70; Complainant's Exhibit 4)

29. I did not credit Complainant's testimony that he had completed training as a backup group leader and was designated as such in September 2017. (Tr. 26-27, 37)

30. In early 2018, Coopenberg reported Complainant's failure to arrive early to Wohlschlegel and Bell, and advised that, as a result, Complainant was not prepared to perform as acting backup group leader or backup group leader. (Tr. 128-29, 134, 169-70)

31. Respondent posted a group leader position in February 2018. Complainant did not apply for the position. (Tr. 185-86, 229-33; Respondent's Exhibits 9)

32. Pursuant to Respondent's rules of conduct distributed to all employees, workers must

report any workplace-related injury within 24 hours. (Tr. 173-74, 198; Respondent's Exhibit 2)

33. On March 31, 2018, Complainant injured his knee at work. He was given leave pursuant to the Family and Medical Leave Act and was out of work for a short time. Complainant informed Coopenberg of his injury but did not state that it was a workplace injury. (Tr. 116-17, 156, 195-200)

34. Complainant's co-workers were also aware of his knee injury. (Tr. 116-17)

35. On April 3, 2018, Complainant reported to Bell that his knee injury had been a workplace injury. (Tr. 175-76; Respondent's Exhibit 3)

36. Bell then made Coopenberg aware of Complainant's medical restrictions as a result of the knee injury because this could be a possible safety concern on the job. (Tr. 184-85)

37. On May 8, 2018, Complainant was hospitalized for what he described as a possible heart attack. (Tr. 178-79, 200; Respondent's Exhibit 4)

38. On May 15, 2018, Complainant reported to Bell that his May 8, 2018, symptoms had actually been the result of an incident in which he inhaled cellulose acetate dust while at work. (Tr. 179-80, 200-02; Respondent's Exhibit 5)

39. During the week of May 15, 2018, Complainant encountered Bell and Coopenberg, and Bell inquired how Complainant's knee "was doing." (Tr. 38-39, 183-85, 202)

40. Respondent maintains an anti-discrimination policy which prohibits discrimination and harassment due to race, color, or disability, and prohibits retaliation. The policy provides for a complaint procedure. (Tr. 218-19, 242; Respondent's Exhibit 7)

41. Complainant was upset that Bell had mentioned his knee condition in front of Coopenberg. Complainant promptly contacted Respondent's human resources department. Cheryl McConnell ("McConnell") of the human resources department referred Complainant to

Fagan to discuss his concerns. (Tr. 38, 41-47)

42. In May 2018, Bell removed Complainant from backup group leader training because of his failure to shadow Coopenberg and because of his failures to report workplace injuries within 24 hours. (Tr. 170-01, 182-83, 203-04, 206; ALJ Exhibit 4)

43. Bell was not aware of Complainant's complaint to human resources at the time he removed Complainant from backup group leader training. (Tr. 171, 207)

44. As admitted by Complainant in testimony at the public hearing, his pay was not reduced as a result of his removal from the training program. (Tr. 104-05, 151, 154)

45. Bell attempted to meet with Complainant in his office to inform him of the removal, but Complainant refused to meet with him. (Tr. 204-07)

46. During spring 2018, Bell removed Nate Beardsley, who is White, as a backup group leader trainee because of his failure to shadow the group leader. (Tr. 173)

47. On a date not specified, Bell removed another White employee, Joe Ventesinquay, from backup group leader training because of attendance problems. (Tr. 173)

48. Later in May 2018, Complainant contacted Fagan, informing her of his concerns that Bell had inquired about his knee injury in front of Coopenberg, and requesting that Bell undergo training. (Tr. 145-46, 155)

49. I did not credit Complainant's testimony at the public hearing that he complained to Fagan regarding discrimination and harassment by Bell. Fagan testified credibly that he had not, and neither the verified complaint nor Complainant's own written account mention this claim. (Tr. 109-13, 145; ALJ Exhibit 3, p. 4; Respondent's Exhibit 1)

50. Fagan investigated Complainant's complaints by speaking to Bell and Coopenberg and determined that Bell had not inappropriately shared medical information in violation of

Respondent's policies. (Tr. 146, 156-57)

51. In or about May 2018, the backup group leader position which had been posted in February was given to John Donald, a White chemical operator. (Tr. 100-01, 185-86, 253-54; ALJ Exhibit 8, p. 8)

52. In late July 2018 Complainant was scheduled to work with Wilson acting as team leader. On July 26, 2018, Complainant informed Bell that he would not work with Wilson and called in sick for the scheduled dates. (Tr. 49-50, 52-54; ALJ Exhibit 3, p. 4; Complainant's Exhibit 5; Respondent's Exhibit 6)

