UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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COREY LASHLEY,

Plaintiff,

Docket No.: CV 13-02683 (BMC)

-against-

NEW LIFE BUSINESS INSTITUTE, INC., and
SHEILA FLYNN a/k/a Sheila Allen,

Defendants.
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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' POST-TRIAL MOTION

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CASE LAW

PRELIMINARY STATEMENT

This case presents a textbook example of why the Federal Rules of Civil Procedure ("FRCP") provides trial judges an opportunity to rectify jury mistakes. Without a factual basis and against the weight of the evidence, the jury rendered a verdict in favor of Plaintiff, Corey Lashley, on his claims of (1) *quid pro quo* sexual harassment, (2) hostile work environment, (3) discrimination, and (4) retaliation, awarding compensatory damages of $10,000 and punitive damages of $30,000. Defendants, New Life Business Institute, Inc. ("NLBI") and Sheila Flynn ("Flynn") (together, the "Defendants") are entitled to judgment as a matter of law ("JMOL") pursuant to FRCP Rule 50, or a new trial pursuant to FRCP Rule 59. Plaintiff failed to produce evidence upon which a reasonable trier of fact could conclude that any of the alleged conduct was unlawful. This Court has already expressed its skepticism about Plaintiff's case:

> It is a pretty thin case. The reason it is thin is because it doesn't sound like he was forced to have sex upon penalty of losing his job. I am just not sure a reasonable jury could find that. It was throughout the relationship consensual, it seems to me. It also seems to me that when he said he had enough and he quit, he voluntarily chose to come back knowing what that meant…I am not sure the evidence supports [the] theory [of quid pro quo sexual harassment]…there were lots of statements about leaving his mother's child and going with her, lots of evidence on that. But, obviously, that never happened and that never I think was proposed as a condition of his continued employment…I am going to deny the motion with some reservations. We will see what the jury does with the case. For the reasons I have stated, particularly on the quid pro quo claim, it is not entirely clear; and the retaliation claim, it might be that the only reasonable conclusion a jury could reach was that if he wasn't fired for not having a license, he was fired because she was angry at him for breaking off the affair. Being angry at somebody for not continuing an affair I am not sure is actionable retaliation…We are going to let it go to the jury and see what happens. Obviously, I will hear more about this if the jury comes back with a plaintiff's verdict. (Tr. 347-50).

For the reasons detailed below, the Court should dismiss this case. Alternatively, Defendants should be granted JMOL on the punitive damages award, or remittitur. The award is constitutionally invalid because it is not supported by evidence of reprehensible conduct, and it is grossly disproportionate. For these reasons, the jury's verdict should not survive judicial review.

STATEMENT OF FACTS[1]

Plaintiff met Flynn at a noisy nightclub on the evening of April 7, 2012. (Tr. 27, 232-33).[2] At the time, Plaintiff was drunk and partying with friends. (Tr. 27-28, 233). During Plaintiff's first conversation with Flynn, Flynn told him she was the proprietor of NLBI, and allegedly asked Plaintiff to work for NLBI because "she [could] change [his] life." (Tr. 29-30). Later that evening, Plaintiff went to Flynn's home. (Tr. 31-32). Plaintiff and Flynn drank more alcohol together, allegedly discussed a job for Plaintiff at NLBI, then had sex multiple times. (Tr. 32-37).

The next day, Flynn took Plaintiff shopping and bought him clothing. (Tr. 38-39). The following Monday, Flynn showed Plaintiff around NLBI, and hired him to advertise the school. (Tr. 39, 43-45). Plaintiff then assembled a "street team" to assist him in marketing NLBI, and introduced them to Flynn. (Tr. 48). On a near daily basis thereafter, Plaintiff went to Flynn's home for sex and alcohol and stayed overnight, and often went drinking with her after work. (Tr. 46-48).

On April 23, 2012, Plaintiff's baby's mother ("BM") visited from out of town. (Tr. 59-60). Plaintiff claimed Flynn was upset over the visit, derisively referred to BM as a "hood rat" and "chicken head," and complained that Plaintiff was spending too much time with BM. (Tr. 60-61, 71). Plaintiff also claimed Flynn was surly at him at work, and slammed doors and kicked garbage pails to show her anger about Plaintiff's relationship with BM. (Tr. 62-63). During this time, Plaintiff fired members of his street team, allegedly at Flynn's direction. (Tr. 95-96). While Flynn told Plaintiff these members needed to be fired for performance reasons or because she could

[1] While Defendants contest much of Plaintiff's factual account, solely for purposes of this motion, Defendants set forth the narrative presented during Plaintiff's examination.

[2] Relevant excerpts of the trial transcript are attached to the Ostrove Declaration and labeled "Tr.".

not afford to pay them, Plaintiff maintained that the reasons were not legitimate, and were part of a "tantrum" caused by his relationship with BM. (Tr. 95, 98-99, 168-69). Plaintiff asked Flynn why she was behaving this way, and, incredibly, Plaintiff claims Flynn's response was to give him a blowjob in her office. (Tr. 63). Plaintiff offered no further explanation about this encounter. Thereafter, on multiple occasions while BM was in town, Plaintiff snuck out to drink and have sex with Flynn at her home, telling BM he was visiting his grandmother's house. (Tr. 65-66, 71-72).

