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United States District Court,
S.D. New York.

Brian Lott, Plaintiff,
v.
Coreone Technologies, LLC, Defendant.

No. 14–CV–5848 (CM)
|
Signed February 2, 2016

**Attorneys and Law Firms**

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**MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR LIMITED SUPPLEMENTAL DISCOVERY**

McMahon, J.

***1** Plaintiff brings claims against his former employer for age and disability discrimination and retaliation for opposition to unlawful employment practices under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the New York State Human Rights Law ("NYSHRL"), Executive Law § 296 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), Administrative Code of New York City § 8–101 *et seq.*, and for breach of contract. Defendant moves for summary judgment and dismissal of Plaintiff s claims. Separately, Plaintiff also seeks limited additional discovery to determine the distribution of CoreOne equity held by employees similarly situated to Plaintiff.

For the reasons stated below, the motion for summary judgment is granted in part and denied in part. Plaintiff s request for limited supplemental discovery is granted.

**BACKGROUND**

The following facts, taken from evidence in the record and the parties' Local Rule 56.1 statements, are undisputed except where noted.

Plaintiff Brian Lott was an employee of Defendant CoreOne Technologies ("CoreOne" or "the Company") and its predecessors—Capital Markets Company, Inc. ("Capco"), Capco Reference Data Services ("CRDC"), and Netik LLC ("Netik")—from 2002 to 2014. (Pl.'s Statement Pursuant to Local R. 56.1 ("Pl.'s Rule 56.1 Statement") ¶¶ 1–2.) The Company named Lott Executive Vice President of Operations in 2007 and Global Head of Product in May 2010. As Global Head of Product, Lott reported directly to a newly hired Chief Executive Officer ("CEO"), Robert Flatley. (*Id.* ¶¶ 215–220, 234.)

In spring of 2010, around the time Lott was named Global Head of Product, he was diagnosed with cancer. (*Id.* ¶¶ 77–82, 87–91.) Though Lott did not request any extended accommodations during the course of his treatment, he did inform the Company that he would not be able to come into the office on occasion, and so would need time off. Lott admits that none of these requests was denied and that none of his colleagues made disparaging remarks about his diagnosis or any time off he ultimately took during treatment. (*Id.* ¶¶ 83–84, 92.)

Nonetheless, Lott did not receive another promotion after he got sick. In 2011, the Company reorganized into three business units—VistaOne, PrimeOne, and DeltaOne—corresponding to sets of CoreOne products, but the Company did not choose Lott to serve as head of one of the new units. (*Id.* ¶¶ 215–216, 235.) Instead, the Company tapped three individuals — Ishan Manaktala, E.J. Liotta, and Bernie Thurston — who were over ten years younger than Lott. Two individuals—Liotta and Thurston—had previously reported to Plaintiff. (*Id.* ¶¶ 242–45.) Lott has offered no evidence—and does not assert—that he "applied" for these positions, but he did not receive them. (*See id.* ¶¶ 240–43.)

Between August 2010 and April 2014, the Company also hired several Chief Technology Officers ("CTOs") and a

  

Chief Operating Officer ("COO"). Lott admits that he did not formally apply for these positions. (*Id.* ¶¶ 13, 25.) However, in the case of the open COO position, Lott claims that he expressed interest in the position to a member of the Company's Board of Directors, Marc Bala. Lott alleges that he only refrained from applying because Bala led him to believe that the Company would be hiring a temporary, rather than a permanent, COO. (*Id.* ¶ 251.) Lott never expressed interest in either position to anyone else involved in the hiring process. All of the individuals ultimately hired for these positions were younger than Lott—though one person chosen for a CTO position was only a year younger than him. (*Id.* ¶ 30.)

**A. Bonus Agreements**

***2** For much of his employment, Lott's compensation was set pursuant to a 2008 employment agreement (the "2008 Agreement") and confidential side letter (the "2008 Side Letter").

The 2008 Agreement contained general information about Lott's employment, for instance the Company's vacation policies and benefits plan. Paragraph 10 of the 2008 Agreement discussed Lott's bonus. According to paragraph 10, Lott was:

> eligible for an annual *discretionary* bonus that *may* be awarded by senior executives of CRDS *acting in their absolute discretion* as to the performance criteria to be applied, whether any bonus will be awarded, and the amount of any bonus. The details of such bonus will be set out in a separate and confidential side letter between you and CRDS."

(Decl. of James R. Williams In Support of Def. CoreOne Techs., LLC's Mot. For Summ. J. ("Williams Decl.") Exh. JJ (emphasis added); *see also* Pl.'s Rule 56.1 Statement ¶ 103.) No other paragraph in the 2008 Agreement referenced a bonus for Lott.

As contemplated by the 2008 Agreement, the details of how Lott would earn the bonus were discussed in the 2008 Side Letter. The 2008 Side Letter stated that "*in accordance with* paragraph 10" of the 2008 Agreement, Lott would be "*eligible* for an annual bonus that *will* be awarded by the senior executives of CRDS, *if* and to the extent that the performance criteria described below are achieved." (Williams Decl. Exh. WW (emphasis added).) In describing the performance criteria—elsewhere referred to as "matters that will be *taken into account* by the senior executives of CRDS in respect of the bonus"—the letter stated:

> The actual amount of your Bonus *will* be determined based on the level of achievement of the revenue and EBITDA targets as outlined in the annual performance plan for the combined Netik and CDSD businesses (together the "Business") approved by the Board of Directors. No portion of the Bonus will be paid unless the Business achieves at least 90% of the revenue and EBITDA targets for the relevant fiscal year.... At levels at or above 90% achievement of performance targets, *you will receive* the same percentage of the Target Bonus Amount as corresponds to the percentage achievement by the Business of the performance targets....

(*Id.* (emphasis added).) The letter stated that the Company's 2008 performance targets were $39 million in revenue and $5.7 million EBITDA and that "senior executives of CRDS shall set the performance criteria for each subsequent year in their sole discretion...." (*Id.*)

The 2008 Side Letter also provided additional details about the timing and availability of Lott's bonus. According to the 2008 Side Letter:

> [The bonus] *will* be payable within 10 days following the completion of an audit of the Business' financial performance for the applicable prior fiscal year and *in any event shall be* payable no later than 31 March after the end of such applicable prior fiscal year.... *You shall be entitled to receive any bonus that is due and payable on 31 March provided that you remain an employee on 31 March and no notice to terminate your employment has been served by either party on or prior to 31 March.* If you are no longer an employee or notice of termination of your employment has been served on

  

> or prior to 31 March, you acknowledge and agree that CRDS or any associated entity shall not be obligated to pay you any Bonus (or part thereof), whether in respect of previous or current fiscal years.

