3SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

EYAD ALHAJ,

Plaintiffs,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PHYSICIAN AFFILIATE GROUP of NEW YORK, KENNETH HUPART, M.D., LANA VARDANIAN, M.D., ERIC CHAIKIN, and SABINA ZAK,

Defendants

Index No.: 501052/2016

DECISION/ORDER

HON. KATHERINE A. LEVINE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Defendants' Notice of Motion for Summary Judgment	1
Affirmation in Support for Defendants' Motion for Summary Judgment with Accompanying Affidavits and Exhibits	2
Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint	3
Plaintiff's Affirmation in Opposition with Accompanying Affidavits and Exhibits	4
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgement	5
Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss	6

Plaintiff Eyad Alhaj ("plaintiff"), a cardiologist employed by defendant New York City Health and Hospitals Corporation ("HHC"), Physician Affiliate Group of New York ("PAGNY"), claims that Kenneth Hupart, M.D., Lana Vardanian, M.D., Eric Chaikin, and Sabina Zak (collectively "defendants"), violated the New York State Human Rights Law ("SHRL") and New York City Human Rights Law ("CHRL") by subjecting him to a hostile work environment and subsequently retaliating against him because he wrote an email, based upon his race, national origin, and religion.

Plaintiff also claims, within his Count on Hostile Environment, that he was terminated

"for absolutely no reason," and that he was terminated on September 11 "as retribution for the horror that unfolded that day." He asserts that during the termination meeting, Chaikin commented to Dr. Hupert "Today is 9/11, right?," wherein Dr. Hupart shook his head and said 'Yes, it is," and Chaikin then made a weird smile. Defendants moved for summary judgment dismissing the claim pursuant to CPLR § 3212.

As will be set forth below, the Court grants in part and denies in part defendants' motion for summary judgment. Simply put, there is absolutely no evidence that any defendant who hired or arranged for plaintiff's working schedule, assignments and conditions created a hostile work environment for plaintiff out of some discriminatory bias under the SHRL or CHRL. Nor is there any evidence that any of the defendants treated Alhaj in a disparate fashion. Defendants had the right to terminate plaintiff, who was a probationary employee, for any reason so long as it was not in violation of a statute or constitution.

However, the Court believes that a jury could find that Chaikin's alleged comment about 9/11, and his "weird" or "strange" smile[1] to Hupart while making that statement at plaintiff's termination hearing on 9/11, evinced a discriminatory intent. Furthermore, Chaikin was much more intimately involved in the CHF program than disclosed by defendants, thus creating an issue of fact as to whether he was a supervisor or manager and played a role in plaintiff's termination. As such, the court will permit these issues concerning Chaikin's actions and whether they could be imputed to the hospital to go to trial.

FACTS

Plaintiff was hired by PAGNY to work as a cardiologist at Coney Island Hospital ("CIH") on September 14, 2014, and was an at will employee subject to a one-year probationary period ending on September 14, 2015. On or about January 16, 2015, plaintiff had a fractious interaction with Dr. Brady, the Chief Medical Officer at CIH and one of his supervisors, over his being one half hour late to a scheduled meeting. Plaintiff made a written complaint to his immediate supervisor, Dr. Khanna, claiming that Brady repeatedly used derogatory and profane language at him in front of co-workers; i.e. to "move his ass" after he was one half hours late to a meeting which Brady had requested. Nowhere did Alhaj assert in this complaint that Brady's comments to him had anything to do with his race, national origin or religion. Plaintiff claims that he was late because he was treating other patients at the time.

In contrast, by email to Sabina Zak dated 1/16/15, Dr. Brady memorialized that he had a "disturbing conversation" with Alhaj. Alhaj failed to attend a meeting requested by Brady at 9:45 so that he could make rounds with a cardiology fellow. Brady asserted that Alhaj and another doctor refused to provide coverage because they were "inappropriate, unprofessional and insubordinate."

[1]Alhaj interchangeably asserts that Chaikin's smile was weird or strange

On or about late July 2015, Dr. Hupart, the Chairperson of Medicine at Coney Island Hospital [2]who is responsible for the medical care of all patients and the practice of doctors, asked plaintiff to prepare a program to improve outcomes for congestive heart failure ("CHF") patients. Hupart asked plaintiff because he had "specific expertise and training in managing CHF patients." and in fact had completed a fellowship in CHF. Defendants claim that plaintiff did not produce an outline for the program in a timely manner, and that when he did put together a plan, it violated Dr. Hupart's instructions not to use extra resources or new hires, as his plan called for six to eight new hires and new resources. Plaintiff claims that the reason he was assigned to prepare the CHF program was "in hopes that he would fail," although he presented no evidence to support this claim. Dr. Khanna, plaintiff's supervisor, averred that Dr. Alhaj "was not hired to perform this task, but was supposed to function as a general cardiologist."

Sometime between late July and August 2015, plaintiff attended a counseling session where Dr. Hupart discussed plaintiff's alleged continued failure to meet job expectations, including his failure to properly establish a cardiac program. Hupart invited Eric Chaikin, associate executive director for medicine to attend the meeting and serve as a witness. According to plaintiff's 50-H testimony, there was no mention of his termination at this meeting.

Plaintiff claims that he was assigned to the CHF program after the "Dr. Brady incident," and that he was given the "most undesirable work shifts and overtime assignments" and was "requested to take on impossible assignments, tasks that could never be completed successfully or effectively, to the detriment of patient care." However, apart from his assignment to the CHF program, plaintiff offered no specifics. He also complained that defendants "created a hostile work environment where they treated Dr. Alhaj as a lesser person based on his country of origin and background as a Syrian Muslim Arab," although he presented no evidence that while he was working at Coney Island Hospital that any of the defendants possessed any animus towards him based on his nationality or religion or that his assignment to the CHF program was outside of his job responsibilities. Plaintiff admitted that prior to his termination date, no one at Coney Island Hospital - doctors, nurses etc - ever made any negative or derogatory comments concerning his ethnicity or where he obtained his medical degree.

Aside from the Brady incident and plaintiff's failure to properly establish a CHF program, defendants documented a number of other incidents. On June 3, 2015, the Director of Human Resources received a complaint that Alhaj, who was required to attend the New Employee Orientation, signed in each day but then left as soon as he signed in resulting in one Young Lee not giving him credit for having completed any of the three sessions (Exhibit J to Defendants' motion for summary judgment). On August 7, 2015, Dr. John Maese notified Dr. Khanna by email that Alhaj had failed to fulfill his obligation to handle an admission denial. Alhaj refused to discuss this case with the medical director, claiming that he was too busy.

Sometime around Labor Day in 2015, Dr. Hupart decided to terminate Alhaj and

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[2]Dr Hupart reported to Dr Brady

informed Dr. Brady and Dr. Maese, to whom he reported; he also discussed the termination with PAGNY human resources. ON September 11, 2015, Dr. Hupart called plaintiff to a meeting to inform him that his services were no longer needed at CIH; Sabina Zak, Chief Affiliation Officer at PAGNY; Erik Chaikin, and Dr. Vardanian were also present. Plaintiff testified at his EBT that with a "strange smile on his face," Chaikin looked at Dr. Hupart and said, "Today is 9/11, right?, and that Dr. Hupart shook his head and said 'Yes, it is.'" Plaintiff further testified that he interpreted the statements to mean that he was terminated on 9/11 to send the message: "Look, you are Middle Eastern, and you are a Muslim. Remember 9/11, and hush."

Plaintiff claims that Chaikin was involved in the decision to terminate him because of his comment about 9/11 during the termination meeting, and his role in administering the cardiology department and the CHF program. Defendants argue that Chaikin's comment was neutral on its face, and there is no evidence that one stray remark was connected to any decisions made by the Hospital through Dr. Hupart concerning plaintiff s employment. They also claim that Chaikin played no role in Alhaj's termination and that he had no authority over Alhaj. Chaikin testified at the 50-h hearing that his duties included "planning any programs in medicine, organizing, budgeting, directing what the executive director of the hospital thought needed to be done, or working with the chairman of medicine and addressing his needs in terms of day-to-day operations of the department."