After BM left town, Plaintiff resumed his overt relationship with Flynn. (Tr. 72). Plaintiff and Flynn were a regular couple – they dined together, went to movies and parties together, went shopping together, and Plaintiff bought Flynn gifts. (Tr. 56, 72-73, 75, 221). Plaintiff also spent time with Flynn's sons, even taking them to the barber.[3] (Tr. 225). Flynn also hosted a birthday party for Plaintiff, which was attended by Plaintiff's friends and family, and Flynn's mother. (Tr. 74, 222-23).

On May 14, 2012, BM returned to town. (Tr. 75). Plaintiff claims Flynn was acting crazy because of BM's visit, and he was "basically done with it," so he broke off his relationship with Flynn. (Tr. 75). Plaintiff claims Flynn offered him a Range Rover and child support payments if Plaintiff left BM for her, but he declined the offer. (Tr. 76). After Plaintiff broke up with Flynn, he continued to work at NLBI, and his job duties did not change. (Tr. 76-77, 82). Shortly after the breakup, Plaintiff claims Flynn was still[4] acting crazy. (Tr. 78). Plaintiff went to Flynn's office to ask what was wrong, and, incredibly, Plaintiff claims Flynn's response was to have sex with him on a table. (Tr. 78). Plaintiff offered no further details about this encounter.

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[3] Plaintiff initially claimed he never took Flynn's sons to the barber, but admitted this was a lie after being confronted with his conflicting deposition testimony. (Tr. 224-25).

[4] "Still" meaning continuing "crazy" behavior which started because of BM's visit.

A week later, BM left town. (Tr. 81). That same day, Plaintiff and Flynn went to "Spa Castle," where they received massages together and kissed in a hot tub. (Tr. 81). Afterward, Plaintiff went to Flynn's house for sex and alcohol, but claimed he felt bad about the relationship afterward and avoided Flynn for the next week. (Tr. 82, 88-89).

In June 2012, Plaintiff attended a cookout with Flynn and her family at Flynn's house, and brought his sister and cousins as guests. (Tr. 89, 96-97, 220). Plaintiff claimed he took this as an opportunity to tell Flynn he was mad that she had earlier tried to bribe him to leave BM, and in this same conversation, hinted that he wanted her to buy him concert tickets. (Tr. 90). Plaintiff also told Flynn he was upset she had directed him to fire members of his street team, to which she responded she "was the boss." (Tr. 97).

The following week, Flynn bought Plaintiff 10 or 13 concert tickets. (Tr. 90). Plaintiff claims he tried to stay away from Flynn during this time, which angered Flynn and caused her to behave irrationally.[5] (Tr. 98). Yet Plaintiff continued having sex with Flynn in her office, accepted the concert tickets, and borrowed her car to attend the concert. (Tr. 91, 98-100). Plaintiff was also given a key to Flynn's house and an alarm code so that he could let himself in after the concert. (Tr. 92). After the concert, Plaintiff spent the night at Flynn's house. (Tr. 93). A few days later, Flynn gave Plaintiff the day off. (Tr. 92). Plaintiff spent the day drinking at the beach with his cousin, Flynn, and her family. (Tr. 92-93).

Later that month, Plaintiff and Flynn had a lover's quarrel, and Plaintiff told Flynn he did not want to be in a relationship with her anymore. (Tr. 165-68). Heartbroken, Flynn initially

[5] It is exceedingly common that one member of a consensual relationship finds the other person to behave "irrationally" at times. Moreover, any "irrational" behavior commenced upon the visit of BM and related to the continued affair with BM.

asked Plaintiff to take two weeks off from work because she needed time to get over him. (Tr. 168). Plaintiff responded:

> All because I didn't want to come sleep with you. I'm tired of all this, excuse my French, I'm tired of all this bullshit. When I don't conform to you you start acting crazy. Now you want to – now you want to [force] me into a two-week unpaid vacation. What about my bills and my daughter[?]

(Tr. 167). Flynn quickly retracted her request for Plaintiff to take two weeks off, and told him he could continue working:

> There is no need for you to take off if you don't want to. I'm over you. When I make up my mind [a relationship is] dead, it seriously – it's dead. My mind is made up. You are just like an employee just like everyone else. You do your job. You will keep your job. Got to go TTYL.

(Tr. 180).

Plaintiff claims he received subsequent texts from Flynn implying her desire to rekindle their relationship, but could not recall any in-person interactions with her during this time; he was "only dealing with her professionally as far as the job itself," and worked with another NLBI employee instead of Flynn. (Tr. 181-83). Around this same time, an unknown employee complained to Flynn about Plaintiff's lack of professionalism and rude demeanor, but Plaintiff was not written up or otherwise punished. (Tr. 182).

