UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIAN SMITH,

Plaintiff,

- against -

COUNTY OF SULLIVAN,

Defendant.

05 Civ. 9114 (LMS)

DECISION AND ORDER

Plaintiff Julian Smith (herein, "Plaintiff") brings this race-based employment discrimination lawsuit against his former employer Defendant County of Sullivan, New York (herein, "Defendant"), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and the New York Human Rights Law, N.Y. EXEC. LAW §296, for alleged acts of disparate treatment, retaliation, and the creation of workplace conditions that caused the Plaintiff's constructive discharge from his position of employment as a Correction Officer in the Sullivan County Jail. See Docket #1, Plaintiff's Complaint (herein, "Compl."). Following a period of pretrial discovery, the Defendant now moves for summary judgment and the dismissal of the Plaintiff's Complaint under Rule 56 of the Federal Rules of Civil Procedure for failure to establish a genuine issue of material fact. See Docket #13, Defendant's Motion for Summary Judgment. Pursuant to 28 U.S.C. §636(c), the parties have consented to the undersigned's jurisdiction for all purposes, including the resolution of dispostive motions and trial. For the following reasons, the Defendant's motion for summary judgment is granted in part and denied in part.

BACKGROUND

A. Facts

The parties do not dispute the following facts that are material to a decision in this case unless where otherwise noted.

The Plaintiff, who is African American, began working at the Sullivan County Jail as a Correction Officer with the Sullivan County Sheriff's Department in May of 1996. See Docket #17, Defendant's Rule 56.1 Statement (herein, "Def's 56.1 Statement") at ¶¶1, 2; see Docket #21, Plaintiff's Opposition, Exhibit 1, Plaintiff's Rule 56.1 Counter-Statement (herein, "Pl's 56.1 Counter-Statement") at ¶1. In his role as a Correction Officer, the Plaintiff personally interacted with inmates at the Sullivan County Jail and was responsible for maintaining an orderly environment within the facility.

The gravamen of the Plaintiff's Complaint is that he and fellow African American employees were subjected to disparate working conditions at the Sullivan County Jail. See Pl's 56.1 Counter-Statement at ¶4, 5. As examples, the Plaintiff alleges that African American employees were denied breaks during their work shifts and leaves from work that were extended to "less senior Caucasian officers," see Pl's 56.1 Counter-Statement at ¶4, and that they were also subjected to a higher rate of disciplinary action than other Caucasian workers, see id. at ¶5. Specifically, the Plaintiff contends that he was disciplined based only upon his race for providing tobacco products to inmates in January of 2002 after he distributed two cigars to two inmates. See Def's 56.1 Statement at ¶¶10-12; Pl's 56.1 Counter-Statement at ¶¶7, 11, 12. The Plaintiff submits that prior to the adoption of a comprehensive smoking ban within the facility in March of 2004, tobacco products were distributed routinely to inmates by corrections personnel without

recourse from the prison's administration, and at times such products were distributed to inmates at the encouragement of the administration. See Pl's 56.1 Counter-Statement at ¶¶7-10. Additionally, the Plaintiff contends that neither he nor other corrections personnel were ever informed that a cigar was an impermissible form of tobacco that was prohibited from being distributed to inmates. See Pl's 56.1 Counter-Statement at ¶13. Counter to these allegations, the Defendant maintains that the Plaintiff's distribution of cigars was in violation of County Jail Policy #120, which prohibits gifts and gratuities from being exchanged between prison personnel and inmates. See Def's 56.1 Statement at ¶¶11, 12; see Docket #14, Affidavit of Kenneth LaPorte (herein, "LaPorte Affidavit") at Exhibit I.

The Plaintiff was charged with violating Policy #120's ban on giving or receiving gifts or gratuities in January of 2002, and a hearing was held before a Hearing Officer on August 6, 2002, pursuant to New York Civil Service Law §75. See Def's 56.1 Statement at ¶13. The Hearing Officer found the Plaintiff guilty of two instances of misconduct and recommended that the Plaintiff be suspended for fifteen days for each instance of misconduct. See Def's 56.1 Statement at ¶14. On September 20, 2002, Colonel Kenneth LaPorte informed the Plaintiff that he was adopting the Hearing Officer's recommendation and that the Plaintiff would be suspended for a total of thirty days without pay. See Def's 56.1 Statement at ¶16; see Pl's 56.1 Counter-Statement at ¶18. Elaborating on these facts, the Plaintiff maintains that Policy #120 "was regularly violated" by prison personnel, see Pl's 56.1 Counter-Statement at ¶16, and that although the prison had a specific anti-contraband policy that ostensibly would cover this alleged malfeasance for providing impermissible tobacco products to inmates, the Plaintiff was charged with violating the more generic provision prohibiting the giving or receiving of gifts under Policy

#120, see Pl's Counter-Statement at ¶17.

