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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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GEORGE CALHOUN,

Plaintiff,

v.

20 CV 6174 (GHW)
Telephone Conference

LAIDLAW & COMPANY (UK) LTD.,

Defendant.

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New York, N.Y.
December 18, 2020
4:02 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES VIA TELECONFERENCE

NESENOFF & MILTENBERG, LLP
Attorneys for Plaintiff
BY: GABRIELLE VINCI

CARMEL, MILAZZO & FEIL, LLP
Attorneys for Defendant
BY: CHRISTOPHER P. MILAZZO

(The Court and all parties appearing telephonically)

THE COURT: So let me first take appearances from the parties. To the extent that either side has more than one lawyer on the line, I'd like to ask the principal spokesperson to please identify him or herself and the members of her team.

First, who is on the line for plaintiff?

MS. VINCI: Good afternoon, your Honor. This is Gabrielle Vinci from Nesenoff and Miltenberg for the plaintiff. Mr. Lewis was expected to join us, but he is, unfortunately, unable to join this afternoon; so it will just be me on behalf of Mr. Calhoun.

THE COURT: Good. Thank you very much.

And who is on the line on behalf of the defendant?

MR. MILAZZO: Good afternoon, your Honor. Christopher Milazzo of Carmel, Milazzo and Feil for the defendant.

THE COURT: Good. Thank you very much.

So just a few brief comments about the protocol that the parties should follow during this conference. First, remember that this is a public proceeding. Any member of the public or press is welcome to join us; so please keep that in mind.

Second, please keep your phones on mute at all times except when you're addressing the Court or your adversary.

Third, please state your name each time that you speak during this conference. You should state your name each time

that you speak even if you've spoken previously. That will help us to keep a clear record of today's conversation.

Fourth, I'm inviting our court reporter to let us know if she has any difficulty hearing or understanding anything that we say here today. If she asks you to do something that will make it easier for her to do her job, please do it to the extent that you can.

And finally, I'm ordering that there be no recording or rebroadcasting of all or any portion of today's conference.

So counsel, I scheduled this conference to take up the partial motion to dismiss filed by defendant Laidlaw and Company (UK) Limited, which I will describe as "Laidlaw" throughout this proceeding. Let me begin with a brief procedural history.

Plaintiff, George Calhoun, filed his complaint on August 6, 2020. Docket No. 1 (“Compl.”). Defendant filed a partial motion to dismiss plaintiff’s retaliation claims under the New York State Human Rights Law (the “NYSHRL”) and the New York City Human Rights Law (the “NYCHRL”) on November 13, 2020. Docket No. 26. Plaintiff filed his opposition on December 4, 2020, (the “Opposition”). Docket No. 27. The motion was fully briefed last week when Defendant filed its reply on December 11, 2020, (the “Reply”). Docket No. 29.

First, let me just ask you, again, to all please place your phones on mute. I'm getting a little bit of background

noise as somebody is moving around in the background; so please, again, place your phones on mute.

So counsel, I've reviewed the parties' written submissions in connection with this motion to dismiss. I believe that I have a very clear sense of the arguments that the parties have presented, but I'd like to ask, before we proceed, if there is anything that either party would like to add to your written submissions. Again, I've reviewed those in depth; so I'd ask that any comments be very targeted.

First, counsel for defendant, is there anything that you'd like to add to your written submissions with respect to the issues raised in this motion? Counsel for defendant?

MR. MILAZZO: Sure. This is Christopher Milazzo. There's nothing that we need to add to our papers.

THE COURT: Thank you. You broke up a little bit. I understand that you have nothing to add to your papers; is that right?

MR. MILAZZO: Correct, your Honor.

THE COURT: Good. Thank you very much.

Counsel for plaintiffs?

MS. VINCI: Thank you. This is Gabrielle Vinci, your Honor. We do not have anything to add in addition to our papers.

THE COURT: Good. Thank you very much.

So, counsel, I'd like to ask you again to please keep

your phones on mute. I'm going to rule on the motion orally. I'm going to do so now.

For the reasons that follow, defendant's motion is denied. The parties are familiar with the underlying facts and procedural history; therefore, I will not recite those in detail. To the extent that any of the facts alleged in the complaint are pertinent to my decision, those facts are embedded in my analysis.

