UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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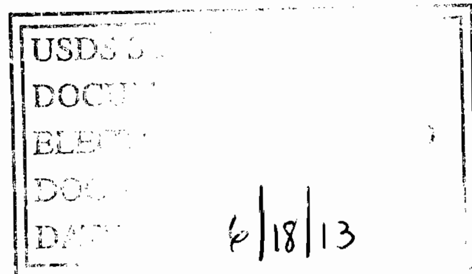
GILLRAY CADET,

Plaintiff,

11 Civ. 7964 (CM)

-against-



DEUTSCHE BANK SECURITIES INC.,
TOMAS DE CASTRO, and
STEPHEN CUNNINGHAM

Defendants.
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DECISION AND ORDER

McMahon, J:

This is a race discrimination case brought by an investment banker against his former employer and two of his former supervisors. Plaintiff Gillray Cadet, a black male, alleges that Defendant Deutsche Bank Securities Inc. ("DBSI") violated Title VII (Count 2) and Individual Defendants Tomas de Castro ("de Castro") and Stephen Cunningham ("Cunningham") violated 42 U.S.C. § 1981 ("Section 1981") (Count 1) through a variety of conduct and on the basis of a variety of legal theories. Defendants now move for summary judgment.

For the reasons set forth herein, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

The following facts are undisputed unless otherwise noted.

I. The Parties

Plaintiff Gillray Cadet is a black male from the Caribbean island of St. Lucia. At all relevant times, Plaintiff was an employee of DBSI in New York City.

Defendant DBSI is a financial services provider with offices located at 60 Wall Street in Manhattan.

At all relevant times, Defendant Tomas de Castro was the "staffer" for DBSI's Latin America ("Lat Am") Group, with responsibility for allocating work to Associates and Analysts.[1] Although Plaintiff contends that de Castro has made a number of conflicting representations about his ethnicity (*see* Pl.'s 56.1 Cntr-Stmt ¶ 3), de Castro testified at his deposition that he is of Asian, Hispanic, and African-American ancestry. (de Castro Depo. Tr. at 7-8.)

At all relevant times, Defendant Stephen Cunningham was employed by DBSI as a Managing Director and head of the Lat Am Group. Cunningham is white.

II. Facts

A. Plaintiff Joins DBSI's Lat Am Group

In or around July 2006, Plaintiff was hired as a full-time DBSI Associate. In February 2007, Cunningham agreed to Plaintiff's joining the Lat Am Group, which is part of DBSI's Corporate Finance division.

At all relevant times, DBSI had a written policy prohibiting discrimination, harassment, and retaliation. Plaintiff acknowledged his receipt of that policy and reviewed it when he joined DBSI.

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[1] Analyst is a more junior position than Associate.

B. Plaintiff's 2007 and 2008 Performance Appraisals

In connection with DBSI's "Multi-Source Feedback" performance evaluation process, Plaintiff was reviewed by a number of different people, including de Castro, who was ultimately responsible for "managing the collection of feedback" for Plaintiff's 2007 and 2008 appraisals. (de Castro Depo. Tr. at 55.) Plaintiff was evaluated on a five-point scale, with 1 being the lowest possible score ("fails to meet expectations") and 5 being the highest ("far exceeds expectations"). Plaintiff's "average score" could be calculated in two ways known as "PMO Average" and "MSF Average"; the parties dispute which is the relevant calculation. The parties also dispute exactly how many of the Associates at Plaintiff's tenure he outperformed in 2007 and 2008. (*See* Defs.' 56.1 Stmt ¶¶ 9-10; Pl.'s Cntr-Stmt ¶¶ 9-10.) However, it is beyond dispute that, in both years, under either calculation method, Plaintiff's average score was over a 4 ("exceeds expectations"), which put him ahead of a substantial portion of his class. It is also undisputed that de Castro gave Plaintiff a 3 ("meets expectations") in a number of categories in both 2007 and 2008.

C. Plaintiff's 2007 and 2008 Bonuses

During the relevant time period, DBSI's Associate Compensation Committee (the "Bonus Committee" or the "Committee")[2] had the ultimate say on Associate bonuses. In making these decision, the Committee considered, among other things, performance evaluation scores, scores from prior years, and a presentation by the Associate's group head and staffer. The Committee also performed its own, independent due diligence by speaking with individuals who had worked with each Associate. The Committee awarded Plaintiff a bonus of $115,000 in 2007

[2] The Committee is made up of certain DBSI group heads and other senior bankers.

and $60,000 in 2008. Bonuses in 2007 ranged from $40,250 to $245,000 and from $0 to $175,000 in 2008.

The parties disagree over how much influence de Castro and Cunningham had over the Committee's decisions with respect to Plaintiff's 2007 and 2008 bonuses and whether their input was detrimental to the calculation of those bonuses. (*See* Defs. 56.1 Stmt ¶¶ 11, 13, 16; Pl.s' 56.1 Cntr-Stmt ¶¶ 11, 13, 16.)

D. The Work Environment

Plaintiff alleges that, throughout 2007, 2008, and early 2009, de Castro – and, to a much lesser extent, Cunningham – systematically singled him out in a variety of ways for poor treatment due to his race. In particular, Plaintiff alleges that de Castro made three racially-tinged comments while Plaintiff was employed at DBSI, two in his presence and one out of his presence.

