UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MASARU TOMIZAWA,

Plaintiff,

- against -

ADT LLC and ANTHONY DEGRAZIO,

Defendants.

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REPORT AND RECOMMENDATION
13 CV 06366 (MKB)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff, Masaru Tomizawa, commenced this action in state court pursuant to the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290–301, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101–8-703, against his former employer ADT LLC ("ADT") and his former supervisor Anthony DeGrazio, who removed the case to this Court. Plaintiff alleges that Defendants discriminated against him and terminated his employment because of his Japanese national origin, and that they retaliated against him for complaining of discrimination. Defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Honorable Margo K. Brodie referred Defendants' motion to me for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). For the following reasons, it is respectfully recommended that Defendants' motion for summary judgment should be granted.

THE INSTANT RECORD

Unless otherwise noted, the following facts are taken from the parties' Rule 56.1 statements and are supported by admissible evidence. See Vt. Teddy Bear Co. v. 1-800 Beargram

Co., 373 F.3d 241, 244 (2d Cir. 2004) ("[The Court] must be satisfied that the citation to evidence in the record supports the assertion."); see also Giannullo v. City of N.Y., 322 F.3d 139, 140 (2d Cir. 2003) (explaining that the Court must review the record to ensure it supports the defendant's Rule 56.1 statement of facts).[1] As permitted by Rule 56(e) of the Federal Rules of Evidence and 28 U.S.C. § 1746, the Court relies in part upon sworn affidavits setting forth admissible facts based on personal knowledge and unsworn, written declarations "subscribed . . . as true under penalty of perjury, and dated."[2] Where the facts are in dispute, the evidence is construed in the light most favorable to the non-moving party, Plaintiff. Federal Ins. Co. v. Am. Home Assurance Co., 639 F.3d 557, 566 (2d Cir. 2011).

BACKGROUND

I. Plaintiff's Hiring and Training

Defendant ADT provides electronic security and related services for residences and businesses. (Defs.' R.56.1 Stmt. ("Defs.' 56.1") ¶ 1, ECF No. 22-4; Decl. of Christopher G. Elko ("Elko Decl."), ECF No. 22-3, Ex. A.) Plaintiff applied through a third-party service to work at ADT. (Defs.' 56.1 ¶ 13.) ADT Sales Manager Anthony DeGrazio reviewed Plaintiff's resume,

[1] In his counter-Rule 56.1 Statement, Plaintiff claims that he "lacks information sufficient to respond" to a number of Defendants' statements. (See Pl.'s Rule 56.1 Counterstatement ("Pl.'s 56.1"), ECF No. 24-3.) This is not a proper response to a Rule 56.1 statement. Plaintiff must either admit or deny the statements with citations to admissible evidence. Fed. R. Civ. P. 56(c)(1); see Copeland v. Sears Roebuck & Co., 25 F. Supp. 2d 412, 419 n.2 (S.D.N.Y. 1998) ("In Plaintiff's Reply to Defendants' Statement of Undisputed Facts, Plaintiff denies these facts as well as numerous other facts by stating he lacks 'direct knowledge.' Plaintiff, however, has not created any issues of fact through this artifice.")). The Court therefore deems the facts that have not been admitted or denied as undisputed. See Fed. R. Civ. P. 56(e) ("If a party fails to . . . properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]"); Parks v. Lebhar-Friedman Inc., No. 04 CV 7133, 2008 U.S. Dist. LEXIS 63019, at *21 (S.D.N.Y. Aug. 11, 2008) (striking Plaintiff's responses that she "lacked knowledge sufficient to form a belief about [defendant's Rule 56.1] assertions" and deeming the 56.1 paragraphs admitted).

[2] Defendant Anthony DeGrazio dated his declaration with only the month and year, not the day, he signed. (ECF No. 22-2.) Because he "substantially complied with the[] statutory requirements" that the declaration be dated, § 1746, and the declaration is based on personal knowledge, the Court deems the declaration admissible. Leboeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham, 185 F.3d 61, 65–66 (2d Cir. 1999).

which indicates that Plaintiff speaks Japanese and Chinese, and asked him at his interview whether he is Chinese. (Defs.' 56.1 ¶¶ 14–15; Elko Decl., Ex. C. ("Pl. Dep. I") 42:10–11.) Plaintiff, who was born in Japan and speaks English with an accent, responded that he is Japanese. (Pl. Dep. I 42:4–20, 159:4–16; Elko Decl., Ex. B ("DeGrazio Dep. I") 73:9–14; Defs.' 56.1 ¶¶ 16–17; Pl.'s 56.1 ¶ 78.) In November 2012, DeGrazio hired Plaintiff as a Custom Home Services Sales Representative ("Sales Representative") for the ADT office in Long Island City, New York ("LIC"). (Defs.' 56.1 ¶ 12; Pl.'s 56.1 ¶ 79.)

At the LIC office, Plaintiff joined four other new Sales Representatives who DeGrazio hired between October and November 2012: two Hispanic men, Guillermo Caesar and Wilfredo Cortes, and two African-American men, Allan Bucknol and Lester White. (Defs.' 56.1 ¶ 12; Elko Decl., Ex. D; DeGrazio Decl. ¶ 11, ECF No. 22-2.) DeGrazio trained the five men in two groups, divided by the month of their hire. (DeGrazio Decl. ¶ 12; DeGrazio Dep. I 99:2–24.) The November hires—Plaintiff, Cortes, and White—received training in model sales calls, product knowledge, and paperwork. (Defs.' 56.1 ¶ 19; DeGrazio Dep. I 100:3–5.) At some point, Plaintiff also completed training online, (Pl.'s Aff. ¶ 4, ECF No. 24-2), and at a week-long "Quick Start" conference with other Sales Representatives in Dallas, Texas, (Defs.' 56.1 ¶ 20; Pl. Dep. I 95:17–96:8). Throughout Plaintiff's employment, Sales Representatives received additional training during weekly conference calls with ADT management, and, upon request, at one-on-one meetings with DeGrazio. (DeGrazio Decl. ¶¶ 13–14; DeGrazio Dep. I 28:15–22.) Each Sales Representative also received an iPad after completing their training to access product and service information on ADT's online portal. (Defs.' 56.1 ¶ 22; Pl.'s Aff. ¶ 4; Pl. Dep. I 96:14–24; DeGrazio Dep. I 32:8–33:3.)

II. Sales Representative Responsibilities and Expectations

Plaintiff's primary duty was to sell a set amount of ADT's products and services. (Defs.' 56.1 ¶ 3; Elko Decl., Ex. A.) Upon completion of a Sales Representative's first four consecutive weeks of employment, ADT assigns the Representative sales quotas. (DeGrazio Decl., Ex. A ("Compensation Plan") at 2.) The ADT Compensation Plan, which Plaintiff received when he was hired, sets forth these quotas. (Id.) The sales quotas fall within three categories: Self-Generated Leads ("SGLs"), Net Sales Production ("NSP"), and "top of the line" products called Pulse Units. (Defs.' 56.1 ¶ 6; DeGrazio Decl., Ex. A ("Compensation Plan").)

SGLs are "any potential customer not previously recorded in the Telmar System"—"the computer system that manages information for individuals interested in ADT services." (Defs.' 56.1 ¶ 6; Compensation Plan.) The Compensation Plan mandated that each Sales Representative find, develop, and close one SGL per week for a total of 52 SGLs per year. (Defs.' 56.1 ¶ 6; Compensation Plan at 2.) NSP refers to the "total dollar amount of products and services sold by the Sales [Representative]," (Defs.' 56.1 ¶ 6), and is calculated by multiplying the NSP value per unit by the total number of units sold, (Pl. Dep. I 149:12–23). The mandatory quota for NSP was $250,000 annually, or $19,231 in a 4-week month and $24,038 in a 5-week month. (Compensation Plan at 2.) The Compensation Plan also required Sales Representatives to sell one Pulse Unit per week, *i.e.* 52 units annually. (Id.) It stated: "Sales Representatives are expected to perform at 100% to quota. Continuous achievement of less than 100% to quota will be addressed by sales management." (Id.)

In addition to these quotas, Sales Representatives are responsible for servicing Telmar Leads, which represent potential clients who have contacted ADT directly and requested

information or services. (DeGrazio Decl. ¶ 5.) A computer assigns Telmar Leads to each Sales Representative based on their availability and geographic sales area. (Declaration of Emre Polat ("Polat Decl."), Ex. B ("DeGrazio Dep. II") 23:6–22, 89:23–25, ECF No. 24.) "If an employee is not producing SGLs, then a supervisor will often reduce the ratio/number of Telmar Leads the Sales Rep[resentative] receives to allow for additional time to develop SGLs." (DeGrazio Decl. ¶ 7.) Although ADT also tracked the percentage of Telmar Leads that Sales Representatives closed, the "closing percentage" or rate was a "peripheral statistic . . . but d[id] not relate to the mandatory quotas assigned to Sales Reps." (Suppl. DeGrazio Decl. ¶ 2, ECF No. 23-1.)

DeGrazio emailed the Sales Representatives he supervised a monthly "Dashboard Update," which tracked their sales in the previous month. (Id. ¶ 15, Ex. B; Defs.' 56.1 ¶ 26.) For those employees who did not meet their quotas, DeGrazio could impose discipline, but he "[n]ormally [] would wait six months before formally documenting performance issues with a new Sales Rep" and then issue a Performance Improvement Plan ("PIP"). (DeGrazio Decl. ¶¶ 16–17.)

III. Plaintiff's First Quarter Performance

After two months of training, Plaintiff began working in the field around January 7, 2013. (Defs.' 56.1 ¶ 23; Pl. Dep. I 15:13–19.) In both January and February of 2013, Plaintiff had one SGL. (Elko Decl., Ex. I.) That January, Plaintiff closed 50% of the Telmar Leads assigned to him, but generated only $6,888 of the $19,231 quota in NSP. (Pl. Dep. I 148:3–15; DeGrazio Dep. I 108:23–109:2.) He also failed to reach his NSP quota for February, selling seven units at $1,826 per unit (a total NSP of $12,782). (Id. 149:3–23; DeGrazio Decl., Ex. B.) Comparatively, Caesar and Cortes, who were hired around the same time as Plaintiff, did not have any SGLs in

January; in February, Caesar had no SGLs, but Cortes had four. (Polat Decl., Ex. D (Apr. 26 Email Chain).) Like Plaintiff, coworkers Bucknol and White each had one SGL in February. (DeGrazio Decl., Ex. B.) Bucknol had the lowest closing percentage in February. (DeGrazio Dep. I 109:3–9.)

In a March 4, 2013 Dashboard Update, DeGrazio informed Sales Representatives that he would be having individual meetings with those who failed to reach their SGL quota for February. (Id.) On March 6, 2013, DeGrazio met with Plaintiff and issued him a form entitled "Coaching for Improvement." (Elko Decl., Ex. F ("Coaching Form"); Polat Decl., Ex A ("Pl. Dep. II") 195:12–17, ECF No. 24-1.) In the section describing the performance standards at issue, DeGrazio wrote "Rep needs to book 1 SGL per week." (Coaching Form.) The form also provided an "Action Plan," in which DeGrazio directed Plaintiff to "be at 2 SGL's by March 15, 2013," and promised to provide Plaintiff with more coaching and training. (Id.) Plaintiff signed the form, but testified during his deposition that DeGrazio told him that the Coaching Form "[was] not a performance review" and that "everybody gets this once a month." (Pl. Dep. II 195:21–196:7.)