One. Introduction. Plaintiff's complaint pleads two causes of action. The first is a claim for breach of contract, which is not directly relevant to this motion. The second is a claim against retaliation triggered by plaintiff's complaints regarding race discrimination, in violation of the New York State Human Rights Law (the "NYSHRL") and the New York City Human Rights Law (the "NYCHRL").

In its motion, defendant seeks the dismissal of plaintiff's claims arising under the NYSHRL and the NYCHRL. defendant argues that plaintiff has failed to adequately plead those claims for a number of reasons.

First, defendant argues in its motion that the retaliation protections of the statutes do not apply to former employees. Memorandum of law, Docket No. 26-1 ("Def's. Mem."), at 8. Defendant also argues that plaintiff has failed to plead an adverse employment action as required under the statutes. Id. at 10. And, finally, defendant argues that plaintiff has

not adequately pleaded a causal relationship between the protected act and defendant's alleged retaliation. Id. at 12.

Defendant's motion is profoundly flawed and must be denied. The opening brief ignored and misstated basic principles of law. I ultimately do not conclude that the motion was frivolous, but it came close to the line.

Two. Legal Standard. A. Rule 12(b)(6). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rule of Civil Procedure 8(a)(2). However, a defendant may move to dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted." Federal Rule of Civil Procedure 12(b)(6).

In deciding a motion to dismiss under Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations and draws all inferences in the plaintiff's favor. See *Palin v. N.Y. Times Co.*, 933 F.3d 160, 165 (2d Cir. 2019) (quoting *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017); *Chase Grp. Alliance LLC v. City of N.Y. Dep't of Finance*, 620 F.3d 146, 150 (2d Cir. 2010).

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

(2007).

A claim is facially plausible when a plaintiff "pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

"To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 544).

Although Rule 8 "does not require 'detailed factual allegations,'...it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting Twombly, 550 U.S. at 555).

Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. In determining the adequacy of a claim under Rule 12(b)(6), a court is generally limited to "facts stated on the face of the complaint." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016).

B. Retaliation Claims under the NYSHRL and the NYCHRL Generally. "The NYSHRL makes it unlawful for 'any employer to

discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.'" *Wu v. Good Samaritan Hospital Medical Center*, 815 F. App'x 575, 581 (2d Cir. 2020) (summary order) (quoting N.Y. Exec. Law Section 296(1)(e)) (ellipsis omitted).

One of the many aspects of the controlling law missed by defendant in its briefing is this: The New York legislature amended the NYSHRL on August 19, 2019, to establish that its provisions should be construed liberally even if "federal civil rights law, including those laws with provisions worded comparably to the provisions of this article" have been construed narrowly. *Deveaux v. Skechers USA, Inc.*, 2020 WL 1812741, at star 3, note 3 (S.D.N.Y. Apr. 9, 2020) (quoting NY Legis 160 (2019), 2019 Sess. Law News of N.Y. Chapter 160 (A. 8421)).

In at least some respects, this language mirrors the provisions of the NYCHRL, as I will flag in a moment. The effective date for the amendment was October 11, 2019, and, as a result, "these amendments only apply to claims that accrue on or after the effective date of October 11, 2019." *Wellner v. Montefiore Med. Center*, 2019 WL 4081898, at star 5, note 4 (S.D.N.Y. Aug. 29, 2019).

The retaliatory conduct that is at the heart of this

litigation occurred after October 11, 2019. See complaint at paragraph 60. So the version of the NYSHRL that applies to this case is the more liberal version enacted by the State in 2019.

Prior to the amendment, NYSHRL claims were analyzed using the same legal framework as Title VII claims. See *Guity v. Uniondale Union Free School District*, 2017 WL 9485647, at star 21, note 14 (E.D.N.Y. Feb. 23, 2017) (collecting cases), report and recommendation adopted, 2017 WL 1233846 (E.D.N.Y. Mar. 31, 2017).

After the amendment, that is no longer the case. Still, for convenience and because case law under the new version of the NYSHRL is scant, I am going to analyze the NYSHRL claims using the law that applied under the Title VII and NYSHRL equivalency framework that existed before the amendment. Because the claims survive even under that more stringent standard, they must pass muster under the current, more liberal version of the statute.