Thereafter, Plaintiff voluntarily resigned. (Tr. 183). However, after Flynn told Plaintiff she was upset he was quitting and asked him to stay, Plaintiff returned to work the next day. (Tr. 184). Flynn told Plaintiff, "You don't have to worry about me no more like I said earlier. I'm your boss only." (Tr. 185). However, by the end of June 2012, Plaintiff resumed his sexual relationship with Flynn.[6] (Tr. 186-87). Plaintiff then had second thoughts, and told Flynn he

[6] During this time Plaintiff told Flynn he loved her, but claimed at trial he said this only in furtherance of his career. (Tr. 189).

wanted to end the relationship because he was still in love with BM. (Tr. 186-87). Plaintiff avoided Flynn after this breakup, and his interactions with her were largely relegated to text message exchanges. (Tr. 190, 196). Flynn sent Plaintiff text messages about BM, stating "You love her and ya'll should get married. I'm done with this love triangle, I deserve better." (Tr. 188). Plaintiff claims Flynn sent him subsequent text messages expressing her desire to get back together and claiming she was pregnant, but that he told her he was not interested. (Tr. 189-91). Plaintiff claims Flynn's response to this rejection was "You should just quit, it is not going to be nice." (Tr. 193). Plaintiff did not interpret this to mean that Flynn would make life difficult at work; rather, Plaintiff interpreted this to mean "like I will be having a hard time in court."[7] (Tr. 193). Flynn later apologized, stating "you really really love [BM], I can't be mad that you don't want me." (Tr. 193, 197).

On July 2, 2012, a payment dispute arose between Flynn and a member of Plaintiff's street team, and Plaintiff became involved and took the side of his team member against Flynn. (Tr. 198). Flynn told Plaintiff he was not loyal to her, and terminated Plaintiff.[8] (Tr. 198-99, 201).

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[7] Plaintiff did not explain the meaning of this statement, but the only reasonable explanation is that Plaintiff's litigation aspirations long pre-date his termination, or that it was a reference to custody proceedings with BM. Regardless, Plaintiff did not believe this was a reference to work, as it related to court.

[8] The reason Plaintiff claimed he was given for his termination is accepted for purposes of this motion. Defendants maintained Plaintiff was terminated because he was unable to obtain a license to work in admissions, which was required by law, and that this was the reason conveyed to Plaintiff. Where there are "clear non-discriminatory reasons for the [employer's] decision," the plaintiff "cannot get to the jury simply because the jury might disbelieve [the employer's] denials"; rather, the plaintiff must present "some affirmative evidence that the event occurred." Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2d Cir. 1985) (reversing denial of JMOL). Indeed, even where "the substance of the testimony of the defendants, who were on the witness stand, may tend to strain credulity, the plaintiff must produce "more than the denials of the defendants" claims. Davis v. National Mortgagee Corp., 349 F.2d 175, 178 (2d Cir. 1965).

Plaintiff speculated that Flynn's retracted statement that he "should just quit" evidences that the true reason for the termination was because the relationship ended, but offered no other testimony in support of this theory. (Tr. 198).

As part of his evidence, Plaintiff presented the following text message exchange, which Plaintiff claims explains the termination:

> **Flynn:** I miss you married man. You hurt me so bad, I will not text or call you ever again, that's a promise.
>
> **Plaintiff:** You know, I'm going through a lot right now. It is like you really don't, excuse my French, you really don't give a fuck about me. Not trying to start no bullshit, but just thinking out loud.
>
> **Flynn:** I treated you real good, whether you will ever admit it or not, you brought all this shit on yourself. You fought me for Kareem quitting, commission for all your boys once you left. You fought me, fought me about Ben now you fought me about Timothy, where is the love? Who are you being loyal to? Then you let your baby momma get my number. You said you had the situation under control. Too much bullshit and drama. You need to learn how to humble yourself and pick your battles wisely. Thank you for all your help at the business. I'm sorry. Business and pleasure don't mix there are no boundaries. You crossed the lines. All the time, but love is blind.

(Tr. 201-02). Thereafter, Plaintiff collected his last paycheck, and moved on with his life, ultimately finding work that paid three times the salary he earned at NLBI. (Tr. 203, 211-12).

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL OF PLAINTIFF'S CLAIMS, OR A NEW TRIAL.

A motion for JMOL pursuant to Rule 50 (b) is appropriately granted when the court determines that "there is no legally sufficient evidentiary basis for a reasonable jury to find for a party." Ruhling v. Newsday, Inc., 2008 U.S. Dist. LEXIS 38936, *9 (E.D.N.Y. 2008), quoting Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 120 (2d Cir. 1998). A jury verdict should be set aside under Rule 50 where there is "such a complete absence of evidence

supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture," or where there is "such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded jurors could not arrive at a verdict against it." Id. at *10 (citing Kosmynka v. Polaris Indus., Inc., 462 F.3d 74, 79 (2d Cir. 2006)). Where, as here, there can be but one conclusion as to the verdict that reasonable persons could have reached, the trial court should grant a motion for JMOL. Binder v. Long Island Lighting Co., 57 F.3d 193,198-99 (2d Cir. 1995).

Courts in this Circuit have not hesitated to overturn plaintiffs' verdicts in employment discrimination cases where the evidence did not support the jury's decision. Garcia v. University at Albany, 320 F.3d 148, 150 (2d Cir. 2003) (holding district court should have granted JMOL in sexual harassment action, as there was a lack of evidence to support the verdict); Williams v. County of Westchester, 171 F.3d 98 (2d Cir. 1999) (affirming JMOL setting aside a jury verdict in a Title VII gender discrimination case); Norton v. Sam's Club, 145 F.3d 114 (2d Cir. 1998) (reversing jury verdict in favor of plaintiff in an age discrimination case where the record was devoid of evidence sufficient to support a finding that he was terminated because of his age); Flynn v. Goldman, Sachs & Co., 836 F. Supp. 152 (S.D.N.Y. 1993) (granting JMOL in Title VII gender discrimination case).