Plaintiff again failed to meet his quotas in March and April. He secured one SGL per month, though four were expected monthly. (Elko Decl., Exs. I, J.) He made $12,303 in NSP in March, when the quota was $19,231. (Elko Decl., Ex. I.)[3] By April 26, 2013, Plaintiff had sold ten Pulse Units, though by quota he was required to sell one in each of the prior sixteen weeks.

[3] Defendant cites Exhibit E to Elko's Declaration as evidence of Plaintiff's sales between January and June 2013. (See Defs.' 56.1.) But Exhibit E is not admissible as evidence for a number of reasons. First, its charts have no column headings explaining the significance of the numbers therein. Nor do they indicate that they contain the NSP per unit value necessary to calculate Plaintiff's monthly NSP. The Court therefore does not rely on the charts in Exhibit E. However, Plaintiff's total NSP for January, February, and March ($31,973) is reflected in Exhibit I, and subtracting Plaintiff's NSP for January and February previously cited ($6,888 and $12,782), allows the Court to calculate Plaintiff's NSP for March ($12,303).

(Id.) Earlier that month, a disgruntled ADT customer complained that Plaintiff "made remarks that hurt [the customer's] feelings," "told [him] repeatedly that [he] was a difficult customer to work with," and was rude and unresponsive to his text messages and calls. (Elko Decl., Ex. G.) Plaintiff testified at his deposition that DeGrazio told him sometime in early April that his "accent wasn't clear" and that it was "confusing people," causing him to lose the deal. (Pl. Dep. I 101:2–19; Pl. Dep. II 100:9–18.) Throughout this four-month period, DeGrazio shifted automatically-assigned Telmar Leads away from Caesar and Plaintiff and reassigned them to Cortes, based on Cortes's superior performance. (Elko Decl., Ex. I.) Although DeGrazio placed October hires Caesar and Bucknol on PIPs because they were struggling to meet their quotas, he deferred placing Plaintiff on a PIP because he had not yet reached six months on the job. (DeGrazio Decl. ¶¶ 18–19, Ex. B; Reply Br., ECF No. 23, Ex. A.)

IV. Plaintiff's First Complaint against DeGrazio

Plaintiff asserts that he submitted a complaint against DeGrazio via ADT's online portal and received a confirmation "in [his] log-in session," but was never contacted by ADT about the complaint. (Pl.'s Aff. ¶¶ 6–7.) On April 23, 2013, Plaintiff had Caesar, his co-worker, sign onto the complaint "to grab more attention," (Pl. Dep. II 63:11), and mailed the complaint to Timothy McKinney, ADT's Vice President of Custom Home Services, (Elko Decl., Ex. H ("the April Complaint")). In the complaint, Plaintiff and Caesar asserted that DeGrazio had been "surreptitiously handing off most [of] the sales appointments initially assigned for [Plaintiff] or [his] fellow sales associates to a specific coworker; a Mr. Wilfredo M. Cortez [*sic*]" due to "employee favoritism." (April Complaint.) They asserted that "[t]here is common consensus amongst the sales associates that this unfair distribution of leads"—4 to 6 Telmar leads to Cortes

and only 1 to 2 Telmar leads to the other associates—"is creating a privileged-only unequal opportunity for employee compensation; and subsequently a hostile work environment." (Id.)

McKinney forwarded the complaint to DeGrazio, instructing him to respond to it after he had it "thought out and documented such that there are no repercussions." (Elko Decl., Ex. I.) DeGrazio responded: "At the end of each month I will make adjustments to the ratio of [appointments] based on [the] prior month performance and also based on [the] current month performance as we see fit based on run rate of NSP per unit/[gross close rate]/SG[L]'s/Pulse Units." (Elko Decl., Ex. I.) In further justification of his leads distribution, DeGrazio provided Caesar's and Plaintiff's sales statistics for January to April, during which they made 0 to 1 SGLs per month, and compared them to Cortes, who secured 0, 4, 1, and 5 SGLs in those months. (Id.) He forwarded McKinney's email and his response to his then wife, Danielle Jones, and expressed his anger at "doing all this work," taking "eight hours to compile all that data." (DeGrazio Dep. II 149:20–151:12.) He wrote, "Furious right now" and, "Steam coming out of my ears right now." (Polat Decl., Ex. D.)

On July 18, 2013, Regional Human Resources Manager Mike Stewart found Plaintiff's and Caesar's complaint to be unsubstantiated. (Suppl. Elko Decl., ECF No. 23, Ex. C ("April Compl. Investigation").) Stewart stated in his Investigation Report that "[t]he manager has the ability to move or change Telmar leads." (Id.) Noting that Plaintiff and Caesar had poor past performance, and that Caesar had recently resigned, Stewart concluded that there was "no evidence of unfair or unethical treatment or reasons for changing these leads in Telmar." (Id.) He added that DeGrazio was nevertheless directed to explain the reasons for any future changes in

Telmar leads to the affected Sales Representative. (Id.) Stewart did not interview Plaintiff as part of his investigation. (Pl.'s Aff. ¶ 17.)

V. May and June Performance

On May 1, 2013, DeGrazio met with both Plaintiff and, via telephone, supervisor Scott Sanor. (Defs.' 56.1 ¶ 36.) At the meeting, DeGrazio first asked Plaintiff why he did not first come to DeGrazio with concerns prior to filing a complaint. (DeGrazio Dep. II 143:4–24; Pl. Dep. II 201: 9–203:23.) Plaintiff felt "very uncomfortable" because he believed DeGrazio was "very angry." (Pl. Dep. II 201:10–12.) DeGrazio then issued Plaintiff a PIP, which required Plaintiff to, in part, book two SGLs by May 15, 2013. (Elko Decl., Ex. J ("May PIP").) According to Plaintiff's deposition testimony, DeGrazio again discussed the impact of Plaintiff's accent on his sales performance. (Pl. Dep. II 100:9–17.)

Following that meeting, Plaintiff emailed Mirela Rahmani, an employee in ADT's Human Resources Division, to document the "uncomfortable" meeting and dispute the allegations of poor performance. (Pl.'s Aff. ¶ 11, Ex. B.) On May 9, Plaintiff again emailed Rahmani, stating that DeGrazio wrongfully accused him of failing to address a customer issue and that he believed DeGrazio was "targeting [him] by creating fallacious claims, all in retaliation to the formal complaints I filed with . . . against [DeGrazio] recently." (Id.) Rahmani forwarded the May 9th email to DeGrazio, (Polat Decl., Ex. F), but she did not respond directly to Plaintiff, (Pl.'s Aff. ¶¶ 11–12).

Plaintiff did not meet his quotas by the end of May, achieving only one SGL and $6,675[4] in NSP and selling two Pulse Units. (DeGrazio Decl., Ex. B; Elko Decl., Ex. L.) In his June 4, 2013 Dashboard Update email, DeGrazio informed the Sales Representatives that he would

[4] Plaintiff sold five units at $1,335 NSP per unit. (DeGrazio Decl., Ex. B.)

address missed quotas in their one-on-one meetings. (DeGrazio Decl., Ex. B.) The next day, DeGrazio alerted Human Resources that Plaintiff and Caesar had failed to meet their sales quotas for May, and stated that both had received PIPs for their March and April performance. (Elko Decl., Ex. K.) With authorization from HR Manager Stewart, DeGrazio issued both Representatives a written warning. (Id.; Elko Decl., Ex. L; DeGrazio Decl. ¶ 21.)

ADT Manager Lorenzo Petroni attended the June 6, 2013 meeting at which DeGrazio issued Plaintiff his warning and Action Plan. (Elko Decl., Ex. M.) Petroni informed HR that Plaintiff did not speak during the meeting and refused to sign the warning. (Id.) The June Action Plan required that Plaintiff make 200 calls[5] to prospective customers within a three-hour time period each day. (Elko Decl., Ex. L.) Between June 10 and June 21, 2013, Plaintiff spent a total of 17 minutes calling prospective customers, during which he completed a total of 126 calls. (Pl. Dep. I 222:22–223:3; Elko Decl., Ex. N.)

Plaintiff did not respond to DeGrazio's texts, email messages, or calls between June 19 and 20. (Pl. Dep. I 235:7–12.) On June 21, DeGrazio emailed Plaintiff, noting his non-responsiveness and requesting an explanation regarding his failure to meet his daily call requirement. (Elko Decl., Ex. O.) Plaintiff replied that he was in a car accident the previous month and that he was delayed in responding because he was receiving medical treatment for injuries he sustained. (Id.) He added that "he had already informed [DeGrazio] that such a [daily call requirement] with all its time allotments and objectives set[] unrealistic and humanly-impossibly expectations of an employee and is inherently designed for failure." (Id.)

[5] This included calls that went unanswered. (Elko Decl., Ex. L.)

VI. June Complaints

Plaintiff asserts, but Defendants dispute, that he submitted a second complaint against DeGrazio via the ADT online portal in early June 2013, complaining that DeGrazio "knowingly and wantonly discriminated against [Plaintiff] due to [his] Japanese nationality & ancestry" and asking to file a "formal complaint" against DeGrazio for "mistreatment and national origin discrimination." (Pl.'s Aff., Ex. C.)

It is undisputed, however, that Plaintiff and Caesar mailed ADT's CEO a second joint complaint against DeGrazio dated June 14, 2013. (Elko Decl., Ex. P.) The June 14 complaint alleged that DeGrazio harassed and mistreated Plaintiff and his "fellow sales associates and customers" based on age and national origin. (Id.) Specifically, Plaintiff and Caesar alleged that DeGrazio failed to provide necessary training, resources, and customer support in that he:

- deprived the LIC team members of iPads and presentation booklets other associates had at their Quick Start training;
- did not take his team members on a "ride along" training "to see [DeGrazio] in a sales situation";
- did not provide business cards and contracts to Sales Representatives;
- did not provide Sales Representatives with "given Telmar identification to book sales officially"; and
- sent Sales Representatives "into the field without proper or complete training regarding pricing;"
- did not communicate policy changes; and
- failed to escalate customer concerns to higher management.

(Id.) They also asserted that DeGrazio "[c]reated a hostile atmosphere where sales associates did or do not feel comfortable asking questions" and was nepotistic, distributing a disproportionate amount of Telmar leads to Cortes. (Id.) Soon after filing the complaint, on June 26, 2013, Caesar resigned. (Suppl. DeGrazio Decl. ¶ 6.)

ADT investigated and found the claims in the June 14 complaint unsubstantiated. (Elko Decl., Ex. Q.) After interviewing Caesar's and Plaintiff's co-workers and Supervisor Scott Sanor, the Investigator concluded that "[t]he employees have a positive opinion of [DeGrazio]" and that "everyone on the team is treated fairly." (Id.)