Defendants, including Chaikin, grossly minimized Chaikin's involvement with the CHF program and Alhaj. While Chaikin claims his first meeting with Alhaj was during a counseling session in August, the record reveals that Chaikin was involved with the CHF program from its inception. By email dated June 29, 2015, Huppart notified Alhaj and Dr. Khanna and cc'd Chaikin that there were disappointing outcomes from CHF data that the hospital reported and that he wanted to meet with both of them regarding "their take" on the hospitals current CHF initiatives and how the hospital could better address CHF for patients. By email dated August 3, 2015 to his supervisor John Masse, Hupart memorialized his meeting with Alhaj, Khanna and Chaikin the week before where in they presented (meaning Khanna and Alhaj) a program was "too large in scope but that they will work with me (Huppart) and Eric (Chaikin) to "right size" and improve on our 30d re admit rate. "

After oral argument, this court, by Order dated October 21, 2019, dismissed the case against Lana Vardanian and Sabina Zak because plaintiff presented no evidence at all about them, much less that they created a hostile environment or acted with discriminatory intent based upon his race, national origin or religion. In fact, plaintiff admitted at his December 1, 2015 EBT that during his time at ClH before being terminated, no other staff members, doctors, nurses, or "anyone ... employed by the hospital" ever made any negative comments or derogatory comments" concerning his ethnicity or religious belief. Plaintiff also agreed to withdraw his claim concerning Dr Brady. Specifically, there is no evidence any defendant subjected Alhaj to disparate treatment by treating him in an abusive or derogatory manner or worse than other Non-Arab or Muslin doctors. Nor is there any evidence they anyone retaliated against plaintiff after he wrote a January 18, 2015 concerning Brady's alleged treatment of him. A hostile work environment exists only where the workplace is "permeated with discriminatory intimidation,

ridicule and insult that is sufficiently severe or pervasive to alter the conditions of " of employment and create an abusive working environment." *Chiara v. Town of New Castle*, 126 A.D.3d 111, 120 (2d Dept. 2015).

To the extent that the Court did not explicitly dismiss plaintiff's claim of hostile work environment as against the remaining defendants it does so now. Plaintiff's bare allegation that non-Muslim doctors did not receive similarly unfavorable treatment, and hence were not subject to such a hostile environment, is simply not supported by any evidence. Plaintiff complained that he was treated as a "lesser person based on his county of origin and background as a Syrian Muslim" to the extent that he was given "impossible" work assignments and the "most undesirable work shift." However, plaintiff did not proffer any evidence, much less even specify how his work assignments were impossible or undesirable, or how the non-Muslim doctors were treated more favorably than Muslim doctors. Furthermore, plaintiff presented absolutely no evidence that Brady or Hupart assigned Alhaj to the CHF program as a retaliatory act or for any reason other than that Alhaj was eminently qualified to work on improving the program.

The Court allowed the case to proceed solely on the issue of whether Alhaj's termination occurred under circumstances giving rise to an inference of discrimination. Plaintiff contends that defendants' purposely set Alhaj up for failure by assigning him to the CHF program without providing him with the requisite staff or resources and then used his "designed failure" as pretext. Plaintiff also contends that after defendants terminated Alhaj they adopted Alhaj's CHF plan and realigned resources at the administrative level. After the hearing the court requested that the parties brief whether Chaikin's alleged singular comment and "weird smile" to Hupert at the termination hearing was indicative of discrimination which could be imputed back to the decision makers (Hupert and CIH) to terminate Alhaj, and whether Chaikin played a role in that decision.[3]

LEGAL ANALYSIS

The court has already dismissed the action against two defendants and, as set forth above, finds that there is no evidence that plaintiff was assigned to extra duties or responsibilities or treated in a disparate fashion during his probationary period up to the date of his termination due to his national origin, religion or race. A probationary employee may "be dismissed for almost any reason, or for no reason at all" so long as the termination was not in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law. *Mtr. of Gagedeen v Ponte*, 170 A.D.3d 1013, 1014 (2d Dept. 2019); *Mtr. of Johnson v County of Orange*, 138 A.D.3d 850, 851 (2d Dept. 2016); *Mtr. of Young v City of New York*, 68 Misc. 3d 514, 517 (Sup. Ct. Kings Co. 2020).

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[3]Since this comment and smile occurred at the termination meeting, i.e. the last day of Alhaj's employment, they hardly can be used ex post facto to provide proof of a hostile work environment that did not exist throughout Alhaj's one year of employment at CIH.

The proponent of a motion for summary judgment bears the burden of showing that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 N.Y2d 320, 324 (1986); *Dallas-Stephenson v Waisman,* 39 A.D.3d 303, 306 (1st Dept 2007); The movant's burden is "heavy," and the facts "must be viewed in the light most favorable to the nonmoving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 N.Y. 3d 470, 475 (2013); *Ledbetter v Department of Educ. of the City of N.Y,* 2021 NY Slip Op 30324(U), 2021 N.Y. Misc. LEXIS 449 (Sup. Ct., N.Y. Co. 2021) at 20. Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 A.D. 3d 535, 545(1st Dept 2008). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 A.D. 3d 1112, 1115 (2d Dept 2010). *See also, Walker v. Ryder Truck Rental & Leasing*, 206 A.D.3d 1036, 1037-38 (2d Dept. 2022); *Ledbetter, supra* at 21. The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *Walker, supra,* 206 A.D. 3d at 1038; *Charlery v Allied Tr. Corp.*, 163 A.D. 3d 914, 915 (2d Dept. 2018). *See, Chimbo v Bolivar*, 142 A.D. 3d 944, 945 (2d Dept. 2016).

The court does not sit "as a super-personnel department that reexamines an entity's business decisions" in an employment discrimination case.' *Baldwin v Cablevision Sys. Corp.* 65 A.D. 3d 961. 966 (1st dept 2009) . Thus a plaintiff alleging discrimination "must do more than challenge the employer's decision as contrary to sound business or economic policy," since such an argument, without more, does not give rise to an inference that the [adverse action] was due to discrimination" *Melman v Montefiore Med. Ctr.,* 98 A.D.3d 107, 120 (1st Dept. 2012) (plaintiff's questioning of business judgment by suggesting that that the departmental problems cited by Montefiore were "stale," not plaintiff's fault, and, in any event, outweighed by plaintiff's alleged achievements as chairman questions not give rise to inference of discrimination); *Bailey v New York Westchester Sq. Med. Ctr.,* 38 AD3d 119, 124 (1st Dept 2007). However, an employer's invocation of the business judgment rule does not insulate its decisions from all scrutiny in a discrimination case. *Weiss v. JPMorgan Chase & Co.,* 332 Fed. Appx. 659 (2d Cir. 2009); *See, Melman, supra*, 98 A.D. 3d at 134. Therefore, it does not matter whether the employer's decision was fair or correct, or whether the stated reason for adverse action was good, bad or petty, so long as the stated reason for the action was non discriminatory. *Melman, supra*, 98 A.D. 3d at 121, *citing to Forest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 308 n.5 (2004).

To establish a prima facie case of racial discrimination under Title VII and both the SHRL and CHRL, the plaintiff must establish that he: (1) is a member of a protected class; (2) is qualified for the position; (3) suffered an adverse employment action; and that (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Forrest, supra, 3 N.Y.3d at 305; *Averbeck v Culinary Inst. of Am.*, 180 A.D.3d 862, 862 (2d Dept. 2020); *Hamburg v. N.Y.U. Sch. Of Medicine*, 155 A.D. 3d 66, 74 (2d Dept. 2017); *Godino v Premier Salons, Ltd.*, 140 A.D.3d 1118, 1119 (2d Dept. 2016).