To survive a motion to dismiss a retaliation claim, a plaintiff must allege "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." *Shultz v. Congregation Shearith Israel of City of N.Y.*, 867 F.3d 298, 309 (2d Cir. 2017) (quoting

Littlejohn v. City of N.Y., 795 F.3d 297, 316) (2d Cir. 2015).

Generally, again prior to the 2019 NYSHRL amendment, the "same pleading standards apply" to retaliation claims under Title VII and the NYSHRL. See *Guity*, 2017 WL 9485647, at 21, note 14 (collecting cases).

The Court discusses Title VII case law because it is relevant to the NYSHRL claims. Like Title VII and the NYSHRL, the NYCHRL also prohibits retaliation. "Section 8-107(7) of the NYCHRL prohibits employers from 'retaliating or discriminating in any manner against any person because such person has opposed any practice forbidden under this chapter.'" *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 112 (2d Cir. 2013) (quoting former N.Y.C. Admin. Code Section 8-107(7)) (alterations omitted).

The Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), amended this section to further provide: "The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment or in a materially adverse change in the terms and conditions of employment, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity." Id. (quoting Restoration Act Section 3 (amending N.Y.C. Admin. Code Section 8-107(7)) (ellipses omitted)).

So to plausibly plead "a retaliation claim under the NYCHRL, the plaintiff must [allege] that she took an action opposing her employer's discrimination and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." Id. (citing *Albunio v. City of New York*, 16 N.Y.3d 472, 479 (2011); *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 33-34 (2009); see also *Warmin v. New York City Department of Education*, 2019 WL 3409900, at star 7 (S.D.N.Y. July 29, 2019) ("To plead retaliation under the NYCHRL, plaintiff must show that he 'took an action opposing his employer's discrimination, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action.'" (quoting Mihalik, 715 F.3d at 112) (brackets omitted).

Although NYCHRL claims had, for many years, "been treated as coextensive with state and federal counterparts," the New York City Council, in passing the Restoration Act, "rejected such equivalence" in favor of a broader remedial scope. *Loeffler v. Staten Island University Hospital*, 582 F.3d 268, 278 (2d Cir. 2009) (citation omitted).

The Restoration Act established two new rules of construction for the NYCHRL. First, the NYCHRL is "a 'one-way ratchet,' by which interpretations of state and federal civil rights statutes can serve only 'as a floor below which the City's Human Rights law cannot fall.'" Mihalik, 715 F.3d

at 109 (quoting Loeffler, 582 F.3d at 278, in turn quoting Restoration Act Section 1).

Thus, "the NYCHRL's standards governing discrimination claims are as, or more, generous to plaintiffs than those under the analogous federal statutes," so "that a claim that satisfies federal law necessarily satisfies the NYCHRL." *Estevez v. S & P Sales & Trucking LLC*, 2017 WL 5635933, at star 3 (S.D.N.Y. Nov. 22, 2017).

Second, NYCHRL provisions must "be construed liberally for the accomplishment of [its] uniquely broad and remedial purposes." Mihalik, 715 F.3d at 109 (quoting Restoration Act Section 7). That is so even if similar "federal or New York State civil and human rights laws" with "comparably worded" provisions have been construed more narrowly. Id. (quoting Restoration Act Section 7) (emphasis omitted).

This discussion of the Restoration Act and its effect on the NYCHRL is valuable for my analysis of the NYCHRL claims. But I linger on it here, in part, because of the similarity in the language used in the recent amendments to the NYSHRL to that in the Restoration Act. As a result, I expect that as the law develops, the "one-way ratchet" that applies to claims arising under the NYCHRL, will apply to post-amendment claims under the NYSHRL as well.

"New York courts have broadly interpreted the NYCHRL's retaliation provisions." *Taylor v. City of New York*, 207 F.

Supp. 3d 293, 308 (S.D.N.Y. 2016) (quoting Mihalik, 715 F.3d at 112); see also, *Mestecky v. N.Y.C. Dep't of Educ.*, 791 F. App'x 236, 239 (2d Cir. 2019) (summary order) ("[The] NYCHRL's retaliation provision is broader than Title VII's." (citing *Ya-Chen Chen v. City University of New York*, 805 F.3d 59, 76 (2d Cir. 2015)).

And, as discussed, the NYCHRL is a "one-way ratchet, by which interpretations of state and federal civil rights statutes can serve only as a floor below which the City's Human Rights law cannot fall." Mihalik, 715 F.3d at 109 (quotation omitted).