VII. Plaintiff's Final Written Warning and Termination

Before ADT investigated the June 14 complaint, DeGrazio met with Plaintiff, Stewart, and Manager Rob Asaro on July 7, 2013. (Elko Decl., Ex. R.) DeGrazio issued Plaintiff a final written warning because Plaintiff again fell short of his SGL, NSP, and Pulse Unit quotas. (Id.) The warning stated, "Any further violations of this policy will result in termination of your employment." (Id.)

Plaintiff did not close any SGLs in July. (Polat Decl., Ex. I.) Between July 1 and 25, 2013, he completed a total of 292 calls. (Id.; Elko Decl., Ex. N.) DeGrazio requested and received permission from Stewart to terminate Plaintiff's employment based on Plaintiff's failure to improve his performance. (Elko Decl., Ex. S.) Although Stewart's superior, Cynthia Haegley, questioned the feasibility of completing 200 calls in a three-hour period each day, she agreed that Plaintiff's 20 call average per day was "not nearly enough." (Polat Decl., Ex. I.) On August 8, 2013, DeGrazio met with Plaintiff and terminated his employment. (DeGrazio Decl. ¶ 25; Polat Decl., Ex. K.)

VIII. State Court Complaint and Proceedings in this Court

Plaintiff commenced suit against Defendants and ADT Security Services Inc. in the New York State Supreme Court in Queens County on October 9, 2013. (Notice of Removal, ECF No. 1.) Plaintiff raised claims of discrimination under the NYSHRL and the NYCHRL and for

intentional infliction of emotional distress. (Id., Ex. A.) Defendants removed the action to this Court based on diversity of citizenship. (Notice of Removal.) Plaintiff then filed an amended complaint against ADT LLC and DeGrazio alone, reasserting his claims under the NYSHRL and the NYCHRL and raising additional discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)–(e)-17 ("Title VII").

Upon completing discovery, Defendants requested a pre-motion conference to seek leave to move for summary judgment. (ECF No. 14.) Defendants argued that Plaintiff's Title VII claims were barred because Plaintiff failed to exhaust his administrative remedies and that he failed to establish discrimination or retaliation under state law. (Id.) At the August 22, 2014 pre-motion conference, Plaintiff voluntarily withdrew his Title VII claims. (Pre-Motion Conference Tr., ECF No. 27.) Plaintiff stated his desire to proceed on his state- and city-law discrimination and retaliation claims under the NYSHRL and the NYCHRL based on diversity jurisdiction, stating that he is a resident of New York and that Defendants are citizens of Delaware and Connecticut. (Id. 3:21–4:6.) Plaintiff also specifically limited his claims to discrimination based on national origin and retaliation, stating that he is not pursuing a hostile work environment claim. (Id. 3:13–20.) Defendants filed the instant motion for summary judgment regarding Plaintiff's remaining claims. (ECF No. 22.) Plaintiff opposed the motion, (Opp'n, ECF No. 24), and Defendants have replied, (Reply, ECF No. 23). The motion for summary judgment was referred to me for a Report and Recommendation. (ECF Entry at 4/3/2015.)

DISCUSSION

I. Legal Standard

"Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Doninger v. Niehoff, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). A fact is material if it is one that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (quoting Anderson, 477 U.S. at 248). "The trial court's function in deciding such a motion is not to weigh the evidence or resolve issues of fact, but to decide instead whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000); see also Baker v. Home Depot, 445 F.3d 541, 543 (2d Cir. 2006) (resolving all ambiguities and drawing all inferences in favor of the nonmoving party on summary judgment). The Second Circuit has repeatedly emphasized the "need for caution about granting summary judgment to an employer in a discrimination case," because "direct evidence of [discriminatory] intent will only rarely be available, so affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 101 (2d Cir. 2010) (quoting Holcomb v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008)) (internal quotation marks omitted).

However, the non-moving party must provide "affirmative evidence" from which a jury could return a verdict in its favor. Anderson, 477 U.S. at 257. "Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact." Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (quoting Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)). Moreover, "[t]he 'mere existence of a scintilla of evidence' supporting the non-movant's case is also insufficient to defeat summary judgment." Id. (quoting Anderson, 477 U.S. at 252).

II. Discrimination

As relevant here, the NYSHRL prohibits an employer from discharging an individual from employment or "discriminat[ing] against such individual in compensation or in terms, conditions or privileges of employment" "because of" his national origin. N.Y. Exec. Law § 296(1)(a). Similarly, the NYCHRL prohibits discrimination against an employee "because of" his national origin. N.Y.C. Admin. Code § 8–107. NYSHRL claims of employment discrimination are examined under the same burden-shifting framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), used to determine liability in Title VII claims. Spiegel v. Schulmann, 604 F.3d 72, 80 (2d Cir. 2010); see also Hyek v. Field Support Servs., Inc., 461 F. App'x 59, 60 (2d Cir. 2012) ("Claims brought under the NYSHRL [and Title VII] 'are analyzed identically'").[6] However, since the 2005 amendment of the NYCHRL, city-law discrimination

[6] Title VII suits fall into two basic categories: single-issue and double-issue motivation cases. Bickerstaff v. Vassar College, 196 F.3d 435, 446 (2d Cir. 1999). Single-issue motivation cases (also known as "pretext" cases) involve the single inquiry of whether impermissible discrimination motivated the adverse action. Id. Dual-issue motivation cases, or "mixed motive" cases, involve the same inquiry plus the issue of whether the employer would have taken the same action for a permissible reason; they usually involve direct evidence of discrimination. Id.; Raskin v. Wyatt Co., 125 F.3d 55, 61 (2d Cir. 1997) ("[T]o warrant a mixed-motive burden shift, the plaintiff must be able to produce a "smoking gun" . . . ."). Although Plaintiff makes mention of mixed motive cases in his opposition, (Opp'n at 9), he and Defendants both rely on McDonnell Douglas, which is the proper framework for single-issue motivation cases. As there is no "smoking gun" evidence of discrimination in this case, there is no basis for a mixed-

claims require an independent analysis. Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013). That amendment dictates that interpretations of federal and state civil rights statutes serve only "'as a *floor* below which the City's Human Rights law cannot fall.'" Id. (quoting Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009)). Courts must also construe the NYCHRL provisions "liberally for the accomplishment of the uniquely broad and remedial purposes thereof . . . ." Id. (citation omitted).

A. NYSHRL Discrimination Claim

The burden of proof and production for employment discrimination claims under the NYSHRL and Title VII are identical. Sethi v. Narod, 12 F. Supp. 3d 505, 522 n.3 (E.D.N.Y. 2014). Accordingly, Plaintiff's state-law claim here is analyzed under the same law applied to Title VII claims. Under the McDonnell Douglas framework, a plaintiff must first establish a *prima facie* case of discrimination, a *de minimis* burden. Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003); McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) (citing Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 169 (2d Cir. 2006)). Once established, the burden "shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action." Raytheon, 540 U.S. at 49 n.3. The plaintiff must then prove that the proffered reason is a pretext for discrimination. Id.

To establish a *prima facie* case of discrimination, a plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) the adverse action took place under circumstances giving

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motive analysis. I note, however, that under either framework, the Court's ultimate task is the same: to determine "[w]hether the plaintiff has presented evidence from which a rational finder of fact could conclude that the defendant discriminated against h[im] illegally." Jalal v. Columbia Univ. in the City of N.Y., 4 F. Supp. 2d 224, 233–34 (S.D.N.Y. 1998).

rise to the inference of discriminatory intent. Abrams v. Dep't of Pub. Safety, 764 F.3d 244, 251–52 (2d Cir. 2014); Soloviev v. Goldstein, No. 14 CV 5035, 2015 U.S. Dist. LEXIS 62702, at *21–22 (E.D.N.Y. May 12, 2015) (citation omitted). It is undisputed here that Plaintiff is a member of a protected class based upon his national origin. It is likewise undisputed that Defendants discharged Plaintiff from his employment. The parties contest whether Plaintiff was qualified for the position of ADT Sales Representative and whether the circumstances of Plaintiff's discharge give rise to an inference of discrimination.

1. *Prima Facie* Case

Plaintiff's Qualifications

Defendants argue that Plaintiff was not qualified to be a Sales Representative because he repeatedly failed to achieve his sales quotas. (Defs.' Mem. at 27–29, ECF No. 22-1.) They acknowledge that the Second Circuit's test set forth in Slattery v. Swiss Reinsurance America Corporation is for "basic eligibility" and "not the greater showing that [the plaintiff] satisfies the employer." (Id. at 27 (citing Whyte v. Nassau Health Care Corp., 969 F. Supp. 2d 248, 255 (E.D.N.Y. 2013)); Slattery, 248 F.3d 87, 92 (2d Cir. 2001). Despite this minimal burden, Defendants argue that Plaintiff fails to make out a *prima facie* case because his performance was "so manifestly poor as to render [him] unqualified for continued employment . . . ." (Id. (citing Gregory v. Daly, 243 F.3d 687, 697 n.7 (2d Cir. 2001).) Plaintiff argues that Slattery foreclosed the possibility that deficient performance can preclude a *prima facie* showing of his basic eligibility. (Opp'n at 14–15.) Although that is not so, Plaintiff has nevertheless established that he was qualified for the position.

The Second Circuit in Slattery admonished that the "qualification prong must not . . . be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer's proffer of a legitimate, nondiscriminatory basis for its decision." Slattery, 248 F.3d at 92. The Circuit determined that regardless of variation in the terminology courts used, the substantive inquiry in assessing qualification remains whether the plaintiff has demonstrated *minimal* qualification, *i.e.* basic eligibility. Id. Dismal performance can reflect a lack of minimal qualifications. See Donnelly v. Greenburgh Cent. Sch. Dist. No. 7, 691 F.3d 134, 147 (2d Cir. 2012) (noting that an academic's performance is relevant to determining his qualification for tenure); Whyte, 969 F. Supp. 2d at 255–56 (considering plaintiff's negative performance reviews in finding that she failed to make a *prima facie* showing of her qualification). Contrary to Defendants' argument, however, Plaintiff's performance was not so dismal as to show Plaintiff's inability to perform the basic duties as a Sales Representative. He has made a sufficient showing for the purpose of his *prima facie* case that he was qualified for the position.

In a discharge case like Plaintiff's, in which the employer had hired the plaintiff into the job in question, "the inference of minimal qualification is, of course, easier to draw than in a hiring or promotion case, because, by hiring the employee, the employer itself has already expressed a belief that []he is minimally qualified." Gregory, 243 F.3d at 696. Here, Plaintiff "need not show perfect performance or even average performance" after he was hired as a Sales Representative; his qualification for the position may be inferred. Ramirez v. Hempstead Union Free Sch. Dist. Bd. of Educ., 33 F. Supp. 3d 158, 167 (E.D.N.Y. 2014). Plaintiff alleges that he was able to perform the tasks of a Sales Representative (including calling customers, addressing issues,

attending meetings, developing leads, and driving to perform house calls) and would have met ADT's standards had DeGrazio not discriminated against him. (See Am. Compl. ¶¶ 28–46, 51–53.) This is sufficient to establish that Plaintiff was qualified for purposes of his *prima facie* case. Cf. Mines v. City of New York/DHS, No. 11 CV 7886, 2013 U.S. Dist. LEXIS 157782, at *16 (S.D.N.Y. Nov. 1, 2013) (finding that employer's hiring of Plaintiff for the position at issue sufficiently demonstrated plaintiff's qualification for that job).