***3** (*Id.* (emphasis added).)

Accordingly, under the terms of the Side Letter, Lott would not have been eligible for a bonus for 2008 or a partial bonus for 2009 if he had ceased to be employed by the Company on March 31, 2009 or had been served with a notice of termination by March 31, 2009. (*See id.*)
Unlike the 2008 Agreement, the 2008 Side Letter did not contain any explicit language describing the bonus as discretionary; however, the Side Letter did say that bonuses would be awarded "if and to the extent that performance criteria are achieved." Furthermore, decisions relating to performance criteria were expressly described as being in the "sole discretion" of the Company's senior executives. (*Id.*)

In 2009, Plaintiff received and signed a letter titled "Proposed Restructuring and Changes to Your Compensation" (the "2009 Letter"). (Williams Decl. Exh. XX.) The agreement said that on February 1, 2009, Lott's gross pay would be reduced 12.5%, but provided Lott with the opportunity to claw back the difference. If the Company exceeded profit targets, Lott was automatically entitled to a non-discretionary bonus. (Pl.'s Rule 56.1 Statement ¶ 105; Williams Decl. Exh. XX.) The agreement also said, "If at the end of the Financial Year cumulative EBITDA exceeds the cumulative Budget EBITDA including the total of all salary claw back payments made by the Company relating to the Financial Year ("the Excess") you *will* receive a bonus. The Board shall determine the portion of the Excess that shall be used to pay bonuses." (*Id.*) The amount of the bonus was, of course, not guaranteed.

On January 1, 2010, Plaintiff received and signed a new compensation letter (the "2010 Letter") that "supersede[d] any and all prior agreements or understandings (whether written or oral)." (Williams Decl. Exh. C.) The 2010 Letter expressly incorporated the 2008 Agreement, which "shall continue in full force and effect." (*Id.*) It did not mention the 2009 Letter.

The 2010 Letter increased Lott's base salary to $300,000 and stated that he was eligible to receive a performance bonus for 2010 in the target amount of $125,000, but again subject to the Company's achieving certain performance objectives and his continued employment through the payment date (March 31, 2011). The letter also stated that a guaranteed bonus of $50,000 for would be paid no later than January 31, 2011, and any additional bonus would be paid no later than March 15, 2011.

Lott did not receive any additional compensation letters or amendments in 2011. He does not allege that was denied a bonus for the 2010 financial year. (Compl.¶ 36.) On May 3, 2013, Lott received a letter notifying him that he would receive a bonus of $100,000 for the 2012 financial year. The bonus was to be paid in two equal installments on October 31, 2013 and January 31, 2014. (Pl.'s Rule 56.1 Statement ¶ 318; Declaration of Anne. L. Clark ("Clark Decl.") Exh. 33.) Plaintiff does not allege that the bonus was not paid.

However, Lott did not receive bonuses for either the 2011 and 2013 financial years. (Pl.'s Rule 56.1 Statement ¶ 294.) Lott claims that Flatley told him in 2012 that he would not receive a bonus because he was part of an "Executive Club" and, like all other senior executives, would not be receiving a bonus. (*Id.* ¶ 300.) Flatley denies making such a statement, and the Company admits that several CoreOne executives received 2011 bonuses, though it claims that at least some of these executives had bonuses guaranteed in offer letters or compensation packages. (CoreOne Techs., LLC's Rebuttal to Pl.'s Responses to its Statement of Undisputed Material Pursuant to Local Civ. R. 56 and Def.'s Response to Pl.'s R. 56.1 Statement ("Def.'s Rebuttal Rule 56.1 Statement") ¶¶ 108, 300.)

***4** The reason Plaintiff did not receive a bonus for 2013 has changed over time. Flatley testified that Lott did not receive a bonus for 2013 because he received a raise in 2013. (Pl.'s Rule 56.1 Statement ¶ 301.) However, the Company now takes the position that he was ineligible for a 2013 bonus because he left the Company's employ before bonuses were paid. Several CoreOne executives received 2013 bonuses; in particular, Chief Financial Officer ("CFO") Evan Lorch, Liotta, and Thurston received bonus letters on July 23, 2014, April 1, 2014, and May 21, 2014 respectively. These letters explained that their bonuses, which were described as either a 2013 "catch-up" bonus or a performance bonuses, would be paid in two installments. The dates for these installment payments differed for each individual, but all were between April 30 and August 29, 2014—dates after Lott left the Company. (*See* Williams Decl. Exh. Z.)

  

**B. Equity Agreements**

On several occasions during his employment, Lott discussed an equity award with senior executives at the Company. (*See* Pl.'s Rule 56.1 Statement ¶¶ 114–18; Williams Decl. Exhs. AA–DD.) Until mid–2012, though, Lott never received any documentation about any specific grant. (Pl.'s Rule 56.1 Statement ¶¶ 117–18.)

On July 17, 2012, Flatley sent Lott a proposed equity agreement that would allocate him 14,550 incentive units vesting over a five-year period. (*Id.* ¶ 120; Williams Decl. Exh. CC.) In an accompanying email, Flatley noted that he was negotiating the addition of "an automatic vest on capital change." (Williams Decl. Exh. CC.) Pursuant to such a provision, the vesting schedule would accelerate and Lott's units would fully vest if the Company was acquired. Such an arrangement is advantageous to the employee.

The proposed agreement was never finalized and Lott did not receive any shares. In early 2013, the CoreOne Board passed a resolution to address "uncertainties regarding whether Inventive Units promised to certain service providers in employment agreements actually were validly authorized and issued ... [T]he Board believes it to be in the best interest of the Corporation and its members to reallocate Inventive Units previously promised." (Pl.'s Rule 56.1 Statement ¶¶ 322–23; Clark Decl. Exh. 27.) The resolution stated that the Board intended to effect grants in accordance with a capitalization table that showed Lott receiving a total of 14,400 incentive units—the same amount as Liotta and Thurston. (*Id.*)

On June 13, 2013, Lott received another proposed equity agreement (the "June 2013 Equity Agreement") that allocated him a total of 14,148 incentive units—less than the amount called for in the Board resolution. (*See* Pl.'s Rule 56.1 Statement ¶ 328.) The agreement did, however, contain a change in control provision, which meant that his units would fully vest upon sale of the Company—but only if the Company was purchased for over $200 million. (Pl.'s Rule 56.1 Statement ¶ 123; Williams Decl. Exh. DD.)