An inference of discrimination "is a 'flexible [standard] that can be satisfied differently in differing factual scenarios." *Sethi v. Narod,* 12 F. Supp. 3d 505, 536 (E.D. N.Y. 2014) *citing to Howard v. MTA Metro—N. Commuter R.R.*, 866 F. Supp. 2d 196, 204 (S.D.N.Y.2011). *See also Moore v. Kingsbrook Jewish Med. Ctr.*, 2013 U.S. Dist. LEXIS 107111 (E.D.N.Y. July 30, 2013) (same).

The burden then shifts to the employer to demonstrate that the employment decisions taken against the plaintiff were for " legitimate, independent, and nondiscriminatory reasons to support its employment decision" *Melman v Montefiore Med. Ctr.*, 98 A.D.3d 107, 114 (1st Dept. 2012); *Balsamo v. Savin Corp.*, 61 A.D. 3d 622-23 (2d Dept. 2009). Plaintiff must then prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination and that discrimination was the real reason. *Gorzynski v. Jet Blue Airways Corp., 596 F. 3d 93, 106 (2d Cir. 2010); Dawson v. City of N.Y 2013 U.S. Dist. LEXIS 117744 (S.D. N.Y. 2013)' Forrest, supra*, 3 N.Y.3d at 305. The burden of persuasion of the ultimate issue of discrimination always remains with the plaintiff. *Stephenson v. Hotel Emples. & Rest. Emples. Union Local 100 of AFL-CIO,* 6 N.Y.3d 265, 271 (2006).

To establish entitlement to summary judgment dismissing a claim of alleged discrimination under the State HRL, the defendant must demonstrate that the plaintiff cannot make out a prima facie claim or, after offering a legitimate, nondiscriminatory reason for the employment action, that there is no material issue of fact as to whether the explanations were pretextual. *Ellison v. Chartis Claims, Inc.*, 178 A.D. 3d 665, 667 (2d Dept. 2019). *See. Forrest v Jewish Guild for the Blind,* 3 NY3d at 305; *Keceli v Yonkers Racing Corp.*, 155 AD3d 1014, 1015. To defeat the motion, the plaintiff must raise a triable issue of fact as to whether the reasons proffered by the defendant were merely a pretext for discrimination. *Ellison supra* at 668. *See, Forrest, supra.* 3 N.Y. 3d at 307; *Furfero v St. John's Univ.*, 94 A.D. 3d at 697.

The Second Circuit has advised district courts to be "particularly cautious about granting summary judgment to an employer in a discrimination case" where "the merits turn on a dispute as to the employer's intent[4].." *LeBlanc v. UPS*, 2014 U.S. Dist. 50760 at 28 (S.D.N.Y. 2014) citing to *Gorzynski v. JetBLue Airways Corp.*, 596 F. 3d 93, 101 (2d Cir.2010). *See, Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2d Cir. 1997); *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 2011 U.S. Dist. LEXIS 84790 (S.D.N.Y. 2011) at 15-16. This is because "employers are rarely so cooperative" as to notate the file that they are taking an adverse action "for a reason expressly forbidden by law." *Bickerstaff v. Vasser College,* 196 F 3d 435, 338 (2d Cir. 1999); *Hawkins v. City of NY*, 2005 U.S. Dist. LEXIS 15898 at 18 (S.D.N.Y. 2005). Since direct evidence of an employer's discriminatory intent will "rarely be found, 'affidavits and depositions must be carefully scrutinized" for circumstantial evidence.'" *Schwapp v. Town of Avon,* 118 F. 3d 106, 110 (2d Cir. 1997); *Mihalik, supra* at 16. (citations omitted). Defendants can only meet their prima facie burden by tendering sufficient evidence to demonstrate the absence of any

[4]Because the CHRL must be construed more broadly than Title VII and the State HRL, the Second Circuit's admonition is particularly apt.

material issues of fact with regard to plaintiff's discrimination claims. *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014); *Chiara v. Town of New Castle*, *supra*, 126 A.D.3d at 120. This is a heavy burden because the facts must be viewed in the light most favorable to the nonmoving party. *Id.*

On the other hand, "the favorable treatment accorded to a plaintiff's complaint is not limitless and, as such, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity" are insufficient to survive a motion for a judgment dismissing the complaint, *Cagino v. Levine*, 199 A.D.3d 1103, 1104 (3d Dept. 2021). "Mere conclusions, expressions of hope or unsubstantiated allegations" are insufficient for this purpose." *Bailey v. Bklyn Hosp. Ctr,* 2017 NY Slip Op. 30013 (U) (Sup. Ct, N.Y. Co. 2017). Even in the discrimination context, a plaintiff must provide more than conclusory allegations and show more than "some metaphysical doubt as to the material facts." *Gorzynski, supra*, 596 F.3d at 101

Claims brought pursuant to the CHRL require a separate analysis, *See Mihalik v. Credit Agricole Cheuvreux N. Am.,* Inc., 715 F.3d 102, 109, 113 (2d Cir. 2013). *Holleman v. Art Crating Inc*, 2014 U.S. Dist. LEXIS 139916 (E.D.N.Y. 2014). The Local Civil Rights Restoration Act of 2005 (Local Law No. 85 (2005) of City of NY) ("Restoration Act") clarified that the City HRL"s provisions must be construed independently and more liberally from their similar state and federal counterparts (*Mihalik v. Credit Agreicole Cheuvreux N.A., supra*, 715 F. 3d at 109 *citing to Williams v. NYC Hous Auth.* 61 A.D. 3d 62, 66 (1st Dept. 2009)) and "broadly in favor of discrimination plaintiffs," even when such protection is not available under federal or state law. *Albunio v. City of New York,* 16 N.Y.3d 472, 477-78 (2011). The federal standard should be considered " a floor below which the City [HRL] fall, rather than a ceiling above which the law cannot rise." *Mihalek v. Credit Agricole Cheuvreux , supra* at 709 *citing to Williams, supra*, 61 A.D. 3d at 66-67.

When analyzing discrimination cases under the CHRL, the court must use the burden shifting analysis under McDonnell Douglas as well as a mixed motive analysis which imposes a lesser burden on a plaintiff opposing such a motion. *Ellison v Chartis Claims, Inc, supra,* 178 A.D. 3d at 668; *Hamburg v N.Y.U., supra.* 55 A.D. 3d at 73; *Melman, supra,* 98 A.D. 3d at 113, 127; *Bennett v Health Mgt. Sys., Inc.*, 92 A.D. 3d 29, 45 (1st Dept. 2011). The McDonnell Douglas and mixed motive frameworks diverge only after the plaintiff has established a prima facie case of discrimination and the defense has responded by presenting admissible evidence of "legitimate, independent and non discriminatory reasons" to support its employment decision. *Hamburg, supra*, 155 A.D. 3d at 73. Whereas under McDonnell Douglas, the plaintiff must show "that the legitimate reasons proffered by the defendant were pretextual," under the mixed motive analysis, the plaintiff must produce evidence that the unlawful discrimination was one of, even if not the sole motivating factors for the employment decision. *Hamburg, supra* , 155 A.D. 3d at 73 citing to *Melman, supra* 98 A.D. 3d at 127. *See*, *Weiss v JPMorgan Chase & Co.,* 2010 U.S. Dist LEXIS 2505 (S.D.N. Y. 2010) citing to *Aulicino v. New York City Dep't of Homeless Servs..*, 580 F.3d 73, 80 (2d Cir 2009); *Crookendale v. NYC Health & Hosps. Corp.*, 2018 N.Y. Slip Op 31309(U), 2018 N.Y. Misc LEXIS 2586 (Sup. Ct. N.Y. Co. 2018). The "salient

difference" between the two standards is that at the final step, the plaintiff has the " lesser burden of raising an issue as to whether the action was motivated at least in part by discrimination...or was more likely than not based in whole or in part of discrimination." *LeBlanc v. UPS*, 2014 U.S. Dist. Lexis 50760 (S.D.N.Y. 2014); *Dozier v Federal Express, Inc.*, 2018 N.Y. Slip Op 31638U, 2018 N.Y. Misc. LEXIS 3058 (Sup, Ct., N.Y. Co. 2018).