At a dinner in or around January 2008, a group of Lat Am Group personnel, which included Plaintiff and de Castro, was having a discussion about the group's diversity. de Castro led the conversation and went around the group and said what each person's ethnicity was. When de Castro got to Plaintiff, he said nothing, smirked, and raised a clenched fist. Plaintiff understood this to be a reference to the Black Power movement. (Pl.'s Depo. Tr. at 150-51.)

In January 2009, while Plaintiff was discussing the upcoming Martin Luther King Day holiday with a group of secretaries, de Castro walked up to them and said "sarcastically" (Plaintiff's word) that Martin Luther King Day is "only a holiday for some people." (*Id.* at 153-55.)

On an unspecified date, an Analyst in the Lat Am Group, Mansour Cortes ("Cortes"), allegedly heard de Castro tell a group of Analysts that he was "100% white," and that his dark

skin was a result of "being exposed to too much sun when he was a boy." (Cortes Aff. ¶ 103.) Plaintiff takes this as evidence that de Castro "denied" and "was ashamed of" his mixed-race ancestry. (Pl.'s 56.1 Cntr-Stmt ¶¶ 48, 52.)

Naturally, Defendants dispute all of these allegations. I discuss them in more detail below.

E. Plaintiff's Resignation

In March 2009, Plaintiff approached Cunningham and told him that he had decided to resign. Cunningham told Plaintiff to sleep on it and let him know the next day whether he truly wished to resign.

The next day, Plaintiff told Cunningham that he still wished to resign. Plaintiff had an exit interview with DBSI Human Resources Business Partner Jennifer Shtainer ("Shtainer").[3] Either during or soon after the exit interview, Plaintiff informed Shtainer that he wished to withdraw his resignation. Shtainer passed along this information to Cunningham.

Thereafter, Cunningham and Shtainer met with Plaintiff and informed him that DBSI would not allow him to withdraw his resignation. The parties dispute whether Cunningham had the authority to permit Plaintiff to withdraw his resignation. (*See* Defs.' 56.1 Stmt ¶ 27; Pl.'s 56.1 Cntr-Stmt ¶ 27.) While Cunningham testified unequivocally that he did not have such authority (Cunningham Depo. Tr. at 30-31), Shtainer's testimony suggests that, even though Cunningham may not have been able to unilaterally authorize Plaintiff to retract his resignation, he could have "funneled" Plaintiff's request up through "senior management" – i.e., he was something of a gatekeeper vis-à-vis employment in the Lat Am Group. (*See* Shtainer Depo. Tr. at 26-27.)

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[3] At the time, Shtainer went by the last name Itskovitch.

Plaintiff claims that he complained to Cunningham about de Castro's conduct at various points, but Cunningham took no action. It is undisputed that Plaintiff never told Cunningham that he believed that de Castro had been discriminating against him. The parties dispute whether Shtainer told Cunningham about Plaintiff's concerns about discrimination. (*See* Defs.' 56.1 Stmt ¶ 27; Pl.'s 56.1 Cntr-Stmt ¶ 27.)

As part of the exit process, Plaintiff filled out an exit questionnaire. (*See* Wallace Affirm. Ex. 22.) While he did not explicitly mention discrimination as a reason for his exit, Plaintiff did indicate that his primary reason for leaving was DBSI's "working environment/culture." (*Id.* at 1.) Plaintiff also wrote in response to a question about what DBSI could have done to prevent his resignation that DBSI could have "Addressed the issues which I raised regarding lack of fairness and unethical behavior of senior team members. There was no attempt to retain me." (*Id.* at 3.)

Following his departure from DBSI, Plaintiff sent email messages to Cunningham, congratulating him on his anniversary and wishing him well on his birthday.

E. Concerns about Plaintiff's Judgment

Both de Castro and Cunningham testified at their depositions that, during the course of Plaintiff's employment at DBSI, they had concerns about Plaintiff's judgment, stemming from two incidents. Plaintiff contends that these concerns are *post hoc* race-neutral justifications for DBSI's decision not to accept Plaintiff's retracted resignation.

First, in the summer of 2007, at de Castro's instruction, Plaintiff took a number of summer interns to a Mets game, followed by dinner and drinks in Manhattan. The tab for the evening came to approximately $1900, for which Plaintiff sought reimbursement from DBSI.

Plaintiff was reimbursed for approximately half of that amount. The gist of de Castro's testimony is that he felt that Plaintiff had gone overboard in entertaining the summer interns.

Second, in 2008, Michael Vigliotti ("Vigliotti"), a DBSI Managing Director, questioned Plaintiff about possible violations of DBSI's late-night car service policy, because he was making additional stops en route to his home. Plaintiff asserts that he made a mistake and offered to reimburse the company.

III. Procedural History

In or around December 2009, Plaintiff filed a complaint against DBSI with the New York State Division of Human Rights, alleging race discrimination and retaliation. (*See* Wallace Affirm. Ex. 24.) DBSI responded with a "position statement" on March 19, 2010. (*See id.* Ex. 13.) It is not clear from the record what the outcome of those proceedings was.

Plaintiff filed this action on November 7, 2011. Defendants answered on January 27, 2012 and moved for summary judgment on October 5, 2012.

As stated above Plaintiff, who is represented by counsel, brings two causes of action: Section 1981 violations against the Individual Defendants (Count 1) and Title VII violations against DBSI (Count 2). Plaintiff does not bring Title VII claims against the Individual Defendants – nor could he, as Title VII does not permit suit against individuals. *See Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004).