This proposed agreement, too, was never finalized and Lott did not receive any shares. Instead, on August 14, 2013, Flatley sent Lott a revised version of the June 2013 Equity Agreement (the "August 2013 Equity Agreement"). (Pl.'s Rule 56.1 Statement ¶ 124.) Like the prior agreement, the proposed agreement allocated Lott 14,148 incentive units with a change of control provision that would cause the units to fully vest upon sale of the Company, however the agreement called for the units to fully vest if the Company sold for $180 million. (*Id.* ¶ 126.) The agreement expressly superseded any prior agreements and representations. (*Id.* ¶ 121.) On August 27, 2013, the Board approved the terms of the August 2013 Equity Agreement (the first proposed agreement that was actually adopted), and two days later Lorch sent Lott a finalized version of the agreement to sign. (Pl.'s Rule 56.1 Statement ¶ 127; Williams Decl. Exh. FF.) The terms of the August 2013 Equity Agreement required Lott to sign the agreement and return a "Joinder to the Company's Members' Agreement" within *30 days* of the effective date, which was specifically stated to be August 27, 2013. (Williams Decl. Exh. FF.) Because the equity grant was explicitly "contingent on [Lott's] execution and delivery to the Company of a Joinder to the Company's Members Agreement ... within 30 days of the Effective Date," failure to sign the agreement and return the Joinder to the Company's Members Agreement within 30 days rendered the offer lapsed. (*See id.*)

***5** Lott claims that around this time, Manaktala suggested to Lott and his wife during dinner that Flatley was treating Lott unfavorably because of Lott's history with cancer. (*Id.* ¶ 332.) Manaktala testified that he did not recall any such conversation. (Def.'s Rebuttal Rule 56.1 Statement ¶ 332.) Lott's testimony, of course, is hearsay.

Throughout the fall, Lott had expressed unhappiness with the terms of the equity agreements and, like Liotta and Manaktala (who were also receiving equity), sought counsel to assist in negotiating his equity award. (Pl.'s Rule 56.1 Statement ¶¶ 329–31.) On September 13, 2013, Lott's counsel sent CoreOne's corporate counsel a letter raising his concerns —specifically his concern that the award did not reflect Lott's proper percentage ownership of the Company. He also complained that the tax treatment of the equity awards was unclear, that the awards were not vesting sooner (because Lott thought he should have received equity back in 2009, he believed that 80% of his shares should have vested upon issuance), and that the change in control provision included a sale price of $180 million, which Lott believed to be inconsistent with prior assurances the Company had made, to the effect that the options would vest if ever the Company was sold, without regard to sale price. (*Id.* ¶ 338; Williams Decl. Ex. GG.) Lott's counsel attached to his letter miscellaneous email correspondence Lott had collected relating to his proposed equity awards. The letter also referenced Lott's cancer diagnosis, stating that Lott "has always received high

  

marks for performance and was regularly promoted until he became ill with cancer in 2010." (Williams Decl. Ex. GG; *see also* Pl.'s Rule 56.1 Statement ¶¶ 133–34, 137.) The letter did not specifically state that this constituted disability discrimination by the Company, or otherwise mention Lott's cancer diagnosis or his age. (*Id.*)

The letter ended with a request for information so that Lott could confirm that he had received the proper bonuses since 2009. (Williams Decl. Ex. GG.)

CoreOne's corporate counsel responded on September 18, 2013, saying, "We find it surprising that Mr. Lott believes the Company is not fulfilling its obligations to him with respect to the proposed grant of Incentive Units. There is nothing in the materials provided that indicates that Mr. Lott was promised an equity award." In response to Lott's concerns about the change of control provision, the letter asserted that the Company was treating the Company's executives consistently and that "Mr. Lott was provided the same terms and conditions, including vesting and potential vesting acceleration in the event of a 'Sale of the Company,' as most other members of management." (Williams Decl. Exh. HH.) The letter concluded by reminding Lott's counsel that "the conditions of the proposed grant was that Mr. Lott sign and return a joinder to the Company's Members Agreement within thirty days of grant."[1] (*Id.*)

[1] The letter expressly stated that the 30–day period had already lapsed. That statement appears to be inconsistent with the effective date listed on the August 2013 Equity Agreement. In its brief, Defendant argues that Plaintiff had until September 26, 2013 to sign and return the agreement and Joinder to the Company's Members Agreement and does not assert that the equity grant had already lapsed on September 18, 2013.

***6** Despite his concerns about the terms of the August 2013 Equity Agreement, Lott signed the agreement and submitted the paperwork to Lorch on September 27, 2013–*31 days* after the effective date. (Pl.'s Rule 56.1 Statement ¶¶ 343.)

Shortly thereafter, Flatley told Lott that CoreOne had agreed to remove the sale-price limitation in the August 2013 Equity Agreement's change of control provision. Upon learning this, Lott took the August 2013 Equity Agreement that he had signed back from Lorch's office-presumably because it had the offending provision in it. (Pl.'s Reply Rule 56.1 Statement ¶¶ 138, 346.)

On October 3, 2013, after the Board approved an equity award for Lott that did not tie acceleration of the equity award to a company sale price, Lott received a new version of an equity agreement (the "October 2013 Equity Agreement"). (Pl.'s Reply Rule 56.1 Statement ¶ 139.) The October 2013 Equity Agreement modified the change in control provision by removing the minimum sale price of $180 million—but it also added a release of claims provision. Flatley testified that the Company added the release of claims provision because Lott "made a lot of comments and statements that he was going to sue the company and we felt if we were going to give him equity we didn't want him to obviously engage in destructive behavior." (*Id.* ¶¶ 139–40; Williams Decl. Exhs. F at 156, Exh. II.)

Lott refused to sign this agreement, even though the Company had modified the change in control provision as he had requested. Instead, on October 10, 2014, Lott sent back the copy of the August 2013 Equity Agreement that he had retrieved from Lorch's office. (Pl.'s Rule 56.1 Statement ¶ 145.)

That same day, Lott's counsel wrote a letter to CoreOne's corporate counsel stating her belief that Lott had been the victim of discrimination. (Clark Decl. Exh. 60.) The letter stated:

> Based on the information supplied to us by Mr. Lott, we believe that he has [sic] meritorious claim of disability and age discrimination. We are particularly concerned that after Mr. Lott's prior counsel ... raised the issue of the change in Mr. Lott's treatment since he had cancer in 2010, and raised issues about his bonus history, CoreOne for the first time sought to condition Mr. Lott's receipt of equity on a release of all employmentrelated claims, a provision that we do not believe was imposed on anyone else and thus is retaliatory.

(Id.)

On October 22, 2013, CoreOne's corporate counsel responded by letter, "I am not aware of any facts that would support a claim of discrimination by Mr. Lott. While the letter I received from his prior counsel raised the issue of Mr.

  

Lott's prior bonuses, the letter was silent as to Mr. Lott's cancer." (Clark Decl. Exh. 62.) The letter further addressed Lott's attempt to return the August 2013 Equity Agreement instead of the October 2013 Equity Agreement.