The Appellate Divisions have held that under the CHRL, summary judgment should not be granted unless the employer establishes as a matter of law that "discrimination play[ed] no role" in its actions. *Mihalik,* 715 F.3d at 110 (*quoting Williams v. N.Y.C. Hous. Auth., supra.* 61 A.D.3d at 78; *Bailey v. Bklyn Hosp Ctr, supra,* 2017 NY Slip Op. 30013 (U); *Lefort v. Kingsbrook Jewish Med. Ctr,* 2019 NY Slip Op 51018(U) at 3, | 64 Misc. 3d 1205(A)(Sup. Ct., Kings Co. 2019) *citing Ellison v Chartis Claims, Inc.* 178 A.D. 3d 665, 668 (2d Dept. 2019): *See, Hamburg v. NYU Sch. Of Medicine,* 156 A.D. 3d 66, 73 (1st Dep't 2017). A defendant, as the moving party, must therefore make a prima facie showing "that there is no evidentiary route" that would could allow a jury to find that discrimination played a role in their challenged actions.. *Ellison supra* 178 A.D. 3d at 668; *Watson v Emblem Health Servs.*, 158 A.D.3d 179, 183(1st Dept. 2018); .*Cadet -Legros v New York Univ. Hosp. Ctr.,* 135 A.D.3d 196, 200 (1st Dept. 2015)' *Bennett v Health Mgt. Sys., Inc.,* 92 AD3d 29, 45 (1st Dept 2011).

If this burden is met, a plaintiff may defeat summary judgment by offering "some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" 158 A.D. 3d at 183; *Cadet-Legros, supra,* 135 A.D. 3d at 200 (1st Dept 2015). *Melman, supra,* 98 A.D. 3d at 127; *Dozier, supra*, 2018 N.Y. Misc. LEXIS 3028 at 13. This is because once a plaintiff introduces "pretext" evidence, "a host of determinations properly made only by a jury come into play," (*Watson, supra,* 158 A.D. 3d at 183; *Bennett, supra,* 92 A.D. 3d at 43) including whether a "false[, misleading, or incomplete] explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons" *Bennett, supra* at 43.

Here, it is undisputed that plaintiff has established the first three elements of a prima facie case of discrimination. As a Syrian Muslim Arab, plaintiff is a member of a protected class. *See, Abdelal v Kelly,* 857 Fed. Appx. 30, 2021 U.S. App. LEXIS 15140(2d Cir. 2021)(Egyptian national origin, middle eastern ancestry and Muslin religion); *Tihan v Apollo Mgt. Holdings, L.P.*, 2021 NY Slip Op 30247(U), 2021 N.Y. Misc. LEXIS 334,*25 (Sup. Ct. NY Co. 2021) (plaintiff, as a Muslim of Turkish descent, was a member of a protected class); *Sarr v Saks Fifth Ave. LLC*, 2016 NY Slip Op 31751(U), 2016 N.Y. Misc. LEXIS 3362, *3 (Sup. Ct. NY Co. 2016) (same). Furthermore, plaintiff suffered an adverse employment action when he was terminated from his position (*see Galabaya v. NYC Bd. Of Educ.,* 202 F. 3d 636, 640 (2d Cir. 2000)), and was also likely qualified to hold the position of physician as he was hired for the position.

Therefore, the sole issue is whether Alhaj's termination occurred under circumstances

giving rise to an inference of discrimination. Per set precedent cited above, this court agrees with defendants that they are under no obligation to justify their assignment of Alhaj to the CHF program or the strictures or requirements they imposed upon him in planning for the program. Therefore it is not for this court to conduct a mini- hearing as to the veracity of Alhaj's success or failure in the CHF so long as discrimination played no role in his termination.

"No one particular type of proof is required to show that Plaintiff's termination occurred under circumstances giving rise to an inference of discrimination." *Sethi v. Narod, supra* 12 F. Supp. 3d at 536 citing to *Moore, supra* 2013 U.S. Dist. LEXIS 107111, 2013 WL 3968748, at *6 (citations omitted). "An inference of discrimination can be drawn from circumstances such as "the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's [adverse employment action]." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001); *Sethi, supra* 12 F. Supp.3d at 536. Alhaj claims that an inference of discrimination can be discerned by Chaikin's comment to Dr. Hupert "Today is 9/11, right?," wherein Dr. Hupart shook his head and said 'Yes, it is," and Chaikin then made a weird smile. Plaintiff interprets this statement and gesture to mean that he was terminated on 9/11 to send the message: "Look, you are Middle Eastern, and you are a Muslim. Remember 9/11, and hush."

There are a dearth of cases which address whether one comment is sufficient to raise an inference of unlawful termination due to discrimination, as opposed to a legion of cases which state that random comments are usually not sufficient to establish a hostile work environment. [5] To establish a prima facie case under a hostile work environment theory a plaintiff must show that its workplace was "permeated with discriminatory intimidation, ridicule and intimidation that is sufficiently severe and pervasive to alter" the conditions of employment and create an abusive environment. *Gorzynski v. JetBLue Airways Corp.*, 596 F. 3d 93, 102 (2d Cir. 2010); *Fullwood v. Ass'n for the Help of Retarded Children*, 2010 U.S. Dist. LEXIS 107713 (S.D.N.Y. 2010). A plaintiff need no longer establish severe and pervasive conduct under the more relaxed CHRL standard, and only has to demonstrate "differential treatment" - that he was treated less well than other employees due to his protected status because of discriminatory intent, and summary judgment should be denied in "borderline cases," *Williams v. N.Y.C. Housing Auth., supra,* 61 A.D. 3d at, 75, 80. *See, Golston-Green v City of N.Y.*, 184 A.D. 3d 24, 43 (2d Dept. 2020); *Nelson v HSBC Bank USA*, 87 A.D. 3d 995, 999(2d Dept.2011).

The courts have also noted that the CHRL is not a "general civility code" and that "petty slights and trivial inconveniences" were still nonactionable under the law. *Golston-Green,*

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[5]This court has already found there is no merit to Alhaj's contention that he was subject to to a hostile work environment throughout his year's work at the hospital because there is simply no evidence that anyone commented or otherwise judged Alhaj due to his national origin or race until the date of his termination, and no evidence that Alhaj was assigned to the CHF program because of his national origin or race .

supra, 184 A.D.3d at 43; *Williams, supra*, 61 A.D3d at 78 -80. A plaintiff still must "do more than cite to his mistreatment" and then ask the court to conclude that the mistreatment must have been related to his protected status. *Sims v. Trustees of Columbia Univ. City of N.Y.*, 2017 N.Y. Slip Op. 32331(U); 2017 N.Y. Misc. LEXIS 4204 at 13-14 (Sup. Ct. N.Y. Co. 2017). Therefore, most courts have granted summary judgment to defendants under the CHRL where a plaintiff's proof of a hostile work environment is limited to sporadic insensitive comments. *See, Mihalik, supra* 2011 U.S. Dist. LEXIS 84790 at 27-28 and cases cited therein; *Williams, supra* at 80; *Nelson ,supra*, 87 A.D. 3d at 999; *Sims v. Trustees of Columbia Univ., supra* at 16-18.