Three. Analysis. A. Protected Activities. The parties do not dispute that plaintiff participated in a protected activity. A plaintiff engages in protected activity when she "opposes" discrimination. Littlejohn, 795 F.3d at 316 (quotation omitted). A plaintiff "need not [allege] that the behavior he opposed in fact violated" federal or state antidiscrimination statutes. *Cooper v. New York State Department of Labor*, 819 F.3d 678, 680-81 (2d Cir. 2016).

Instead, she must only allege "that she possessed a good-faith, reasonable belief that the" employer unlawfully discriminated. Id. at 681 (citations omitted); see also *Kelly v. Howard I. Shapiro & Assocs. Consulting Engineers, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) ("The plaintiff 'is required to have had a good-faith, reasonable belief that she was opposing

an [unlawful] employment practice.'" (quoting *McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001)).

Plaintiff clearly met this bar. He reported on the discriminatory conduct that led to his termination and filed a lawsuit that was the subject of his settlement with defendant.

The anti-retaliation protections of the NYSHRL and NYCHRL apply to former employees. In its motion, defendant made the argument that because plaintiff was not employed by defendant at the time that the retaliatory act occurred, there could be no violation of the NYSHRL. Def.'s Mem. at 8.

Defendant cited no case law in support of this position in his initial memorandum of law, and did not pursue it in the reply. Defendant's retreat from this argument in the reply makes sense because, as plaintiff points out in the opposition, the argument runs contrary to clear Supreme Court precedent.

There is no question that the anti-retaliation provisions of Title VII, and thus the NYSHRL, apply to actions taken against former employees. Justice Thomas, writing on behalf of a unanimous court could not have been more clear in writing the following: "We hold that the term "employees," as used in Section 704(a) of Title VII, is ambiguous as to whether it includes former employees. It being more consistent with the broader context of Title VII and the primary purpose of Section 704(a), we hold that former employees are included

within Section 704(a)'s coverage." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 849, 136 L. Ed. 2d 808 (1997).

The Second Circuit has, as would be expected, applied the same rule. See, e.g., *Rivas v. New York State Lottery*, 745 F. App'x 192, 194 (2d Cir. 2018) (summary order), cert. denied, 140 S. Ct. 43, 205 L. Ed. 2d 35 (2019), rehearing denied, 140 S. Ct. 577, 205 L. Ed. 2d 375 (2019) ("A plaintiff may state a claim for retaliation even if she is no longer employed by the defendant company....").

Defendant's argument that the NYSHRL -- which, again, has been subject to the same standard as Title VII -- does not apply to former employees has no merit. And, as described above, the NYSHRL provides a floor for the NYCHRL claims. Given that defendant's argument runs contrary to explicit Supreme Court case law, it could easily be viewed as frivolous.

B. Adverse Employment Action. Plaintiff has adequately pleaded an adverse employment action. In addition to alleging that he participated in a protected activity known to the defendant, a plaintiff must allege "an adverse employment action" to plausibly allege a retaliation claim. Littlejohn, 795 F.3d at 316.

"The Supreme Court has held that in the context of a Title VII retaliation claim, an adverse employment action is any action that 'could well dissuade a reasonable worker from

making or supporting a charge of discrimination.'" *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 90 (2d Cir. 2015) (quoting *Burlington N. & Santa Fe Railway Company v. White*, 548 U.S. 53, 57 (2006)).

"This definition covers a broader range of conduct than does the adverse-action standard for claims of discrimination under Title VII: 'The anti-retaliation provision, unlike the substantive discrimination provision, is not limited to discriminatory actions that affect the terms and conditions of employment.'" Id. (quoting Burlington, 548 U.S. at 64) (brackets omitted). But "actions that are 'trivial harms' -- i.e., 'those petty slights or minor annoyances that often take place at work and that all employees experience' -- are not materially adverse." *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 568 (2d Cir. 2011)(quoting Burlington, 548 U.S. at 68).

Defendant's initial motion rested on an incorrect presentation of the law regarding what an "adverse employment action" is in the context of a retaliation claim. In its moving brief, defendant argued the following: Under the NYSHRL, "adverse employment action is a materially adverse change in the terms and conditions of employment." *Sanders v. N.Y.C. Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004).