> I understand that Mr. Lott provided executed incentive award agreements to Evan Lorch on October 10, 2013. The versions Mr. Lott returned reflect a grant of Incentive Units that initially was approved by the Board of Managers of CoreOne ... on July 18, 2013. When Mr. Lott failed to meet the requirements of the grant specifically that he sign and return a Joinder to the Company's Members' Agreement within 30 days, the award lapsed. In order to provide Mr. Lott a second opportunity to receive Incentive Units, the Board reapproved the award on August 27, 2013, and Mr. Lott was promptly notified of the reapproval. The reapproved award lapsed on September 26, 2013 when Mr. Lott again failed to meet the requirements of the grant.
>
> ***7** Effective as of October 15, 2013, the Board acted a third time to provide a grant of Incentive Units to Mr. Lott.... If Mr. Lott returns the paperwork and meets the conditions of grant (returning a signed Joinder to the Company's Members" Agreement as stated in the award paperwork) by November 14, 2013, Mr. Lott will have accepted the award and will be treated as the holder of the applicable Incentive Units. Because Mr. Lott failed to meet the requirements of grant for both the July 18, 2013 and August 27, 2013 approvals, the Company will not now accept paperwork reflecting those approvals.

(Clark Decl. Exh. 62; *see also* Pl.'s Rule 56.1 Statement ¶ 354.)

Lott never returned a signed October 2013 Equity Agreement. Instead he pursued discrimination claims against his employer.

**C. Lott's Discrimination Charge and the RIF**

On October 31, 2013, Lott filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of his age and perceived or actual disability related to his 2010 cancer diagnoses, as well as retaliation for opposing the Company's discrimination. (Pl.'s Rule 56.1 Statement ¶ 361; Clark Decl. Exh. 74.) CoreOne's Director of Human Resources received notice of Lott's EEOC charge on or around December 30, 2013 and forwarded it to Lorch, who shared it with Flatley and, presumably, other senior executives. (Pl.'s Rule 56.1 Statement ¶ 198; Williams Decl. Exh. UU.)

In January 2014, just weeks after the Company learned of Lott's EEOC charge, Manaktala, the Global Head of VistaOne, prepared a list of 24 employees allocated to the VistaOne payroll who would be let go as a result of cost cutting measures (the "Reduction in Force List" or the "RIF List"). (Pl.'s Rule 56.1 Statement ¶¶ 186, 189; Williams Decl. Exh. QQ.) Lott was on the list. (*Id.*) The Company claims that the VistaOne unit had experienced a deterioration in revenue and profitability due to customer attrition and that layoffs were required as a result. Plaintiff admits that this is so. (Pl.'s Rule 56.1 Statement ¶ 167.)

In his deposition testimony, Manaktala stated that he compiled the RIF List by weighing the cost of an employee against his or her value to the Company. (*Id.* ¶¶ 187–88.) Lott was placed on the RIF List because he did not add enough value to the group to justify paying his compensation —$350,000 at the time. (*Id.*)

On March 20, 2014, Flatley and Lott met to discuss Lott's performance. (*Id.* ¶ 173.) During the meeting, Flatley told Lott that Lott had been self-selecting out of working specific projects and dealing with certain clients. He also told Lott about negative feedback from a representative of TIAA–CREF, a major client of the VistaOne unit. (*Id.* ¶ 174.) In email correspondence following the meeting, Flatley told Lott that, "Internal senior managers and clients have a negative view of your engagement or lack thereof.... [Y]ou are not working at a level of expectations from a management nor a client perspective because you declined to participate and seemed to have created your own rules of engagement—Specifically when, on what, and how you participate." (*Id.* ¶¶ 175–176; Williams Decl. Ex. OO.) Flatley advised Lott that such behavior was inappropriate.

Neither party offers any evidence that Lott's illness, diagnosed four years earlier, ever necessitated a cutback in his responsibilities. Lott does not allege that he subsequently sought any set of accommodations in the form of a lesser work load. However, perhaps aware that his time at CoreOne was limited, Lott informed his realtor in California nine days after he met with Flatley that he and his wife "have decided that we will probably be heading back to the west coast sometime after [the] summer." (Pl.'s Rule 56.1 Statement ¶ 177; Williams Decl. Ex. PP.)

  

***8** CoreOne fired Lott on April 30, 2014, three months after he was placed on the RIF List. He received an email from Flatley stating, "Due to a difficult business climate for VistaOne and a pending reorganization, CoreOne will no longer require your services and your employment is terminated effective today." (Pl.'s Rule 56.1 Statement ¶ 193; Williams Decl. Exh. SS.) Lott was 56 years old at the time.

The other individuals on the RIF List were also let go in 2014, as well as an additional 30 employees of VistaOne who had not been included on the list. (Pl.'s Rule 56.1 Statement ¶ 192.)

**D. Procedural History**

On July 29, 2014, Lott filed a complaint alleging discrimination, retaliation, and breach of contract. The first six causes of action alleged discrimination against Lott on the basis of age and perceived or actual disability related to his 2010 cancer diagnoses under the ADEA, ADA, NYSHRL, and NYCHRL; the seventh, eighth, ninth, and tenth causes of action alleged retaliation for opposition to the Company's age and disability discrimination under the ADEA, ADA, NYSHRL, and NYCHRL; and the eleventh cause of action alleged breach of contract for the Company's failure to award him equity under the August 2013 Equity Agreement and to pay him bonuses for the 2011 and 2013 fiscal years. (Dkt. No. 1.)

The Company filed an answer on September 29, 2015. (Dkt. No. 10.) The parties engaged in discovery, and on June 29, 2015, the Company moved for summary judgment dismissing the claims against it. (Dkt. No. 26.)

On October 19, 2015, after the motion for summary judgment was fully briefed, Lott filed a motion to amend the complaint to add a successor entity to CoreOne, which had been acquired by Markit, Ltd ("Markit") since he filed the complaint, and to engage in additional related discovery to determine Markit's successor liability and the distribution of CoreOne equity held by similarly situated employees. (Dkt. No. 58.) On November 12, 2015, Lott withdrew his request to amend the complaint and obtain discovery related to Markit's successor liability. (Dkt. No. 63.) Plaintiff continues to request discovery related to the value of the equity he was supposedly denied.

On November 30, 2015, the Company filed an opposition to Lott's motion for supplemental discovery, which the Company claimed would cause prejudice and unnecessary delay. (Dkt. No. 67.)

**DISCUSSION**

The Company now moves for summary judgment dismissing: (1) Lott's claims regarding age and disability discrimination under the ADEA, ADA, NYSHRL, and NYCHRL on the grounds that various adverse actions, namely the Company's failure to promote him, pay him bonuses, and award him equity on the terms he wanted, were not the product of discrimination (the first six causes of action); (2) Lott's claims for retaliation under the ADEA, ADA, NYSHRL, and NYCHRL on the grounds that Lott has neither established a prima facie case of retaliation nor pretext; and (3) Lott's breach of contract claim on the grounds that Lott's equity agreements were never effectuated and that Lott's equity agreements granted the Company discretion to decide not to pay him a bonus. (Dkt.Nos.26–27.)