Following the County Jail Administrator's September 2002 decision to suspend the Plaintiff for thirty days without pay, the Plaintiff filed a charge of race-based discrimination with the New York State Division of Human Rights (herein, "NYSDHR") for the alleged selective enforcement of the County Jail's policies. See Pl's 56.1 Counter-Statement at ¶¶21, 22. The Plaintiff asserts that subsequent to filing the complaint with the NYSDHR, he was summoned to meet with Undersheriff Decker in February of 2003 to discuss his charge of racial discrimination. See Pl's 56.1 Counter-Statement at ¶24. In support of his allegation of disparate treatment made with the NYSDHR, the Plaintiff claims that he showed Undersheriff Decker a copy of a log book from November of 2001 reflecting that two Caucasian Correction Officers distributed cigarettes to inmates and were not disciplined for such conduct. See Pl's 56.1 Counter-Statement at ¶¶10, 11, 25. Subsequent to this meeting, however, the Plaintiff alleges that he was again subjected to selective discipline for a minor infraction of County Jail policy in March of 2003 involving the alleged improper handling of keys that resulted in a one day suspension from work. See Pl's 56.1 Counter-Statement at ¶¶26-28.

Last, the Plaintiff claims that the Defendant's pattern of disparate treatment and retaliation culminated in February of 2004 with the filing of several charges against him that he claims were patently false. The Plaintiff was charged with seven allegations of misconduct, including tardiness, insubordination, leaving his post unattended, and being under the influence of alcohol while at work. See Def's 56.1 Statement at ¶¶17-28; Pl's 56.1 Counter-Statement at ¶29, 30. Rather than dispute the charges in another CSL §75 hearing, the Plaintiff elected to resign from his position of employment with the Defendant in April of 2004. See Def's 56.1

Statement at ¶¶30, 31; Pl's 56.1 Counter-Statement at ¶31. While both parties signed a stipulation of discontinuance terminating the pending disciplinary charges against the Plaintiff, see Def's 56.1 Statement at ¶30; Pl's 56.1 Counter-Statement at ¶31, the Plaintiff asserts that the releases of liability envisioned by the signed stipulation neither were signed nor exchanged by the parties. See LaPorte Affidavit, Exhibit C at ¶4; see Pl's 56.1 Counter-Statement at ¶¶31, 32.

B. Plaintiff's Complaint and Defendant's Motion for Summary Judgment

Following his resignation from the Defendant's employ in April of 2004, and his receipt of his right to sue letter from the Equal Employment Opportunity Commission (herein, "EEOC") in October of 2005, the Plaintiff commenced the instant action in this Court pursuant to Title VII and N.Y. EXEC. LAW §296. In his Complaint, the Plaintiff maintains that he was subjected to disparate treatment based upon his race, was retaliated against subsequent to the filing of his NYSDHR complaint, and was constructively discharged from his position of employment in April of 2004. In support of its motion for summary judgment, the Defendant argues that the Plaintiff has not established a prima facie case of disparate treatment or retaliation under the three tiered analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. Notably, however, the Defendant does not argue that the Plaintiff has failed to establish a genuine issue of material fact on his claim of constructive discharge in its moving papers in support of its motion for summary judgment.[1]

---

[1] In its Reply memorandum, the Defendant argues that the Plaintiff has not established a valid constructive discharge claim. See Docket #23, Defendant's Reply Memorandum of Law at p. 3-5. Generally, arguments raised for the first time in reply are not considered by the Court. See, e.g., Playboy Enters. v. Dumas, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997). Notwithstanding this general rule, even considering these arguments, as explained infra, there exist genuine issues of material fact that preclude granting the Defendant's motion for summary judgment on the Plaintiff's constructive discharge claim.

For the following reasons, the Defendant's motion for summary judgment is granted in part and denied in part. Specifically, because there exist genuine issues of material fact that must be resolved by a neutral factfinder on the Plaintiff's claims of disparate treatment and constructive discharge, the Defendant's motion as to these claims is denied. Because, however, there are no genuine issues of material fact on the Plaintiff's retaliation claim based upon his allegation of a constructive discharge, the Defendant's motion for summary judgment as to this claim is granted.