To be considered adverse, there must be a change in working conditions which is more disruptive than mere

inconvenience or a change of job responsibilities. *Mathirampuzha v. Potter*, 548 F.3d 70, 78 (2nd Cir. 2008) Defendant's Mem. at 10.

But this statement of the law is just wrong in this context. Neither case cited described the meaning of the term "adverse employment action" in the context of a retaliation claim. So defendant's position on this issue in its motion was premised on a fundamentally flawed understanding of the law, one that I would not expect seasoned counsel to present to the Court.

The standard for adverse employment action in the retaliation context is the one that I described earlier, derived from the Supreme Court's decision in Burlington. To his credit, in the reply, defendant's counsel has recognized that the law that he presented in the original memorandum of law was incorrect, and his arguments pivot to address the correct standard. See reply at 4.

I will address those arguments momentarily, but first, I want to point out another continuing error in defendant's presentation of the applicable standard.

Defendant argues that "what plaintiff has failed to respond to is that this Second Circuit has already limited the scope of post-employment retaliation under the NYSHRL to 'only those actions injurious to…the ability to secure future employment.' *Hagan v. City of New York*, 39 F.Supp.3d 481,

503 (S.D.N.Y. 2014)." Reply at 3.

Defendant cites multiples times to Hagan for that proposition, but I have looked at the case several times to try to find the quoted text and searched for words contained in defendant's asserted quotation from that case -- like "future" and "secure" -- and I have not found the cited language in that case.

I believe, however, that I have discovered the source of defendant's position on this issue: The Second Circuit's decision in *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). In that case, the Circuit wrote the following: "Generally, the ADEA, like Title VII, protects individuals from actions injurious to current employment or the ability to secure future employment."

At the outset, I observe that Wannamaker does not limit post-employment retaliation claims to only actions that limit a person's ability to secure future employment. The use of the word "generally" at the outset of that sentence suggests that is not the case. I do not read the Circuit's decision in Wannamaker to limit adverse employment actions to only those that affect the ability to secure future employment. That sentence is descriptive, not preclusive.

More significantly, the Circuit's decision in Wannamaker predated the Supreme Court's decision in Burlington by nine years. In Burlington, the Supreme Court specifically

rejected several circuit courts' "more restricted" approach to adverse employment actions in the retaliation context -- in which they applied an "ultimate employment decision" standard. Burlington, 548 U.S. at 60.

The Court rejected that approach and, instead, adopted the standard that I articulated earlier -- namely, that an adverse employment action in this context "is any action that 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" Vega, 801 F.3d at 90 (quoting Burlington, 548 U.S. at 57).

I do not believe that Wannamaker can be read to cramp the definition later established by the Supreme Court. I am going to apply the Supreme Court's standard from Burlington, which is the standard that the Second Circuit has used consistently since that case was decided.

The complaint pleads facts that readily meet that standard. The complaint pleads that defendant withheld $125,000 that was otherwise due to him. Being deprived of a six-figure payment to which a worker is otherwise entitled is something that well might deter that reasonable worker from making or supporting a charge of discrimination.

Defendant argues that "plaintiff has not alleged, argued, or even identified a single manner by which the withholding would deter anyone else from engaging in the protected activity of complaining of discrimination." Reply at

5. But it is not difficult to infer how being deprived of $125,000 or the threat of being deprived of such an amount would affect a worker's willingness to engage in protected activity.

That's a lot of money to lose as a result of challenging discrimination -- even in the finance industry -- separate and apart from the cost and strain of continuing litigation to seek its repayment.

To plausibly plead a retaliation claim under the NYCHRL, the plaintiff must plausibly allege that "the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." Mihalik, 715 F.3d at 112 (citing Albunio, 16 N.Y.3d at 479; Williams, 872 N.Y.S.2d at 33-34).

"The NYCHRL imposes an identical standard to that of the NYSHRL, except that the plaintiff need not [allege] any 'adverse' employment action; instead, she must prove that something happened that would be reasonably likely to deter a person from engaging in protected activity." *Benzinger v. Lukoil Pan Americas, LLC*, 447 F. Supp. 3d 99, 129 (S.D.N.Y. 2020) (quotation and brackets omitted).

For the same reasons that the allegations in the complaint satisfy this requirement of the NYSHRL, they are sufficient to satisfy the pleading requirement under the NYCHRL.