Plaintiff brings his two causes of action under numerous legal theories and on the basis of a variety of alleged conduct. Nailing down exactly what legal theories Plaintiff is asserting and what conduct supports those theories has been something of a challenge, as neither Plaintiff's complaint nor his opposition brief is particularly well organized or clear. That said, it is now clear to the Court that Plaintiff bases his causes of action on the following legal theories: (1)

race discrimination (i.e., adverse employment actions taken against Plaintiff on the basis of his race); (2) hostile work environment/constructive discharge/verbal harassment; (3) retaliation; and (4) failure to promote.

DISCUSSION

I. Standard of Review

A party is entitled to summary judgment when there is "no genuine issue as to any material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247–48 (1986). On a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the nonmoving party must present "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson*, 477 U.S. at 248.

To withstand a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmoving party. Summary judgment is designed to flush out those cases that are

predestined to result in directed verdict. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997).

II. Plaintiff's Discrimination Claims Are Dismissed in Part

Courts analyze both Title VII and Section 1981 claims under the Supreme Court's familiar *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Patterson*, 375 F.3d at 225-27.

First, the plaintiff must establish a prima facie case by proving that he: (1) is a member of a protected class; (2) was qualified for his position; (3) was subject to an adverse employment action; and (4) suffered under "circumstances giving rise to an inference of discrimination." *Terry v. Ashcroft*, 336 F.3d 128, 137–38 (2d Cir. 2003). "[A]lthough in certain circumstances a Title VII claim may be established through proof of a defendant's mere negligence, without a showing of discriminatory intent, a plaintiff pursuing a claimed violation of § 1981 . . . must show that the discrimination was intentional." *Patterson*, 375 F.3d at 226.

If the plaintiff succeeds in establishing his prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for its challenged action. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Terry*, 336 F.3d at 138.

If the employer does so, the *McDonnell Douglas* presumptions disappear. In a race discrimination case, the plaintiff must then adduce sufficient evidence to support a reasonable inference that discrimination occurred. *See James v. New York Racing Ass'n.*, 233 F.3d 149, 156 (2d Cir. 2000). The relevant factors in this determination "include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." *Davis v. City of New York*, 99 Civ. 4955,

2003 WL 22832165, at *3 (S.D.N.Y. Nov. 25, 2003) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-49 (2000)).

There is no dispute that Plaintiff satisfies the first two elements of his prima facie case: he is a member of a protected class (he is black) and Defendants do not challenge that he was qualified for his position.

As I read Plaintiff's complaint, as well as Plaintiff's statement of his claims in the parties' proposed joint pretrial order, Plaintiff alleges that Defendants discriminated against him on the basis of his race in the following ways: (1) downgrading Plaintiff's 2007 and 2008 performance scores by giving him a 3 ("meets expectations") in a handful of categories; (2) giving Plaintiff lower bonuses in 2007 and 2008 than were originally recommended, and lower bonuses than white and other non-black Associates; (3) denying Plaintiff training, mentoring, and advancement opportunities (elsewhere, Plaintiff describes this allegation as a denial of "coaching"); (4) not assigning Plaintiff to "live" deals that he had helped to pitch; (5) harassing Plaintiff verbally; (6) refusing to provide Plaintiff with sufficient Analyst support; (7) failing to promote Plaintiff to Vice President ("VP"); and (8) not allowing Plaintiff to rescind his resignation. All claims are asserted against DBSI. With respect to the Individual Defendants, items 1, 3, 4, 5, and 6 are leveled at de Castro alone. Item 8 is leveled at Cunningham alone.

Each of items 1 (performance appraisals), 2 (bonuses), 3 (coaching), 4 (live deals), and 6 (Analyst support) qualifies as an adverse employment action. *See Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 446 (2d Cir. 1999). Plaintiff has raised genuine issues of material fact as to whether each of these was the product of race discrimination. Therefore, Defendants' motion for summary judgment must be denied in part.

A. Plaintiff's Performance Appraisals

Having reviewed Plaintiff's evaluations ((DeBraun Affirm. Exs. M (2007) and K (2008)), I could dedicate several pages of this opinion to recounting all of the positive and encouraging things de Castro wrote about Plaintiff. Plaintiff himself admitted that his reviews were good. (*See* Pl.'s Depo. Tr. at 115-17.) And no matter which calculation is the relevant one, Plaintiff's average score was above a 4 in both 2007 and 2008 – i.e., in de Castro's opinion, Plaintiff was generally exceeding expectations. Neither performance appraisal on its face looks like an adverse employment action.

The crux of Plaintiff's claim with respect to his performance appraisals is that he would have had a higher score (and, presumably, a larger bonus) but for de Castro's decision to grade Plaintiff a 3 in a handful of categories. Plaintiff claims that this scoring reflects racial "bias." Plaintiff points to the fact that the majority of his other reviewers did not give him a 3 in those categories. (*See* Pl.'s Depo. Tr. at 100, 102.) Plaintiff also suggests that a Lat Am Group reviewer giving an Associate a 3 was something that was not done, because the group "made sure [to] rate [its] people as highly as possible." (Pl.s Depo. Tr. at 102, 106-7.)