While the court can look at the aforementioned precedent for guidance, that paradigm only goes so far since hostile environment cases presume that discrimination occurred over a prolonged time span which created an untenable working environment, whereas a termination based in part upon discriminatory intent of the employee may be more subtle and not require proof of a pattern of pervasive discriminatory conduct. The courts have recognized that hostile work environment claims are different in kind from discrete acts as " [t]heir very nature involves repeated conduct" *Julius,* 2010 U.S. Dist. LEXIS 33259, at *22, quoting *National RR Passenger Corp. v Morgan*, 536 U.S. 101, 115, 153 L. Ed. 2d 106 [2002]); *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 2017 NY Slip Op 32331(U), 15, 2017 N.Y. Misc. LEXIS 4204, *14 (Sup. Ct., N.Y. Co. 2017). A hostile work environment cannot by definition occur on one particular day but over a series of days or months or years, and "in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. *Khalil v. State of N.Y.*, 17 Misc. 3d 777, 783 (Sup Ct., N.Y. Co. 2007) citing to *Morgan,* 536 U.S. 101, 115, 153 L Ed 2d 106 (2002). Therefore, mere utterances which engender offensive feelings in an employee do not sufficiently affect the conditions of employment to create a hostile work environment since such claims must be based on the "cumulative effect of individual acts" *Khalil, supra*,17 Misc 3d at 783 *citing to National RR Passenger, supra*, at 115. *See, Gorokhovsky v. N.Y.C. Housing Auth.*, 552 F. App'x 100, 102 (2d Cir. 2014).

Plaintiff alleges that Chaikin's referral to the 9/11"tragedy" and his "strange smile" at Hupart during plaintiff's termination meeting, which coincidentally was held on 9/11, is sufficient to raise a inference that discrimination played a role in his termination. Defendants contend that the statement allegedly made by Chaikin was "neutral on its face" and "merely stated the date" which happens to be an important day for those in NYC who lived through it.

In employment discrimination cases, the term "prima facie case" denotes the establishment by plaintiff of facts sufficient to create "a legally mandatory rebuttable presumption" rather than the traditional meaning of describing a plaintiff 's burden of setting forth sufficient evidence to go before the jury. *Melman v. Montefiore Med. Ctr, supra,* ,98 A.D. 3d at 122; *Sogg v. American Airlines* , 193 A.D. 2d 153, 156 (2d Dept. 1993). In considering whether a defendant has sufficiently established plaintiff's inability to establish all elements of intentional discrimination, the court must consider that plaintiff's prima facie showing is a "low threshold." *Singh v. State of N.Y. Office of Real Prop Serv.*, 40 A.D. 3d 1354, 1356 (3d Dept 2007); *Gonzalez v. N.Y. State Off. Of Mental Health*, 2010 N.Y. Slip Op 50282U, 26 Misc. 3d 1227A (Sup. Ct Kings Co. 2010).

It is "rare" that a court would grant a motion for summary judgment based upon the absence of a prima facie showing of circumstances giving rise to an inference. *Hamburg v. N.Y.U Sch. Of Medicine*, 155 A.D. 3d 66, 71 (1st Dept. 2017) *citing to Melman, supra, 98 A.D. 3d at 114-15; Bennett, supra,* 92 AD3d at 38; *Murphy v. Wolford Am. Inc.*, 2019 NY. Slip Op. 30267(U), 25-26; 2019 N.Y. Misc. LEXIS 441 (Sup. Ct. N.Y. Co. 2019) (court assumes that circumstances surrounding plaintiff's termination gave rise to inference of discrimination, but defendants met burden of providing legitimate business reason for termination and plaintiff failed to raise inference of pretext). However, a prima facie showing by a plaintiff only creates a "legally mandatory rebuttable presumption" rather than the traditional showing that plaintiff has set forth sufficient evidence to go before the jury. *Melman, supra,* 98 A.D. 3d at 122 *citing to Sogg v. American Airlines, supra, 193 A.D. 2d at 156.*

In fact, the courts often bypass requiring the plaintiff to make a prima facie case and skip directly, on a defendant's motion for summary judgment under the City HRL, to inquiring whether a defendant has shown, based on all the evidence, that "no jury could find defendant liable under any of the evidentiary routes [applicable to discrimination cases]" *Cadet-Legros v New York Univ. Hosp. Ctr.,* 135 A.D. 2d at 128. Courts must exercise special caution in granting summary judgment because "discrimination seldom announces itself openly." *Id.*, "Because an employer who discriminates for an unlawful reason rarely announces a discriminatory motive or intent, verbal comments may provide sufficient to support a claim for employment discrimination," *Gonzalez v. N.Y. State Off. of Mental Health* 2010 N.Y. Slip Op 50282(U), 26 Misc. 3d 1227(A) at 38. (Sup Ct. Kings Co. 2010)

In considering whether a comment is probative of discrimination or rather a non-probative "stray remark," a court must consider 1) whether the remark was made by a decisionmaker or supervisor; 2) when the remark was made in relation to the employment decision at issue; 3) the context of the comment (i.e. whether a juror would regard the remark as discriminatory; and 4) the context in which the remark was made - whether it was related to the decision making process. *Henry v. Wyeth Pharms. Inc.* 616 F. 3d 134, 149-50 (2d Cir. 2010); *Holleman v. Art Crating Inc, supra.* . 2014 US. Dist LEXIS 139916 at 89-90 ; *Tomassi v. Insignia Fin. Grp Inc.* 478 F. 3d 111 115 (2d Cir. 2007). *See also, Obinabo v. Radioshack Corp.*, 522 F. App'x 55, 57 (2d Cir. 2013) ("When considering 'stray remarks' as evidence of discrimination, courts consider who made the remark, when the remark was made in relation to the employment decision, the remark's content, and the context in which the remark was made." (citing Henry, 616 F.3d at 149)). A remark will be "more probative" of discriminatory intent, where it evinces a discriminatory state of mind and is in close relation to the allegedly discriminatory behavior. *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115 (2d Cir. 2007) (citation omitted); *Sethi*, supra , 12 F. Supp. 3d at 535-36. Even stray remarks in the workplace made by individuals who are not involved in the pertinent decision making process may suffice to make a prima facie case if the remarks evidence "invidious discrimination." *Chiara, supra,* 126 A.D. 3d at 124 . *See, Belgrave v City of New York*, 1999 US Dist LEXIS 13622, *89-90 (E.D.N.Y. 1999) affd 216 F3d 1071 (2d Cir 2000).

In *Cadet-Legros, supra*, the court assumed that a supervisor's comment that "a leopard

does not change its spot" was sufficient for plaintiff to make a prima facie case but ultimately found that said comment was not discriminatory as it was no longer "imbued with racial meaning" and granted summary judgment to the defendant). *See, Vega v Hempstead Union Free Sch. Dist.*, 801 F3d 72, 86 (2d Cir 2015); *Lloyd v. Holder*, 2013 U.S. Dist. LEXIS 178456, *19 (S.D. N.Y. 2013). The court recognized that a plaintiff alleging discrimination must be allowed to "present a wide range of indirect evidence of discrimination, including the fact that a defendant (or its agent or employee) used coded language, that is probative of discriminatory intent," and that it must examine the language and its historical usage, in addition to the context in which it was used. *Cadet, supra*, 135 A.D. 3d at 204-05.

A plaintiff's subjective interpretation of critical but facially nondiscriminatory terms does not "itself" reveal discriminatory animus. *Thelwell v City of New York,* 2015 U.S. Dist. LEXIS 98406 (SD NY 2015) (defendants' purported use of the words "angry" and "abrasive" did not rise to the level of racial code words such as "boy" or "thug"). *See also, Cook v. Emblem Health Servs.* Co., LLC, 2018 NY Slip Op 50451(U), 2018 N.Y. Misc. LEXIS 1138 at 19-20(Sup Ct. N.Y. Co. 2018) (supervisor's use of the facially non-discriminatory terms "very authoritarian," "critical," and "aggressive"did not constitute racial coding or evidence of discrimination where the supervisor was describing the plaintiff's leadership skills).

