Irons et al v. Bedford-Stuyvesant Community Legal Services et al

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK
---------- JONATHAN IRONS and KAREN CHANDLER, Plaintiffs, v. BEDFORD-STUYVESANT COMMUNITY LEGAL SERVICES, LEGAL SERVICES NYC, and BETTY STATON, Defendants.

MEMORANDUM & ORDER 13-CV-4467 (MKB)

MARGO K. BRODIE, United States District Judge:

Plaintiffs Jonathan Irons and Karen Chandler brought this action against Defendants Bedford- s and Betty Staton on August 7, 2013, alleging that Irons was subject to sexual harassment,

discrimination and retaliation on the basis of his sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. N.Y. Exec. Law § Admin. Code § 8- was subject to retaliation in violation of Title

VII, NYSHRL and NYCHRL, and that Defendant Staton aided and abetted violations of NYSHRL and NYCHRL. Defendants moved for summary judgment on all claims. 1

For the ion for summary judgment as to prejudice.

1 ge James Orenstein for a report and recommendation. The Court vacates its April 17, 2015 Order.

I. Background

a. The parties LSNYC is a community-based organization that provides legal services to low-income clients throughout New York City. (Defs. 56.1 ¶¶ 1, 5; Pls. 56.1 ¶¶ 1, 5.) BSCLS is a component of LSNYC and provides free legal services to residents of the Bedford-Stuyvesant and Crown Heights communities in the areas of housing, foreclosure, tax, immigration, social security and unemployment insurance, and at some time it had a family law practice. (Defs. 56.1 ¶¶ 6, 41, 50; Pls. 56.1 ¶¶ 6, 41, 50.) In 2011, BSCLS had approximately twelve employees, and only four management positions, which were titled Project Director, Director of Housing Litigation, Director of General Litigation and Director of Finance Administration. (Defs. 56.1 ¶ 7; Pls. 56.1 ¶ 7.) The first three management positions were supervising attorneys, and the fourth was an administrative

management position. (Defs. 56.1 ¶¶ 8, 33 34; Pls. 56.1 ¶¶ 8, 33 34.) The non-management employees, including six staff attorneys, were represented by the

. (Defs. 56.1 ¶¶ 10, 40; Pls. 56.1 ¶¶ 10, 40.)

Former Project Director, Victor Olds, hired both Chandler and Irons. He hired

assistant in December of 2007 and Irons, a former colleague from the New York State Attorney Defs. 56.1 ¶¶ 19 21, 29 30; Pls. 56.1 ¶¶ 19 21, 29 30.) Both Chandler and Irons reported to Olds until Olds resigned from BSCLS in May of 2011, although Olds continued as a LSNYC employee until approximately October of 2011. (Defs. 56.1 ¶¶ 37, 62; Pls. 56.1 ¶¶ 37, 62.)

As Director of General Litigation, Irons handled unemployment insurance, social security , ters, and supervised attorneys Debra Giles, Jooyeon Lee, Gina Son and Catherina Isobe in the same types of matters. 2 (Defs. 56.1 ¶¶ 23 26; Pls. 56.1 ¶¶ 23 26.) Plaintiffs assert that Irons had additional responsibilities, including attending community meetings and orchestrating outreach in community settings. (Pls. 56.1 ¶ 23; Irons Dep.

Ex. 1, 61:21 62:6.) Irons served in this position until he was terminated in January of 2012. (Defs. 56.1 ¶ 28; Pls. 56.1 ¶ 28.) In 2011, his annual salary was approximately $106,000. (Defs. 56.1 ¶ 127; Pls. 56.1 ¶ 127.)

Chandler, who was not an attorney, was promoted from Olds Director of Finance and Administration in April or May of 2008. (Defs. 56.1 ¶¶ 32, 125; Pls. 56.1 ¶¶ 32, 125.) In that position, Chandler dealt with grants, budgeting and purchasing, and worked directly with Pascale Nijhof, LSNYC Director of Grants and Contracts, and Laura Vogel, LSNYC Director of Budget. (Defs. 56.1 ¶¶ 33 36; Pls. 56.1 ¶¶ 33 36.) Chandler served in this position until she was terminated in January of 2012. (Defs. 56.1 ¶ 39; Pls. 56.1 ¶ 39.) In salary was approximately $72,400. (Defs. 56.1 ¶ 128; Pls. 56.1 ¶ 128.)

Staton is the current President of BSCLS, and served as Chair of the Board of Directors

year. (Defs. 56.1 ¶¶ 11, 16 17; Pls. 56.1 ¶¶ 11, 16 17.) Staton permanently assumed the Project Director role in 2012, and has held the title of President since the summer of 2012. (Defs. 56.1

2 one or more practice areas. Giles handled supplemental security income cases and some housing cases, Lee handled housing cases and a few immigration and Social Security cases, Son handled immigration cases, and Isobe handled foreclosure actions. (Defs. 56.1 ¶¶ 43 46, 48; Pls. 56.1 ¶¶ 43 46, 48.) Paralegals were also available to represent clients at Social Security hearings. (Defs. 56.1 ¶ 49; Pls. 56.1 ¶ 49.) The Director of Housing Litigation, not Irons, was responsible s. 56.1 ¶¶ 24, 42; Pls. 56.1 ¶¶ 24, 42.) ¶¶ 17 18; Pls. 56.1 ¶¶ 17 18.) As Acting Project Director and Project Dir include supervising all the attorneys, handling BSCLS goals and grants, and conducting budget planning and oversight.

(Defs. 56.1 ¶ 17; Pls. 56.1¶ 17.) Staton has the authority to make decisions concerning the termination of employees. (Defs. 56.1 ¶ 17; Pls. 56.1¶ 17.)

b. Staff concerns about management Beginning in late 2010, members of the BSCLS staff and the Board of LSNYC voiced concerns about the working conditions and staff morale at BSCLS. Many of the complaints were about Olds, and, Defs. 56.1 ¶¶ 51 54; Pls. 56.1 ¶¶ 51 54; see E-mail from Michael D. Young to Betty Staton, annexed to Decl. of Andrew Rice in Supp. of Defs. Mot. for Summ. . SS, D006785 86.) In an e-mail dated March 14, 2011, the e-mailed Staton expressing reservations about Olds, and noted his allies, and another for ever Defs. 56.1 ¶¶ 55 57; Pls. 56.1 ¶¶ 55 57; Mar. 14, 2011 e-mail responded to the e-mail more effective leadership and positive growth for the staff and the organization, and invited the

staff members to a board meeting on March 16, 2011. (Defs. 56.1 ¶ 58; Pls. 56.1 ¶ 58; E-mail from Betty Staton dated Mar. 14, 2011, annexed to Staton Decl. as Ex. B, D006776.) On March 16, 2011, some BSCLS staff not including Irons or Chandler attended the board meeting to further explain their concerns, but no minutes were taken. (Defs. 56.1 ¶¶ 59, 61; Pls. 56.1 ¶¶ 59, 61.) On March 18, 2011, the staff [the] discussion, L mention Irons or Chandler.