Assigning a lesser rating to an Associate is an adverse employment action for the purposes of this motion, especially since Plaintiff's bonuses depended in part on his performance appraisals.

Plaintiff does not offer any evidence that other black employees' performance appraisals were similarly downgraded by de Castro, while the evaluations of white or other non-black employees were not. Instead, Plaintiff appears to rely exclusively on de Castro's allegedly racially-tinged remarks (described above) to support his assertion that de Castro's conduct was motivated by Plaintiff's race.

"The circumstances that give rise to an inference of discriminatory motive include [*inter alia*] . . . remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus." *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996). While it is not at all obvious that de Castro's remarks evinced any racial animus, I agree with the Seventh Circuit that "the task of disambiguating ambiguous utterances is for trial, not for summary judgment." *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990). Moreover, I am compelled to view the record in the light most favorable to Plaintiff and draw all reasonable inferences in his favor. *Matsushita*, 475 U.S. at 587 (1986).

Defendants assert that de Castro felt his scores were justified in light of Plaintiff's actual performance. Whether that is pretextual is for the jury to decide.

In sum, I find that Plaintiff has carried his burden to demonstrate that there is a genuine issue fact as to whether de Castro's downgrading of Plaintiff's performance appraisals constituted race discrimination.

B. Plaintiff's Bonuses

Plaintiff alleges that, despite his high performance appraisals, he was consistently placed in the lowest band for bonuses on account of his race. He blames de Castro and Cunningham for this. In particular, he alleges that de Castro and Cunningham manipulated the Associate Bonus Committee's final determination of his bonus. This was undoubtedly an adverse employment action.

Plaintiff offers more evidence to support his bonus claim than he does to support his performance appraisal claim. In addition to de Castro's ambiguous, potentially racially-tinged remarks, Plaintiff points to ample evidence that there were racial disparities in how bonuses reflected performance appraisals at DBSI – i.e., white and other non-black Associates received

higher bonuses than did black employees, and those bonuses were correlated with their high performance appraisals. (*See* Pl.'s 56.1 Cntr-Stmt ¶¶ 65-79.) Plaintiff also offers evidence that the Committee initially recommended that he receive a higher bonus than he got, and that Cunningham may have had a role in downgrading him. (*See, e.g.,* Shtainer Depo. Tr. at 96-99, 126-27.) By contrast, Cunningham allegedly increased a non-black banker's bonus. (*See* Pl.'s 56.1 Cntr-Stmt ¶¶ 81-82.) Finally, Mansour Cortes, the only other black banker in the Lat Am Group during Plaintiff's tenure, testified that his "bonuses did not reflect [his] actual work performance and should have been higher," thereby corroborating Plaintiff's account that bonuses were doled out in a racially suspect manner at DBSI. (Cortes Aff. ¶ 43.)

Defendants counter that bonuses were ultimately decided by the Committee, not by de Castro and Cunningham, who did not sit on the Committee. The Individual Defendants did make presentations to the Committee concerning Plaintiff's performance, but de Castro testified at his depositions that he "fought" and "advocated" for Plaintiff in front of the Associate Bonus Committee. (*See* de Castro Depo Tr. at 73-75, 97-99, 238-39, 250-51.) Cunningham, for his part, could not recall what he said to the Committee. (*See* Cunningham Depo. Tr. at 66-68.) Defendants also note that performance appraisals were only part of the bonus calculation, and the Committee carried out its own due diligence in reaching a final number.

All this does is demonstrate that there is a genuine issue of material fact. Accordingly, this issue must also be submitted to a jury.

C. Live Deals

Plaintiff alleges that de Castro "refused" to assign Plaintiff to live deals that he had been instrumental in pitching for DBSI, when it was customary for those heavily involved in the pitch to also be assigned to the deal's execution. At his deposition, Plaintiff identified two such deals:

a telecoms project in Mexico and a financial institution project in Brazil. (*See* Pl.'s Depo. Tr. at 66-67.) When asked for further examples, Plaintiff responded that "We can make a note to come back. I will give it some more thought." (*Id.* at 68.) Plaintiff did not come back to it, and he points to no other deals that he helped pitch but to which he was not assigned.

Assignment (or lack of assignment) qualifies as an adverse employment action, since such exposure was integral for career advancement. (*See* de Castro Dep. Tr. at 282-83.)

Here, too, Plaintiff comes forward with evidence from which a jury could reasonably infer that Plaintiff's lack of live deal exposure was motivated by his race: de Castro's racially-tinged remarks, coupled with Cortes's corroboration of Plaintiff's assertion that live deal exposure was meted out by race. (*See* Cortes Aff. ¶¶ 23-29.)

Defendants have come forward with a race-neutral explanation for de Castro's failure to assign Plaintiff to certain deals that he had been involved in pitching – namely, that the Lat Am Group's resources were limited, particularly with respect to Associates, of which Plaintiff was the only one for a substantial period of his employment. (*See* Pl.'s Depo. Tr. at 48, 63-64, 143-44.) As a result, personnel who helped to pitch certain deals could not always be staffed to those deals. (*See* de Castro Depo. Tr. at 290-91.) If credited by a jury, this explanation would indeed defeat Plaintiff's discrimination claim with respect to his live deal exposure. However, all Defendants have done is demonstrate once again that there is a genuine issue of material fact as to whether de Castro discriminated against Plaintiff in not assigning him to deals that he had pitched.