In *Lloyd v. Holder*, 2013 U.S. Dist. LEXIS 178456 (S.D.N.Y. 2013), the court found that "drawing the line between facially race-neutral statements and racially charged code words is difficult." *Id* at 27. The court found that the employer's use of adjectives to describe plaintiff, such as lazy, shiftless, incompetent, entitled, slacking off, and dumb, without any other evidence of discrimination, did not reveal discriminatory animus. However, certain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness — words like "welfare queen," "terrorist," "thug," "illegal alien." *See, Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456, 163 L. Ed. 2d 1053 (2006) (The use of the word ['boy'], standing alone, is not always benign); *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010) (code words such as "fried chicken" and "ghetto" may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 278 (3d Cir. 2001) (noting that the use of code words such as "all of you" and "one of them" could be sufficient evidence from which a jury could find an intent to discriminate).

And yet, even a seemingly banal term such as "selected clientele" may, within a certain context, raise an inference of discrimination. In *Camp-of-the-Pines, Inc. v. New York Times Co.*, 184 Misc. 389 (Sup. Ct. Albany Co. 1945), defendant NY Times edited the advertising copy sent by plaintiff - an owner of a vacation club - by striking out the words "selected clientele" and substituting in the words "congenial following" and thereafter published the ad. Plaintiff sued the NY Times for breach of contract, alleging it had not consented to the omission of the words "selected clientele" and the substitution thereof. The court granted the Times motion to dismiss plaintiff's suit for damages based upon the Times refusal to publish the advertisement exactly as sent by plaintiff on the grounds that said alleged contract was illegal and void.

The court found that the term was "not only ... injurious and offensive to morals," but that it contravened Civil Rights Law §40. 184 Misc at 399. The use of the words "selected clientele" to describe members in good standing who would be eligible to use the facilities was a "sham", a "mask and subterfuge" and "merely a cloak and disguise" and an indirect means to hide discrimination. *Id.* As a practical matter such words as "selected clientele" connote in the public mind that colored persons, Jews and others who are not lily-white need not apply to plaintiff for accommodation.." Id at 398.

Based upon this deminimus standard, this court finds that Chaikin's comment that "it is 9/11" coupled with his strange smile at Hupert during plaintiff's termination meeting held on 9/11, is more than a generic neutral comment made about the horrific event that occurred on that day. A jury could find that Chaikin's comment and strange smile were directed at Alhaj, who is a Syrian Muslim, and could be deemed to be a code word, i.e. that as a Muslim, Alhaj was associated with the 9/11 catastrophe -a racist concept that is already planted in the public consciousness. Furthermore, Chaikin's comment was made on the day of Alhaj's termination and the facts are not clear as to his supervisory or decision making role in the Cardiology Department.

To state the obvious, there has been a marked increase in anti-Islam phobia since 9/11. *See, Sulehria v. New York,* 2012 U.S. Dist. LEXIS 52836 (N.D.N.Y. 2012) (plaintiff alleges that he has been the victim of racial prejudice, xenophobia, and religious intolerance in the wake of the September 11, 2001. "His account of the climate of discrimination and fear felt by many Muslim Americans and individuals of Middle Eastern descent is unfortunately not a new one") . *See,* Liz Mineo, *Born to take on Islamophobia,* The Harvard Gazette, Sept. 2021, available at https://news.harvard.edu/gazette/story/2021/09/muslim-americans-reflect-on-the-impact-of-9-11/ "It has been 20 years since the atrocities of 9/11, yet the wound continues to dig deep," said Ijaz in an email. "It digs into the families that lost loved ones on that ill-fated day.... It also digs into the lives of Muslim Americans, marked by the scarlet letters imprinted on them by terrorists with whom they shared nothing in common save for one imperfect classification: Muslim.")

Having found previously that Chaikin's comment to Hupart" that "Today is 9/11, right?" amd his immediate "strnage smile" to Hupart followed by his immediate "strange smile" could be found by a jury to be a code word, the Court must now discern whether defendants produced evidence of a legitimate reason for the termination and if so, whether plaintiff can show that the termination was motivated at least in part by discrimination and that there is a nexus between said comment and his termination.

Defendants assert that there are no evidentiary routes by which a jury could find that discrimination played any role in the decision to terminate plaintiff, either under the mixed motive or McDonnell Douglas tests. In its original motion for summary judgment and accompanying brief, defendants state that three doctors (Vardanian, Hupart and Brady) filed a complaint against Alhaj for being insubordinate in refusing to provide coverage for a clinic after having been requested to do so by his supervisors. As set forth previously, by email dated 1/16/

15, Dr. Brady informed Sabrina Zak that Alhaj and another doctor refused to provide coverage of the CCU as per Brady's request, because they were upset about schedules of part time doctors. Neither had a busy schedule and Alhaj's excuse was that he was in another meeting in the morning and had to cover the clinic in the afternoon. Brady informed Alhaj that had he come to the meeting on time in the morning, he would have had ample time to do his rounds and cover the clinic in the afternoon, and wrote that Alhaj "continued to argue in circles for another half an hour, refusing to leave my office as requested multiple times, wasting precious time from patient care." Brady said that plaintiff's behavior was "completely inappropriate, unprofessional and insubordinate.

Subsequently, on or about August 7, 2015, one Valerie Dener informed Dr. Maese that Alhaj had refused to discuss a case and give patient information concerning a denial claiming that he was too busy and that he was not an attendant. Maese told Dr Khanna to address this issue as it was the obligation of every attending to participate in the UM process and in denials. Finally, defendants contend that Dr. Khanna's affirmation praising Alhaj and stating that he "never received any complaints about his...work performance , professionalism and...work ethic" is belied by the aforementioned record.

As to Alhaj's unsatisfactory performance on the CHF program, Hupart testified that he had initially instructed Alhaj that he had to use existing resources and could not hire new staff but that he could redeploy existing staff and that he had to produce an outline within two weeks. Hupart stated that plaintiff did not produce an outline for the program in a timely manner, and that when he did put together a plan, it violated Dr. Hupart's instructions as his plan called for six to eight new hires and new resources. Chaikin testified that Hupart called Alhaj in for a counseling session about his failure to establish a cardiac program and other deficiencies. Curiously, Hupart did not deem his meetings with Alhaj in late July to be counseling sessions; rather he testified he "followed up" with Alhaj to see if he had problems and to offer his assistance. Defendants never presented a counseling memo about the CHF program.

Based upon the above, this court finds that defendants have produced sufficient evidence that Alhaj behaved in an inappropriate, unprofessional and insubordinate manner" which constitutes a legitimate reason for termination. Furthermore, the Hospital and Hupert were within their right to determine that Alhaj did not perform satisfactorily on the CHF program since Hupert told plaintiff to use only existing resources and not to hire any new staff for the program.

As the court has stated previously, it does not sit "as a super-personnel department that reexamines an entity's business decisions" in an employment discrimination case.' *Melman, supra.* 98 A.D.3d at 121 (2d Dept. 2012); *Baldwin v Cablevision Sys. Corp.* 65 A.D. 3d 961. 966 (1st dept 2009). "In a discrimination case," the court is "decidedly not interested in the truth of the allegations against [the] plaintiff," but rather in what motivated the employer. *McPherson v. N.Y.C. Dep't of Educ.*, 457 F.3d 211, 216 (2d Cir. 2006) (quoting *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 75 L. Ed. 2d 403 (1983)). "The question in any discrimination case is not whether defendant's decision to fire plaintiff was correct but whether it was discriminatory." *DeFina v. Meenan Oil Co.,* 924 F. Supp. 2d 423, 435 (E.D.N.Y. 2013). *See, Tuccio v. FJC Sec.*

Servs., Inc.,2014 U.S. Dist. LEXIS 125090(E.D.N.Y. Sept. 8, 2014) (same)." *Rothenberger*, 2008 U.S. Dist. LEXIS 46614 (quoting *Thornley v. Penton Publ.*, 104 F.3d 26, 29 (2d Cir. 1997)). Courts do not have a "'roving commission to review business judgments . . . .'" *Rosenberg v. Chesapeake Pharm. & Health Care Packaging*, 888 F. Supp. 2d 302, 309 (E.D.N.Y. 2012) and the only issue before them is whether there is sufficient information by which a jury could find that the employer's decision was discriminatory, not whether it was wise. *Holleman v. Art Crating Inc*, supra, 2014 U.S. Dist. LEXIS 139916 .