Adverse Employment Action

Although not expressly discussed by the parties, Plaintiff's amended complaint does not specify which of Defendants' actions he challenges as the result of national origin discrimination. At the pre-motion conference, Plaintiff's counsel withdrew any hostile work environment claim. (Tr. 3:13–20.) What remains are Plaintiff's claims that DeGrazio discriminated against him by failing to train him, negatively reviewing his performance, issuing him written warnings, and terminating his employment. (See Am. Compl.)

Negative performance reviews or reprimands "are generally not considered actionable" adverse actions in either discrimination or retaliation claims. Brierly v. Deer Park Union Free Sch. Dist., 359 F. Supp. 2d 275, 300 (E.D.N.Y. 2005); Franchitti v. Bloomberg, No. 07 CV 7496, 2005 U.S. Dist. LEXIS 19285, at *17 (S.D.N.Y. Aug. 12, 2005) ("[Plaintiff's] negative performance review, however, fails to qualify as an adverse action . . . ."). Nor does the written warning DeGrazio issued Plaintiff or DeGrazio's alleged failure to train Plaintiff constitute separate adverse actions. See Joseph v. Leavitt, 465 F.3d 87, 91 (2d Cir. 2006) ("The application of the [employer's] disciplinary policies to [the employee], without more, does not constitute an adverse employment action."); Santiago v. City of New York, No. 05 CV 3668, 2009 U.S. Dist.

LEXIS 30371, at *42 (E.D.N.Y. Mar. 31, 2009) (finding that plaintiff's claim of failure to train and dissatisfaction with her duties were not adverse employment actions); see also Chang v. Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) (concluding that oral and written warnings are not materially adverse). These actions (and inaction) may, however, be considered part of an adverse action if it leads to a demotion or termination, as Plaintiff alleges is the case here. Byra-Grzegorczyk v. Bristol-Myers Squibb Co., 572 F. Supp. 2d 233, 252 (D. Conn. 2008); Puleo v. Western Connecticut State Univ., No. 13 CV 936, 2015 U.S. Dist. LEXIS 77544, at *13 (D. Conn. June 16, 2015). The Court therefore considers Plaintiff's claims regarding the circumstances under which Defendants issued Plaintiff his negative performance reviews and warning, trained—or failed—to train him, and discharged him to determine whether they demonstrate discrimination.

Inference of Discrimination

Various circumstances may give rise to an inference of discrimination, including, but not limited to:

> the employer's criticism of the plaintiff's performance in [] degrading terms [based on the employee's protected characteristic]; or its invidious comments about others in the employee's protected group; or the more favorable treatment of [similarly situated] employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.

Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001) (quoting Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994)); see also Bivens v. Inst. for Cmty. Living, Inc., No. 14 CV 7173, 2015 U.S. Dist. LEXIS 51000, at *20 (S.D.N.Y. Apr. 17, 2015)). Here, however, Plaintiff proffers little evidence from which to reasonably infer discrimination.

The most overt evidence Plaintiff proffers of Defendants' discriminatory animus for these decisions are DeGrazio's alleged comments that his Japanese accent "wasn't clear," may have affected his ability to sell ADT products and, in turn, hurt his performance and led to his discharge. (Pl. Dep. I 101:2–19; Pl. Dep. II 100:9–18.) "'Accent and national origin are obviously inextricably intertwined in many cases'" because accents "are perhaps the most recognizable indication of one's national identity." Pibouin v. CA, Inc., 8567 F. Supp. 2d 315, 324 (E.D.N.Y. 2012) (citation omitted). A comment regarding an employee's accent must, however, be "'probative of discriminatory intent, *i.e.* a supervisor saying that he does not like an employee's accent, to reflect some bias.'" Id. (quoting Manessis v. N.Y. City Dep't of Transportation, No. 02 CV 359, 2003 U.S. Dist. LEXIS 1921, at *24 (S.D.N.Y. Feb. 10, 2003)). DeGrazio was critiquing Plaintiff's work performance when, it is alleged, he commented on Plaintiff's accent. But, as Defendants point out, (Mem. at 30), DeGrazio was aware Plaintiff had an accent before hiring him and did not indicate a personal dislike of his accent, (see Pl. Dep. I 159:14–16). Given Plaintiff's minimal *prima facie* burden, however, the Court assumes that Plaintiff satisfies the fourth McDonnell Douglas element, and has established a *prima facie* case of discrimination.

2. Defendants' Legitimate, Nondiscriminatory Reasons

The burden now shifts to the employer to provide a legitimate, nondiscriminatory reason for Plaintiff's discharge. Defendants assert that they fired Plaintiff because he failed to meet his sales quotas, which all Sales Representatives were required to meet, (Elko Decl., Ex. A (requiring Sales Representatives to "meet or exceed [their] assigned sales quota"). The Compensation Plan defines those sales quotas, for NSP, SGLs, and Pulse Units. (DeGrazio

Decl., Ex. A.) Plaintiff does not dispute that he never met these quotas during the seven months he worked in the field and that he failed to meet the individual goals Defendants set for him in Action Plans and written warnings. (See Suppl. Elko Decl., Pl. Dep. III 152:14–153:1.) The sales statistics provided in the Dashboard Update emails, emails between DeGrazio and his superiors, and Plaintiff's discipline records confirm Plaintiff's poor sales performance. (See Elko Decl., Exs. F, I, J, L, N, R.)[7] Defendants have therefore advanced a legitimate, nondiscriminatory reason for Plaintiff's discharge. See Jones v. Yonkers Pub. Sch., 326 F. Supp. 220, 228 (S.D.N.Y. 1997) (excessive lateness and poor performance are legitimate, nondiscriminatory reasons for termination).

3. Pretext

The crux of this case, like most discrimination lawsuits, is whether the asserted legitimate, nondiscriminatory reason was pretext for discrimination. Plaintiff does not directly address pretext in his opposition, (see Opp'n at 14–16), but his other filings and deposition testimony identify the following incidents as evidence of discrimination. Plaintiff testified at his deposition that DeGrazio twice criticized his Japanese accent, in April and May 2013, as unclear and "confusing" to customers and DeGrazio surmised that Plaintiff's accent caused him to lose deals. (Pl. Dep. II 100:9–13.) He further testified that DeGrazio rebuked him for asking permission to offer a customer a discount in order to make a sale. (Pl. Dep. I 102:11–22.) In his Rule 56.1 Facts Statement, Plaintiff also states that "DeGrazio testified that he would send Plaintiff to [] Chinese leads." (Pl.'s 56.1 ¶ 87.) Plaintiff also generally argues that DeGrazio disciplined him more

[7] Plaintiff's record also reveals his failure to comply with company policy (he received a warning for giving an unauthorized customer discount), (DeGrazio Dep. II 135:24–136:9), and a customer letter complaining that Plaintiff was unresponsive and rude, (Elko Decl., Ex. G). However, Defendants assert only that Plaintiff's "failure to ever meet even one of his mandatory quotas at any time during his employment" was the legitimate, nondiscriminatory reason for his PIP, written warnings, and discharge. (Defs.'Mem. at 22.)

severely, trained him less, and gave him fewer Telmar leads than non-Asian men in his office. (See id. ¶¶ 83–85.) Even construed in the light most favorable to Plaintiff, these incidents do not evidence pretext.

Assuming for the purposes of this motion, as I must, that DeGrazio criticized Plaintiff's accent as alleged, Plaintiff must establish that those comments evidence some discriminatory animus based on his national origin and connect them to his discharge. "Stray remarks, even by a decisionmaker, without a demonstrated nexus to the adverse action will not defeat a motion for summary judgment." Pilbouin, 867 F. Supp. 2d at 324 (citing Danzer v. Norden Sys., 151 F.3d 50, 56 (2d Cir. 1998)). Several factors contribute to the determination that a remark is "stray:" the remark's speaker, timing in relation to the employment decision at issue, content, and context. Schreiber v. Worldco, LLC, 324 F. Supp. 2d 512, 518 (S.D.N.Y. 2008). By nature of Plaintiff's brief, one-year employment, DeGrazio's April and May remarks were made close in time to Plaintiff's August discharge. See Sass v. MTA Bus Co., No. 10 CV 4079, 2012 U.S. Dist. LEXIS 142567, at *19 (E.D.N.Y. Oct. 1, 2012) (listing cases finding periods up to five and a half months as sufficiently close in time to suggest connection to some discriminatory animus). The temporal proximity between DeGrazio's remarks on Plaintiff's accent and Plaintiff's discharge may therefore circumstantially evidence a causal connection between the two. See Tomassi v. Insignia Fin. Group, Inc., 478 F.3d 111, 115 (2d Cir. 2007) ("[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination."); Kirsch v. Fleet St., Ltd., 148 F.3d 149, 163 (2d Cir. 1998) (considering temporal proximity between supervisor's discriminatory remark and date of discharge to determine whether remark was "stray"); Pilbouin, 867 F. Supp. 2d at 325 (finding

no pretext "without some temporal connection" between defendant's mocking of plaintiff's accent and a comment that the defendant "hates people with strong accents").

Yet DeGrazio's remarks, considered in context, do not evidence discriminatory animus. "'An adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance. There is nothing improper about an employer making an *honest* assessment of the oral communication skills of a candidate for a job when such skills are reasonably related to job performance.'" Vidal v. Metro-North Commuter R.R. Co., No. 12 CV 248, 2014 U.S. Dist. LEXIS 107685, at *31 (D. Conn. Aug. 6, 2014) (quoting Fragante v. City & Cnty. of Honolulu, 888 F.2d 591, 596–97 (9th Cir. 1989)). The same can be said of hired candidates whose accents later interfere with their job performance. See Josma v. New York City Health & Hosps. Corp., No. 10 CV 3610, 2012 U.S. Dist. LEXIS 126079, at 42–48 (E.D.N.Y. Sept. 4, 2012) (finding that record evidence that plaintiff failed to adequately perform on a competency exam undermined "double inference" that comments about plaintiff's heavy Haitian accent constituted derogatory comments based on national origin). A supervisor's comment expressing difficulty understanding an employee's accent is insufficient to support an inference of national origin discrimination. See Ghose v. Century 21, Inc., 12 F. App'x 52, 54–55 (2d Cir. 2001) (concluding that plaintiff failed to show circumstances from which discrimination could be inferred when "the evidence on which he relies indicates only that his coworkers and supervisors asked him to repeat himself because they could not understand him."); Ponniah Das v. Our Lady of Mercy Med. Ctr., No. 00 Civ. 2574, 2002 U.S. Dist. LEXIS 7771, at *29 (S.D.N.Y. Apr. 30, 2002), aff'd 56 F. App'x 12 (2d Cir. 2003) ("That [plaintiff's

supervisor] said that she could not understand [plaintiff's] accent does not support a claim of discrimination.").