Rule 59 of the FRCP provides that a court "may, on motion, grant a new trial on all or some of the issues … after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." FRCP 59(a)(1)(A). Generally, a court may grant a new trial if the verdict is against the weight of the evidence, see Byrd v. Blue Ridge, 356 U.S. 535, 540 (1958), or where the verdict is excessive. Mitchel v. Boelcke, 440 F.3d 300, 303 (6th Cir. 2006).

For the reasons set forth below, this Court should dismiss the matter pursuant to Rule 50, or, alternatively, grant a new trial under Rule 59.

A. *Quid Pro Quo* Sexual Harassment

No reasonable jury could have found for Plaintiff on his *quid pro quo* sexual harassment claim.[9] There is no evidence in the record to support this determination as a matter of law. As set forth in the Court's charge, the elements of a *quid pro quo* sexual harassment claim are: (1) Plaintiff was subjected to harassing conduct by Defendants based on sex; (2) Defendants' conduct was unwanted by Plaintiff; (3) Plaintiff's acceptance or rejection of Defendants' conduct was an express or implied condition of his employment; (4) Plaintiff suffered an adverse employment action; (5) Plaintiff's rejection of Defendants' conduct was a motivating factor for Defendants' decision to take adverse action against Plaintiff. (Tr. 588-89). See also Burlington Indus. v. Ellerth, 524 U.S. 742, 753-54 (1998); Adeniji v. Administration for Children Servs., 43 F. Supp. 2d 407, 414 (S.D.N.Y. 1999). Each element is discussed below.

1. Defendants' conduct was not based on sex.

Defendants' conduct was not based on sex. In DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304 (2d Cir. 1986), male plaintiffs alleged the defendant gratuitously added an extra job requirement for the position they sought so that the defendant could hire his girlfriend. The court held the plaintiffs were not members of a protected class, reasoning that "sex," when read in the context of Title VII could only refer to membership in a class delineated by gender, rather than sexual affiliations regardless of gender. Just so here. Plaintiff's entire claim relates to Flynn's

[9] Plaintiff brought claims under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law, however it is Plaintiff's position that none of these claims can survive.

displeasure with Plaintiff's continued affair with BM (Tr. 60-63, 71, 95, 98-99, 167-69, 188, 193, 197), not Plaintiff's gender. Thus, Plaintiff has not satisfied the first element.

2. *Defendants' conduct was not unwanted.*

Plaintiff produced no evidence showing Defendants' conduct was unwanted.[10] Plaintiff met Flynn after a night of heavy drinking, had sex with her many times that night, and went to Flynn's house for sex and alcohol on a near daily basis thereafter. (Tr. 27-37, 46-48). The couple spent most of their leisure time together, and socialized with each other's family members. (Tr. 38-39, 56, 72-74, 75, 81, 89, 96-97, 220-23, 225). As more fully described in the statement of facts, this entire relationship was consensual and welcome. Thus, Plaintiff has not satisfied the second element.

3. *Plaintiff's acceptance or rejection of Defendants' conduct was not an express or implied condition of his employment.*

Plaintiff's acceptance or rejection of Defendants' conduct was not an express or implied condition of his employment. First, Plaintiff never rejected Defendants' conduct – after Plaintiff broke up with Flynn, he continued to voluntarily have sex with her.[11] (Tr. 63, 78, 81-82, 88-89,

[10] This is fatal to Plaintiff's *quid pro quo* sexual harassment claim. Reed v. Shepard, 939 F.2d 484, 486-87, 492 (7th Cir. 1991) (holding that plaintiff, a civilian jail employee who was often handcuffed to furniture or doors, subjected to suggestive remarks and conversations involving oral sex, and forcefully placed on male employees' laps had no actionable sexual harassment claim because she participated willingly in the "sexual hogans" and reciprocated in kind); Koster v. Chase Manhattan Bank, 687 F. Supp. 848, 861-62 (S.D.N.Y. 1988) (stating that plaintiff's allegations that bank president who caused her to be denied salary increases, transferred, and ultimately terminated upon cessation of their sexual relationship were dismissed because there was no demonstration that the relationship was not consensual).

[11] Given the totality of the circumstances, the breakups in this case cannot imply rejection. See Trautvetter v. Quick, 916 F.2d 1140, 1149-50 (7th Cir. 1990) (stating "[t]he fact that [plaintiff sometimes said no to [defendant's] suggestions or made excuses not to meet him does not imply that she did not welcome his advances, especially when she often did agree to meet him and participated actively in the relationship…the course of conduct when reviewed in its entirety,