(Mar. 18, 2011 Letter, annexed to Willemin Decl. as Ex. 12.) In May of 2011, Olds resigned and Staton became Acting Project Director at BSCLS. (Defs. 56.1 ¶¶ 62 63; Pls. 56.1 ¶¶ 62 63.)

Plaintiffs dispute any inference that the discontent amongst the staff and in the BSCLS or LSNYC Boards was related to their employment. (Pls. 56.1 ¶¶ 54 57.) Plaintiffs also highlight that they received positive reviews at work, 3

and assert that no one at BSCLS or LSNYC

well-liked among the staff, or that they had any attendance problems. (See Pls. 56.1 ¶ 59; Mar. 14, 2011 e-mail; Staton Dep. 116:2 117:22.) Rijo-Lopez, who signed the March 18, 2011 Letter to the BSCLS Board, also could not recall any complaints about Irons or Chandler. (Mar. 18, 2011 Letter at D006784; Tr. of Aug. 25, 2014 Dep. of Jessica Rijo- , annexed to Willemin Decl. as Ex. 10, 32:2 33:22.)

Defendants suggest that the staff concerns about management at BSCLS included Olds, as well as Irons and Chandler, who were viewed as were perceived to be (See Def. 56.1 ¶ 53.) Staton

beginning in April or May of 2011. (Staton Dep. 101:3 21.) The parties agree that Staton had

3 E.g., Tr. of Aug. 2 Decl. as Ex. 7, 88:25 89:25; Evaluation form for Jonathan Irons by Victor Olds dated Dec. 16, E-mail from Michael Young dated Jan. 24, 2011, annexed to Willemin Decl. as Ex. 15 (congratulating Plaintiffs for exceeding goals); see also Willemin Decl. as Ex. 3, 237:5 24 (stating that there are no documents to re Willemin Decl. as Ex. 8, 56:2 24 (stating that Plaintiffs were not hurting

clients).

The Court notes that different but overlapping excerpts of the transcripts of the August 8, 2014 deposition of Betty Staton and August 22, 2014 deposition of Raun Rasmussen, LSNYC Executive Director, are annexed as Exhibits E and B, respectively, to the Rice Declaration. The parties have similarly attached different and overlapping excerpts of other depositions, as well. The Court will refer generally to each deposition to include both sets of excerpts, regardless of whether they are annexed to the Willemin Declaration or to the Rice Declaration. practically no interaction with Irons or Chandler after Staton became Acting Project Director in July of 2011, and Defendants contend that it is because Staton did not expect that they would remain employed by BSCLS for much longer. (Defs. 56.1 ¶¶ 27, 38; Pls. 56.1 ¶¶ 27, 38; Staton Dep. 101:3 18.)

c. BSCLS 2011 budget cuts and layoffs In 2011, various LSNYC constituent programs faced funding problems and were required to make budget cuts. (Defs. 56.1 ¶ 68; Pls. 56.1 ¶ 68.) LSNYC, and consequently BSCLS, lost a portion of their funding from the federal Legal Services Corporation, and BSCLS lost funding Defs. 56.1 ¶¶ 50, 68; Pls. 56.1 ¶¶ 50, 68.) The budget concerns made it likely that some layoffs and other cost-reducing measures would be necessary, although the parties dispute when the decision to lay off employees became final. (Defs. 56.1 ¶¶ 67 70, 113; Pls. 56.1 ¶¶ 67 budget was submitted to the LSNYC Board for approval at the last LSNYC Board meeting of the year, in December of 2011. (Defs. 56.1 ¶ 64; Pls. 56.1 ¶ rack revenues and expenses for the LSNYC programs, including BSCLS, and those workbooks were ultimately prepared to comply with the Defs. 56.1 ¶ 65; Pls. 56.1 ¶ 65.)

Throughout 2011, BSCLS predicted that it would be required to reduce its expenses by - compensation cost for an LSNYC employee although Plaintiffs assert that the budget was in flux, and it was not clear what, if any, reductions or layoffs were necessary until the final budget was approved in December of 2011. (Defs. 56.1 ¶¶ 75 76; Pls. 56.1 ¶¶ 75 76.) LSNYC offered a voluntary buyout program to employees in July of 2011 in an effort to reduce the need for layoffs and other cutbacks, and one BSCLS employee, Robert Purdie, took advantage of the program. (Defs. 56.1 ¶¶ 71, 73; Pls. 56.1 ¶¶ 71, 73.) As early as July of 2011, after Staton became Acting Project Director, -Chief of Operations Jeanne Perry considered laying off Chandler, and Staton and Perry discussed laying off Chandler in conjunction with other potential cost-cutting scenarios. 4

(Defs. 56.1 ¶ 80; Pls. 56.1 ¶ 80.) functions in the summer of 2011. (Defs. 56.1 ¶ 125; Pls. 56.1 ¶ 125.) Throughout the summer and fall of 2011, Staton repeatedly told the BSCLS staff and BSCLS and LSNYC Boards that there was a layoff mandate, but expressed optimism about raising funds, and about reducing the number of potential layoffs through alternative workforce reductions.