C. Causal Connection. A plaintiff must also allege "a causal connection between the protected activity and the adverse employment action" to plausibly allege a retaliation claim. Littlejohn, 795 F.3d at 316.

A plaintiff must also "plausibly plead a connection between the act and his engagement in protected activity." Vega, 801 F.3d at 90 (citing 42 U.S.C. § 2000e-3(a)). "A retaliatory purpose can be shown indirectly by timing: Protected activity followed closely in time by adverse employment action." Id. (citation omitted).

For "an adverse retaliatory action to be 'because' a plaintiff made a charge, the plaintiff must plausibly allege that the retaliation was a 'but-for' cause of the employer's adverse action." Id. (citing *Univ. of Texas Southwest Med. Center v. Nassar*, 570 U.S. 338, 360); see also *Spratt v. Verizon Communications, Inc.*, 633 F. App'x 72, 73 (2d Cir. 2016) ("A supervisor's retaliatory actions must be the 'but-for' cause of the employer's adverse employment action" under Section 1981.) (citing *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010) for the proposition that "substantive legal principles for claims under Title VII also apply to claims under Section 1981").

So a plaintiff must allege facts suggesting that "the adverse action would not have occurred in the absence of the retaliatory motive." Vega, 801 F.3d at 91 (quotation omitted).

As an aside, the "Second Circuit has yet to decide explicitly whether the but-for causation standard applies to [retaliation] claims under the NYSHRL, as it does under Title VII."

Benzinger, 447 F. Supp. 3d at 125 note 17 (collecting cases); see also *Holcomb v. State University of New York at Fredonia*, 698 F. App'x 30, 31 (2d Cir. 2017) (summary order) ("We need not decide today whether the 'but-for' standard of causation applies to all of [the plaintiff's] retaliation claims because each fails under both the 'but-for' causation standard and the 'substantial or motivating factor' causation standard.")

But the Circuit has "implicitly applied the but-for standard to NYSHRL claims." Benzinger, 447 F. Supp. 3d at 125 note 17 (citing *Saji v. Nassau Univ. Med. Center*, 724 F. App'x 11, 14-16 (2d Cir. 2018)).

This was the state of the law prior to the implementation of the 2019 amendment to the NYSHRL. I am applying the higher but-for causation standard in my analysis here, but I am not holding that that standard applies under the amended NYSHRL. The amendment may have the effect of changing the standard to the NYCHRL's lower "motivating factor" standard, but I do not need to resolve this question in order to decide this motion, since the motion fails even under the higher standard.

"A plaintiff may establish causation either directly through a showing of retaliatory animus or indirectly through a showing that the protected activity was followed closely by the adverse action." *Smith v. County of Suffolk*, 776 F.3d 114, 118 (2d Cir. 2015) (citation omitted); see also *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018) (holding that a causal connection may be "inferred through temporal proximity to the protected activity." (citing Vega, 801 F.3d at 90-91)).

A plaintiff can also plead that his protected activity "initiated a sequence of events that satisfactorily plead causation by suggesting retaliatory animus." *Gonzalez v. City of New York*, 377 F. Supp. 3d 273, 292 (S.D.N.Y. 2019).

To plausibly plead a retaliation claim under the NYCHRL, the plaintiff must also plead causation. The higher but-for causation standard does not apply to NYCHRL retaliation claims. To survive a motion to dismiss, a plaintiff need only allege that the retaliatory animus played some role in the employer's decision. Cf. Mihalik, 715 F.3d at 112 ("Summary judgment is appropriate only if the plaintiff cannot show that the retaliation played any part in the employer's decision." (citing *Melman v. Montefiore Med. Center*, 946 N.Y.S. 2d 27, 30-31 (2012); *Furfero v. St. John's University*, 941 N.Y.S.2d 639, 642 (2d Dep't 2012); see also *Graciani v. Patients Med., P.C.*, 2015 WL 5139199, at star 20 (E.D.N.Y. Sept. 1, 2015)

("The but-for standard that applies to Title VII

retaliation claims (and may or may not apply to NYSHRL retaliation claims) does not apply to NYCHRL retaliation claims." (citing Mihalik, 715 F.3d at 116).

Although neither the Second Circuit nor the New York Court of Appeals has expressly decided whether this standard is the same as the "motivating factor" causation standard, it appears to be the same. See *Cardwell v. Davis Polk & Wardwell LLP,* 2020 WL 6274826, at star 20, note 16 (S.D.N.Y. Oct. 24, 2020).