DISCUSSION

A. Summary Judgment Standard and Local Rule 56.1

1. Summary Judgment Standard

Pursuant to the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 320-23 (1986). A fact is "material" when it may affect the outcome of a case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. A trial judge may, therefore, grant summary judgment only if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Id. at 250. The inquiry performed is the threshold inquiry of determining whether there are any genuine factual issues that properly can be resolved only by a finder of fact. Id.

Summary judgment may be granted only "[i]f after discovery, the nonmoving party 'has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.' " Berger v. United States, 87 F.3d 60, 65 (2d Cir. 1996) (quoting Celotex, 477 U.S. at 323) (alteration in original). "The nonmoving party must have 'had the opportunity to discover information that is essential to his [or her] opposition' to the motion for summary judgment." Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir.1989) (quoting Anderson, 477 U.S. at 250 n. 5). Moreover, a court should "construe the evidence in the light most favorable to the nonmoving party and draw[] all reasonable inferences in its favor." Mount Vernon Fire Ins. Co. v. Belize NY, Inc., 277 F.3d 232, 236 (2d Cir. 2002); Farias v. Instructional Sys., Inc., 259 F.3d 91, 97 (2d Cir. 2001); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 764 (2d Cir. 1998); see also Anderson, 477 U.S. at 261 n.2. Thus, "[o]nly when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted." Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992) (quoting H.L. Hayden Co. of New York, Inc. v. Siemans Med. Sys. Inc., 879 F.2d 1005, 1011 (2d Cir. 1989)).

2. Local Rule 56.1

Pursuant to the Local Rules for the Southern and Eastern Districts of New York, a moving party must attach a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." See Local Rule 56.1(a). A similar requirement is imposed upon the party opposing the motion for summary judgment. See Local Rule 56.1(b) (requiring the party opposing a motion for summary judgment to identify the material facts which it contends are in dispute). Should the

non-moving party fail to respond to the facts alleged by the moving party to be undisputed, those facts "will be deemed to be admitted for purposes of the motion . . . ." Local Rule 56.1(c). Importantly, "[e]ach statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)." See Local Rule 56.1(d). This requirement "free[s] district courts from the need to hunt through voluminous records without guidance from the parties." Holtz v. Rockefeller Co., 258 F.3d 62, 74 (2d Cir. 2001) (citations omitted).

B. Defendant's Motion for Summary Judgment[2]

1. Plaintiff's Disparate Treatment Claim

The Plaintiff's claim of disparate treatment based upon his race is governed by the standards and analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas paradigm, the Plaintiff must first establish a prima facie case of employment discrimination. Second, after the Plaintiff makes out a prima facie case, the burden shifts to the Defendant to establish a legitimate, nondiscriminatory reason for taking the challenged action. Third, upon such a showing by the Defendant, the burden shifts back to the Plaintiff to prove that the reason proffered by the Defendant is pretextual, and that the Defendant's true motivation for taking the challenged act is rooted in discriminatory animus. See McDonnell Douglas, 411 U.S. at 802-03; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S.

---

[2] Because the Plaintiff's claims under Title VII and N.Y. EXEC. LAW §296 against the Defendant in this case are analyzed under the same standards, the propriety of the Plaintiff's federal and state claims are considered together. See, e.g., Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 609-10 (2d Cir. 2006).

133, 142-43 (2000) (explaining the McDonnell Douglas burden shifting framework and noting that at the third stage of the analysis, it is the Plaintiff's burden to establish discrimination *vel non*).

In its motion for summary judgment, the Defendant argues in succinct fashion that the Plaintiff has not met his initial burden under McDonnell Douglas. See Docket #16, Memorandum of Law in Support of Defendant's Motion for Summary Judgment (herein, "Def's Mem.") at 6. In order to make out a prima facie case of racial disparate treatment, the Plaintiff must show (1) that he is a member of a protected class; (2) that he performed his job duties in a satisfactory manner; (3) that he was subjected to an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. See, e.g., Feingold v. New York, 366 F.3d 138, 152-53 (2d Cir. 2004); Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998). The Supreme Court has classified this initial burden as "not onerous," and has opined that "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). Because of the nature of a disparate treatment allegation, the Plaintiff must put forth some showing that he was treated differently than one or more similarly situated comparators because of his race. Feingold, 366 F.3d at 153-54.