186-87). Second, after a breakup, Flynn explicitly told Plaintiff, "You are just like an employee just like everyone else. You do your job. You will keep your job." (Tr. 180). Plaintiff's job duties never changed throughout the duration of his employment at NLBI, and Plaintiff did not testify that his compensation ever changed, either. (Tr. 76-77, 82). While Flynn once told Plaintiff he "should just quit, it is not going to be nice," Flynn quickly retracted this remark, apologized, and continued to employ Plaintiff after making the comment. (Tr. 193, 197). Further, Plaintiff claimed Flynn asked him to take a two week unpaid vacation following a breakup, Flynn quickly retracted this request. (Tr. 167-68, 180). Evidence of unfulfilled threats is not sufficient to support a quid pro quo harassment claim. Ellerth, 524 U.S. at 753-754. As this Court has already noted, "It is a pretty thin case. The reason it is thin is because it doesn't sound like [Plaintiff] was forced to have sex upon penalty of losing his job. I am just not sure a reasonable jury could find that. It was throughout the relationship consensual…when [Plaintiff] said he had enough and he quit, he voluntarily chose to come back knowing what that meant…I am not sure the evidence supports [the] theory [of quid pro quo sexual harassment]…there were lots of statements about leaving his mother's child and going with her, lots of evidence on that. But, obviously, that never happened and that never I think was proposed as a condition of his continued employment." (Tr. 347-50). Thus, Plaintiff has not satisfied the third element.

4. The adverse employment action.

Plaintiff claimed to have suffered adverse action in the form of his termination and Flynn's post-breakup behavior toward him, which consisted of Flynn slamming doors, kicking garbage pails, and being surly toward him. (Tr. 62-63, 98-99, 201). While the former constitutes adverse

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appears to substantiate the district court's findings that [plaintiff] grew to "welcome" [defendant's] advances and even participated in an active way so as to encourage them.").

action, the latter does not. Martinez v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 41454, *1 (2008) (finding that incidents of supervisor publicly yelling at plaintiff and calling him "shit" were petty slights and personality conflicts that were not actionable). Thus, the only adverse action was Plaintiff's termination.

5. Plaintiff's rejection of Defendants' conduct was not a motivating factor for his termination.

Plaintiff's breakups with Flynn were not a motivating factor for his termination. Plaintiff claimed Flynn told him disloyalty was the reason for his termination, citing an incident involving a payment dispute where Plaintiff sided with a member of his street team over Flynn. (Tr. 198). Plaintiff did not dispute that he was disloyal to Flynn on this occasion, and messages exchanged between Plaintiff and Flynn reflect that Flynn was unhappy about Plaintiff's disloyalty. (Tr. 201-02). This was a clear non-discriminatory reason and Plaintiff admits this occurred. Where there are "clear non-discriminatory reasons for the [employer's] decision," the plaintiff "cannot get to the jury simply because the jury might disbelieve [the employer's] denials"; rather, the plaintiff must present "some affirmative evidence that the event occurred." Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2d Cir. 1985) (reversing denial of JMOL). Indeed, even where "the substance of the testimony of the defendants, who were on the witness stand, may tend to strain credulity, the plaintiff must produce "more than the denials of the defendants" claims. Davis v. National Mortgagee Corp., 349 F.2d 175, 178 (2d Cir. 1965). There is no more elemental cause for discharge of an employee than disloyalty to his employer. NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464 (1953). Thus, since Plaintiff conceded disloyalty, he cannot establish pretext.

To the extent Plaintiff provided proof of another reason that motivated Flynn's actions, the explanation repeatedly offered by Plaintiff was that Flynn was unhappy about Plaintiff's continued

affair with BM. (Tr. 60-61, 71, 188, 201-02). This is insufficient to establish a *quid pro quo* sexual harassment claim, as the Court has already noted:

> I am not sure the evidence supports [the] theory [of quid pro quo sexual harassment]…"there were lots of statements about leaving [BM] and going with [Flynn], lots of evidence on that. But, obviously, that never happened and that never I think was proposed as a condition of [Plaintiff's] continued employment…it might be that the only reasonable conclusion a jury could reach was that if [Plaintiff] wasn't fired for not having a license, he was fired because [Flynn] was angry at him for breaking off the affair. Being angry at somebody for not continuing an affair I am not sure is actionable…(Tr. 347-50).

No reasonable jury could have believed Plaintiff's claim that his termination was because he "didn't want to sleep with [Flynn] anymore." (Tr. 198). Plaintiff based this allegation solely on Flynn's post-breakup comment that "you should just quit, it is not going to be nice." (Tr. 197-98). As discussed, Plaintiff admitted that this comment related to court, and Flynn immediately retracted this comment, continuing to employ Plaintiff. Thus, Plaintiff has not satisfied the fifth element.

Accordingly, the Court should dismiss Plaintiff's *quid pro quo* sexual harassment claim, or order a new trial.

B. Hostile Work Environment

No reasonable jury could have found for Plaintiff on his hostile work environment claim. There is no evidence in the record to support this determination as a matter of law. As set forth in the Court's charge, the elements of a hostile work environment claim are: (1) Plaintiff was subjected to unwanted harassment, ridicule, or other abusive conduct; (2) the abusive conduct was motivated at least in part by plaintiff's gender; and (3) the abusive conduct was so severe or pervasive that both plaintiff himself and a reasonable person in plaintiff's position would find his work environment so hostile or offensive that it would interfere with his work performance. (Tr.

590-591). See also Johnson v. City of New York, 326 F. Supp. 2d 364, 371 (E.D.N.Y. 2004); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Factors to consider when determining whether the conduct alleged rises to the level of a hostile work environment include the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with the plaintiff's work performance. Quinn v. Green Tree Credit Corp., 159 F.3d 759, 767-68 (2d Cir. 1998); Ferraro v. Kellwood Co., 2004 U.S. Dist. LEXIS 23482, *1 (S.D.N.Y. 2004). "An employment discrimination claim based upon a hostile working environment requires a showing of more than sporadic, offensive behavior." Miller v. Taco Bell Corp., 204 F. Supp. 2d 456, 465 (E.D.N.Y. 2002). A plaintiff alleging a hostile work environment "must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of [his] working environment." Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000). As discussed below, Plaintiff has not established a hostile work environment claim.