Here, DeGrazio suggested that Plaintiff's accent may have contributed to his low sales and made these comments during meetings in which he critiqued Plaintiff's overall poor performance and provided him with Action Plans for improvement. (See Pl. Dep. II 100:2–21.) Rather than expressing personal prejudice, DeGrazio's comments, when considered in context, tend to show that DeGrazio was objectively evaluating Plaintiff's poor performance and surmising that Plaintiff's heavy accent may have impacted his sales. The "same actor inference" further undermines any reasonable inference that DeGrazio harbored enmity against Plaintiff's accent or, by extension, his Japanese origin. "When the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [him] an invidious motivation that would be inconsistent with the decision to hire." Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997). Plaintiff admits that DeGrazio hired him knowing that he spoke with a Japanese accent. (Pl. Dep. I 159:4–16.) It is "suspect to claim that the same manager who hired [Plaintiff] . . . would suddenly develop [less than six months later] an aversion to members of [Plaintiff's protected] class." Watt v. New York Botanical Garden, No. 98 Civ. 1095, 2000 U.S. Dist. LEXIS 1611, at *23 (S.D.N.Y. Feb. 15, 2000) (citation and internal quotation marks omitted). DeGrazio's comments are therefore insufficient to establish discriminatory intent.

Nor does DeGrazio's assignment of Chinese customers to Plaintiff support an inference of anti-Asian or anti-Japanese bias. Plaintiff testified that DeGrazio hired him because he "just wanted an Asian person in the office," (Pl. Dep. I 159:9–13), and highlights in his Facts

Statement DeGrazio's testimony that Plaintiff likely received Telmar leads for Asian customers, (Pl.'s 56.1 ¶ 87; DeGrazio Dep. II 88:8–89:2–6). This simply supports DeGrazio's testimony that he viewed Plaintiff's language abilities as advantageous in providing service to Chinese- and Japanese-speaking customers. (See Suppl. Elko Decl., Ex. A ("DeGrazio Dep. III") 146:4–10, ECF No. 23-3 (stating that he told Plaintiff, "You could capitalize on an opportunity that nobody else in the office can capitalize because you speak three different languages." So, if you go to that area, you would be able to penetrate that area better than anybody else in the team."). Instead of supporting Plaintiff's claim that DeGrazio harbored an anti-Asian or anti-Japanese bias, DeGrazio's testimony provides probative evidence that he harbored no ill-will towards Plaintiff's language skills, accent, and, by extension, national origin. See Petrisch v. HSBC Bank USA, Inc., No. 07 CV 3303, 2013 U.S. Dist. LEXIS 45346, at *33 (E.D.N.Y. Mar. 28, 2013) (finding supervisor's testimony that he considered plaintiff's ability to speak Spanish as a benefit to the employer which had many Spanish-speaking clients was probative that the supervisor harbored no discriminatory animus towards her language or accent).

When asked at his deposition whether there were other instances when DeGrazio treated him unfairly, Plaintiff responded that he once requested a discount for a customer and, on speakerphone and in that customer's presence, DeGrazio responded, "Are these people serious? Don't make the deal." (Pl. Dep. I 102:11–22.) DeGrazio also issued a warning to Plaintiff for providing a customer with an unauthorized discount. (DeGrazio Dep. II 136:3–9.) As Plaintiff stated in his June complaint, he believed that DeGrazio's reaction to his discount request "d[id] not result in a positive interaction with the customer," but neither he nor DeGrazio's reaction suggest that DeGrazio's disfavor for discounts evidence animus against Plaintiff's national

origin. His own complaint suggests that DeGrazio treated all discounts with disdain, regardless of the ethnicity of the Sales Representative who requested one. Plaintiff cannot "shoehorn" his allegation of unfair treatment regarding discounts, which apparently has nothing to do with his national origin, into his discrimination claim. Payano v. Fordham Tremont CMHC, 287 F. Supp. 2d 470, 475 (S.D.N.Y. 2003); see also Delaney v. Bank of Am. Corp., 766 F.3d 163, 167 (2d Cir. 2014) ("[W]e do not sit as a super-personnel department that reexamines an entity's business decisions."); Jones, 326 F. Supp. 2d at 547 (finding that employer's reprimands of plaintiff's failure to follow rules and violating the "chain of command" were unrelated to unlawful discrimination and, even if unfair, did not show racial discrimination).

Beyond these remarks, Plaintiff alleges he suffered discriminatory treatment in the amount of training and Telmar leads he received compared to non-Asian employees. The evidence contradicts his assertion. As to training, both Plaintiff and his Hispanic co-worker Caesar complained about the inadequacy of training for *all* Sales Representatives. (Elko Decl., Ex. P (protesting DeGrazio's failure to take his sales associates on a Model Sales Call or provide them with "proper or complete training regarding pricing").) Although Plaintiff asserts that he saw DeGrazio provide one-on-one trainings to three of his co-workers—Cortes, who is Hispanic, and White and Bucknol, who are African-American—he testified that he was "not aware what their conversations [we]re" and had no other reason to believe that DeGrazio was conducting trainings as opposed to performance reviews similar to those he held with Plaintiff and other employees who failed to meet their quotas. (Pl. Dep. 88:8–92:6; see DeGrazio Decl., Exs. B, C (announcing that DeGrazio would hold one-on-one meetings with any Representative who failed to meet the SGL quota or closing percentage target).) Even had DeGrazio trained these employees

individually, trainings that DeGrazio asserts he would provide in the field upon request, (DeGrazio Decl. ¶ 14), Plaintiff does not assert that he sought and was denied one-on-one training. Plaintiff's "utter speculation" that DeGrazio denied him personal training he provided other Sales Representatives is no substitute "for the competent proof that would be necessary to permit rational inferences by a jury of discrimination . . . ." Shupbach v. Shineski, 905 F. Supp. 2d 422, 437 (E.D.N.Y. 2012); see Niagara Mohawk Power Corp., 315 F.3d at 175 ("Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.").

Similarly, both Plaintiff and Caesar complained that DeGrazio unfairly deprived *all* Sales Representatives of their share of Telmar leads with one exception, Cortes who, like Caesar, is Hispanic. (Elko Decl., Exs. H ("As it stands, the ratio distribution is substantially unfair whereas I, along with the other four team members, will get 1 – 2 leads when Mr. Wilfredo M. Cortez [*sic*] will get 4-5; only to later have our leads inexplicably take[n] away last minute and given to [] Cortez [*sic*]."), P (alleging that DeGrazio "has consistently and frequently taken the appointments off of several employee schedules and handed it exclusively to Mr. Wilfredo M. Cortez [*sic*]; without any cause, provocation, or explanation.").) DeGrazio admits to redistributing Telmar leads to Cortes, but explained in response to Plaintiff's complaints that he had authority and discretion to funnel more leads to Representatives with higher sales rates. (DeGrazio Dep. II 95:5–21.) Vice President Timothy McKinney confirmed this company-wide practice in an email to DeGrazio, stating "I understand as a matter of procedure and operating discipline that we adjust ap[pointments] to those who submit SG's [(self-generated leads)] and have a stronger GCR [(gross close rate)]." (Elko Decl., Ex. I.) In his April and June complaints, Plaintiff accuses DeGrazio of "nepotism" and "favoritism" in redistributing leads to Cortes, but

fails to allege an unlawful motive. (Id., Exs. H, P.) What Plaintiff may find to be unfair, favoritism, or nepotism is not actionable absent unlawful discrimination. See Sethi, 12 F. Supp. 3d at 536 ("'Hostility or unfairness in the workplace that is not the result of discrimination against a protected characteristic is simply not actionable.'" (citation omitted)).

During his deposition, Plaintiff more broadly asserted that he received less Telmar leads than his Hispanic and African-American co-workers Cortes, Caesar, Bucknol, and White, because of his Japanese nationality and ancestry. (Pl. Dep. I. 86:3–21, 92:18–24.) He also asserted that he complained that the uneven lead distribution was discriminatory in a third letter he alleges he submitted via ADT's online portal in early June 2013. (Pl.'s Aff. ¶ 14, Ex. C.)[8] Absent evidence of disparate treatment based on factors other than his performance, Plaintiff's assertion regarding uneven lead distribution alone does not create a genuine issue of material fact here.

Discriminatory intent may be inferred when "the employer subjected [the plaintiff] to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group." Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000). A "similarly situated employee" is one who is similar to the plaintiff in "all material aspects," such as being subject to the same workplace standards and engaging in similar conduct Id. Initially, DeGrazio asserts that Bucknol was not similarly situated to Plaintiff because Bucknol was assigned to a different geographical unit (Brooklyn) than Plaintiff (Queens), (DeGrazio Decl. ¶ 23), and Telmar leads for a given region are distributed only to those Representatives assigned to that region, (Degrazio Dep. II 89:21–25). However, even including Bucknol as a comparator, there is no record evidence as to White's and Bucknol's appointments for the month of January,

[8] Defendants dispute ever receiving this complaint. (Suppl. DeGrazio Decl. ¶ 8; Decl. of Michael Stewart ¶¶ 3–4, ECF No. 23-2.) The complaint is discussed *infra*, in relation to Plaintiff's claims of retaliation.

Plaintiff's first month in the field.[9] An email between DeGrazio and his superiors indicate that Plaintiff received less Telmar leads (4) than Cortes (14) and Caesar (12) during that month. (Elko Decl., Ex. I.) But there is no evidence as to Cortes's and Caesar's sales performance in December, which DeGrazio stated he relied on to redistribute the leads in January. The same email reflects that Plaintiff received the same or between one to nine more leads than Caesar in February, March, and April 2013. (Id.) As to the remaining months of Plaintiff's employment, there is again a lack of record evidence as to the leads and how they were distributed.

Although Plaintiff appears to have received less leads in his first month in the field, Plaintiff does not show that he was similarly situated to Caesar and Cortes based on performance in the preceding month (as Plaintiff did not start sales until January and it is unclear when Caesar and Cortes began selling). Plaintiff's share equaled or exceeded Caesar's in the next months during which Caesar's performance floundered. (See Elko Decl., Ex. I; Suppl. DeGrazio Decl., Exs. B, C (Caesar's Performance Improvement Plans).) Plaintiff therefore fails to demonstrate that he was similarly situated to those Sales Representatives who received more leads. Moreover, Plaintiff fails to present any evidence that the uneven distribution of leads was due even in part to Plaintiff's national origin.

As other evidence of disparate treatment, Plaintiff points to DeGrazio's testimony that he did not terminate the employment of any of his Sales Representatives other than Plaintiff between

[9] DeGrazio attaches a chart he created, which he asserts reflects the number of appointments Caesar, Tomizawa, and White received between January and June 2013. (DeGrazio Decl., Ex. C.) Although the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart," Fed. R. Evid. 1006, there is no indication here that ADT's records of Plaintiff's sales performances for less than one year are so "voluminous" as to permit submission of a summary chart in lieu of the underlying records which were not submitted. I therefore find DeGrazio's chart to be inadmissible and I do not consider it. Cf. Butler v. N.Y. Health & Racquet Club, 768 F. Supp. 2d 516, 525 n.4 (S.D.N.Y. 2011) (finding chart admissible because it summarized voluminous payroll records and those records were produced during discovery). As explained previously, I also decline to consider the chart included as Exhibit E to Elko's Declaration. See supra footnote 3.