On August 30, 2011, Lana Gilbert, then-LSNYC Human Resources Administrator, e- mailed buyout for Robert Purdie (pursuant to the program announced in July). (E-mail dated Aug. 30 from Gilbert to B. Caines and Perry, annexed to Willemin Decl. as Ex. 21.) On August 31, 2011, Rasmussen sent an

e-mail to all staff at LSNYC programs explaining the difficult financial situation. (Defs. 56.1 ¶ 84; Pls. 56.1 ¶ 85.) On September 15, 2011, five draft budget workbooks were prepared, including two that did not include Plaintiffs as employees after 2011, and three that showed their continued employment. (Compare Budget Workbooks dated Sept. 15, 2011, annexed to Willemin Decl. as Exs. 16 17, 20, at 9 with Budget Workbooks dated Sept. 15, 2011, annexed to

4 Perry testified that, based on documents reviewed at her deposition, she did not believe rogram, the relative ease of laying off management employees versus union employees, and the spending on Decl. as Ex. 4, 134:13 1367:20; see also Pls. 56.1 ¶ 70(vi).) Willemin Decl. as Exs. 18 19, at 9.) The only other staff reductions reflected in any of the budget workbooks were Robert Purdie, who had accepted a voluntary buyout, and Victor Olds. (Id.) 5

(Defs. 56.1 ¶ 90; Pls. 56.1 ¶ 90.) On September 19, 2011, Staton e-mailed all BSCLS employees a memorandum about the

Defs. 56.1 ¶ 90; Pls. 56.1 ¶ 90.) Reports to the LSNYC Board in September and October of 2011 expressed hope that the buyouts program would reduce the need for layoffs, but noted that voluntary buyouts were more expensive than layoffs. (Minutes of LSNYC Bd. Meeting dated Sept. 13, 2011, annexed to Willemin Decl. as Ex. 40, D002881 (expressing hope to reduce layoffs through buyout); Minutes of LSNYC Bd. Meeting dated Oct. 11, 2011, annexed to Willemin Decl. as Ex. 43, D002263 (same, noting buyouts cost more than layoffs).) On September 23, 2011, Staton held a meeting with the BSCLS staff to discuss the proposed cuts in staff. (Defs. 56.1 ¶ 91; Pls. 56.1 ¶ 91; Agenda dated Sept. 23, 2011, annexed to Rice Decl. as Ex. Q.) On September 27, 2011, the buyout was extended. (E-mail dated Sept. 27, 2011 from Perr

On October 11, 2011, Perry e-mailed Gilbert asking for a budget including the layoffs of Irons and Chandler and the buyout for Purdie. (Defs. 56.1 ¶ 93; Pls. 56.1 ¶ 93.) Gilbert testified t (Pls. 56.1 ¶

5 Defendants also contend workbooks were occasionally prepared so that the Project Directors at LSNYC programs could see the effect of different staffing alternatives and see what additional layoffs might be needed. (Decl. of Laura Vogel in Supp. of Defs. Mot. for Summ. J. 5, Docket Entry No. 40-7; Rasmussen Dep. 62:9 64:5.) Willemin Decl. as Ex. 6, 28:15 29:15.) Alternate models were exchanged the following day, and the active budget workbook continued to reflect no staff reductions beyond Olds. (Defs. 56.1 ¶ 94; Pls. 56.1 ¶ 94.) On October 19, 2011, Staton prepared a report to the BSCLS Board indicating that she hoped the number of layoffs would be lower than originally estimated. (Project Director Report to BSCLS Bd. dated Oct. 19, 2011, annexed to Willemin Decl. as Ex. 27, D002309). Throughout October and early November, more budget workbooks were prepared, some of which showed Plaint . (Defs. 56.1 ¶¶ 96 100; Pls. 56.1 ¶¶ 96 100; Budgets dated Oct 12, Oct. 15, Oct. 25, Nov. 4, Nov. 8, and Nov. 14, 2011, annexed to Willemin Decl. as Exs. 25 26, 28 31.) The only other staff reductions Willemin Decl. as Exs. 25 26, 28 31.)

noting that, in accordance with the collective-bargaining agreement with the BSCLS staff union, the management was providing formal notice of its intent to make layoffs. (Defs. 56.1 ¶ 101; Pls. 56.1 ¶ 101.) The Notice included an e-mail from board member Job Mashiriki, Pls. 56.1 ¶ 70(xiv);

E-mail Ex. 32.) On November 15, 2011, the federal Legal Service Corporation announced that it would reduce funding to organizations like LSNYC by more than the amount previously projected. 6 (Defs. 56.1 ¶ 102; Pls. 56.1 ¶ 102.) BSCLS needed to retain attorneys who had expertise in the

6 As of January 25, 2012, thirteen percent of all attorneys and support staff across Legal Service Corporation-funded programs were laid off; there were 1226 full-time staff reductions across Legal Service Corporation programs nationwide. (Defs. 56.1 ¶ 112; Pls. 56.1 ¶ 112.) subject-matter of areas for which it had grants. (Defs. 56.1 ¶ 123; Pls. 56.1 ¶ 123.)

The BSCLS Board met on November 16, 2011, and the minutes reflect that layoffs were still being considered, Defs. 56.1 ¶ 103; Pls. 56.1 ¶ 103; Minutes of BSCLS Bd. of Dirs. Meeting dated Nov. 16, 2011, annexed to Willemin

BSCLS reflected that Irons and Chandler would be laid off, and on that same date, Rasmussen e-mailed the Project Directors and informed them that two managers at BSCLS (and one at another location) were to be laid off. 7

(Defs. 56.1 ¶¶ 104 105; Pls. 56.1 ¶¶ 104 105.) On November 30,

and reduced workweeks or furloughs for several other BSCLS employees. (Defs. 56.1 ¶ 107; Pls. 56.1 ¶ 107.) Plaintiffs were notified on December 2, 2011 that they would be laid off effective January 4, 2012. (Defs. 56.1 ¶ 108; Pls. 56.1 ¶ 108.) On December 9, 2011, Lana Gilbert e- mailed Rasmussen a document tit -8-11- and Son were selected for layoffs at BSCLS. (E-mail dated Dec. 9, 2011, annexed to Willemin Decl. as Ex. 35, at D005197 98.)

d. Sexual harassment complaint and investigation In the period between the issuance of the thirty-day layoff notice to all employees, on November 14, 2011, and when he was notified of his layoff on December 2, 2011, Irons

7 As discussed further below, Plaintiffs argue that because the budget workbooks could be changed until they were adopted by the LSNYC Board on December 10, workbook was not final, nor were any decisions regarding their termination. (Pls. 56.1 ¶¶ 66 70, 104, 106.) him, as detailed below. Irons testified that, from September through November of 2011, Staton subjected him to a pattern of sexual hara unwanted sexual advances, [and] sexualized statements . . . . Defs. 56.1 ¶ 142; Pls. 56.1 ¶ 142.)