Lott has failed to raise an issue of material fact as to whether he was denied promotions. However, there is sufficient evidence in the record to create a genuine issue of material fact as to whether Lott was denied an appropriate equity award, denied bonus payments due to his age or actual or perceived disability, and retaliated against for his opposition to the Company's actions. Finally, because Lott was not entitled to equity and his bonuses were discretionary, his breach of contract claim is dismissed.

***9** Because claims related to Lott's equity award remain, I grant his request for *limited* additional discovery.

**I. Standard**

Summary judgment is appropriate where the parties' submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). In ruling on a motion for summary judgment, the Court must resolve all ambiguities and draw all inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

However, the non-moving party cannot establish a question of material fact by merely disagreeing with deposition testimony and documentary evidence presented by the moving party. *See Anderson*, 477 U.S. at 257. To defeat summary judgment, the non-moving party must go beyond the pleadings and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*

*Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, for the plaintiff in a discrimination case to survive a motion for summary judgment, he or she must offer "concrete particulars" to substantiate the claim. *See* *Meiri v. Dacon*, 759 F.2d 989 (2d Cir.1985) *cert. denied*, 474 U.S. 829 (1985).

**II. Lott's Age and Disability Discrimination Claims**

Employment discrimination claims under the ADEA and the ADA are governed by the burden-shifting framework laid out by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). *See* *James v. New York Racing Ass'n.*, 233 F.3d 149, 153–154 (2d Cir.2000) (ADEA); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir.2006) (ADA). "Employment discrimination claims brought under ... the NYSHRL [ ] and the NYCHRL are generally analyzed under the same evidentiary framework that applies to ... ADEA claims." *Barbosa v. Continuum Health Partners Inc.*, 716 F.Supp.2d 210, 217 (S.D.N.Y.2010). "An age discrimination claim brought under any of those statutes must permit a court to infer that it is plausible that the plaintiff suffered an adverse employment action because of his age." *Anderson v. Davis Polk & Wardwell LLP*, 850 F.Supp.2d 392, 409 (S.D.N.Y.2012).

Under the *McDonnell Douglas* framework, a plaintiff first "has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." *McDonnell Douglas*, 411 U.S. at 793. To meet its burden of establishing a prima facie case of discrimination, generally a plaintiff must show: (1) membership in a protected group; (2) qualification to perform the duties of the position; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Id.* The requirements of a prima facie case set a low bar, which a plaintiff can overcome even without evidence of discrimination. *James*, 233 F.3d at 154.

If the plaintiff establishes the "minimal" prima facie case, the burden shifts back to the defendant "to articulate some legitimate nondiscriminatory reason" for the employment action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant does so, the burden shifts to the plaintiff to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext *for discrimination. " Id.* (emphasis added). On a motion for summary judgment, the employer will be entitled to a dismissal of the plaintiff's claims once the defendant's burden is met "unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *James*, 233 F.3d at 154.

***10** Lott does not allege that he was the victim of any disparaging remarks regarding his age or health. He does not suggest that he asked for a reasonable accommodation of a disability that was denied. Rather, he asserts that he was denied promotions, the equity to which he was entitled, and bonuses he had earned because of his age and received or actual disability related to his 2010 cancer diagnosis.

**A. Failure to Promote**

The first adverse action Lott alleges is that the Company "refused to consider him for a number of positions" that were ultimately given to younger employers without disabilities —specifically open positions for CTO, COO, and Global Head of one of the three CoreOne units established in 2011. (Compl.¶ 18.) Claims based on most of these positions are time-barred. To the extent that they are not, Plaintiff has produced no admissible evidence that he applied for these positions and thus he has failed to establish a prima facie case of discrimination. Therefore, they are dismissed.

It is too late for Lott to complain of the Company's failure to promote him for the position of COO or Global Head of a CoreOne business units under federal law. Under the ADEA and the ADA, Lott had 300 days from the date he was denied these positions to file a claim with the EEOC. *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir.1999) (ADA); *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir.1998) (ADEA). The COO position was filled in August 2010 and the Global Head positions in mid-to-late 2011—more than 300 days before Plaintiff filed his EEOC charge on October 31, 2013—so claims based on the Company's failure to promote Lott to these positions are time-barred under the ADEA and ADA. (Pl.'s Reply 56.1 Statement ¶¶ 8, 57, 59, 74; Clark Decl. Exh. 74.) Additionally, some, though not all, of the open CTO positions were filled more than 300 days before Lott filed his charge. Claims based on the Company's failure to promote Lott to those positions are timebarred under the ADEA and ADA, as well.

That Lott alleges that the promotions were part of a pattern of discrimination dating back to 2010 is immaterial, since "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.*

Accordingly, each of the Company's failure to promote Lott is a discrete act, even he was repeatedly passed over.

Under the NYSHRL and NYCHRL, Lott had to bring this lawsuit within three years of his failure to receive a promotion. N.Y.C.P.L.R. 214(2); N.Y.C. Admin. Code § 8–502(d); *see also Wade v. New York City Dep't of Educ.*, No. 11 CIV. 05278, 2014 WL 941754, at *6 (S.D.N.Y. Mar. 10, 2014). Lott filed his complaint on July 29, 2014, which is more than three years after he claims the Company failed to promote him to COO in August 2010. Thus, under state and city law, Lott has lost any claim relating to the Company's failure to promote him to that position.

But while his claim that the Company failed to promote him to Global Head or CTO are not time barred, it—and all of Lott's claims based on a failure to promote—fail because he has not established a prima facie case of discrimination. A prima facie case requires a plaintiff to demonstrate that he "applied and was qualified for a job for which the employer was seeking applicants." *Petrosino v. Bell Atl.*, 385 F.3d 210, 226 (2d Cir.2004) (ADEA and ADA); *Davis-Bell v. Columbia Univ.*, 851 F.Supp.2d 650, 679 (S.D.N.Y.2012) (N.Y.SHRL and NYCHRL). It is not sufficient for a party to "merely assert[ ] that on several occasions [he] generally requested promotion." *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir.1998). As the Second Circuit explained, "if generally requesting a promotion in an annual review were sufficient to establish a prima facie case, employers would be unfairly burdened in their promotion efforts" because they would "have to keep track of all employees who have generally expressed an interest in promotion and consider each of them for any opening for which they are qualified but did not specifically apply." *Id.*

***11** Lott has offered no evidence that he applied for the Global Head positions and admits that he did not apply for the CTO positions. Indeed, he has provided no testimony or other evidence demonstrating that he even expressed an interest in holding any position other than COO—and there, his testimony is only that he spoke with a member of the Board, not that he discussed the position with the CEO, human resources, or anyone else responsible for the ultimate decision. Lott cannot establish a prima facie case of discrimination based on a theory that he was denied promotions for which he did not apply. *See Brown*, 163 F.3d at 706.