1. Unwanted harassment, ridicule, or other abusive conduct.

As discussed above, Flynn's sexual advances were not unwanted. The only unwanted conduct Plaintiff alleged was as follows:

> Flynn sent Plaintiff disparaging text messages regarding his character and his relationship with BM, acted surly toward him, and kicked over garbage pails and slammed doors to show she was angry. (Tr. 60-63, 71, 188).
>
> Flynn sent Plaintiff a text message stating, "You should just quit, it is not going to be nice." (Tr. 193). Plaintiff interpreted this to mean "like I will be having a hard time in court," but admitted Flynn later apologized, stating "you really really love [BM], I can't be mad that you don't want me." (Tr. 193, 197).
>
> Flynn directed Plaintiff to terminate subordinates for performance reasons or because she could not afford to pay them. Plaintiff claimed these reasons were not

> legitimate, and were part of a "tantrum" caused by his relationship with BM. (Tr. 95, 98-99, 168-69).
>
> Flynn asked Plaintiff to take a two week unpaid vacation because she needed time to get over him. The next day, Flynn told Plaintiff he did not have to take time off he did not want to, and that he would have a job for as long as he continued to perform. (Tr. 167-68, 180).

Thus, this conduct is so *de minimus* that it cannot have altered a work environment and does not even constitute harassment, ridicule, or abuse.

2. The allegedly abusive conduct was unrelated to Plaintiff's gender.

As discussed above, the allegedly abusive conduct was not based on Plaintiff's gender. Plaintiff claimed Flynn's texts, surliness and outbursts were caused by her anger about Plaintiff's relationship with BM, not Plaintiff's gender. (Tr. 62-63). Plaintiff further claimed Flynn directed him to fire members of his street team as part of a "tantrum" caused by his relationship with BM. (Tr. 95-96, 98-99, 168-69). Saying "it's not going to be nice" cannot possibly be abusive enough to constitute a claim and even if it was, Plaintiff testified that it related to "court," not employment. Finally, the unpaid vacation suggestion never came to fruition and was immediately retracted. In short, these items are not actionable and/or not related to gender.

3. The allegedly abusive conduct was not severe or pervasive.

The allegedly abusive conduct was not severe or pervasive. Plaintiff broke up with Flynn several times during the course of their three month long on-again, off-again relationship. After each breakup, Plaintiff largely avoided Flynn, but had a handful of negative interactions with her, mostly via text message, which were in relation to his relationship with BM, not related to the job. (Tr. 181-83, 190, 196). In this Circuit and others, hostile work environment claims have been dismissed for insufficiency of evidence even though, compared to what was adduced here, they involved (a) a similar or greater number of incidents, (b) that were more compressed in time, and

(c) that were more severe and had more pronounced discriminatory overtones. Lucas v. S. Nassau Cmtys. Hosp., 54 F. Supp. 2d 141, 147-48 (E.D.N.Y. 1998) (denying NYSHRL hostile work environment claim where plaintiff alleged supervisor brushed up against him on three occasions, touched plaintiff on three additional occasions, briefly touched plaintiff's back or shoulder five to seven other times, and said "fuck you" on two unidentified occasions); Rivera v. Edenwald Contracting Co., 1996 U.S. Dist. LEXIS 6117 (S.D.N.Y. 1996) (sexually degrading comments including requests for plaintiff to "give…some pussy" and to "give…some head" not sufficient to defeat summary judgment on Title VII claim because plaintiff failed to show that her "workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment"); Penry v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257, 1261-63 (10th Cir.1998) (in a three-year period, harasser made remarks concerning plaintiff's bra strap, her underclothing, and whether she had sexual dreams; claimed sexual conquest of another woman employee; made pornographic architectural analogies; and took the plaintiff to a Hooter's restaurant on business travel).

Again, for the reasons detailed above, none of the alleged abuse is actionable taken in totality, nor is it so taken independently. Accordingly, the Court should dismiss Plaintiff's hostile work environment claim, or order a new trial.

C. Retaliation

No reasonable jury could have found for Plaintiff on his retaliation claim. As set forth in the Court's charge, the elements of a retaliation claim are (1) Plaintiff complained of discrimination in his employment; (2) Defendants were aware of Plaintiff's complaint; (3) Plaintiff was subjected to a material adverse action by Defendants; and (4) Plaintiff's complaint was a

critical element in Defendants' decision to take the adverse action. See also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-70 (2006).

Under Federal law, Plaintiff must prove causation according to traditional principles of but-for causation, which "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013). To prevail on a retaliation claim, the plaintiff is "obliged to produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not [discrimination] was the real reason for the discharge.'" Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714 (2d Cir. 1996). As discussed below, Plaintiff has not established a retaliation claim.