Irons could recall only two specific dates on which the conduct occurred, but testified that it regularly occurred approximately three times per week. (Irons Dep. 157:22 159:18, 161:8 21, 166:9

169:12.) Irons contends that, on November 15, 2011, Staton looked at Irons than Defs. 56.1 ¶ 144; Pls. 56.1 ¶ 144; Irons Dep. 160:6 161:4, 162:22 163:23.) On November 22, 2011 after Irons complained to Chandler about the November 15, 2011 incident, which complaint is discussed in further detail below Irons overheard Staton speaking with another individual in a loud and Defs. 56.1 ¶ 145; Pls. 56.1 ¶ 145.) Staton did not make these remarks directly to Irons, who was in his office at the time. (Defs. 56.1 ¶ 145; Pls. 56.1 ¶ 145.)

i. Complaints continual remarks to Chandler, including the November 15, 2011 incident, and later made a formal complaint to HR. Irons and Chandler gave different accounts of his complaints.

September of 2011 (although Irons does not recall any specific incident other than the November 15 and November 22, 2011 incidents), but not to anyone else at LSNYC or BSCLS. (Defs. 56.1 ¶ 154; Pls. 56.1 ¶ 154.) On November 16, 2011, he asked Chandler about making a formal sexual harassment complaint because Chandler, as the Director of Finance and Administration at BSCLS, would have insight into the proper channels for making such a complaint. 8

(Defs. 56.1 ¶ 156; Pls. 56.1 ¶ 156.) Chandler contacted Verna Alexander, who worked at Queen Legal sexual harassment panel. (Defs. 56.1 ¶ 156; Pls. 56.1 ¶ 156.) Alexander told Chandler that the sexual harassment panel was not meeting 9

and that Irons should speak to Lana Gilbert, in HR. (Defs. 56.1 ¶ 158; Pls. 56.1 ¶ 158.) On November 23, 2011, the day before Thanksgiving, 10

Irons contacted HR about his complaints for the first time. (Defs. 56.1 ¶ 159; Pls. 56.1 ¶ 159.) He spoke with Elisette Reynoso, and told her that he wanted to file a complaint against Staton for sexual harassment; Reynoso told Irons that he could talk to Rasmussen, but Irons declined. (Defs. 56.1 ¶ 159; Pls. 56.1 ¶ 159.) Reynoso called Gilbert, who was on vacation, and Reynoso told Irons that Gilbert would return the following week and would contact him to speak about the matter further. (Defs. 56.1 ¶ 159; Pls. 56.1 ¶ 159.)

Chandler testified that Irons first complained to her around November 15, 2011, about

8 ler on November 16, 2011 to ask about to Chandler arose out of their personal friend Finance and Administration. (See Irons Dep. 169:15 171:20 (indicating that Irons was

id. 233:4 22 (discussing how he went to Chandler to make a complaint on November 16, 2011,

9 There is some dispute about whethe See Defs. 56.1 ¶ 158; Pls. 56.1 ¶ 158.)

10 The Court takes notice that Thanksgiving was on Thursday, November 24, 2011. See Yoselovsky v. Associated Press, 917 F. Supp. 2d 262, 280 (S.D.N.Y. 2013) (taking judicial notice that Passover began

at sundown on Wednesday, April 8, 2009 (citing Fed. R. Evid. 201(b))). the November 15, 2011 incident. (Defs. 56.1 ¶ 154; Pls. 56.1 ¶ 154; Chandler Dep. 197:25 198:7.) Chandler testified that, on the same day, she reached out to Alexander, communicated

the information she received from Alexander to Irons, and then had another conversation with Irons, wherein Irons told Chandler that he had called Gilbert and Reynoso after speaking with her. (Defs. 56.1 ¶ 160; Pls. 56.1 ¶ 160; Chandler Dep. 210:2 211:19.) Chandler testified that she believed Irons spoke with Reynoso over the phone on November 15, 2011, because Irons

24.) However, the parties appear to accept that Irons

56.1 ¶ 159; Pls. 56.1 ¶ 159.)

Chandler did not discuss other than Alexander and Irons, Alexander did not discuss her call from Chandler with anyone

else. 11

(Defs. 56.1 ¶ 158; Pls. 56.1 ¶ 158.) Reynoso called Rasmussen on November 23, 2011, to tell him that there was a complaint involving Staton. (Rasmussen Dep. 123:2 124:19.) Staton testified that November 2011, which she asserts was the first time she became aware of his allegations. (Staton Dep. 265:24 269:4; see also Perry Dep. 106:14 107:2 (noting that she and Rasmussen called Staton to discuss the complaint).) Staton could not recall when she learned that Chandler sment complaint. (Staton Dep. 317:15 318:3.)

11 Alexander testified that she might have sent Lana Gilbert an e-mail stating that there was a complaint, but that she could not recall if she did. (Tr. of Aug. 15, 2014 Dep. of Verna 41:21.) No such e- mail has been presented to the Court. Gilbert testified that she first learned that Irons made a -mail from Alexander regarding the complaint. (Gilbert Dep. 47:16 49:13.)

ii. Internal investigation Gilbert called Irons on November 28, 2011, the Monday after Thanksgiving, upon her return to the office. (Defs. 56.1 ¶ 162; Pls. 56.1 ¶ 162.) Thereafter, Gilbert informed Perry that Irons had made a complaint about Staton. (Defs. 56.1 ¶ 163; Pls. 56.1 ¶ 163.) Perry and attorney Vilia Hayes, of Hughes Hubbard & Reed LLP, to investigate the sexual harassment

claim. (Defs. 56.1 ¶ 163; Pls. 56.1 ¶ 163.) Hayes was a member of the LSNYC Board. (Rasmussen Dep. 133:2 . annexed to Willemin Decl. as Ex. 9, 15:15 16:3.) Hayes interviewed Irons on December 1,

2011, Staton on December 2, 2011 and December 5, 2011, and Chandler on December 29, 2011. (Defs. 56.1 ¶¶ 167 69; Pls. 56.1 ¶¶ 167 69.) Hayes also interviewed other witnesses identified by Irons. 12

(Defs. 56.1 ¶ 170; Pls. 56.1 ¶ 170.) She eventually submitted a report summarizing her investigation.

e. informing them that they would be laid off effective January 4, 2012. (Defs. 56.1 ¶ 108; Pls.