"As with [federal and state law] retaliation claims, temporal proximity may be used to support an inference of indirect causation, and there is no bright-line rule to determine when a gap in time attenuates an inference of retaliatory motive." *Mooney v. City of New York,* 2018 WL 4356733, at star 9 (S.D.N.Y. Sept. 12, 2018) (citing *Harrington v. City of New York*, 70 N.Y.S.3d 177, 181 (1st Dep't 2018).

Plaintiff has adequately pleaded causation even under the higher Title VII but-for standard, and as a result, he has easily satisfied the more lenient NYSHRL and NYCHRL pleading requirements. First off, plaintiff's complaint describes the fact that he reached a settlement of allegations that the company had discriminated against him as an employee. Complaint paragraph 6. Those facts support a causal inference based on the discriminatory motivations of defendant's management -- the discriminatory conduct that was the basis for the lawsuit and

the substantial settlement that resulted from it.

Second, the retaliatory conduct took place approximately seven months after plaintiff's protected activity -- close enough in time to give rise to an inference of a causal connection.

Third, the nature of defendant's conduct itself strongly supports a causal link. As alleged, defendant negotiated a settlement. During the discussions, the prospect of a holdback for the client claim was specifically discussed and rejected. Id. at paragraphs 13, 17-42.

On December 20, 2019, less than one month after the parties finalized their agreement, defendant reneged on the deal point that was the subject of direct negotiation and withheld $125,000 from Plaintiff. Id. at paragraph 62.

It is easy to draw the inference from this set of facts that but for an intention to retaliate, defendant would not have acted as it did. What legitimate reason was there for defendant to renege on its contractual obligation? The justification asserted by defendant for its conduct as pleaded -- a desire to cash collateralize the contingent obligation for a settlement in principle with the client -- is weak tea, particularly given the other facts pleaded, including the nature of defendant's business and the fact that plaintiff would have been flush with cash to make good on his obligations after payment of the settlement amount.

Defendant's intentional decision to violate a contractual obligation, coupled with its weak justification, further demonstrate that plaintiff sufficiently pleaded the conduct was, in fact, a reaction to plaintiff's protected activity.

Four. Conclusion. For the foregoing reasons, defendant's partial motion to dismiss for failure to state a claim for which relief may be granted pursuant to rule 12(b)(6) is denied in its entirety. I will enter a separate order denying the motion, referring to the transcript of today's conference for the basis for my decision.

I thank you very much, counsel, for your patience. That completes my decision. Just a note, which I think should be clear from the language of my decision and that is the following: I have not decided here what the proper standard is to analyze these NYSHRL claims after giving effect to the 2019 amendment.

I've suggested some areas where I think that the law may evolve away from equivalency with Title VII. I flagged, for example, whether or not the but-for causation may be the appropriate standard in retaliation claims under the NYSHRL going forward, in light of modifications to the State statute.

There are many other aspects in which it may be that the law now, which we are directed to review as less restrictive than the federal statute, will evolve to make it

easier for plaintiffs to make out this kind of claim.

For expediency, and because the claim survived under the higher standard, I've applied that standard, but I want to make it very clear that I'm not making a decision now about the multiple ways in which the NYSHRL may have become more plaintiff friendly as a result of the amendment. These are issues in which we may, or we will, perhaps have to engage in more depth as we get to summary judgment and trial in this case.

So I just wanted to be very clear that the standard of law, based on the equivalency doctrine that I've applied here, is not necessarily the legal standard that I will find to be appropriate when this issue is carefully briefed by the parties in connection with the future motions for summary judgment and the jury charges, if we get to that point in the case.

Good. So thank you very much, counsel, again for your patience. I read the briefing and thought that was amenable to a quick resolution.

Anything else that we need to talk about here, first counsel for plaintiff?

MS. VINCI: This is Gabrielle Vinci, your Honor. Thank you. I have nothing to discuss at the moment.

THE COURT: Good. Thank you.

Counsel for defendant?

MR. MILAZZO: This is Christopher Milazzo. Nothing

from defendant's side. Thank you, your Honor.

THE COURT: Good. Thank you, all.

MR. MILAZZO: Thank you.

(Adjourned)