D. Analyst Support

Plaintiff alleges that de Castro regularly denied him assistance from Analysts, which forced Plaintiff "to perform the work of both an analyst and an associate." (Pl.'s 56.1 Cntr-Stmt

¶ 43.) In his complaint, Plaintiff points to just one incident in January 2009 in which de Castro allegedly denied him Analyst support in connection with an unspecified project. (*See* Compl. ¶¶ 69-74.) At his deposition, Plaintiff was unable to identify another such instance. It would be hard to conclude, on that record, that Plaintiff had succeeded in raising the necessary disputed issue.

However, Cortes testified that Plaintiff only received Analyst assistance "sporadically," whereas other non-black Associates always got the assistance they required. (Cortes Aff. ¶¶ 79-84.) And, as already noted multiple times, de Castro's racially-tinged remarks (assuming the trier of fact concludes that they were "racially-tinged") also support Plaintiff's claim.

Defendants again cite the lack of manpower in the Lat Am Group as the reason why Plaintiff did not always get the support he needed. But Plaintiff has succeeded in raising a genuine issue of fact concerning his claim that he was denied analysis support – a perquisite of employment – because of his race.

E. Coaching

Plaintiff alleges that de Castro failed to "coach" him – i.e., de Castro denied Plaintiff "mentoring" and "positive encouragement" that was not denied to non-black bankers. (*See* Pl.'s Depo. Tr. at 49, 68, 196; Pl's Opp'n at 21; Pl.'s 56.1 Cntr-Stmt ¶¶ 45-47.) Cortes's testimony once again corroborates Plaintiff's allegations. (*See* Cortes Aff. ¶¶ 15-16.)

Plaintiff has demonstrated that there is a genuine issue of material fact as to whether de Castro's alleged failures in mentoring constituted race discrimination.

III. Plaintiff's Hostile Work Environment and Verbal Harassment Claims Fail

While some or all of the discrete acts outlined above could constitute discrete instances of race discrimination in employment, neither singly nor taken together do they add up to a hostile work environment.

The hostile work environment theory of race discrimination, first recognized in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), provides a remedy for employees who experience behavior that manifests discrimination, not through discrete adverse employment actions, like those cited by Plaintiff, but by teasing, harassing, ridiculing, and insulting someone because of his race. To establish the existence of a hostile work environment, the plaintiff must demonstrate that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citation and quotation marks omitted); *see also Dawson v. Cnty. of Westchester*, 373 F.3d 265, 272 (2d Cir. 2004). "A jury must be able to conclude that the work environment both objectively was, and subjectively was perceived by the plaintiff to be, sufficiently hostile to alter the conditions of employment for the worse." *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 604 (2d Cir. 2006).

"Courts look to the totality of the circumstances in determining whether a plaintiff has established a hostile work environment claim, considering factors 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.'" *Dawson*, 373 F.3d at 272 (quoting *Harris*, 510 U.S. at 23). "[M]ere utterance of an epithet which engenders offensive feelings in a employee does not sufficiently affect the

conditions of employment to implicate Title VII." *Harris*, 510 U.S. at 21 (internal quotation citation, quotation marks, and editing omitted). Similarly, "Conduct that is merely offensive, unprofessional, or childish cannot support a hostile work environment claim. Nor can offhand comments, isolated incidents, stray remarks, or [the plaintiff's] subjective belief constitute a viable claim." *Payton v. City Univ. Of New York*, 453 F. Supp. 2d 775, 785 (S.D.N.Y. 2006) (internal citation and quotation marks omitted).

Furthermore, because a hostile work environment claim is, in effect, an aggravated verbal or physical harassment claim, no such claim can survive a motion for summary judgment if the record does not contain evidence of verbal or physical harassment. *Cf. Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998); *Washington v. E. Harlem Council for Cmty. Imp., Inc.*, No. 06 Civ. 6186, 2006 WL 3497860, at *2 (E.D.N.Y. Dec. 5, 2006); *Mullen v. City of New York*, No. 02 Civ.103, 2003 WL 21511952, at *8 (S.D.N.Y. July 1, 2003).

The fact that Plaintiff has raised a genuine issue of material fact concerning discrete instances of discrimination does not mean that he has raised a genuine issue of fact on the issue of whether DBSI was a hostile work environment. The standard for establishing a hostile work environment is different (and arguably higher) than that for a simple discrimination claim. *Cf. Ennis v. Sonitrol Mgmt. Corp.*, No.02 Civ. 9070, 2006 WL 177173, at *3 (S.D.N.Y. Jan. 25, 2006); *Smith v. AVSC Int'l, Inc.*, 148 F. Supp. 2d 302, 310 (S.D.N.Y. 2001).