12 Plaintiffs argue that Hayes did not interview Jessica Rijo, a witness identified by Irons, and instead fraudulently manufactured notes from a purported interview with Rijo. (See Pls. 56.1 ¶¶ 170 in con Id. ¶ 171(iii) (citing Rijo Dep. 24:13 meet with an investigator in the case, she was shown a document in an attempt to refresh her recollection. After reviewing it, she testified that it was possible she met with an investigator on December 16, 2011, but she could not remember. (Rijo Dep. 24:13 29:3.) This does not (Pls. 56.1 ¶ 171(iii).) 56.1 ¶ 108.) Son, a female staff attorney at BSCLS and a member of the union, 13

was also laid off effective January 4, 2012, and BSCLS furloughed employees to reduce its budget deficit further. (Defs. 56.1 ¶¶ 107, 109 110; Pls. 56.1 ¶¶ 107, 109 110.) On December 10, 2011, the LSNYC Board adopted the final budget, which reflected these reductions. (Defs. 56.1 ¶ 111; Pls. 56.1 ¶ 111.) In total, LSNYC laid off nineteen employees at the end of 2011, including twelve female employees at offices other than BSCLS. (Defs. 56.1 ¶ 112; Pls. 56.1 ¶ 112.)

was made. According to Defendants, Plaintiffs were candidates for layoff beginning in the

summer of 2011, when it became clear that BSCLS would have to cut back expenses by five FTEs. (Defs. 56.1 ¶¶ 83 84; e.g., Rasmussen Dep. 62:9 64:5; Vogel Decl. ¶ 6.) Michael D. Young, who served as interim Executive Director of LSNYC from June of 2010 to June of 2011 and thereafter served as Vice Chair of the LSNYC Board until June of 2014, stated that the LSNYC Board had directed BSCLS that any relief from its budget constraints was contingent on ung Decl. in Support of Defs. Mot. 2 3, 7, Docket Entry No. 40-10.) Staton convinced the board to wait to lay off Irons and Chandler until December, because it would be easier to terminate them when layoffs were mandated. (Staton Dep. 125:11 128:18.) Staton testified that Plaintiffs

14 (Staton

13 The collective bargaining agreement with the union required layoffs in seniority order s. 56.1 ¶ 122; Pls. 56.1 ¶ 122.)

14 Plaintiffs note that their layoffs are not mentioned in the board minutes from ten different board meetings between May 10, 2011 and December 21, 2011. (Pls. 56.1 ¶ 70(xix); Minutes of LSNYC and BSCLS Board of Directors meetings, annexed to Willemin Decl. as Exs. Dep. 137:21 138:18.)

Plaintiffs highlight several statements which indicate that the budgets were in draft form and that the number of layoffs could have been reduced. For example, on August 30, 2011, Gilbert prepared a document projecting the cost savings if Irons and Chandler were laid off, and was unaware if a final

decision to terminate Irons and Chandler had been made at that time. (Tr.

of Aug. 15, 2014 Dep. of Lana Gilbert 25:15 27:20; E-mail dated Aug. 30, 2011 from Gilbert to Betty Caines copying Jeanne Perry,

annexed to Willemin Decl. as Ex. 21, D005270.) The following day, Rasmussen sent an e-mail to all LSNYC emplo E-mail dated Aug. was - Acting Project Director dated Oct. 19, 2011, annexed to Willemin Decl. as Ex. 27, D002309.)

Plaintiffs assert that a list of layoffs was not created until December 8, 2011, after they were notified of their termination. (Pls. 56.1 ¶ 70(xvii); E-mail dated Dec. 9, 2011.)

f. EEOC filings Irons and Chandler filed charges of discrimination with the EEOC on April 5, 2012 and

37 46.) However, the November 15, 2011 minutes of the LSNYC Board meeting did reflect

of Nov. 15, 2011 LSNYC Board meeting, annexed to Willemin Decl. as Ex. 44, D006265.) Defendants contend that this decision was not included in board minutes or in any budget documentation that was circulated to other staff in order to maintain confidentiality and avoid revealing the fact of the layoffs too early, thus further harming morale and productivity among the employees slated for layoff. (Defs. 56.1 ¶ 89; Rasmussen Dep. 114:18 115:5; Staton Dep 246:19 247:23; Vogel Decl. ¶ 5.) August 15, 2012, respectively. (Compl. ¶ 10; Defs. 56.1 ¶¶ 172, 177; Pls. 56.1 ¶¶ 172, 177.) The EEOC issued two separate right-to-sue letters on May 15, 2013, one to Irons and one to Chandler. (Defs. 56.1 ¶¶ 174, 178; Pls. 56.1 ¶¶ 174, 178.) On August 7, 2013, Plaintiffs timely filed this action.

II. Discussion

a. Standard of review Summary judgment is proper only when, construing the evidence in the light most favorable to the non- is entitled to judgment as a matter of law see also Tolbert v. Smith, 790 F.3d 427, 434 (2d Cir. 2015); Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 843 (2d Cir. 2013); Kwong v. Bloomberg, 723 F.3d 160, 164 65 (2d Cir. 2013). The role of the court is not idence and determine the truth of the matter but to determine whether there is a Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 162 (2d Cir. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). A genuine

Anderson, sufficient to defeat summary judgment. Id. resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000). The Second Circuit has cautioned that [w]here an employer acted with discriminatory intent, direct evidence of that intent will only rarely be available, so affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.