53. Barbara Galante ("Galante), who is White, is a business partner in Respondent's human resources department. Her duties include employee investigations and short-term employee disability. (Tr. 217-18, 248)

54. In late August 2018 Complainant again spoke to McConnell about his complaints regarding Bell. She advised him to wait until Galante returned from vacation. (Tr. 54-55, 58-59, 238, 255-56; ALJ Exhibit 4)

55. In August 2018, Complainant told Bell that he had contacted the human resources department regarding Bell. (Tr. 207)

56. On September 12, 2018, Bell summoned Complainant to his office to review and discuss a counseling form regarding Complainant's failure to timely report his work-related injuries, and the July 2018 incident in which Complainant called in sick for three days to avoid working with Wilson. Complainant refused to sign the counseling form. [2] (Tr. 61, 63-64, 180-82,

[2] Respondent's Exhibit 6 and Complainant's Exhibit 5 are versions of the same document prior to, and after, Bell's signature was affixed.

207-11; Complainant's Exhibit 5; Respondent's Exhibit 6)

Respondent's Investigation

57. Respondent maintains a medical department, staffed by nurses and other medical professionals. (Tr. 238-39)

58. On or about September 5, 2018, Complainant met with Galante. He complained that Bell and Nancy Signorino ("Signorino"), a nurse practitioner employed by the medical department, had inappropriately shared his medical information and that Bell had discriminated against him, been hostile to him and harassed him. Complainant also complained that he was forced to work with Wilson, with whom he had had an "altercation" approximately nine years prior, and that there was a document or documents in Respondent's files stating that he was not to work with Wilson. (Tr. 219-20, 237-41, 254, 256)

59. Galante initially testified in error that her first meeting with Complainant was in June 2018. (Tr. 219, 256) The record is clear that the meeting occurred in early September. (Tr. 58-59, ALJ Exhibit 3, p. 5; Respondent's Exhibit 1, p. 2)

60. During the September 5, 2018, meeting with Galante, Complainant did not complain that he had been discriminated against due to his race or disability, or that any inappropriate racial remarks had been made to him. (Tr. 116, 220)

61. Complainant did not provide any specific examples of Bell's mistreatment of him. (Tr. 241)

62. Galante interviewed Bell, Fagan, and Wohlschlegel. All advised that there was no prohibition against Wilson and Complainant working together. Galante also reviewed Respondent's files and found that there was no written record of such a prohibition. (Tr. 220-21,

224)

63. Galante interviewed Bell, Signorino and Complainant's co-workers. She found that Complainant had made his knee injury generally known to those at work, and concluded that there had been no inappropriate release of medical information. (Tr. 220-22, 241-44)

64. Galante interviewed Bell, Fagan, Coopenberg, and Complainant's co-workers regarding Complainant's claims of hostile and discriminatory treatment by Bell. All of those interviewed denied observing discriminatory treatment by Bell. (Tr. 220-22, 242-45)

65. Several of Complainant's co-workers told Galante that Complainant made them "fearful" regarding his "agitated" behavior and speech, including making statements such as "you'll see who the real Cornell Walker is," expressing an intent to "take Mike Bell out" and to "take out" a co-worker. (Tr. 222-23, 245-47)

66. Galante concluded that Complainant's complaints were unfounded. (Tr. 146-47, 224)

67. On October 6, 2018, Bell summoned Complainant to his office to sign a document acknowledging that he had received Respondent's Rules of Conduct policy, a job requirement for all employees. Complainant refused to sign. (Tr. 74-75, 211-13; Respondent's Exhibit 2)

68. Complainant was out on medical leave from October 7 to November 7, 2018, and was unable to meet with Galante regarding her investigation. (Tr. 76-77, 224-25)

69. On November 8, 2018, Galante and a member of Respondent's corporate security unit met with Complainant, and Galante informed him of the results of her investigation. (Tr. 76-79, 81-83, 224-25, 247-48; ALJ Exhibit 4)

70. In the meeting, Complainant complained about discrimination but was unable to provide Galante with any specific instances. (Tr. 225-26)

71. Complainant became "agitated and aggressive." Complainant admitted in testimony at

the public hearing that, referring to the 2008 incident with Wilson, he stated to Galante, "if it happens again I don't know what I'll do and that's on you." (Tr. 114, 225)

Medical Leave

72. Immediately after the meeting, Galante met with representatives of Respondent's legal and security departments, McConnell, Mark Johnson, Respondent's medical director, and Dr. Alaimo, an independent medical consultant. They decided that because of his behavior and statements, Complainant should be taken out of work for a mental evaluation by a psychologist to protect employee safety. (Tr. 147-49, 159, 226, 248-51)

73. On November 9, 2018, Complainant was placed on short-term disability leave, at full pay, pending the mental evaluation. (Tr. 76, 84-88, 94, 151, 228-29, 251)