Thus, a plaintiff's subjective disagreement with the employer's assessment of her performance is not actionable under the discrimination statutes. See *White v. Pacifica Found.*, 973 F. Supp. 2d 363, 382 (S.D.N.Y. 2013). *See also Potash v. Florida Union Free Sch. Dist.*, 972 F. Supp. 2d 557, 592 (S.D.N.Y. 2013) (Plaintiff's personal disagreements with defendants'] evaluation of her job performance are insufficient to preclude summary judgment."); *Silva v. Peninsula Hotel*, 509 F. Supp. 2d 364, 385 (S.D.N.Y. 2007) (the employer, not the employee, decides what constitutes satisfactory performance); cf. *McNamee v. Starbucks Coffee Co.*, 914 F. Supp. 2d 408, 420 (W.D.N.Y. 2012) ("Plaintiff's subjective belief that she was performing satisfactorily, by itself, is not sufficient to create a triable issue of fact as to pretext"). Therefore, it does not matter whether the employer's decision was fair or correct, or whether the stated reason for adverse action was good, bad or petty, so long as the stated reason for the action was non discriminatory. *Melman, supra; la*, 98 A.D. 3d at 121 *citing to Forest v. Jewish Guild for the Blind*, supra, 3 N.Y. 3d at 308 n.5 (2004).

This precedent is even stronger when the employer's actions are challenged by a probationary employee who may be discharged for "almost any reason, or for no reason at all" as long as it is not "in bad faith or an improper or impermissible reason,." *Mtr. of Duncan v. Kelly*, 9 N.Y. 3d 1024,1025 (2008); *Mtr. Of Hirji v Chase*, 151 A.D. 3d 857 (2d Dept 2017); *Mtr. Of Johnson v County of Orange*, 138 A.D. 3d 850, 851 (2d Dept 2016); *Mtr of Young v City of New York*, 68 Misc. 3d 514, 517 (Sup Ct. Kings Co. 2020). A bad faith determination is one based upon a constitutionally impermissible or illegal purpose, or "in violation of statutory or decisional law." *Mtr of Lake v. Town of Southhold, 189 A.D. 3d 1588, 1591* (2d Dept. 2020); *Mtr of Lane v. City of N.Y.* 92 A.D. 3d 786 (2d Dept.); *Card v. Sielaff, 154 Mic. 2d 239, 244 (Sup. Ct., N.Y. Co., 1992).* The petitioner has the burden of proving bad faith by producing competent evidence, rather than mere speculation. *Mtr. Of Young ,supra* at 517; *See, Mtr of Swinton v Safir,* 93 NY2d 758, 763(1999); *Walsh v New York State Thruway Auth.*, 24 AD3d 755, 757 (2d Dept 2005).

Given the above, this Court will not sit as an arbitrar as to whether defendants or Alhaj more accurately describe what occurred in the CHF program. Furthermore, it finds no credence to Alhaj's claim that by being assigned to create a CHF program he was handed a mission to fail (not substantiated) or that Chaikin and the Department adopted many of his recommendations for the program aafter he was fired.

Since defendants have produced evidence of legitimate, non discriminatory reasons for

terminating ALhaj from his probationary position, the burden shifts back to plaintiff to produce evidence that the action was ""motivated at least in part by discrimination. *Melman, supra,* 98 A.D. 3d at 120. *See, Cadet - Legros, supra*, 135 A.D. 3d at 200, n.1; *Coronado v.Weill Cornell Med. Coll. 66 Misc. 3d 404, 407 (Sup. Ct., N.Y. CO. 2019); Ortiz v. Gazes LLC.* 2017 N.Y. Slip Op 32339(U); 2017 N.Y Misc. LEXIS 4221 (Sup. Ct. N.Y Co. 2017). Under the mixed motive theory recognized by the CHRL the plaintiff must produce evidence that the unlawful discrimination was one of, even if not the sole motivating factors for the employment decision. *Hamburg, supra* , 155 A.D. 3d at 73 citing to *Melman, supra.* 98 A.D. 3d at 127. *See, Weiss v JPMorgan Chase & Co.,* 2010 U.S. Dist LEXIS 2505 citing to *Aulicino v. New York City Dep't of Homeless Servs..*, 580 F.3d 73, 80 (2d Cir 2009); *Crookendale v. NYC Health & Hosps. Corp.*, 2018 N.Y. Slip Op 31309(U), 2018 N.Y. Misc LEXIS 2586 (Sup. Ct. N.Y. Co. 2018). Plaintiff need only respond with "some evidence" that at least one of the reasons proferred by the defendant is false, the court should deny the motion for summary judgment. *Melman, supra*, 98 A.D 3d at 127; *Dozier, supra*, 2018 N.Y. Misc. LEXIS 3028 at 13. Summary judgment should not be granted under the City HRL unless the record establishes as a matter of law "that discrimination...played no role in the defendant's employment decision. *Lefort v. Kingsbrook Jewish Med. Ctr,* 203 A.D. 3d 708, 711 (2d Dept. 2022); *Singh v Covenant Aviation Sec. LLC* 131 A.D. 3d 1158 1161 (2d Dept. 2015); *Bennett v. Health Mgt Svs. Inc., supra* 92 A.D. 3d at 40. See *Ellison v Chartis Claims, Inc.* 178 A.D. 3d 665, 668 (2 Dept. 2019).

Defendant argues that there is absolutely no evidence that either the Hospital or Chaikin acted in a discriminatory manner in terminating Alhaj, which was due to his various infractions throughout the year and his non-performance in working on the CHF program. They first reiterate that Chaikin's comment was neutral on its face, as he was just commenting that the weather on that day was the same as it was on 9/11 when the attacks took place, and there is no evidence that one stray remark was connected to any decisions made by the Hospital through Dr. Hupart concerning plaintiff s employment. They cite to precedent that stray remarks made by non -decision makers or decision makers without more, cannot prove a claim of employment discrimination. *Godbolt v. Verizon N.Y., Inc.* 115 A.D. 3d 493, 494 (1st Dept. 2014); *Gonzalez v. N.Y. State Off. Of Mental Health*, 26 Misc. 3d 1227A (Sup. Ct., Kings Co. 2010). Defendants claim there is no "more" insofar as Chaikin was not involved in the decision to terminate Alhaj's employment.

This court has already ruled that Chaikin's comment and strange smile to Hubert could be viewed, by a reasonable jury, as a code word as opposed to a banal innocent comment about the day of 9/11. However, verbal stray comments can raise an inference of discrimination only where there is a "demonstrated nexus" between the remarks and the negative employment action. *Cherry v. NYC* Housing Authority *, 2017 U.S. Dist., LEXIS 161830 ((E.D.N.Y. 2017); Dawson v. City of New York*, 2013 U.S. Dist. LEXIS 117744 at 25 (S.D.N.Y. 2013) *Sandiford v City of New York Dept. of Educ.*, 22 N.Y.3d 914, 916 (2013); *Chiara , supra,* 126 A.D.3d at 124. *See, Sandiford v City of N.Y. Dept. of Educ.*, 94 AD3d 593, 604 (Dept. 2013. "[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination." *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111,

115 (2d Cir. 2007); *Holleman, supra*, 2014 U.S. Dist. LEXIS 139916 at 88-89.