1. Plaintiff did not complain of discrimination in his employment.

It is unclear what protected activities Plaintiff purports to have engaged in. No specific protected activities are addressed within Plaintiff's closing statement; Plaintiff merely suggests he was "retaliated against" because he ended his relationship with Flynn. (Tr. 570, 572). Vague and conclusory allegations are insufficient to establish the existence of a protected activity. Herling v. New York City Dep't of Educ., 2014 U.S. Dist. LEXIS 56442, *24 (E.D.N.Y. 2014). Thus, the failure to identify a specific protected activity is fatal to Plaintiff's retaliation claim. Thus, Plaintiff has not satisfied the first element.

2. Defendants were not aware of Plaintiff's complaint

Defendants were not aware of Plaintiff's alleged complaint, as it is unclear what protected activities Plaintiff purports to have engaged in. Thus, Plaintiff has not satisfied the second element.

3. Adverse actions.

As discussed above, the only adverse action was Plaintiff's termination.

4. Plaintiff's alleged complaint was not the but-for cause of his termination.

Assuming *arguendo* that Plaintiff's break-up with Flynn constituted a protected activity, Plaintiff's breakup with Flynn was not a motivating factor for his termination, much less the but-for cause. Plaintiff's unsupported speculation that he was terminated because he broke up with Flynn is not, as a matter of law, sufficient to prove that Defendants' conduct was motivated by a retaliatory purpose. Evans v. New York Botanical Garden, 253 F. Supp. 2d 650, 660-61 (S.D.N.Y. 2003), aff'd, 88 Fed. Appx. 464 (2d Cir. 2004) (plaintiff's "belief" that job-performance criticisms "were unfounded" is "not sufficient" to show that subsequent discharge for poor work performance was a pretext for retaliation); Van Zant, 80 F.3d at 714 (plaintiff "put forward nothing other than conclusory allegations to suggest a causal relationship between her complaints" and the alleged retaliatory acts); Uddin v. N.Y. City/Administration for Children's Servs., 2001 U.S. Dist. LEXIS 12207, *1 (S.D.N.Y. 2001) ("Conclusory allegations which lack specificity necessary to establish the causal link between the protected activity and the retaliatory treatment do not state a prima facie case").

As this Court stated, "[Regarding] the retaliation claim, it might be that the only reasonable conclusion a jury could reach was that if [Plaintiff] wasn't fired for not having a license, he was fired because [Flynn] was angry at him for breaking off the affair. Being angry at somebody for not continuing an affair I am not sure is actionable retaliation...obviously, I will hear more about this if the jury comes back with a plaintiff's verdict." (Tr. 347-50). Accordingly, Defendants are entitled to JMOL on Plaintiff's hostile work environment claim.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S PUNITIVE DAMAGES AWARD

No reasonable jury could have found Plaintiff was entitled to an award of punitive damages. There is no evidence in the record to support this determination as a matter of law. The law is well settled that punitive damages are awarded rarely in employment discrimination actions, and are appropriate only where the employer has engaged in intentional discrimination and has done so with malice or reckless indifference to the rights of an aggrieved individual. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999). A finding of intentional discrimination alone is not a sufficient basis for an award of punitive damages: "Congress plainly sought to establish two standards of liability - one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive damage award." D'Ascoli v. Roura v. Melamed, 2005 U.S. Dist. LEXIS 14274, *1 (S.D.N.Y. 2005). To prove malice or reckless indifference, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law; absent such a showing, punitive damages are not recoverable." Kolstad, 527 U.S. at 536. This rigid requirement that the plaintiff "prove defendant's knowledge of the federal law imposes a formidable, if not unattainable, burden on the plaintiff." Robinson v. Instructional Sys., Inc., 80 F. Supp. 2d 203 (S.D.N.Y. 2000), aff'd, 259 F.3d 91 (2d Cir. 2001).

It is the plaintiff's burden to prove by a preponderance of the evidence that defendant acted with malice or reckless indifference, or engaged in egregious and outrageous conduct - and not the defendant's burden to disprove it. Farias v. Instructional Sys., Inc., 259 F.3d 91, 101 (2d Cir. 2001). Plaintiff failed to meet this burden. As discussed herein, Plaintiff's romantic relationship with Flynn was at all times consensual. After Plaintiff broke up with Flynn, he continued to voluntarily have sex with her. (Tr. 63, 78, 81-82, 88-89, 186-87). If Defendants truly engaged in egregious and outrageous conduct, it would have caused at least some emotional damages. Yet,

the jury rejected Plaintiff's claim for emotional damages outright. Thus, Defendants are entitled to JMOL on Plaintiff's punitive damages award, or a new trial as it was against the great weight of the evidence.

III. THE PUNITIVE DAMAGES AWARD SHOULD BE REMITTED

Alternatively, the jury's $30,000 punitive damages award should be remitted. This Court has an obligation under the U.S. Constitution to conduct an independent review of any jury award of punitive damages. Honda Motor Co. v. Oberg, 512 U.S. 415, 424 (1994). An independent review is appropriate because, unlike the measure of actual damages, "the level of punitive damages is not really a 'fact' 'tried' by the jury." Id. at 437. Thus, it is "the duty of the court to interfere" to prevent the wrongful imposition of punitive damages. Honda, 512 U.S. at 424.

When reviewing awards of punitive damages under the due process clause of the Constitution, three guideposts are to be considered: (1) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; (2) the degree of reprehensibility of the defendant's misconduct; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. BMW of N. Am. v Gore, 517 US 559, 574-86 (1996). Each of these guideposts is discussed below.