January and August 2013. (Pl.'s 56.1 ¶ 119; DeGrazio Dep. II 167:17–23.) Again, however, Plaintiff fails to identify any co-workers who performed similarly but who were not similarly disciplined. As the instant record lacks the complete sales records for the LIC Sales Representatives during the relevant period, the Court cannot make such a comparison. However, piecing together the data Defendants do provide, which reveals only a portion of those sales performance statistics, the record evidence contradicts Plaintiff's assertion that he was the only Sales Representative that was disciplined. The record shows that Plaintiff, Caesar, and Bucknol, the lowest-performing Representatives, were similarly disciplined.

Between January and March 2013, Plaintiff outperformed Caesar overall, but his performance was eclipsed by Cortes's and did not meet ADT's sales quotas. The sales made in this first quarter by Plaintiff and his purported comparators are summarized here, to the extent they are documented in the record:

January to March 2013 Sales				
Representative	Total SGLs	Average Close Rate Percentage	Total Net Sales Production (NSP)	(Total) Pulse Units
Plaintiff	3	53%	$31,973	10
Caesar	0	36%	$19,847	1
Cortes	5	45%	$93,969	26
Bucknol	1	N/A	N/A	N/A
White	N/A	N/A	N/A	N/A

(Elko Decl., Ex. I; Suppl. DeGrazio Decl., Ex. A.)

In April 2013, DeGrazio considered Plaintiff the lowest-performing employee because he had only one SGL and a close rate of 41 percent, while White had three SGLs, Caesar had one

SGL with a close rate of 54 percent, and Cortes had five SGLs with a close rate of 105 percent. (DeGrazio Dep. II 109:22–110:2–6.) In May 2013, Plaintiff had the lowest close rate of the five employees and closed one SGL; only Caesar closed less SGLs than Plaintiff. (DeGrazio Decl., Ex. B.) Plaintiff was the lowest-performing Representative of the five in June 2013, and had no SGLs in July. (DeGrazio Dep. II 110:16–111:13; Elko Decl., Ex. R; Polat Decl., Ex. I.) Although Bucknol's performance improved in April, (Suppl. DeGrazio Decl. ¶ 7), it did not recover significantly and he performed worse than White, Cortes, and two other LIC Representatives, Frank Reyan and Victor Rosenbaum, (see DeGrazio Dep. II 111:2–20; Elko Decl., Ex. D).

Contrary to Plaintiff's allegation, DeGrazio similarly disciplined representatives who performed poorly. DeGrazio issued Caesar and Bucknol PIPs in April 2013. (Suppl. DeGrazio Decl., Ex. A.) Like the first PIP Plaintiff received in May 2013, Caesar's and Bucknol's PIPs required them to "book 1 SGL a week as per company policy," book at least two SGLs within two weeks of receiving the PIP, utilize the 10.10.10 program, and to report to DeGrazio daily to set goals and obtain any necessary additional training. (See id.; Elko Decl., Ex. J.) Although Bucknol's performance improved the next month, (Suppl. DeGrazio Decl. ¶ 7), Caesar's remained unsatisfactory and he received a second PIP in May 2013. (Id., Ex. B.) In early June 2013, both Caesar and Plaintiff received written warnings with identical Action Plans that required each to complete 200 sales calls during a two-hour period. (Elko Decl., Ex. L; Suppl. DeGrazio Decl., Ex. C.) Although DeGrazio did not terminate the employment of either Caesar or Bucknol, Caesar resigned on June 26, 2013, and Bucknol (whose performance had only marginally improved) resigned not long thereafter on September 12, 2013. (Suppl. DeGrazio Decl. ¶¶ 6, 7.) As Plaintiff was in essence the last underperforming representative left standing, it

is therefore not evidence of disparate treatment that he was the only Sales Representative terminated by DeGrazio. Even when viewed in the light most favorable to Plaintiff, a reasonable jury could not conclude that national origin discrimination was a motivating factor for his termination given that his allegations of disparate treatment have no support in or are contradicted by the record. Plaintiff's allegations of disparate treatment alone do not suffice to create a genuine issue of material fact regarding pretext. Henny v. New York State, 842 F. Supp. 2d 530, 553 (S.D.N.Y. 2012) ("Conclusory and speculative allegations will not suffice to demonstrate discriminatory intent."). Accordingly, Defendants' motion for summary judgment should be granted on Plaintiff's state-law claim of discrimination.

B. NYCHRL Discrimination Claim

The Court considers Plaintiff's city-law claim separately and independently in accordance with the Local Civil Rights Restoration Act of 2005, N.Y.C. Local L. No. 85 (2005). Although it is unclear whether that Act modifies the McDonnell Douglas framework as it is applied to city law claims, "the rule is consistent that the defendant is entitled to summary judgment 'only if the record establishes as a matter of law that the discrimination play[ed] no role in its actions.'" Velazco v. Columbus Citizens Found., No. 12 Civ. 2015, 2015 U.S. Dist. LEXIS 83555, at *3 (S.D.N.Y. June 22, 2015); see also N.Y.C. Admin. Code § 8-107 (prohibiting discharge or discrimination "because of" employee's national origin); Mihalik, 715 F.3d at 113 ("[S]ummary judgment is still appropriate in NYCHRL cases, but only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory . . . .").

While there is ample record evidence showing that Plaintiff was terminated for his failure to meet his sales quotas or improve his performance after receiving warnings, there is no record

evidence that discrimination played any role in Defendants' actions. DeGrazio's comments regarding Plaintiff's accent reflect his core concern, which was Plaintiff's ability to make sales, and not discriminatory animus. This is particularly true here where DeGrazio hired Plaintiff knowing he had an accent. Further, DeGrazio's assignment of Chinese-speaking leads to Plaintiff who was Chinese-speaking and DeGrazio's disfavor of using discounts to make sales reflect his business judgment not discriminatory animus. Finally, as discussed, Plaintiff only speculates and thus fails to present any evidence that similarly-situated Sales Representatives were treated more favorably than him. Applying a more liberal standard for consideration of Plaintiff's city-law discrimination claim, no evidence exists for a reasonable jury to conclude that Plaintiff was the victim of national origin discrimination in violation of the NYCHRL.

III. Retaliation

Plaintiff alleges that Defendants retaliated against him for filing three internal grievances through the ADT Portal and in writing to ADT officers in April and June 2013. Again, while Plaintiff's state-law retaliation claims are analyzed under the Title VII standards, his city-law claims are reviewed separately and independently. Loeffler, 582 F.3d at 278.

A. NYSHRL Retaliation Claim

To establish a *prima facie* case of retaliation, Plaintiff must show that (1) he participated in a protected activity known to the defendant; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. Richardson v. Comm'n on Human Rights & Opportunities, 532 F.3d 114, 123 (2d Cir. 2008); Kessler v. Westchester Cnty. Dep't Social Servs., 461 F.3d 199, 205–06 (2d Cir. 2006). Retaliation claims are evaluated under the McDonnell Douglas burden-shifting framework. See

Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005) ("[A] retaliation claim follows the familiar burden-shifting framework developed to evaluate allegations of disparate treatment.").

1. Plaintiff's and Caesar's April Complaint

The complaint dated April 23, 2013, which both Plaintiff and Caesar submitted to an ADT officer, does not constitute protected activity.[10] "Protected activity within the meaning of the NYSHRL is conduct that 'oppos[es] or complain[s] about unlawful discrimination.'" Mi-Kyung Cho v. Young Bin Café, 42 F. Supp. 3d 495, 507 (S.D.N.Y. 2013) (quoting Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312–13 (2004)). Plaintiff need not, however, establish that the conduct he opposed was in fact a violation of the NYSHRL, "but rather, only that []he had a 'good faith, reasonable belief' that the underlying employment practice was unlawful." Reed, 95 F.3d at 1178 (quoting Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F.2d 590, 593 (2d. Cir. 1988)). "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998).

Plaintiff's April letter does not complain of discrimination based on race, color, religion, national origin, or sex—the protected grounds under Title VII, state, and city law. Rather, it charges DeGrazio with "an act of employee favoritism": "surreptitiously" and "unfairly" assigning Cortes more Telmar leads "without any cause, provocation, or explanation," thereby creating "a hostile work environment." (Elko Decl., Ex. H.) "[W]here a plaintiff's complaint is

[10] Plaintiff asserts that he first submitted a complaint signed only by him via the ADT online portal, but then "mailed the same complaint [he] submitted through the online portal" with Caesar's signature when he did not receive a response to his electronically-submitted complaint. (Pl.'s Aff. ¶ 8.) Because the content of the complaints were identical, the analysis applies to both.

vague or ambiguous and does not sufficiently articulate the nature of harassment, courts hold that a plaintiff has not engaged in a protected activity." Soliman v. Deutsche Bank AG, No. 03 Civ. 104, 2004 U.S. Dist. LEXIS 9087, at *38 (S.D.N.Y. May 19, 2004) (collecting cases); see also Panzarino v. Deloitte & Touche LLP, No. 05 Civ. 8502, 2009 U.S. Dist. LEXIS 101209, at *35 (S.D.N.Y. Oct. 29, 2009) (reporting was not protected activity when the plaintiff did not report that "she thought the practice was discriminatory"); Santucci v. Veneman, No. 01 Civ. 6644, 2002 U.S. Dist. LEXIS 19032, at *11 (S.D.N.Y. Oct. 8, 2002) (dismissing plaintiff's retaliation claims since they did "not involve some sort of complaint about a type of discrimination that Title VII forbids" (internal quotation marks omitted)).

Moreover, "implicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII" or state anti-discrimination law. Soliman, 2004 U.S. Dist. LEXIS 9087, at *37–38. The April letter only put Defendants on notice of a hostile work environment based on favoritism. Defendants could not have reasonably understood the letter to be complaining of unlawful discrimination. See Rhuling v. Tribune Co., No. CV 04-2430, 2007 U.S. Dist. LEXIS 116, at *67–68 (E.D.N.Y. Jan. 3, 2007) (holding that an internal complaint of favoritism was not protected activity where plaintiff had not framed the complaint as involving unlawful discriminatory conduct).