74. During the disability leave, Complainant received full pay until the pay period prior to his return to work, at which point his rate was reduced by thirty per cent in accordance with Respondent's disability policy. (Tr. 228-29; Respondent's Exhibit 8)

75. On December 5, 2018, after the mental evaluation, Complainant and Respondent received a "long term restriction" from the medical examiner, directing that Complainant was "[n]ot to work in the same group or work under the supervision or leadership of 'specific' individual" (referring to Wilson). (Tr. 92-96, 115, 149, 226-27; Complainant's Exhibit 7)

76. Fagan, Galante, and Bell discussed the proposed restriction and concluded that due to the size and structure of Respondent's chemical operator workforce, including the possibility of an employee working overtime or a substitution due to vacation or illness, it would be impossible to guarantee that Wilson and Complainant would not work together. (Tr. 149-50, 161, 227)

77. As an alternative, Respondent had Complainant and Wilson undertake mediation. The mediation was successful, with the two "agree[ing] to disagree." Upon Complainant's return to

work, they resumed working together without incident. (Tr. 96-97, 115-16, 150, 227-28)

78. Complainant returned to work in early February 2019. (Tr. 96-97, 116, 150, 228, 236-37)

OPINION AND DECISION

Pursuant to N.Y. Exec. Law art. 15 (the "Human Rights Law") it is an unlawful discriminatory practice for an employer, because of an individual's race, color or disability, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. Human Rights Law §296.1 (a).

To make out a prima facie case of unlawful discrimination in employment, a complainant must show that 1) he or she is a member of a protected class, 2) he or she was qualified for the position, 3) he or she suffered an adverse employment action, and 4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. Am. Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If a complainant makes out a prima facie case of unlawful discrimination, the burden shifts to the respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. *Id.* If the respondent does so, the complainant must show that the reasons presented by respondent were merely a pretext for the unlawful discrimination by demonstrating both that the respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with the complainant. *Stephenson v. Hotel Empls. and Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

A disability is defined as "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions ... or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment." Human Rights Law § 292.21.

Complainant is a member of two protected classes. Complainant is African American, and prior to Complainant's removal from training as a backup group leader, he suffered an injury to his knee and was granted medical leave pursuant to the Family and Medical Leave Act. Complainant was qualified for his position as a chemical operator, and Respondent found that he was qualified to begin training as a backup group leader. With respect to the fourth prong of Complainant's prima fascia case, Complainant alleged that a White chemical operator, Wilson, was made a backup group leader in preference to him, a circumstance permitting an inference of discrimination. However, Complainant's removal from backup group leader training was not an adverse employment action. "An adverse employment action requires a materially adverse change in the terms and conditions of employment. 'To be materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities'..." *Messinger v. Girl Scouts of the U.S.A.,* 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dept. 2005), quoting *Galabya v. New York City Bd. of Educ.*, 202 F3d 636 (2d Cir. 2000). As Complainant admitted in testimony, after his removal from training, Complainant continued to perform the duties of a chemical operator. He experienced no change in title or reduction in salary, and the record revealed no discipline or other adverse effects as a result of the removal. Complainant did not establish that removal from training constituted an adverse job action, and thus he did not prove a prima facie case of discrimination due to race, color, or disability.

Even if Complainant had demonstrated a prima facie case, the record demonstrates that

Respondent had ample grounds to remove Complainant from the training, and that two White employees were also removed from backup group leader training for violations of Respondent's job requirements. Complainant was not treated differently than those other backup group leader trainees because of his race or color. Although Complainant alleges that a White chemical operator, Wilson, was made a backup group leader in preference to him, there was no indication in the record that Wilson, unlike Complainant, had chosen not to complete his training. The decision to remove Complainant from training was made by Complainant's supervisor Bell. Complainant did not demonstrate that either Bell or operations manager Fagan displayed animus against him because of his race or color. Respondent provided credible evidence that Complainant was removed from training because of his failure to shadow his group leader and because he had failed to report workplace injuries pursuant to Respondent's policies. Complainant did not demonstrate that Respondent's stated reasons for his removal from training were pretextual. This claim is dismissed.

Hostile Work Environment

In order to establish a hostile work environment claim, under Human Rights Law § 296.1(a), a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382 (2004) (quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21, 114 S.Ct. 367 (1993)). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work

performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Id.* at 311 (quoting *Harris,* at 23). Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *Id.* (quoting *Harris*, at 21).[3]

Complainant must show that the discriminatory conduct occurred because of his or her protected class membership. *See Arcuri v. Kirkland,* 113 A.D.3d 912, 914, 978 N.Y.S.2d 439, 441 (3d Dept. 2014).