In determining whether a comment is probative of an intent to discriminate or is merely a non probative stray remark a court must consider the following factors: (1) whether the comment was made by a decisionmaker, a supervisor, or a low-level coworker, (2) was the remark made close in time to the adverse employment decision at issue, (3) given the context of the remark, whether a reasonable juror could view the remark as discriminatory, and (4) the context in which the remark was made - was it related to the decision-making process." *Chiara, supra*, 126 A.D.3d at 124; *Wiggins v Mount Sinai Hosps. Group, Inc.*, 2020 N.Y. Misc. LEXIS 10819, *39 (Sup. Ct. NY Co. 2020); *Gomez v Cablevision Sys. New York City Corp.*, 2016 NY Slip Op 31177(U), 13 2016 N.Y. Misc. LEXIS 2353, *17-18, *Breistein v. Michael C. Fina Co.*, 2016 N.Y. Slip Op. 31858U, 2016 N.Y. Misc. LEXIS 3591 at 26 (Sup. Ct., N.Y. Co. 2016); *Gonzalez, supra*, 26 Misc. 3d 1227 (A). Even stray remarks by persons who are not supervisors or involved in the pertinent decision-making process may suffice to present a prima facie case of discrimination. *Chiara, supra,* 126 A.D. 3d at 124. See, *Belgrave v City of New York*, 1999 US Dist LEXIS 13622, *89-90 [ED NY, Aug. 31, 1999) affd 216 F3d 1071 (2d Cir 2000)

Defendants claim that Chaikin did not play a supervisory role in the CHF program and that there is simply "no evidence linking Mr. Chaikin to any input" over Alhaj's job performance in either the CHF program or generally, in substantively reviewing plaintiff's progress at work, or in Hupart's decision to fire him. Rather it was Dr. Hupart who assigned plaintiff and the monitored his progress. Specifically Chaikin testified that he first met Alhaj at a meeting in late July or August where Dr Hupart counseled him on failing to meet his job expectations re the CHF program. Chaikin was only there to serve as a witness The only other interaction he had with Alhaj was during the 9/11 termination meeting where he served solely as a witness with no input as to the decision making about Alhaj's continued employment. Chaikin stated he did not know whose decision it was to terminate Alhaj, although Dr. Khanna was his immediate supervisor and Hupart was the chairman of the department. Defendants also point to Alhaj's deposition testimony that he"only saw Chaikin" but never interacted with him

Defendants then contend that Chaikin's only job responsibilities concerning the CHF program was "a future expectation of an administrative nature" in terms of moving rsources around the hospital and working with Hupart to reassign resources, i.e. staff, which "made sense" since he was not a doctor. They quoted this court's observation during a conference that plaintiff needed to do more than say that "Chaikin came in and was an administrator." Plaintiff claims that Chaikin was involved in the decision to terminate him because of his comment about 9/11 during the termination meeting, and his role in administering the cardiology department and the CHF program.

Chaikin's official title was "Associate Executive Director for Medicine." His duties were to plan programs in medicine, implement what the executive director of the hospital thought needed to be done and "work with the chairman of medicine" to address his day to day needs to the operation of the hospital. Hupart testified that because Chaikin was not a doctor, he

had an administrative role in all of his assigned projects, including the CHF program and worked to achieve Hupart's goals for the hospital . Chaikin's main role was to work collaboratively with Hupart to bring people together, get them to agree to and move forward on a plan. Chaikin not only worked on the CHF program, but was involved in all of Hupart's major initiatives to improve the department of medicine.. Hupart testified that Chaikin started working on the CHF program about a month prior to Alhaj's termination, and had attended a series of twice weekly one-on-one meetings to discuss various initiatives. Hupart did not expect Chaikin to work with Alhaj to create the program, but rather expected Alhaj to update Chaikin about the resources that he would need to implement the program.

The facts in *Lefort v. Kingsbrook Jewish Med Ctr.*, 203 A.D. 3d 708 (2d Dept. 2022) are quite similar to the facts presented in this case. The Second Department found there were triable issues of fact as to whether a supervisor's remarks concerning the plaintiff's maternity leave "were indicative of a discriminatory notice to terminate" her employment. *Id.* at 710. While the Medical Center argued that the supervisor had no involvement in the decision to terminate, the record contained evidence that the Chief Operating Officer, who made the decision to terminate plaintiff, met with the supervisor to discuss plaintiff's return from maternity leave and that the supervisor was present at the termination meeting. Where there are factual issues concerning the supervisor's involvement and whether an inference of discriminatory motive can be drawn from this evidence, the court must follow the precept that "all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor." *Rollins v Fencers Club, Inc.*, 128 A.D.3d 401, 402 (1st Dept. 2015); *Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 (1st Dept 2010). See also, *Abdellah v. Kelly, supra, 857 Fed. Appx. 30,* where the Second Circuit denied summary judgment to the City defendants despite their proffering legitimate, non-discriminatory reasons for plaintiff's discharge- namely, his guilty plea to and conviction of numerous instances of misconduct. The Second Circuit found that plaintiff presented sufficient evidence to raise a triable issue of fact as to whether the investigation and termination occurred in circumstances giving rise to an inference of discrimination, such as two statements defendants made where they noted his national origin (Egyptian) and his ancestry (Middle Eastern) while investigating his alleged misconduct.

This admittedly is a very difficult case which presents a very close question of law, given that Chaikin only made one comment and one strange smile (assuming plaintiff's version of the event which the court must do on a motion for summary judgment) and given that plaintiff's past history of work at the hospital could warrant termination since he was a probationary employee. However, plaintiff has raised triable issues of fact as to Chaikin's supervisory position in the Cardiology Department and whether Chaikin played a role in Alhaj's termination. Implicit in Hupart's testimony is an admission that he relied upon Chaikin to be the eyes and ears of the CHF program and cardiology department.

Defendants, including Chaikin, grossly minimized Chaikin's involvement with the CHF program and Alhaj, While Chaikin claims his first meeting with Alhaj was during a counseling session in August, the record reveals that Chaikin was involved with the CHF program from its

inception. By email dated July 28, 2015, Hupart informed Khanna and Alhaj that he wanted to meet with them about the proposal they were developing for the new CHF program designed to improve quality of care and a decreased need for hospitalization and rehospitalization after discharge; Chaikin was cc'd on this and another similar email dated June 29, 2015. By email dated August 3, 2015 to his supervisor John Masse, Hupart memorialized his meeting with Alhaj, Khanna and Chaikin the week before where in they presented (meaning Khanna and Alhaj) a program was too large in scope but that they will work with me (Huppart) and Erik (Chaikin) to "right size" and "improve on our 30d re admit rate and that he- Hupart- would work with him get the right size and improve the Hospital's admit rate." Contrary to Hupart's testimony, there is no evidence that an actual "counseling session" on the CHF program was ever held or that Hupart wrote Alhaj up on his deficiencies .

Alhaj's direct supervisor is Dr. Ashok Khanna is Chief of Cardiology. She stated in an affidavit that Alhaj's work performance while he was employed at Coney Island Hospital was of the "highest quality" and that she never received any complaints about his work performance, professionalism or work ethic. No one in the hospital informed her that Alhaj was to be terminated and she was never asked about his job performance by the individual defendants. [6] She could think of no reason for his termination.

All of these factors, coupled with Chaikin's incendiary comment, which could be viewed as a code word, made on the very day of Alhaj's termination which, perhaps coincidentally, occurred on 9/11, inures against this Court awarding summary judgment to defendants. As such, this case shall proceed to trial on the narrow issue of whether Alhaj termination was based upon discriminatory motives.

This constitutes the decision and order of the court.

DATED: October 10, 2022

Hon. Katherine A. Levine, J.S.C.

HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT

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[6]Since this court has already dismissed Alhaj's hostile environment and retaliation claims it will not summarize Khanna's affidavit on those points.

APPEARANCES

Attorneys for Plaintiff
Joseph J. Ranni, Esq.
RANNI LAW FIRM
148 North Main Street
Florida, NY 10921

Attorneys for Defendants
Sylvia Hinds-Radix
Office of the Corporation Counsel
100 Church Street
New York, NY 10007