Here, Plaintiff alleges that de Castro unfairly singled him out for criticism, said various negative things about him, and made two racially-tinged comments in his presence and one out of his presence. To wit, de Castro allegedly:

- told Plaintiff and others in the Lat Am Group that they "wouldn't make it at Morgan Stanley," (Pl.'s Depo. Tr. at 48-49);

- cut Plaintiff off during conference calls or "look[ed] . . . unhapp[y]" if Plaintiff did make a comment, (*id.* at 50);
- said "loudly for the entire group to hear" that Plaintiff's work on a certain "model" was slow, (*id.* at 50-51);
- "sp[oke] badly" about Plaintiff "openly to the group" to the point where certain Analysts with whom Plaintiff was close were "tainted" by association and others began avoiding him for fear of getting in trouble with de Castro, (*id.* at 132-35);
- told certain members of the Lat Am Group that being assigned to projects in Chile, as Plaintiff had been, was a "poor reflection on you in the group," (*id.* at 138); and
- "accused" Plaintiff of wanting to "hang out" in Peru for the weekend after the client had asked Plaintiff to stay in the country for an extra day to do some additional site visits, (*id.* at 144-48).

de Castro's racially-tinged comments, as described in more detail above, allegedly included a reference to the Black Power movement, a disparaging remark about Martin Luther King Day, and a representation that he was "100% white."

The bulleted remarks outlined above were, at best, "merely offensive, unprofessional, or childish," and thus cannot support a hostile work environment or harassment claim. *Payton*, 453 F. Supp. 2d at 785. Plaintiff's subjective belief that they were racially-motivated is not sufficient to create a genuine issue of material fact with respect to whether de Castro created a hostile work environment or harassed Plaintiff. *Id.*; *see also Schiano*, 445 F.3d at 604. As the Supreme Court has noted, "Title VII . . . does not set forth 'a general civility code for the American workplace.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale*, 523 U.S. at 80).

de Castro's allegedly racially-tinged comments are also insufficient to support Plaintiff's hostile work environment claim. Even assuming *arguendo* that de Castro meant his comments to be hostile and racially-tinged (which is not at all obvious), he made only three such comments over the course of Plaintiff's nearly three years of employment with the Lat Am Group, This is

the very definition of "stray remarks" or "isolated incidents" that do not demonstrate a pervasive pattern of racial harassment. *See Payton*, 453 F. Supp. 2d at 785.

Plaintiff also argues that, "A major factor that rendered Plaintiff's working conditions intolerable in the first place and that triggered his decision to resign was Mr. Cunningham's total inaction in the face of [Plaintiff's] complaints" about de Castro. (Pl.'s Opp'n at 19.) For example, when Plaintiff told Cunningham that he intended to resign because de Castro was "making [his] life difficult," Cunningham allegedly brushed him off and told him to "leave things in the past." (Pl.'s Depo. Tr. at 194; *see also* Compl. ¶¶ 102-03.) Plaintiff also allegedly complained to Cunningham about de Castro after he received his 2007 bonus and in connection with de Castro's remark about working on projects in Chile (see above); Cunningham allegedly ignored Plaintiff then, too. (Pl.'s Depo. Tr. at 138-39.) Plaintiff could recall no other examples (*see id.* at 139); rather, he testified generally that Cunningham was "looking out for himself and de Castro." (*Id.* at 201.)

But Plaintiff admitted that he never told Cunningham that he felt that de Castro had discriminated against him on the basis of his race. (*See id.* at 194.) Furthermore, the environment could not have been too hostile to tolerate, since Plaintiff, having resigned, tried shortly thereafter to rescind his resignation and return to that same "intolerable" envionrment.

Plaintiff has failed to raise a genuine issue of fact as to his hostile work environment claim. Therefore, Defendants' motion for summary judgment dismissing that claim is granted. Plaintiff's verbal harassment claim must also be dismissed, because it is simply another way of asserting a hostile work environment claim. *Cf. Oncale*, 523 U.S. at 80; *Washington*, 2006 WL 3497860, at *2; *Mullen*, 2003 WL 21511952, at *8.

IV. Plaintiff's Claims Relating to His Resignation Are Dismissed

Plaintiff alleges that his resignation was involuntary – i.e., it was the product of a constructive discharge. *See Chamblee v. Harris & Harris, Inc.*, 154 F. Supp. 2d 670, 675 (S.D.N.Y. 2001). Plaintiff also alleges that Cunningham and DBSI discriminated and retaliated against him by not allowing him to rescind his resignation.

I conclude: (1) no reasonable jury could conclude that Plaintiff's resignation was involuntary, so Plaintiff's constructive discharge claim is dismissed; and (2) DBSI/Cunningham's failure to permit Plaintiff to retract his resignation does not constitute an adverse employment action as a matter law, so Plaintiff's race discrimination claim, to the extent it is predicated on the failure to allow him to change his mind, is dismissed, as is his retaliation claim.

A. Plaintiff's Constructive Discharge Claim Fails

A voluntary resignation does not constitute an adverse employment action unless the plaintiff was constructively discharged – i.e., the resignation was in fact *involuntary* as a result of coercion or duress. *See Chanval Pellier v. British Airways, Plc.*, No. 02 Civ. 4195, 2006 WL 132073, at *4 (E.D.N.Y. Jan. 17, 2006). "Constructive discharge of an employee will occur only 'when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Trinidad v. New York City Dep't of Correction*, 423 F. Supp. 2d 151, 168 (S.D.N.Y. 2006) (quoting *Chamblee*, 154 F.Supp.2d at 675). "Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case" such as this one, where Plaintiff bases his constructive discharge

claim on the same conduct as his hostile work environment and harassment claims. *Suders*, 542 U.S. at 147, 149.