A review of the record in this case leads me to conclude that despite the Defendant's perfunctory assertion to the contrary, the Plaintiff has put forth sufficient evidence that could lead a factfinder to conclude that the Plaintiff was treated differently because of his race. Specifically, the Plaintiff is a member of a protected class, held his position of employment for a number of

years without serious incident, and was suspended for thirty days without pay in September of 2002. Additionally, the Plaintiff has submitted his own affidavit, along with the supporting affidavits of two other prison personnel, which contain averments stating that no other employee other than the Plaintiff was disciplined for distributing tobacco products to inmates. See Docket #21, Plaintiff's Opposition, Exhibit 5, Affidavit of Julian Smith; Exhibit 2, Affirmation of Christopher D. Watkins, Esq. (containing the declarations of Bernd Woloszczak and Charles Mack). In conjunction with these allegations of singular enforcement against the Plaintiff, the declarations also contain averments that other prison personnel routinely distributed tobacco products without being disciplined and that at times tobacco products were distributed to inmates at the urging of the prison administration. See id. These allegations of disparate treatment, and the existence of potential comparators to evince such disparate treatment, sufficiently satisfy the Plaintiff's *de minimis* burden of establishing a prima facie case of disparate treatment under McDonnell Douglas.

In short retort, the Defendant advances that the Hearing Officer's findings and recommended suspension of the Plaintiff from his position of employment in August of 2006 provide the legitimate, non-discriminatory reason called for in the second stage of the McDonnell Douglas analysis justifying the Defendant's allegedly discriminatory actions. See Def's Mem. at 6. This reasoning is flawed for two reasons. First, the Plaintiff's claim of disparate treatment is based upon the initiation of the CSL §75 proceeding through the varied and arbitrary enforcement of the Defendant's workplace policies. Relying on the results of the very proceeding that is at the heart of the Plaintiff's claim of disparate treatment to justify the initiation of that disciplinary proceeding is nothing more than tautological reasoning. Thus,

because the claim for disparate treatment focuses on the commencement of the proceeding, the results of the proceeding cannot be used to justify its inception. Second, the very purpose of Title VII proceedings, as noted by the Plaintiff, is to provide a complainant a de novo trial on the merits of his or her claim of employment discrimination. The Supreme Court has specifically held that the findings of a state administrative body that are not reviewed by a state court are not entitled to preclusive effect in a subsequent Title VII proceeding. See Univ. of Tenn. v. Elliott, 478 U.S. 788, 796 (1986) ("[W]e conclude that . . . Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims."). Although such findings may have some evidentiary value at trial, see Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976), such findings do not have a preclusive effect on this Court that could be used to satisfy the second phase of the McDonnell Douglas analysis.

Accordingly, because the Plaintiff has established a prima facie case of disparate treatment for the selective enforcement of prison policy against him based upon his race that the Defendant has not refuted with a legitimate, nondiscriminatory reason, there exist genuine issues of material fact that must be resolved at trial that compel the denial of the Defendant's motion for summary judgment on this claim.

2. Constructive Discharge

Similar to the existence of genuine issues of material fact on the Plaintiff's claim of disparate treatment, there also exist genuine issues of material fact on the Plaintiff's constructive discharge claim that preclude granting summary judgment in the Defendant's favor. In order to establish a claim of constructive discharge, the Plaintiff must establish that his resignation from his position of employment "qualified as a fitting response" to intolerable working conditions.

See Pa. State Police v. Suders, 542 U.S. 129, 133 (2004); Terry v. Ashcroft, 336 F.3d 128, 151-52 (2d Cir. 2003). Second Circuit case law requires a two part showing to meet this standard. First, the Plaintiff must show that the Defendant intentionally created intolerable working conditions that precipitated the Plaintiff's resignation. See Petrosino v. Bell Atl., 385 F.3d 210, 229 (2d Cir. 2004). Such a showing may be established either by evidence of an employer's specific intent to force to an employee to resign or by evidence of deliberate action taken by an employer to cause an employee to resign. See id. at 229-30. Second, the Plaintiff must establish that his working conditions would be perceived objectively as intolerable from the perspective of a "reasonable person in the employee's position." Id. at 230 (citations omitted).