Plaintiff attempts to convert his complaint to one reporting discrimination by citing DeGrazio's affirmative response during his deposition to the question, "Was [the April complaint] the first circumstance that you were being accused of discrimination?" (Pl.'s 56.1 ¶ 95; DeGrazio Dep. II 135:17–23.) However, moments before, DeGrazio testified that the

complaint "definitely wasn't [accusing him of] discrimination." (DeGrazio Dep. II 135:7–10.) There is no record evidence that Defendants did or could have reasonably understood the April letter to be alleging *unlawful* discrimination. Nor do ADT's efforts to respond to Plaintiff's complaint evidence Defendants' understanding that Plaintiff was complaining of unlawful discrimination. Plaintiff suggests as much, asserting that "Timothy McKinney in his April 26, 2013 email to Defendant DeGrazio warned [] DeGrazio of retaliator repercussions in preparing his response." (Opp'n at 11.) To the contrary, McKinney said nothing of retaliation, but stated in regards to Plaintiff's complaint, "This needs to be formally addressed and responded to after review with you [and] Scott. It is important not to respond until you have this thought out and documented such that there are no repercussions." (Elko Decl., Ex. I.) ADT's general understanding that an inappropriate or insufficient response to an employee's complaint about unfair treatment may result in "repercussions" does not evidence a specific understanding that the complaint was for unlawful discrimination. The April letter therefore was not a protected activity.

2. Plaintiff's and Caesar's June Complaint

Again, on June 14, 2013, Plaintiff and Caesar mailed a written complaint to an ADT officer.[11] The June letter similarly accuses DeGrazio of "nepotism" because he, "without cause, provocation, or explanation," gave Cortes more leads. (Elko Decl., Ex. P.) Additionally, the letter alleges that DeGrazio created a "hostile atmosphere where sales associates did or do not feel comfortable asking questions," refused to "escalate the situation to higher management" when asked for help to provide a customer discount, and failed to provide any of his Sales

[11] As with his prior complaint, Plaintiff submitted through the ADT online portal a complaint identical to his June 14 written complaint. (Pl.'s Aff. ¶ 16.) The analysis regarding his written June 14 complaint therefore applies equally to his online complaint.

Representatives with sufficient training and resources. (Id.) Plaintiff and Caesar characterized this as "mistreatment entail[ing] harassment, age, and national origin discrimination." (Id.)

Despite the letter's mention of the terms "harassment," "mistreatment" and "age, and national origin discrimination," Plaintiff and Caesar do not describe any discrimination based on their age or national origin and do not mention their ages or that Plaintiff is Japanese and Caesar is Hispanic. (Elko Decl., Ex. P.) The letter merely mirrors their previous complaint about favoritism, and adds that DeGrazio fails to provide *any* of his "Long Island City team members" with sufficient training, resources, business cards, contracts, and lacks requisite leadership skills. (Id.) While Plaintiff had a good-faith belief that he was being treated unfairly, the Court must determine whether he had an objectively reasonable belief that DeGrazio was *unlawfully* discriminating against him based on his age or national origin. See Sullivan-Weaver v. N.Y. Power Auth., 114 F. Supp. 2d 240, 243 (S.D.N.Y. 2000) ("Mere subjective good faith belief is insufficient[;] the belief [that the employee is complaining of unlawful discrimination] must be reasonable and characterized by *objective* good faith." (emphasis in the original)). Additionally, Plaintiff's letter must have put Defendants on notice that he was complaining of unfair treatment based on his membership in a protected class. "Although particular words such as 'discrimination' are certainly not required to put an employer on notice of a protected complaint, neither are they sufficient to do so if nothing in the substance of the complaint suggests that the complained-of activity is, in fact, unlawfully discriminatory." Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F.3d 10, 17 (2d Cir. 2013) (affirming district court's dismissal of plaintiff's retaliation claim, even though plaintiff alleged she used words like "sexual favoritism," "discrimination" and "harassment" in complaining to her employer, because

there was no indication she "believed that her sex had anything to do with her treatment"). Despite the difficulties posed by the fact that Plaintiff's co-complainant was Hispanic and the lack of any claims regarding age, I assume for the purpose of this Report and Recommendation that Plaintiff's June 14 complaint was protected activity.

Plaintiff nevertheless fails to show a connection between that complaint and an adverse employment action. In the context of a retaliation claim, an "adverse employment action" is one that "a reasonable employee would have found [to be] materially adverse," *i.e.*, that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Lore v. City of Syracuse, 670 F.3d 127, 163 (2d Cir. 2012) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). Following Plaintiff's June 14 complaint, DeGrazio issued Plaintiff a final written warning on July 7 and discharged him on August 8. Unlike in the discrimination context, written warnings are also considered adverse actions in the retaliation context because "[a] formal reprimand 'can reduce an employee's likelihood of receiving future bonuses, raises and promotions, and may lead the employee to believe (correctly or not) that his job is in jeopardy.'" Lewis v. Eerie Cnty. Med. Ctr. Corp., 907 F. Supp. 2d 336, 350 (W.D.N.Y. 2012) (quoting Milea v. Metro-North R.R. Co., 658 F.3d 154, 165 (2d Cir. 2011)). But see Chang v. Safe Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) ("[O]ral and written warnings do not amount to materially adverse conduct" required in a retaliation claim.). Plaintiff must therefore show a causal connection between his June 14 complaint and his July 7 final written warning and August 8 discharge.

He accomplishes this at the *prima facie* stage by showing that the temporal proximity between the acts was "very close." See Lewis, 90 F. Supp 2d at 350–51 ("At the *prima facie*

stage, a plaintiff can rely solely on temporal proximity to establish the requisite causal connection between her protected activity and the materially adverse [and allegedly retaliatory] action . . . ."); Yarde v. Good Samaritan Hosp., 360 F. Supp. 2d 552, 562 (S.D.N.Y. 2005) ("Three months is the outer edge of what courts in this circuit recognize as sufficiently proximate to admit of an inference of causation."). Although DeGrazio testified that he was unaware of the June 14 complaint, (DeGrazio Dep. I 174:4–9), "[n]either this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity," though it may undermine any inference of retaliation. Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 116 (2d Cir. 2000). As DeGrazio's knowledge of the complaint or lack thereof relates to his individual liability for retaliation, a jury is free to reject DeGrazio's testimony that he was unaware of the June 14 complaint, and the Court will not resolve such a factual issue on summary judgment. See Summa v. Hofstra Univ., 708 F.3d 115, 130 (2d Cir. 2013) ("[A] jury is not required to credit [the employer's agent's] testimony that she was unaware of the NYSDHR complaint."). Therefore, assuming the June 14 complaint was protected activity, Plaintiff satisfies his *prima facie* burden for retaliation under the NYSHRL.

However, temporal proximity alone does not establish pretext, Kwan v. The Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013), and Plaintiff fails to otherwise overcome Defendants' nondiscriminatory reason for giving him a final written warning and discharging him—his unsatisfactory performance.[12] Plaintiff's final written warning and ultimate discharge

[12] The Second Circuit has not decided whether the Supreme Court's decision in University of Texas Southwest Medical Center v. Nassar, which required a Title VII plaintiff to show that unlawful discrimination was the but-for cause for the employer's alleged retaliatory act, also applies to retaliation claims under the NYSHRL. See Kwan, 737 F.3d at 847 n.7 (declining to reach the issue); Kleehammer v. Monroe Cnty., 583 F. App'x 18, 21 (2d Cir. 2014) (same). At least one district court has applied the but-for standard to a NYSHRL retaliation claim. Soloviev, 2015

were part of a progressive series of disciplinary actions taken against him that began months *before* he submitted his June 14 complaint and involved similar failures to meet objective sales criteria. This progressive discipline undermines any inference of retaliation. See Slattery, 248 F.3d at 95 (noting that "gradual adverse job actions [that] began well before the plaintiff had ever engaged in any protected activity" did not give rise to an inference of retaliation); Manz v. Gaffney, 200 F. Supp. 2d. 207, 219 (E.D.N.Y. 2002) (where "performance reviews issued after the filling of [a] notice of claim are consistent with those filed before Plaintiff engaged in this protected activity," they "cannot support a claim of retaliation"); Hahn v. Bank of Am., Inc., No. 12 Civ. 4151, 2014 U.S. Dist. LEXIS 45886, at *63 (S.D.N.Y. Mar. 31, 2014) (finding that a final written warning based on performance issues was not pretext for retaliation because employer issued plaintiff similar or identical warnings about the same audit issues prior to the protected activity).

Moreover, in the two weeks following Plaintiff's first warning, Plaintiff made only 126 calls total though his PIP required him to complete 200 customer calls per day. (See Elko Decl., Exs. L, N.) He also failed to meet any of the sales quotas for the month of June. In the month of July, during which he was also required to make 200 customer calls per day, he completed only 292 total calls, created no SGLs, and failed to meet any other sales quotas. (Id., Exs. N, S; Polat Decl., Ex. J.) Plaintiff attempts to paint the 200-calls requirement itself as unfair and yet another example of DeGrazio's discriminatory animus. (Opp'n at 13.) However, Plaintiff imposed this requirement on both Plaintiff and Caesar prior to their June 14 complaint. (Elko Decl., Ex. L; Suppl. DeGrazio Decl., Ex. C.) Further, despite questioning the feasibility of making so many

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U.S. Dist. LEXIS 62702, at *34–35 (applying but-for causation standard to NYSHRL claims). I do not reach the issue because Plaintiff fails to satisfy even the more liberal "pretext" standard.

calls within a three-hour period daily, senior ADT officer Cynthia Haegly independently found that making at most 20 calls per day, only ten percent of the daily call goal, was clearly insufficient to avoid further discipline. (Polat Decl., Ex. J.)

Plaintiff asserts that Defendants' delay in investigating his and Caesar's complaint and the failure to interview him in the course of their investigation evince retaliatory intent. (Opp'n at 13.)[13] A supervisor's failure to investigate may bolster an inference of discriminatory animus. Collins v. Cohen Pontani Lieberman & Pavane, No. 04 Civ. 8983, 2008 U.S. Dist. LEXIS 58047, at * 45 (S.D.N.Y. July 31, 2008). Here, however, ADT, through HR Manager Michael Stewart, investigated Plaintiff's April and June 14 complaints. (See Elko Decl., Ex Q; Suppl. Elko Decl., Ex. C.) The investigation for the instant June 14 complaint did not begin until over one month later; Plaintiff was discharged during the investigation. Although Stewart did not interview Plaintiff in either investigation, there are notes indicating that he spoke to Plaintiff's team and DeGrazio, and Stewart already had the benefit of Plaintiff's claims as stated in his complaint. (Elko Decl., Ex Q.) Given the lack of record evidence that Defendants failed to comply with their own internal procedures for investigating discrimination complaints, their delay in investigating the June complaint does not give rise to a reasonable inference of retaliatory animus.

Plaintiff also argues that DeGrazio's livid reaction to his April complaint tainted all subsequent actions with unlawful retaliatory intent. Plaintiff refers directly to the email DeGrazio sent to his wife after he was instructed to justify his lead redistribution. He wrote, "Furious right

[13] Plaintiff does not assert that Defendants' failure to investigate constitutes an independent adverse employment action. To the extent he does, his claim is without merit. See Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 721 (2d Cir. 2010) ("[A]n employer's failure to investigate a complaint of discrimination cannot be considered an adverse action taken in retaliation for the filing of the same discrimination complaint."); see also Price & Cushman & Wakefield, Inc., 808 F. Supp. 2d 670, 690 (S.D.N.Y. 2011) ("Defendants' failure to follow up on [plaintiff's] claims of discrimination is not an adverse employment action.").

now" and, "Steam coming out of my ears right now." (Polat Decl., Ex. D.) DeGrazio's anger at being accused of unfair treatment is insufficient to undermine Defendants' proffered legitimate, nonretaliatory reasons for its actions. See Holmes v. Donahoe, No. 10 CV 1031, 2014 U.S. Dist. LEXIS 88779, at *26–30 (W.D.N.Y. June 25, 2014) (finding that supervisor's anger for having been named as a bad actor in an EEO complaint was insufficient to show pretext given Defendants' action was a continuation of progressive discipline that preceded plaintiff's protected activity).