In the instant case, Complainant alleged that Bell harassed him when he summoned Complainant to his office on September 12, 2018, to review and discuss a counseling form, and again on October 6, 2018, to sign an acknowledgment that he had received Respondent's rules of conduct. Complainant refused to sign both documents. Bell's actions do not constitute severe or pervasive discriminatory conduct, and Complainant did not present any evidence that Bell engaged in this behavior because of Complainant's race, color, or disability. These claims are dismissed.

Retaliation

Human Rights Law § 296.7 makes it an "unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate against any person" who has opposed discriminatory practices. To make out a prima facie case of retaliation, a complainant must show

[3] Effective October 11, 2019, Human Rights Law § 296.1 (h) amended the definition of harassment and the standard applied to such claims. Because the allegations which gave rise to the harassment claim in the instant complaint were purported to have occurred prior to the effective date of the amendments, this claim is analyzed under the former "severe or pervasive" standard.

that 1) he or she engaged in activity protected by the Human Rights Law, 2) the respondent was aware that the complainant participated in the protected activity, 3) he or she suffered an adverse employment action, and 4) there is a causal connection between the protected activity and the adverse employment action. *See Adeniran v. State of New York,* 106 A.D.3d 844, 965 N.Y.S.2d 163 (2d Dept. 2013).

In a retaliation context, an adverse employment action is one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Mejia v. Roosevelt Is. Med. Assoc.,* 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), *aff'd.,* 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed,* 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013), citing *Burlington Northern & Santa Fe Railway Co. v. White,* 543 U.S. 53, 68 (2006).

If a complainant makes out a prima facie case of retaliation, the burden shifts to the respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. If the respondent does so, the complainant must show that the reasons presented by the respondent were merely a pretext for discrimination. *Adeniran* at 845, 965 N.Y.S.2d at 165.

Bell removed Complainant from backup group leader training shortly after his initial complaint to human resources employee McConnell in May 2018, a circumstance which might have dissuaded a reasonable worker from making or supporting a charge of discrimination. However, Bell was not aware that Complainant had complained about him when he removed Complainant from the training in May 2018. In addition, Complainant's expressed concerns to McConnell that Bell had asked about the condition of his knee in front of another employee does not constitute opposing unlawful discrimination and cannot serve as a predicate for a retaliation claim. Vague complaints about "discrimination" or "harassment" do not qualify as protected

activity. *See Kelly v. Howard I. Shapiro & Associates Consulting Engineers, PC*, 716 F.3d 10 (2d Cir. 2013). Complainant failed to state a prima facie case of unlawful retaliation, and his claim with respect to removal from backup leader training this claim is dismissed.

Later in May 2018, Complainant complained to Fagan with a similar complaint, and again to McConnell in August 2018. Complainant then told Bell that he had complained to the human resources department regarding Bell. Although Bell was made aware of Complainant's concerns during Fagan's investigation, once again, Complainant did not complain regarding unlawful discrimination and thus his concerns could not form the predicate for a retaliation claim. This claim is dismissed.

In September 2018, Complainant complained to Galante that Bell and a nurse practitioner had inappropriately shared his medical information, that Bell had discriminated against him, been hostile to him and harassed him, and that he had been forced to work with Wilson. Galante promptly undertook an investigation of these complaints, finding them unsubstantiated. Galante reported the results of her investigation to Complainant in November 2018. Respondent then placed Complainant on leave, and for a portion of that leave, Complainant did not receive his full pay, a circumstance which might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Regarding the fourth prong of Complainant's retaliation claim, a causal connection between the protected activity and the adverse employment action may be established by temporal proximity. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014). Respondent suspended Complainant immediately

following the November 8, 2018, meeting. Complainant has established a prima facie case of retaliation.

Respondent provided a legitimate, independent, and nondiscriminatory reason for its suspension of Complainant. During the November 8, 2018, meeting, Complainant became agitated, and as he admitted in testimony, made at least one threatening statement. In consideration of Complainant's statements and behavior, Respondent determined that Complainant should be placed on a medical leave for a mental evaluation. Complainant presented no evidence in rebuttal that Respondent's action was anything but a response to a perceived danger in the workplace, to wit, Complainant's hostile and agitated behavior and statements. This claim is dismissed.

Reasonable Accommodation

Following Complainant's psychological evaluation, he was returned to work with the restriction that he was not to work with Wilson. Complainant presented no evidence that this restriction was intended as a reasonable accommodation for any mental or medical disability. Respondent considered the proposed restriction and found it to be unworkable. Complainant and

Wilson then undertook mediation, which successfully resolved the conflict between them, thus obviating any need for the restriction. This claim is dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and hereby is, dismissed.

DATED: May 21, 2024
Bronx, New York

Michael T. Groben
Administrative Law Judge