Taddeo v. L.M. Berry & Co. Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 101 (2d Cir. 2010)).

b. Irons contends that his discharge was discriminatory on the basis of his sex, in violation of Title VII and NYSHRL. 15

Title VII and NYSHRL discrimination claims are assessed using the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in which the Supreme Court set forth a burden-shifting scheme that of proof at trial. Littlejohn v. City of New York, 795 F.3d 297, 307 (2d Cir. 2015) (discussing

burden-shifting, citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. , 509 U.S. 502, 506 (1993); , 450 U.S. 248, 253 55 (1981)); see also Hyek v. Field Support Servs., Inc. of an employment discrimination claim made pursuant to the NYSHRL is the same as it is

under . . Smith v. Xerox Corp., 196 F.3d 358, 363 n.1 (2d Cir. 1999))). Under that framework, a plaintiff must first establish a prima facie case of discrimination. Hicks, 509 U.S. at 506; Ruiz v. Cty. of Rockland, 609 F.3d 486, 491 (2d Cir. de minimis. Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010); Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (quoting Hicks, 509 U.S. at 506). If plaintiff meets her burden at the prima facie stage, a temporary presumption of discrimination arises, and the burden shifts to the employer-defendant to

15 of Title VII, (see Compl. ¶¶ 62 67), and one for discrimination and harassment in violation of the NYSHRL, (see id. ¶¶ 72 79). However, Irons specifically alleges that he was subject to discriminatory discharge in addition to workplace-related sexual harassment, (id. ¶¶ 2, 42, 44). Although discriminatory discharge and sexual harassment are two theories under which a plaintiff can show gender discrimination, and I articulate a legitimate, nondiscriminatory reason for its actions. Vega v. Hempstead Union Free Sch. Dist., --- F.3d ---, ---, 2015 WL 5127519, at *9 (2d Cir. Sept. 2, 2015); see Hicks, 509 U.S. at 506 07; Ruiz . Risco v. McHugh, 868 F. Supp. 2d 75, 99 (S.D.N.Y. 2012) (quoting Greenway v. Buffalo Hilton Hotel persuasion; it Reeves, 530 U.S. at 142 (quoting Hicks, 509 U.S. at

United States v. City of New York, 717 F.3d 72, 102 (2d Cir. 2013). need only show that the defendant was in fact motivated at least in part by the prohibited

discriminatory ani Henry v. Wyeth Pharm., Inc., 616 F.3d 134, 156 (2d Cir. 2010); see also Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. ---, ---, 133 S. Ct. 2517, 2522 23 (2013) -based discrimination under Title VII . . . [must] show that the

To establish a prima facie case of sex discrimination under Title VII, a plaintiff must show that: he suffered an adverse employment action; and (4) that the adverse employment action occurred

under circumstances giving rise to an inference of discriBrown v. City of Syracuse, 673 F.3d 141, 150

(2d Cir. 2012); see also Talwar v. Staten Island Univ. Hosp., 610 F. Ruiz, 609 F.3d at 491 92. A plaintiff can meet the fourth element of the prima facie case by pointing to similarly-situated employees outside the protected class who did not suffer the same fate. See McDonnell v. Schindler Elevator Corp., --- ---, ---, 2015 WL 4038567, at *3 (2d Cir. July 2, 2015) (quoting Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001)); Ruiz, 609 F.3d at 493 94.

Defendants 16

discharge claim because Irons failed to produce evidence that Defendants were acting with

discriminatory intent, and because Defendants proffered several legitimate, non-discriminatory Defs. Defs. Docket Entry No. 40-13.) Irons argues that there is an issue of fact as to D

because he was terminated while Giles, a female BSCLS attorney who worked on the same type of cases as Irons, was retained. (Pl. Defs. 25, Docket Entry No. 43.) The parties dispute whether Irons and Giles were similarly situated, and whether that issue can be resolved on the facts presented in this motion. (Compare id. with Defs. Mem. 18 19.) As the first three elements of the prima facie case are not currently in dispute, the Court will assume that Irons meets all three elements and addresses only whether he has raised an inference of discriminatory intent.

i. Inference of discrimination in Howard v. MTA Metro-N. Commuter R.R., 866 F. Supp. 2d 196, 204 (S.D.N.Y. 2011) (quoting Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir.

Moore v. Kingsbrook Jewish

16 Compl. ¶¶ 62 74 (bringing two causes of action alleging (1) discrimination and harassment, and (2) retaliation in Staton as an aider and abettor. (Id. ¶¶ 75 89.) against Staton for aiding and abetting separately. Med. Ctr., No. 11-CV-3625, 2013 WL 3968748, at *6 (E.D.N.Y. July 30, 2013) (citation omitted). An inference of discrimination can

performance in [ ] de protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the Abdu-Brisson, 239 F.3d at 468 (quoting Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994)); see also Abdul- Hakeem v. Parkinson plaintiff less favorably than a similarly situated employee outside his protected group . . . Ruiz, 609 F.3d at 493)). Contrary to , at the prima facie stage, Plaintiffs are not required to show that Defendants legitimate reason for terminating [Plaintiffs] in order to raise an inference of discrimination; , No. 11-CV-5528, 2014 WL 4773975, at *9 (E.D.N.Y.

Sept. 24, 2014) (citing Graham v. Long Island R.R., 230 F.3d 34, 41 42 (2d Cir. 2000)).

1. Similarly-situated employee that is, a showing that an employer treated plaintiff less favorably than

a similarly situated employee outside his protected group is a recognized method of raising an inference of discrimination for the purposes of making out a prima facie Ruiz, 609 F.3d at 493 (quoting Mandell v. Cty. of Suffolk, 316 F.3d 368, 379 (2d Cir.

Brown v. Daikin Am. Inc., 756 F.3d 219, 230 (2d Cir. 2014) (quoting Graham, 230 F.3d at 40). What facts establish similarity in the inquiry generally Id.; see also Ruiz, 609 F.3d at 493 -

quoting Graham, 230 F.3d at 40)). A plaintiff need

not show . Ruiz, 609 F.3d at 494 (quoting Graham, 230 F.3d at 40); see also Brown, 756 F.3d at 230.

It is undisputed that Giles and Irons were both attorneys, and that supplemental social Defs. 56.1 ¶¶ 23 26, 43; Pls. 56.1 ¶¶ 23 alary, approximately $101,000, was also , $106,000. (Pls. 56.1 ¶¶ 116(vii), 127; Defs. 56.1 ¶ 127 (noting that Irons was the highest paid employee other than the Project Director); see, e.g., Budget dated Sept. 15, 2011, annexed to Willemin Decl. as Ex. 25, JI0000376.) Irons contends that Giles was a comparable candidate for termination because she had a demonstrably worse performance record than he did. (Pls. 56.1 ¶ 116.)