The Second Circuit has prescribed that a plaintiff must comply with a more robust showing of oppression and discord than mere displeasure with his or her working conditions or circumstances in order to establish a constructive discharge claim. See, e.g., Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996) ("disagreement with management over the quality of an employee's performance will not suffice to establish a constructive discharge."); Stetson v. Nynex Serv. Co., 995 F.2d 355, 359-61 (2d Cir. 1993). Such heightened proof of caustic working conditions may include evidence of an employer's intent to terminate an employee from his or her position of employment by initiating disciplinary action against the employee, criticizing the employee with more ferocity than other employees, or altering the employee's working conditions to effectuate changes in job responsibilities or salary and benefits. See, e.g., Petrosino, 385 F.3d at 230 (accelerated harassment could create a constructive discharge situation); Terry, 336 F.3d at 152 (employer comments evincing the employer's desire that the employee leave his position of employment or face additional

disciplinary charges sufficient to establish constructive discharge claim); Chertkova, 92 F.3d at 91 (threat of imminent termination from employment); Stetson, 995 F.2d at 360 (placement on probation and inevitable termination from employment). To help ameliorate this elevated showing, the Circuit has reasoned that a constructive discharge claim may be "premised on the cumulative affect [sic] of a number of adverse conditions in the workplace." Terry, 336 F.3d at 153 n.24 (citing Chertkova, 92 F.3d at 90).

In this case, the Plaintiff asserts that he was charged falsely with seven instances of misconduct in February of 2004 by the Defendant with the express intent to cause him to resign from his position of employment. See Smith Affidavit at ¶14. The Plaintiff contends that one of the charges, reporting to work while under the influence of alcohol, required that he submit to a Breathalyzer test to assist the Defendant in its investigation into the veracity of the charge. See Smith Affidavit at ¶15. In this instance, however, the Plaintiff contends that after the charge was filed, the attendant investigation he believes was required was never conducted and that there was absolutely no inquiry made by the Defendant in an attempt to prove or disprove the allegation. See id. Though not evincing the Defendant's specific intent, such allegations about the Defendant's failure to follow the protocol for disciplinary proceedings, if established at trial, could prove that the "employer's actions were 'deliberate' and not merely 'negligent or ineffective[].' " Petrosino, 385 F.3d at 229 (quoting Whibdee v. Garzarelli Food Specialities, Inc., 223 F.3d 62, 74 (2d Cir. 2000)).

Although a close call, if proven at trial, it is possible that a reasonable factfinder could conclude that the allegedly fabricated charges in February of 2004 and the Defendant's alleged failure to follow administrative protocol when investigating such charges could make a

reasonable person in the Plaintiff's position feel compelled to resign his or her position of employment involuntarily. Differing from some of the other cases where plaintiffs' allegations have been found to be insufficient to state a constructive discharge claim, in this instance, it does not appear that the Plaintiff was able to seek a transfer of employment or was simply enduring unfair criticism of his quality of work. See, e.g., Petrosino, 385 F.3d at 231-32 ("where an employee has within [his or] her power the means to eliminate the added condition that purportedly renders [his or] her employment intolerable and fails to pursue that option, [he or] she cannot demonstrate that [he or] she was compelled to resign."); Stetson, 995 F.2d at 361 ("the record does not show any change in . . working conditions thereafter that could have caused a reasonable person in his [or her] position to conclude that he [or she] was forced to resign . . . ."). The allegations, if proven, could suggest that the Plaintiff was facing serious charges of workplace misconduct that go beyond the mere "difficult or unpleasant" conditions the Circuit has held are insufficient to state a constructive discharge claim. Stetson, 995 F.2d at 360 (citing Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985) (upholding a directed verdict for a defendant on a constructive discharge claim in the absence of formal acts of discipline taken against the plaintiff-employee)).

Moreover, the Defendant's assertion in its Reply that the Plaintiff failed to exhaust his remedies by electing not to participate in the CSL §75 hearing and by resigning from his position of employment does not preclude the Plaintiff from raising this claim in this Court. The only administrative exhaustion required by Title VII involves filing a charge of employment discrimination with the EEOC or the NYSDHR and receiving a right to sue letter. See 42 U.S.C. §2000e-5(c). Both of these prerequisites have been met in this case.

Accordingly, because a factfinder could conclude that a reasonable person in the Plaintiff's position could feel compelled to resign his or her position of employment if presented with these circumstances, there exist genuine issues of material fact that preclude the Court from granting the Defendant's motion for summary judgment on the Plaintiff's constructive discharge claim.