1. Disparity

In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-425 (2003), the Supreme Court addressed the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded as follows:

> Our jurisprudence and the principles it has now established demonstrate…that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process…[A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.

Id. at 424-25. Thus, a 4:1 ratio between punitive and compensatory damages, like the award in

the instant case, rests on the upper cusp of constitutionality. Accordingly, to justify such an extreme ratio, the facts which underlie BMW guideposts relating to reprehensibility and comparable civil penalties must also be extreme. Here, they are not.

2. Reprehensibility

The degree of reprehensibility of the defendant's conduct is "the most important indicium of the reasonableness of a punitive damages award." BMW, 517 U.S. at 575. In BMW, one of the reasons the defendant's conduct was not held to be reprehensible enough to justify the amount of punitive damages awarded was because the plaintiff's harm was purely economic. Id. at 576. Likewise, in Thomas v. iStar Fin., Inc., 520 F. Supp. 2d 478 (S.D.N.Y. 2007), the court held that "ordinarily, the extent of pain, suffering and emotional distress inflicted by wrongdoing is one fair measure of the degree of blameworthiness that particular misbehavior entails." Id. at 481. Based upon the plaintiff's minimal recovery of $3,500 in emotional damages, the court ordered a new trial on the issue of punitive damages unless the plaintiff elected to remit the jury awards. Just so here. Here, the jury rejected Plaintiff's claim for emotional damages outright, awarding no emotional damages whatsoever. A jury awarded a mere $10,000 in lost pay. Thus, a high degree of reprehensibility is lacking in this case, as the jury found it caused Plaintiff no emotional detriment, and minimal economic impact.

3. Civil penalties

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. BMW, 517 U.S. at 583. This BMW guidepost is inapplicable to this case, as the instant facts and circumstances create no basis for the Defendant to be penalized civilly. The only civil penalty for comparable misconduct is contained in the New York City Human Rights Law ("NYCHRL"), which provides

for civil penalties of up to $125,000 where a person has engaged in an unlawful discriminatory practice, or up to $250,000 where the unlawful discriminatory practice was "the result of the respondent's willful, wanton or malicious act." NYC Administrative Code § 8-126(a). While Plaintiff's case is largely premised upon Defendant's alleged violations of the NYCHRL, no civil penalty pursuant to this law has been imposed. Nor would there be any basis for this to occur.

The legislative history of the amendments to the Administrative Code, including the civil penalty provision, indicates that they were intended to strengthen and expand the enforcement mechanisms of the law to prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate. 119-121 E. 97th St. Corp. v. New York City Comm'n on Human Rights, 220 A.D.2d 79, 88 (1996). In 97th St. Corp., the defendant landlord burglarized the plaintiff's apartment, disabled his door locks, and turned off his electricity. Id. at 82. The defendant refused to accept his timely rent checks, refused to renew his lease, and commenced eviction proceedings against the plaintiff. Id. at 82. The defendant verbally and physically accosted the plaintiff, and encouraged its employees to do so, including publically calling him a "faggot punk", "male whore", and "sicko," telling him he had AIDS and they hoped he died, leaving threatening messages on his answering machine, distributing a notice to tenants in defendant's building informing them of his Human Rights complaint and HIV status and warning the tenants not to cooperate with him, and divulged his HIV status to his employer. Id. at 83. While the Appellate Division upheld the award of damages to the plaintiff, it reduced the civil penalty that was imposed by two thirds. The Appellate Division noted that the civil penalty "is not intended to compensate the complainant but to punish the violator." Id. at 88. The decision observed that the 50 units owned by the defendant failed to place it "in the upper range of units owned by large landlords in the City." Id. at 88. Consequently, "while their actions were

egregious, committed over a period of time, and implicated individuals besides the plaintiff, the public interest was not affected to the much greater extent it would have been had defendant been a large landlord whose actions affected hundreds, if not thousands of individuals." Id. at 88-89. Based on the limited impact of defendant's conduct, and the fact the plaintiff's award of damages would deter others from imitating the actions of the defendant, the Appellate Division reduced the civil penalty by two thirds.

For the same reasons the civil penalty in 97th St. Corp. was dramatically reduced, there is not even a theoretical basis for imposing such a penalty in this case. The public interest was not affected because the conduct implicated only Plaintiff, Flynn's paramour. Furthermore, the deterrent effect of this litigation would not be meaningfully enhanced by the addition of a civil penalty. In addition to their potential liability for Plaintiff's damages and attorneys fees, Defendants have incurred extensive attorneys' fees. As Defendants are a small business, this has been an enormous financial burden.

Thus, because no civil penalty was ever imposed on Defendants, and there is not even a theoretical basis for which a civil penalty could be imposed, all BMW factors lead to the conclusion that punitive damages should be remitted. As discussed above, the conduct at issue was not reprehensible. Due to the lack of reprehensibility and the fact that a comparable civil penalty would be inapplicable to this case, as well as the extreme disparity between punitive damages and compensatory damages, the punitive damage award should be remitted.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court enter judgment as a matter of law in Defendants' favor, or, in the alternative, a new trial and/or remittitur of the punitive damage award.

Dated: Carle Place, New York
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Respectfully submitted,

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