The fact that Plaintiff attempted to rescind his resignation severely undermines any inference that DBSI had become such a hostile work environment that Plaintiff felt compelled to resign. *See Trinidad*, 423 F. Supp. 2d at 168; *see also Finkelshteyn v. Staten Island Univ. Hosp.*, 687 F. Supp. 2d 66, 86 (E.D.N.Y. 2009) (citing *Trinidad*); *Alkhatib v. Steadman*, No. 10 Civ. 342, 2011 WL 5553775, at *7 n.7 (S.D. Ala. Nov. 15, 2011) (same); *Hammonds v. Hyundai Motor Mfg. Alabama, LLC*, No. 10 Civ. 103, 2011 WL 2580168, at *4 (M.D. Ala. June 28, 2011) (same); *Rutledge v. SunTrust Bank*, No. 05 Civ. 536, 2007 WL 604966, at *7 (M.D. Fla. Feb. 22, 2007) (same), *aff'd*, 262 F. App'x 956 (11th Cir. 2008). Indeed, this fact alone is probably sufficient to grant Defendants' motion for summary judgment dismissing Plaintiff's constructive discharge claim.

However, Plaintiff's constructive discharge claim also fails because, as discussed above, Plaintiff has not raised a genuine issue of fact as to his hostile work environment claim. Absent that, Plaintiff has not established the necessary predicate to a "compound" hostile work environment/constructive discharge claim. *Suders*, 542 U.S. at 147, 149.

B. DBSI's Refusal to Allow Plaintiff to Rescind His Voluntary Resignation Did Not Constitute an Adverse Employment Action

Plaintiff alleges that he was discriminated and retaliated against when DBSI (and, specifically, Cunningham) refused to permit him to retract his voluntary resignation. Some of Plaintiff's testimony arguably indicates that he does not believe that Cunningham's decision not to allow him to rescind his resignation was race discrimination. (*See* Pl.'s Depo. Tr. at 201.) For

the purposes of this motion, I will assume that Plaintiff asserts that Cunningham's decision constituted both discrimination and retaliation.

Either way, Defendants are entitled to summary judgment dismissing Plaintiff's claims arising out of DBSI/Cunningham's decision not to accept Plaintiff's retraction of his resignation.

Claims of discrimination and retaliation both require the plaintiff to come forward with evidence that he suffered an "adverse employment action" as a result of being a member of protected class, in the case of discrimination, or as a result of engaging in a protected activity, in the case of retaliation. *See Terry v. Ashcroft*, 336 F.3d 128, 137–38 (2d Cir. 2003); *McMenemy v. City of Rochester*, 241 F.3d 279, 282-83 (2d Cir. 2001).

As already noted, there is no dispute that Plaintiff is a member of protected class. While there is no dispute that Plaintiff engaged in protected activity by complaining about race discrimination to Shtainer, there is a dispute as to whether *Cunningham* knew about Plaintiff's complaints when he refused to let Plaintiff retract his resignation. For the purposes of this motion, I will assume Cunningham did know.

Defendants argue that DBSI/Cunningham's decision not to allow Plaintiff to retract his voluntary resignation was not an adverse employment action. I agree.

An adverse employment action in the discrimination context is a "materially adverse change" in the terms and conditions of the plaintiff's employment. *See Richardson*, 180 F.3d at 446. In the retaliation context, the definition of an adverse employment action is broader, *see Gentile v. Potter*, 509 F. Supp. 2d 221, 238 (E.D.N.Y. 2007): "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of

discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks omitted).

Federal courts across the country have held that "the refusal to allow rescission of a voluntary resignation does not constitute an adverse action." *Hammonds*, 2011 WL 2580168, at *4 (collecting cases). The reason for this is simple: employers are not usually obligated to allow their employees to rescind their resignations. *See Smith v. DeTar Hosp. LLC*, No. 10 Civ. 83, 2012 WL 2871673, at *13 (S.D. Tex. July 11, 2012); *cf. Wilkerson v. Springfield Pub. Sch. Dist. No. 186*, 40 F. App'x 260, 263 (7th Cir. 2002); *Schofield v. Metro. Life Ins. Co.*, No. 03 Civ. 0357, 2006 WL 2660704, at *9 (M.D. Pa. Sept. 15, 2006) *aff'd*, 252 F. App'x 500 (3d Cir. 2007). Indeed, there is a presumption under New York law that employment is at-will, and thus terminable at any time by either party. *See Baron v. Port Auth. of New York & New Jersey*, 271 F.3d 81, 85 (2d Cir. 2001). Thus, in the absence of a duty to permit an employee to rescind his resignation, it is not an adverse employment action – for the purposes of a discrimination claim or a retaliation claim – for an employer to take the employee at his word that he wants out and not reinstate him if he changes his mind. *See Hammonds*, 2011 WL 2580168, at *4; *MacLean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1300, 1303 (M.D. Fla. 2002).

Plaintiff argues that this case is distinguishable from those cited above because Plaintiff "retracted his resignation within a day of tendering it and obviously while still employed at DBSI and [because] Mr. Cunningham's refusal to accept the retraction was itself retaliatory after he learned in the interim that Plaintiff had complained about his supervisor's discrimination." (Pl.'s Opp'n at 23.) Nothing in the case law suggests that an employee is entitled to some kind of grace period during which he is free to reconsider his resignation or that an employer is obligated to allow him to rescind if he does so within a brief period of time. Here, Cunningham did give

Plaintiff an opportunity to reconsider his resignation, and Plaintiff decided to submit it anyway! And even granting Plaintiff the benefit of assuming that (1) he did in fact complain about race discrimination to Shtainer, (2) she communicated Plaintiff's concerns to Cunningham, and (3) Cunningham had the authority to reinstate Plaintiff – all of which is disputed – there is still nothing in the record that rebuts the presumption that Cunningham had no obligation to permit Plaintiff – an at-will employee who as a matter of law had not been constructively discharged – to rescind his resignation, or even to pass along his desire to do so to senior management. This Court will not impose obligations that do not otherwise exist under the law.