3. Retaliation

Last, the Plaintiff asserts that the circumstances giving rise to his constructive discharge from his position of employment constitute a form of retaliation in violation of Title VII, 42 U.S.C. §2000e-3(a).[3] In order to establish a prima facie claim of retaliation, the Plaintiff must show (1) that he engaged in a form of protected activity; (2) that the Defendant knew of his participation in the activity; (3) that he suffered an adverse employment action; and (4) that there exists a causal link between the protected activity and the adverse employment action. See Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005). For the purposes of this motion, there is no dispute that the Plaintiff engaged in a form of protected activity when he filed a claim of employment discrimination with the NYSDHR or that the Defendant knew that the Plaintiff filed the NYSDHR charge. See Smith Affidavit at ¶13 (declaring that one of the Plaintiff's supervisors queried the Plaintiff about his NYSDHR charge); see Kessler v. Westchester County Dep't. of Soc. Serv., 461 F.3d 199, 210 (2d Cir. 2006) (instructing that

---

[3] A review of the Plaintiff's allegations could be read as contending that his one day suspension from work in March of 2003 for improper handling of prison keys is a retaliatory act in violation of Title VII. Though this does not appear to be the primary focus of this claim, the following analysis does not apply to this claim and evidence of the claim may be presented at trial because the Plaintiff can establish the requisite prima facie elements discussed infra, which the Defendant has not refuted.

general corporate knowledge of a plaintiff's charge of discrimination is sufficient to establish the knowledge prong of the prima facie showing). Additionally, for the purposes of this motion only, the Court assumes *arguendo* that the Plaintiff's constructive discharge claim, if proven, would constitute an adverse employment action. See Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 447 (2d Cir. 1999) (relying on a claim of constructive discharge as an adverse employment action for the purposes of a Title VII retaliation claim).

Dispositive of this claim, however, is the absence of the requisite causality between the Plaintiff's December 2002 filing with the NYSDHR and his alleged constructive discharge from employment in April of 2004. In order to establish the causal nexus element of his retaliation claim, the Plaintiff has to show that his participation in the protected activity and the occurrence of the adverse action are "very close" in time. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (citing cases standing for the proposition that three months between participation in a protected activity and an adverse employment action is too long to satisfy the close temporal proximity requirement). Although the Plaintiff engaged in a form of protected activity when he filed his claim of employment discrimination with the NYSDHR in December of 2002, see 42 U.S.C. §2000e-3(a), the year and four month lapse in time between this participation and his allegation of constructive discharge from employment in April of 2004 is too attenuated to support the causal link needed to establish his retaliation claim. See Richardson, 180 F.3d at 447 (noting that a two year period of time is too attenuated to satisfy causality); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (indicating that allegedly retaliatory action within a two month period of time is sufficient to establish the requisite causal nexus); DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir.

1987) (explaining alternative ways to establish a causal nexus between participation in a protected activity and an adverse action for the purposes of establishing retaliatory conduct). Although the Plaintiff relies on a one day suspension in March of 2003 following his December 2002 NYSDHR filing as establishing a pattern of retaliatory practice, see Smith Affidavit at ¶13, there is still too great a temporal lapse between March of 2003 and April of 2004 to establish a pattern of retaliation for the purposes of a prima facie showing on this claim. Because there is no other evidence before the Court at this time that would tend to support a pattern of retaliation after the Plaintiff filed his NYSDHR complaint that could satisfy the fourth element of a prima facie showing of retaliation, the Defendant's motion for summary judgment on the Plaintiff's retaliation claim predicated upon his allegation of a constructive discharge is granted. As explained supra at note 3, this disposition does not include any potential claim the Plaintiff may elect to pursue at trial involving his one day suspension in March of 2003 in light of the close temporal proximity between the Plaintiff's filing of the NYSDHR claim and his one day suspension from work and in the absence of a legitimate, nondiscriminatory reason advanced by the Defendant justifying the Plaintiff's suspension.

CONCLUSION

For the foregoing reasons, the Defendant's motion for summary judgement on the Plaintiff's disparate treatment and constructive discharge claims is denied, and the Defendant's motion for summary judgment on the Plaintiff's retaliation claim based upon his constructive discharge allegation is granted. The conference scheduled for June 14, 2007, is rescheduled for an in person appearance on Tuesday, June 5, 2007, at 10:00am in Courtroom 420.

Dated: May 25, 2007
White Plains, New York

SO ORDERED

Lisa Margaret Smith
Chief United States Magistrate Judge
Southern District of New York