However, the differences between Irons and Giles are too great to conclude that they

was a manager while Giles was not. (Defs. 56.1 ¶¶ 8, 19, 25; Pls. 56.1 ¶¶ 8, 19, 25.) Irons had additional responsibilities as a manger, and thus his overall performance and value was subject to , which further undermines his assertion that they were similarly situated. See Risco, 868 F. Supp. 2d at 102 (finding plaintiff had failed to identify similarly-situated comparator with similar job functions who was treated more favorably); see also Ruiz, 609 F.3d at 493 In addition, Irons was

bargaining unit, the LSSA, and Giles was, (Defs. 56.1 ¶¶ 10, 40; Pls. 56.1 ¶¶ 10, 40), further demonstrating the material differences between Irons and Giles. Inc., 580 F. Supp. 2d 300, 308 (S.D.N.Y. 2008) (concluding plaintiff could not show a prima facie case of discriminatory demotion by comparing himself to a non-supervisor who was subject to collective bargaining agreement, because comparison to plaintiff, a supervisory at-will emplo ; see also Warren v. Johnson, No. 11-CV-810, 2015 WL 1243319, at *5 (W.D.N.Y. Mar. 18, 2015) (granting summary judgment on disparate treatment larly situated to non- supervisory officer who was subject to a collective bargaining agreement which governed transfers); Krishnapillai v. Donahoe, No. 09-CV-1022, 2013 WL 5423724, at *14 (E.D.N.Y. Sept. 26, 2013) (fin -management, bargaining unit employee not similarly situated to plaintiff for purposes of Title VII and ADEA claim that plaintiff was required to work without same holiday pay as other employees).

Irons contends that the fact that he was not a member of the LSSA union because Son, a female staff attorney who was subject to the collective bargaining agreement, was also laid off effective January 4, 2012. (Irons Mem. 25; see also Defs. 56.1 ¶ 109; Pls. 56.1 ¶ 109.) This argument is unpersuasive. The

LSSA had a collective bargaining agreement with LSNYC which proscribed certain procedures for layoffs and required layoffs in order of seniority; Giles, but not Irons, was subject to that agreement. (See Defs. 56.1 ¶¶ 101, 122; Pls. 56.1 ¶¶ 101, 122.) Irons testified that Giles was also a long-serving employee at BSCLS, and that, under the collective bargaining agreement, her high salary could indicate higher seniority. (Irons Dep. 216:8 13, 255:9 14; see also Saton Dep. 344:20 345:11 (noting that Giles was the most seni

laying off employees like Giles that were not applicable to Irons, and that the LSSA was involved in negotiation with BSCLS and LSNYC over the impact of the layoffs on bargaining unit employees, pressuring LSNYC to keep the number of bargaining-unit layoffs to a minimum. (Defs. 56.1 ¶ 122; Pls. 56.1 ¶ 122.) Defendants were not subject to the same constraints in evaluating whether to lay off Irons. The fact that a member of the LSSA was also laid off does not alter impact of those standards on Giles, the purportedl . See Nurse v. Lutheran Med. Ctr., 854 F. Supp. 2d 300, 313 (E.D.N.Y. 2012) (finding plaintiff and members of union were not similarly situated, as they were not subject to same performance evaluation and [d] contractual limitations on [the Giles, a non-management employee and part of the LSSA, was not subject to the same workplace standards and layoff procedures that Irons

an inference of discrimination.

2. Additional evidence In addition, as Defendants note, there is no evidence that Irons was replaced by a female employee, or that the majority of his responsibilities were reassigned to a female employee. See Montan n of Rochester, 869 F.2d 100, 105 (2d Cir. 1989) (discussing circumstances giving rise to an inference of discrimination in a reduction-in- Sgarlata v. Viacom, Inc., No. 02-CV-7234, 2005 WL 659198, at *7 (S.D.N.Y. Mar. 22, 2005) (granting summary judgment, finding that plaintiff failed to raise an inference of discrimination when he was terminated as part of a reduction in force, no one was hired to replace him, and duties were distributed to remaining colleagues (citing Roge v. NYP Holdings, 257 F.3d 164, 170 n.2 (2d Cir. 2001))). Furthermore, of the three employees laid off from BSCLS, two were women, and the other was Irons. (Defs. 56.1 ¶¶ 107 110; Pls. 56.1 ¶¶ 107

at offices other than BSCLS. (Defs. 56.1 ¶ 112; Pls. 56.1 ¶ 112.) These facts further undercut See McDonnell, --- F. at ---, 2015 WL 4038567, at *3 (affirming grant of summary judgment on disparate off when other two mechanics who were laid off were outside the protected class); see also Robles v. Cox & Co., Inc., 987 F. Supp. 2d 199, 208 (E.D.N.Y 2013) (granting summary judgment on age discrimination claim, noting that reduction in work force resulted in retention of people within the protected class and termination of people outside it (citing Chin v. ABN-AMRO N. Am., Inc., 463 F. Supp. 2d 294, 303 (E.D.N.Y. 2006))).

Irons proffers no other evidence in support of his argument that his employment was terminated under circumstances giving rise to an inference of sex discrimination. (Irons Mem. 24 25.) As Irons

has failed to establish a prima facie case of discriminatory termination in violation of Title VII or the NYSHRL ry judgment as to this claim. 17

17 Even if Irons had established a prima facie case of discrimination, his claims would fail for substantially the same reasons discussed infra Part II.d.ii and iii. Defendants have proffered a legitimate, n presented evidence to show that discriminatory animus played a role in the decision to lay him

c. - based discrimination prohibited by Title VII and the NYSHRL. Defendants contend that the conduct alleged, including only two specific incidents that Irons could identify, amounted only to isolated, trivial occurrences and was not so objectively offensive to constitute actionable sexual harassment. (Defs. Mem. 14.) Defendants further argue that even if the conduct rose to the level of actionable harassment, there is no evidence that it was directed at Irons because of his gender. (Id.

24.)