**B. Denial of Equity Awards**

The second adverse action Lott alleges is that the Company awarded him fewer equity shares, and on worse terms, than his colleagues—again due to his age and his perceived or actual disability. Specifically, Lott claims that "In mid–2013, Flatley changed [Lott's equity] award, so that Lott was granted fewer shares that Liotta and Thurston." (Pls. Br. at 17, 19.)

In response, the Company argues that its decision to allot Liotta and Thurston more equity than Lott (as well as Lorch and Paul Mancinelli, the former CTO) reflected their value to the Company. (Def. Br. at 22–23; *see also* Pl.'s Rule 56.1 Statement ¶ 132.) Defendant also argues that with one exception—the litigation release—the terms and conditions of Lott's equity agreement were identical to those in Liotta's, Thurston's, and Lorch's agreements. In particular, all of their agreements had identical change of control provisions in their equity agreements. (Def. Br. at 23; Pl.'s Rule 56.1 Statement ¶ 131.)

Plaintiff has raised a genuine issue of fact as to whether the amount of equity he was allotted was the result of discrimination.

There is nothing necessarily discriminatory about the fact that Lott received less equity than the younger and healthier Liotta and Thurston; according to the Company, equity awards reflect the relative value of an individual's contribution to the business. Lott's equity awards could be explained, not by discrimination against him, but by the fact that as Global Heads of two of CoreOne's business units, Liotta and Thurston made greater contributions to the Company.

However, months before Lott received the August 2013 Equity Agreement that granted him fewer shares than Liotta and Thurston, the Board passed a resolution calling for Lott to receive the same equity as Liotta and Thurston. It is reasonable to assume, based on the resolution, that the Board believed, as late as early 2013, that the three senior executives were equally valuable to the Company. That management ultimately decided to grant him less equity than called for by the Board's resolution, when coupled with other evidence (including, but not limited to Manaktala's statement that Lott was treated unfavorably because of his history with cancer), might cause a reasonable jury to conclude that the management was acting, not on the basis of Lott's value to the Company, but because of his age or the perception that he was ill.

  

Furthermore, though Lott cannot pursue his failure to promote claims, the same evidence that tends to support those claims (namely, that he was passed over for several positions that ultimately went to younger and healthier employees) is *some* evidence that he was denied an appropriate equity award years later because of his age and/or health. Incidents of alleged discrimination that are not actionable because they are time-barred can nonetheless be admitted as "relevant background evidence" in support of a timely claim. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002). If Lott would have received the appropriate number of shares had he held a certain position that he was unfairly denied, such as a Global Head of CoreOne's Business units, then the impact of the failure to promote him was to deny him an appropriate equity award.

***12** Lott's discrimination claim based on his equity award survives summary judgment.

**C. Bonuses**

The third adverse action Lott alleges is that the Company decided not to pay him 2011 and 2013 bonuses. (Pl.'s Br. at 19.)

The Company acknowledges that it paid bonuses for both years to younger executives who had not undergone cancer treatment. The Company provides three non-discriminatory justifications for denying Lott a bonus:

- ^ first, Lott did not deserve a discretionary bonus in 2011 because he did not contribute to the Firm that year;
- ^ second, some executives who received bonuses in 2011 had employment contracts and offer letters guaranteeing them a bonus in their first year; and
- ^ third, Lott was no longer employed when 2013 bonuses were paid.

(Def. Br. at 24; Parties' Local Rule 56.1 Statement ¶ 299; *see also* Williams Decl. Exh. WW.)

Lott has three responses to the Company's non-discriminatory justifications for denying him bonuses. First, he argues that his entitlement to bonuses was not discretionary, so he was entitled to bonuses in 2011 and 2013 as long as the Company hit its performance targets. Second, because his bonus were not discretionary, he should have received his 2013 bonus before he was fired on April 30, 2014. Third, he points out that the Company repeatedly shifted its story about why he was not paid, which casts doubt on the justifications it now gives. (Pl.'s Br. at 17–18.)

Because Lott's 2011 bonus would have been paid in early 2012, over 300 days before he filed his EEOC charge, claims related to the 2011 bonus under the ADA and ADEA are timebarred. The payment of bonuses, like promotions, are discrete acts. However, claims related to the 2011 bonus are not time-barred under state and city law, so the 2011 bonus claim remains in the case.

For all timely non-payment of bonus claims, Lott has met his burden of showing a "minimal" prima facie case of discrimination. The Company admits that it paid bonuses in 2011 and 2013 to executives that were younger and healthier than Lott. Because Lott was treated differently than these younger and healthier executives, Lott has shown that the Company's bonus payments in 2011 and 2013 occurred under circumstances giving rise to an inference of discrimination. The Company, too, has met its burden of proffering legitimate, nondiscriminatory reasons why Lott did not receive a bonus: it offers evidence that Lott's performance in 2011 did not warrant a discretionary bonus and it is undisputed that Lott was not employed by the firm when 2013 bonuses were paid.

Lott is mistaken about the terms of his Lott's compensation agreements; they do not guarantee him an annual bonus. Paragraph 10 of the 2008 Agreement states that Lott's bonus was discretionary, to be "awarded by senior executives of CRDS acting in their *absolute discretion* as to the performance criteria to be applied, *whether any bonus will be awarded*, and the amount of any bonus." (Pl.'s Rule 56.1 Statement ¶ 103; Williams Decl. Exh. JJ (emphasis added).)

The 2008 Agreement was expressly incorporated into subsequent Letters of Agreement, and the purpose is quite clear: bonuses were always discretionary. In arguing that his bonus was not discretionary, Lott relies heavily on language in the 2008 Side Letter that, out of the context of the 2008 Agreement, suggests that his bonus was guaranteed as long as performance criteria were met—the 2008 Side Letter stated, for instance, that Lott is "*eligible* for an annual bonus that *will* be awarded by the senior executives of CRDS, *if* and to the extent that the performance criteria described below are achieved" and that Lott "*will receive* the same percentage of the Target Bonus Amount as corresponds to the percentage achievement by the Business of the performance targets." (*See* Williams Decl. Exh. WW (emphasis added).)

  

However, these statements cannot be read in isolation. The 2008 Side Letter clearly states that it is to be read "in accordance with paragraph 10" of the 2008 Agreement, which clearly and unambiguously states that bonuses are discretionary. (*See* Williams Decl. Exh. JJ (emphasis added).)