In sum, because Plaintiff's "resignation was voluntary and not a result of coercion or duress, there [was] no constructive discharge and [DBSI's] failure to accept [Plaintiff's] rescission of [that] voluntary resignation [was] not an adverse employment action." *Hammond*, 2011 WL 2580168, at *4. Accordingly, Plaintiff's discrimination claims are dismissed to the extent it is based on DBSI/Cunningham's failure to accept his retraction of his resignation. Plaintiff's retaliation claim is dismissed in its entirety.

V. Plaintiff's Failure to Promote Claim Fails as a Matter of Law

Plaintiff alleges that Defendants' failure to promote him to VP constituted race discrimination.

To survive summary judgment on a failure to promote claim, the plaintiff must come forward with evidence that (1) he is a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) he was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709 (2d Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

The essence of Plaintiff's failure to promote claim is that if he had "remained employed at DBSI, he would have become eligible for promotion to VP in or about February 2010." (Pl.'s 56.1 Cntr-Stmt ¶ 131.) But Plaintiff did not remain employed at DBSI; as discussed above, he resigned voluntarily in March 2009. So what Plaintiff is truly complaining about is DBSI's failure to allow him to rescind his resignation, which claim I have already dismissed. Since Plaintiff was not eligible for promotion prior to the time he quit, he fails to make out one of the elements of his prima facie case of discrimination on this ground.

Plaintiff's contention that de Castro and Cunningham had already decided that Plaintiff would not be promoted when he was eligible in light of his "judgment issues" (a justification that Plaintiff argues was pretextual) does not resurrect his claim. (*See* Pl.'s Opp'n at 12; *see also* Cunningham Depo. Tr. at 133-34.) The fact is, Plaintiff quit his job before he became eligible for a promotion, so he has no claim for failure to promote. The law does not recognize a claim for "possible future failure to promote."

So Plaintiff's failure to promote claim is deficient as a matter of law and therefore must be dismissed.

VI. Cunningham is Not Entitled to Summary Judgment Dismissing Plaintiff's Section 1981 Discrimination Claim Against Him

Defendants argue that the discrimination case against Cunningham – which, following all of the above, boils down to the alleged manipulation of Plaintiff's bonuses – must be dismissed for a number of additional reasons.

First, as noted above, Defendants claim that Plaintiff "admit[ted] that Mr. Cunningham did not engage in discriminatory conduct towards him." (Defs.' Support Memo. at 20 (citing Pl.'s Depo. Tr. at 201).) Viewing the record in the light most favorable to Plaintiff (as I must),

the context suggests that Plaintiff was saying that Cunningham's decision not to allow him to rescind his resignation was not race discrimination, rather than Cunningham's conduct vis-à-vis Plaintiff's bonuses. (*See id.* at 200-01.) This may be a generous reading. In any event, Defendants have some choice testimony with which to cross-examine Plaintiff.

Second, Defendants note that Plaintiff continued to send Cunningham birthday and anniversary greetings after Plaintiff left DBSI. That may be some evidence that Cunningham harbored no race-based animus against Plaintiff, but it does no more than raise a genuine issue of fact.

Third, Defendants argue that Cunningham is entitled to "the presumption of nondiscrimination that arises where the same supervisor is involved in both the decision to hire and the alleged discriminatory act." (Defs.' Support Memo. at 20 (citing, *inter alia*, *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997).) However, Defendants make this argument in connection with Cunningham's decision not to accept Plaintiff's rescission of his resignation, not Cunningham's alleged manipulation of Plaintiff's bonuses, so the argument is arguably moot. In any event, this is an argument more properly made to a jury. *Cf. Copeland v. Rosen*, 38 F. Supp. 2d 298, 305 (S.D.N.Y. 1999).

In sum, I find that a genuine issue of material fact exists as to whether Cunningham discriminated against Plaintiff in violation of Section 1981.

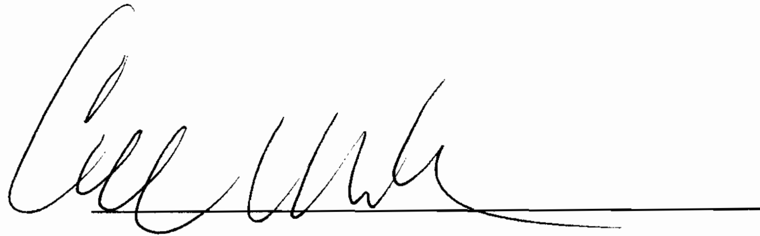
CONCLUSION

For the reasons set for above, Defendants' motion for summary judgment is granted in part and denied in part.

The parties must submit an amended joint pretrial order reflecting the findings of this opinion by July 3, 2013.

The Clerk of the Court is directed to remove the motion at Docket No. 24 from the Court's list of pending motions.

Dated: June 18, 2013



U.S.D.J.

BY ECF TO ALL COUNSEL