Therefore, even assuming that Plaintiff's June 14 complaint constituted protected activity, Plaintiff does not demonstrate that Defendants' proffered legitimate, nondiscriminatory reason for his discipline was retaliation for his complaint regarding discrimination.

3. Plaintiff's Other Complaint

Plaintiff alleges for the first time in his opposition that he submitted via ADT's online portal a separate complaint in "early June 2013" and attaches an undated, typed copy of the complaint to his affidavit in opposition to Defendants' motion. (Pl.'s Aff. ¶ 14.) The complaint generally alleges "national origin discrimination" and specifically asserts that DeGrazio "knowingly and wantonly discriminated against [him] due to [his] Japanese nationality and ancestry" by assigning him less Telmar leads than his coworkers. (Id., Ex. C.) However, Plaintiff never mentioned this complaint in his Amended Complaint. (See Am. Compl. ¶¶ 39–53.) He alleged only that he made "several complaints with the Defendants," consisting of "two official complaints" submitted on April 23 and June 14 and "oral complaints directly with his supervisor." (Id. ¶¶ 38, 39, 47, 49.) Both DeGrazio and HR Regional Manager Stewart deny having received or viewed this complaint, (Suppl. DeGrazio Decl. ¶ 8; Decl. of Michael Stewart

¶¶ 3–4), and Stewart additionally attests that he "reviewed ADT's records, including electronic records related [to] ADT's online intake of complaints from ADT employees, and there is no record of any complaints being filed online by Masaru Tomizawa in early June of 2013," (Stewart Decl. ¶ 3). Plaintiff's new factual allegation is improperly raised for the first time on summary judgment. See Mahmud v. Kaufmann, 607 F. Supp. 2d 514, 555 (S.D.N.Y. 2009) ("[C]ourts will not consider, on a motion for summary judgment, allegations that were not pled in the complaint and raised for the first time in opposition to a motion for summary judgment."); Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 544 (S.D.N.Y. 2003) ("A summary judgment opposition brief is not a substitute for a timely motion to amend the complaint.").

Even if Plaintiff's allegation that he submitted a second June complaint were properly before the Court, and it was assumed that ADT did receive the complaint, Plaintiff still fails to show retaliation. Because the complaint alleges unlawful national origin discrimination, it is a protected activity. 42 U.S.C. § 2000e-3(a). And like Plaintiff's June 14 complaint, this complaint was "very close" temporally to the Defendants' adverse actions and therefore establishes a *prima facie* case of retaliation. Again, however, Plaintiff fails to demonstrate that his warnings and discharge were the result of his complaints regarding discrimination. Assuming that the early June complaint preceded his June 6 written warning, Plaintiff was previously counseled and then disciplined, by the issuance of a PIP, for similar failures to meet sales quotas. (See Elko Decl., Exs. F, J.) Absent additional evidence from which retaliation may be inferred, the temporal proximity upon which Plaintiff establishes a *prima facie* case is insufficient to demonstrate pretext. Consequently, even if Plaintiff's allegation regarding his early June complaint were

properly before the Court, he has not proffered any evidence to show that his final warning and termination were in retaliation for that complaint.

4. Complaints to Mirela Rahmani

Finally, Plaintiff also asserts that his email to Human Resources coordinator Mirela Rahmani on May 2, 2013 constituted protected activity by "putting her on notice that Defendant DeGrazio was taking retaliatory action against him by making fallacious claims for having made the [April] complaint to Timothy McKinney." (Pl.'s Aff. ¶ 104; see Opp'n at 10.) Rahmani forwarded DeGrazio that email the same day, (Polat Decl., Ex. F), which Plaintiff asserts was just days before DeGrazio issued him a PIP on May 8, (Pl.'s 56.1 ¶ 106).

The email Plaintiff cites is not dated May 2, but May 9, 2013. (Polat Decl., Ex. E.) And, despite DeGrazio's testimony of a May 8 PIP, the May PIP was issued on May 1. (Elko Decl., Ex. J.) The May 9th email to Rahmani references an earlier complaint Plaintiff made to her on May 2, presumably also by email, that complained of his "uncomfortable" May 1 meeting in which DeGrazio issued him his PIP and accused him of not selling any pulse units, not doing ADT's 10.10.10 program, and failing to complete customer experience forms. (Polat Decl., Ex. E.) Nothing, however, "suggests that the complained-of activity is, in fact, unlawfully discriminatory." Kelly, 716 F.3d at 17. Rather, Plaintiff disputes the accuracy of DeGrazio's performance assessment. Because the May 2nd grievance does not allege unlawful discrimination, it is not protected activity. See id.

The May 9th email also accuses DeGrazio of "targeting [him] by creating fallacious claims, all in retaliation to the formal complaints I filed with Vice President Timothy McKinney against him recently." (Polat Decl., Ex. E.) In addition to the May PIP, Plaintiff alleges in the

email that DeGrazio accused him of "never answering calls from the technician [], himself and Ms. Lissette Money . . . , regarding the problem with [a customer] contract," though the only missed call he had was from DeGrazio and his voicemail messages did not relate to a customer contract. (Id.) Again, Plaintiff's complaint does not constitute protected activity. Plaintiff plainly complained of retaliation, but not retaliation based on unlawful discrimination. The only complaints Plaintiff made previous to the May 9th email (the April complaint and May 2nd grievance to Rahmani) did not constitute protected activity because Plaintiff did not allege that DeGrazio engaged in unlawful discrimination. Retaliation for those unprotected complaints also falls outside the category of "protected activity." See N.Y. Exec. Law § 296(1)(e) (prohibiting retaliation against employees for their opposition to discriminatory practices); Talwar v. Staten Island Univ. Hosp., No. 14 CV 1520, 2015 U.S. App. LEXIS 7455, at *4 (2d Cir. May 6, 2015) (concluding that appellant did not establish unlawful Title VII retaliation because her complaint, which did not put defendants on notice of gender discrimination, did not protect her from retaliation) (citing Kelly, 716 F.3d at 15, 17). The Second Circuit has held that "[a] plaintiff may prevail on a claim for retaliation even when the underlying conduct complained of was not in fact unlawful 'so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law.'" Bennett v. Hofstra Univ., 842 F. Supp. 2d 489, 501 (E.D.N.Y. 2012) (quoting Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002)). However, as in his prior complaints, Plaintiff's May 9th email demonstrates that Plaintiff believed that DeGrazio's retaliatory conduct was unfair, not that it was unlawful discrimination.

Even if he possessed such a good faith, reasonable belief, and Defendants had sufficient notice that Plaintiff was complaining of unlawful retaliation, Plaintiff ultimately fails to raise a genuine issue of material fact regarding Defendants' subsequent disciplinary actions in June, July, and August that would demonstrate pretext. Plaintiff's PIPs, warnings, and his ultimate termination relate back to the May 1st PIP and even earlier to the Coaching for Improvement DeGrazio gave Plaintiff in March. Given that Defendants initiated its progressive discipline before Plaintiff engaged in any protected activity, Plaintiff's subsequent discipline does not give rise to an inference of retaliation. See Slattery, 248 F.3d at 95. Accordingly, Plaintiff's complaints to Rahmani are not protected activity and, even assuming the May 9th email was protected, Plaintiff fails to show that Defendants retaliated against him.

Plaintiff raises no genuine issue of material fact and presents no evidence from which a reasonable juror could find pretext and retaliation. Therefore, Defendants' motion for summary judgment on Plaintiff's state-law retaliation claims should be granted.

B. NYCHRL Retaliation Claim

The NYCHRL prohibits discrimination based on "actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status sexual orientation, or alienage or citizenship status." N.Y.C. Admin. Code § 8-107(1)(a). Because neither Plaintiff's April complaint nor his May 2nd complaint to Rahmani are based on any of these forms of discrimination, they do not constitute protected activities. See Fatturoso v. Hilton Grand Vacations Co., 525 F. App'x 26, 27–28 (2d Cir. 2013) (affirming district court's dismissal of a NYCHRL claim because plaintiff's "belief that he was being treated 'unfairly'" was not a charge of unlawful discrimination); Mi-Kyung Cho, 42 F. Supp. 3d at 507 ("[F]iling a grievance

complaining of conduct other than unlawful discrimination is simply not a protected activity subject to a retaliation claim under the . . . NYCHRL." (citation omitted)).

Assuming the remainder of Plaintiff's complaints were protected activity under the NYCHRL, Plaintiff's retaliation claim fails even under the NYCHRL's more lenient standard, because "'the kind, quality, or nature of evidence that is necessary to' overcome [Defendants'] legitimate, nondiscriminatory reasons for its decision to terminate Plaintiff remain unaltered." Diaz v. Local 338 of the Retail, Wholesale, Dep't. Store Union, United Food & Commercial Workers, No. 13 CV 7187, 2015 U.S. LEXIS 86777, at *106 (E.D.N.Y. May 15, 2015) (quoting Varughese v. Mt. Sinai Med. Ctr., No. 12 CV 8812, 2015 U.S. Dist. LEXIS 43758, at *102 (S.D.N.Y. Mar. 27, 2015)). Because this record is devoid of any evidence upon which a jury could find an inference of retaliation based on Plaintiff's complaints of national origin discrimination, his NYCHRL claim fails for the same reasons as his NYSHRL retaliation claim fails. Specifically, Plaintiff's sole evidence of pretext, the temporal proximity between Plaintiff's complaints and Defendants' discipline, cannot demonstrate that Defendants' progressive discipline, initiated before Plaintiff's protected activity and supported by Plaintiff's poor performance record, was pretext for retaliation. See Kwan, 737 F.3d at 846 ("Temporal proximity alone is insufficient to defeat summary judgment at the pretext stage"); cf. Joseph v. Owens & Mino Distribution, Inc., 5 F. Supp. 3d 295, 322 (E.D.N.Y. 2014) ("In the absence of evidence beyond Plaintiff's speculation that his supervisor, White, and/or the human resources department . . . were motivated to terminate Plaintiff in response to Plaintiff's complaints . . . Plaintiff cannot establish retaliation under the less stringent standard of the NYCHRL."). It is

therefore respectfully recommended that Defendants' motion for summary judgment on Plaintiff's NYCHRL retaliation claim should be granted.

CONCLUSION

Accordingly, it is respectfully recommended that Defendants' motion for summary judgment should be granted and that Plaintiff's amended complaint should be dismissed.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physicians' Health Plan, Inc., 293 F.3d 42, 46 (2d Cir. 2002); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

/S/
LOIS BLOOM
United States Magistrate Judge

Dated: July 17, 2015
Brooklyn, New York