***13** Nonetheless, Lott is entitled to a trial on the 2011 and 2013 bonus claims. The Company's shifting justifications for why it did not pay Lott a bonus could allow a jury to conclude that the Company was motivated by discrimination. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (emphasis in the original). Here, there is ample reason for a jury to reject the Company's justifications. The evidence provided by the Company, such as complaints from colleagues and negative feedback from a major client, relate only to Lott's 2013 performance and not his 2011 performance. Thus, Defendant has not supported its proffered reason for denying Lott a bonus in 2011. Furthermore, Lott testified that Flatley twice supplied him with false pretexts for why he did not receive a bonus—first, that no senior executives were getting bonuses in 2011, and, second, that Lott did not receive a bonus because he received a raise in 2013. This testimony, if believed, could lead a jury to conclude, as Lott argues, that the Company's current justifications are mere pretexts.

**D. Lott's Firing**

The fourth adverse action Lott alleges is that the Company fired him in April 2014. The Company provides a non-discriminatory justification for firing Lott—the reduction in force that resulted in dozens of VistaOne employees losing their jobs. Lott does not dispute that by 2014, VistaOne was performing poorly. He also does not dispute that the Company laid off other VistaOne employees in an effort to reduce costs. Evidence is the record establishes that Lott was the highest paid executive on the VistaOne's payroll. (Pl.'s Rule 56.1 Statement ¶¶ 186–188, 192.)

The Company is correct that no evidence in the record suggests that Lott's firing was pretextual. (Def.'s Br. at 27–28.) The only evidence Lott puts forward is that, after he was fired, his duties were assigned to a substantially younger colleague. (Pl.'s Br. at 19.) While that disputed fact is relevant in determining whether the Company's justification was pretextual, it is not sufficient. Lott was the oldest employee holding an executive position at the firm. (Pl.'s Rule 56.1 Statement ¶ 449.) He was fired in the context of a RIF, which means the Company would not be taking in replacements from the outside (and, indeed, it did not—it reassigned Lott's responsibilities internally). It would have been impossible for the Company *not* to reassign his duties to a younger employee. Lott thus cannot rely on this fact, alone, to support a discrimination claim. *See, e.g., Zucker v. Five Towns Coll.*, 09–CV–4884, 2010 WL 3310698 (E.D.N.Y. Aug. 18, 2010). Unfortunately, Lott has no other evidence that he was fired on account of his age or perceived disability.

Lott has failed to show that the Company's nondiscriminatory justification for firing him is a pretext. His ADA, ADEA, NYSHRL, and NYCHRL discrimination claims based on his firing are dismissed.

**III. Plaintiff's Retaliation Claims**

Lott asserts claims under the ADEA, ADA, NYSHRL, and NYCHRL for retaliation for asserting age and disability discrimination claims against the Company. These claims can proceed to trial.

To establish a prima facie case of retaliation, a plaintiff must produce sufficient evidence to permit the court to find that (1) the plaintiff engaged in activity protected by the statutes, (2) that the employer was aware of this activity, (3) that the employer took adverse action against the plaintiff, and (4) that a causal connection exists between the protected activity and the adverse action, that is, that a desire to retaliate against the employee lead, at least in part, to the adverse employment action. *Treglia v. Manlius*, 313 F.3d 713, 719 (2d Cir.2002) (stating the standard under the ADA and NYSHRL); *Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir.2000) (stating the standard under the ADEA). Causation may be established "indirectly, by showing that the protected activity was followed closely by the discriminatory treatment," or "directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Gordon v. New York City Bd. Of Educ.*, 232 F.3d 111, 117 (2d Cir.2000).

***14** If the plaintiff establishes a prima facie case, the defendant must articulate a legitimate, non-retaliatory reason for the adverse employment action. *Hicks v. Baines*, 593 F.3d 159, 160 (2d Cir.2010). If it does so, the burden shifts back to the plaintiff who "must point to evidence that would be

  

sufficient to permit a rational fact finder to conclude that the employer's explanation is merely a pretext for impermissible retaliation." *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216 (2d Cir.2001).

The inquiry under the NYCHRL is "broader than its federal counterpart." *Fincher*, 604 F.3d at 723. Under the NYCHRL, a plaintiff need not prove the existence of an adverse employment action, but must instead "prove that something happened that would be reasonably likely to deter a person from engaging in protected activity." *Jimenez v. City of New York*, 605 F.Supp.2d 485, 528 (S.D.N.Y.2009). The Second Circuit has instructed that "a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by ... retaliatory motives." *Krasner v. City of New York*, 580 F. App'x 1, 3–4 (2d Cir.2014). If Lott fails to make out a claim of retaliation under the NYCHRL, he necessarily fails under the more stringent state and federal claims.

**A. Plaintiff's Termination**

The first retaliatory action that Lott alleges is that the Company fired him after learning that he filed an EEOC charge. Lott has provided some evidence to establish that the Company's legitimate, non-retaliatory reason for his firing—the reduction in force—was pretextual, and so the Company's motion for summary judgment on this claim is denied.

Lott has met the elements of a prima facie case of retaliation. His attempt to assert his rights against age and disability discrimination, including his decision to file a charge with the EEOC on October 31, 2013, is a protected activity. *See e.g.*, *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir.1990). CoreOne became aware of this activity by December 30, 2013, and Lott's subsequent firing is clearly an adverse action. (*See* Pl.'s Rule 56.1 Statement ¶ 198; Williams Decl. Exh. UU.)

The Company argues that Lott has not presented sufficient evidence to establish the final element, because Lott was not fired until more than six months after he first complained of discrimination and four months after he filed his EEOC charge. (Pl.'s Br. at 27.) But the Company has cherry-picked dates to support its argument. Within a month of the Company receiving notification of Lott's EEOC charge, it placed Lott's name on the RIF List. (Pl.'s Reply Rule 56.1 Statement ¶ 186; Williams Decl. Exh. QQ.) All Lott has to show is that his firing occurred in circumstances from which a reasonable jury could infer retaliatory intent. *Treglia*, 313 F.3d at 720. Plaintiff has clearly shown a sufficiently close temporal relationship between his EEOC complaint and his placement on the RIF List to establish the causation. *Id.*

The temporal relationship also provides evidence to rebut the Company's legitimate, nonretaliatory reason for firing Lott, particularly in the context of Lott's negotiation of his equity award that fall. The Company admits that it responded to Lott's suggestion that he would be seeking legal action against the Company by adding a release of claims provision to the October 2013 Equity Agreement. A jury could certainly conclude, based on that episode, that the Company again responded to the threat of a lawsuit by placing Lott on the RIF List.

***15** Having presented evidence that would allow a reasonable jury to conclude that his firing was pretextual, Lott's retaliation claims based on his firing survive summary judgment.

**B. Equity and Litigation Release**

The second and third retaliatory actions that Lott allege is that the Company denied him equity he had earned, and predicated his receipt of equity on his signing a release of claims, as retaliation for his asserting that he had been the victim of discrimination. Lott has provided evidence that, if believed, would establish that he discussed his belief that he had been the victim of discrimination with a senior executive—Manaktala—in the fall of 2013. During this time, Lott and the Company were negotiating his equity award. As stated above, the Company admits that it added a litigation release to the October 2013 Equity Agreement because it believed Lott intended to sue the Company—admitting, in essence, knowledge of protected activity and a causal link between Lott's discussion of legal action against the Company. The September 13, 2013 letter from Lott's lawyer stating that Lott had "always received high marks for performance and was regularly promoted until he became ill with cancer in 2010" plainly refers to disability discrimination. The Company's admission, in the context of the equity negotiations, is some evidence that the Company took retaliatory action against Lott by changing the terms and the quantity of his equity award. As a result, Lott's retaliation claims based on his equity agreements also survive summary judgment.

**C. Other Non–Adverse Actions**

In conclusory fashion, Lott raises a litany of other CoreOne actions that he alleges to be retaliatory. These include having to report vacation days to the head of VistaOne; having his

  

performance criticized; having his son's application for a position in the internship program denied; the Company's failure to pay him and others 401(k) catch-up payments; and having his emails ignored by other executives. (*See* Pl.'s Br. at 20–21.) The Company asserts that these actions are not *materially* adverse, as required to make a prima facie case of retaliation. (Pl.'s Br. at 26.)

Lott must show that a "a reasonable employee would have found the [employer's] challenged action materially adverse, which ... means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (internal quotations omitted). The analysis is necessarily contextual, since "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69. Furthermore, "the alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently substantial in gross as to be actionable." *Hicks*, 593 F.3d at 165.

None of these actions is materially adverse under the ADA, ADEA, or NYSHRL; also, they are not "reasonably likely to deter a person from engaging in protected activity," as required by the NYCHRL. *See Jimenez*, 605 F.Supp.2d at 528. Lott has not explained why these actions—particularly needing to report his vacation or having his emails ignored—were anything more than "trivial harms—*i.e.*, those petty slights or minor annoyances that often take place at work and that all employees experience." *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 568 (2d Cir.2011). They are far less likely to dissuade a reasonable worker from making a complaint than other common examples of materially adverse employment actions, including "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir.2004). They are more akin to being singled out for excessive scrutiny and discipline, which has been found not to be a materially adverse action. *Bowen–Hooks v. City of New York*, 13 F.Supp.3d 179, 216 (E.D.N.Y.2014).

**IV. Plaintiffs Breach of Contract Claims**

***16** Finally, Lott claims breach of contract for the Company's failure to award him equity and pay him 2011 and 2013 bonuses. Because no contract granting Lott equity in CoreOne was ever executed, the Company is entitled to summary judgment as to Lott's complaint that the Company did not grant him equity. Because Lott's compensation agreements stated unambiguously that his bonuses were discretionary, as discussed above, the Company is entitled to summary judgment on his claim for breach of contract as well.

The Second Circuit has articulated specific standards applicable to summary judgment motions in contract disputes:

> In determining a motion for summary judgment involving the construction of contractual language, a court should accord that language its plain meaning giving due consideration surrounding circumstances and apparent purpose which the parties sought to accomplish. Where contractual language is ambiguous and subject to varying reasonable interpretations, intent becomes an issue of fact and summary judgment is inappropriate. The mere assertion of an ambiguity does not suffice to make an issue of fact. Ambiguity resides in a writing when –after it is viewed objectively—more than one meaning may reasonably be ascribed to the language used. Only where the language is unambiguous may the district court construe it as a matter of law and grant summary judgment accordingly.

*Palmieri v. Allstate Ins. Co.*,445 F.3d 179, 187 (2d Cir.2006) (quotations and citations omitted). Thus, "The initial question for the court on a motion for summary judgment" concerning a contract claim "is whether the contract is unambiguous with respect to the question disputed by the parties." *Continental Ins. Co. v. Atlantic Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir.2010) (citation and internal quotation marks omitted). "Whether the contract is unambiguous is a question of law for the court." *Id.* (citation and internal quotation marks omitted).

The terms of the August 2013 Equity Agreement were unambiguous. Lott had to sign the agreement and return it to Lorch with a signed "Joinder to the Company's Members' Agreement" within thirty days of the effective date of August 27, 2013. (Williams Decl. Exh. FF.) Lott admits that he failed to do so; therefore, the Company's offer of equity lapsed.

  

The terms of Lott's bonus agreements were also unambiguous, as discussed above. Lott's bonuses were at the "*sole discretion* " of the Company. Under New York law, an employee like Lott cannot recover for an employer's failure to pay a bonus under a compensation plan that provides the employer with absolute discretion over bonus determinations. *See, e.g.*, *Namad v. Salomon Inc.*, 74 N.Y.2d 751, 752–53 (1989).

Lott's breach of contract claims are dismissed because he had no contracts.

**V. Supplemental Discovery**

Lott seeks limited additional discovery to determine what compensation CoreOne employees received in exchange for their CoreOne equity after the Company was acquired. Lott claims that this information is relevant to his determination of the value of the CoreOne equity he allegedly is owed. The Company opposes Lott's request, in part because it claims that Plaintiff already has all necessary information to determine his damages.

Under Federal Rule of Civil Procedure 16, a scheduling order "may be modified only for good cause and with the judge's consent." Fed.R.Civ.P. 16(b)(4). Among the factors that courts consider in re-opening discovery is whether trial is imminent, whether the request is opposed, whether the non-moving party would be prejudiced, whether the moving party was diligent in obtaining prior discovery, the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and the likelihood that the discovery will lead to relevant evidence. *Bakalar v. Vavra*, 851 F.Supp. 489, 493 (S.D.N.Y.2011).

***17** CoreOne was acquired after the close of discovery. To determine the value of the equity Lott alleges he is owed, Lott needs to know what happened to CoreOne shares under the terms of the acquisition. To the extent this information is not public, Lott needs access to additional discovery. Because Lott's request is so limited, the Court is not inclined to believe the Company's assertion that it would be prejudiced by Lott's limited requested for additional discovery or that the trial schedule would be significantly delayed (the trial date is not yet scheduled).

Accordingly, the Court will grant's request for limited additional discovery. Specifically, the Court will permit Lott to request from CoreOne information regarding any form of payment or other compensation that was given to two similarly situated executives—Liotta and Thurston—in exchange for their CoreOne equity.

Lott is entitled to nothing else.

**CONCLUSION**

For the foregoing reasons, Defendant's motion for summary judgment is granted in part and denied in part. Plaintiff's request for limited supplemental jurisdiction is granted. The Clerk of the Court is directed to remove Docket Nos. 26 and 58 from the Court's list of pending motions.

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