Sexual harassment claims are typically pursued under two legal theories: hostile work environment, where an individual is subject to severe and pervasive discriminatory conduct altering his conditions of employment, quid pro quo are directly premised on submission to unwelcome sexual

conduct. See Reid v. Ingerman Smith LLP, 876 F. Supp. 2d 176, 181 82 (E.D.N.Y. 2012) (citing Gregory v. Daly, 243 F.3d 687, 698 (2d Cir. 2001)) (noting there is no reason to distinguish between the two types of harassment); f Homeless Servs., No. 05-CV- 5986, 2009 WL 700695, at *5 (E.D.N.Y. Mar. 15, 2009); Gonzalez v. Beth Israel Med. Ctr., 262 F. Supp. 2d 342, 349 harassment was consistent and regular and altered his conditions of employment, the Court assumes that Irons is proceeding on his sexual harassment claim under a hostile work

off. See Henry v. Wyeth Pharm., Inc., 616 F.3d 134, 156 (2d Cir. 2010); see also Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. ---, ---, 133 S. Ct. 2517, 2522 23 (2013). environment theory. 18

In order to establish a Title VII or NYSHRL hostile work environment claim, a plaintiff must produce evidence to show that the complained- pervasive that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive;

18 Quid pro quo arrangements and hostile work environment are theories upon which an employee can show discriminatory treatment on the basis of sex. To the extent that the two t both theories can be considered in analyzing the same claim. Reid v. Ingerman Smith LLP, 876 F. Supp. 2d 176, 182 (E.D.N.Y. 2012); see also Gregory v. Daly, 243 F.3d 687, 698 (2d Cir. 2001) (noting

The distinction between the two forms of sexual harassment serves to instruct that Title VII is

violated by either explicit or constructive alterations in the Richards v. N.Y.C t of Homeless Servs., No. 05-CV-5986, 2009 WL 700695, at *5 (E.D.N.Y. Mar. 15, 2009) (alteration in original) (quoting Mormol v. Costco Wholesale Corp., useful to Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 603 (2d Cir. 2006) (quoting Mormol, 364 F.3d at 57).

The gravamen of a quid pro quo claim is that a tangible job benefit is linked to an See Schiano, 445 F.3d at 603; Fitzgerald v. Henderson, 251 F.3d 345, 356 (2d Cir. 2001) (citing Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994)). Irons testified that he believed Staton was making a sexual advance at him, and that he felt like it was an advance because she looked at him while she commented that she had a man who was younger than her and could please her, which Irons took to mean that he would not be treated fairly unless he pleased her like the younger man did. (Irons Dep. 161:23 163:23, 172:13 23.) To the extent Irons intended to argue that his advances, this theory of recovery address it here. See Lopez v. Gap, Inc., 883 F. Supp. 2d 400, 413 (S.D.N.Y. 2012) well settled that a Court should not on summary judgment consider factual allegations and legal theori See Schiano they did not rise to the level of quid pro quo harassment). 19

Robinson v. Harvard Prot. Servs. (internal quotation marks omitted) (quoting Patane v. Clark, 508 F.3d 106, 113 (2d Cir. 2007));

Kaytor v. Elec. Boat Corp., 609 F.3d 537, 547 (2d Cir. 2010) (noting that conduct is evaluated form both an objective and subjective perspective); Transp. Auth., 743 F.3d 11,);

Summa v. Hofstra Univ., 708 F.3d 115, 123 24 claims u Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 609 (2d Cir. 2006))).

alter[s] the conditions of [ ] employment and create[s] Lewis v. City of Norwalk Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001)) (citing Kaytor, 609 F.3d at 547); see also Rivera, 743 F.3d at 20

discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter e an (quoting Gorzynski, 596 F.3d at 102)). Kaytor, 609 F.3d at 547 (quoting Harris v.

Forklift Sys., Inc., 510 U.S. 17, 21 22 (1993)); see also Schiano be able to conclude that the work environment both objectively was, and subjectively was

perceived by the plaintiff to be, sufficiently hostile to alter the conditions of employment for the

19 The employee must also show that the employer is responsible for the harassing conduct, an issue not raised by either party on this motion. See Summa v. Hofstra Univ., 708 F.3d 115, 123 24 (2d Cir. 2013); Kaytor v. Elec. Boat Corp., 609 F.3d 537, 546 (2d Cir. 2010). Harris, 510 U.S. at 21 and Feingold v. New York, 366 F.3d 138, 150 (2d Cir. 2004))).

frequency of the discriminatory conduct; its severity; whether it is physically threatening or

humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an Lewis v. Morgan, 536 U.S. 101, 116 (2002)); see also Kaytor, 609 F.3d at 547 (quoting Harris, 510 U.S. at 23); Schiano, 445 F.3d at 605 (same). The Second Circuit distinguishes between which there is no consent express or implied]; uninvited sexual solicitations; intimidating words or acts;

tected under the law. Redd v. N.Y. Div. of Parole, 678 F.3d 166, 177 (2d Cir. 2012) (alteration in original) (citations omitted).

to others about her social life and personal relationships contained implicit sexual pressures and uninvited sexual solicitations directed toward him, which made his workplace hostile in violation of Title VII. (Irons Mem. 22 24.) that she w

these things. (Defs. 56.1 ¶ 143 (quoting Irons Dep. 158:19 159:2); Pls. 56.1 ¶ 143.) Although

November of that year, Irons only provided evidence as to two specific incidents. Nevertheless, construing the evidence in the light most favorable to Irons and drawing all inferences in his favor, the jury could general allegations that he overheard similar comments from Staton about her personal life to others on a weekly basis, between September and November of 2011. See Ramos v. M , 134 F. Supp. 2d 328, 349 (S.D.N.Y. 2001) (noting that a jury could credit general allegations about repeated conduct). According to Irons, this caused him to feel embarrassed, humiliated and abused, and made him believe that Staton viewed him as a sexual object and was making a sexual advance or demonstrating her sexual prowess to him. (Pls. 56.1 ¶ 144; Irons Dep. 161:23 12, 163:8 23, 172:13 23.)

However, these incidents, while they may have made Irons subjectively uncomfortable, embarrassed , reasonable person would find hostile or abusive under the totality of the circumstances. It is undisputed that Staton never directly asked Irons whether he was interested in sexual activity with her, and never made the comments directly to Irons, (Defs. 56.1 ¶¶ 147 48; Pls. 56.1 ¶¶ 147 48), although Irons contends that on some occasions Staton looked directly at him while talking to h, (Irons Dep. 160:6 12) other BSCLS employees like Lane and Rijo, making him a part of the conversation, (Pls. 56.1 ¶ 148; Irons Dep. 193:6 24). See Byrne v. Telesector Res. Grp., Inc. egations that male co-

that plaintiff heard male colleagues discussing topics that were inappropriate and sexual in nature, and that manager invited former employee who had been accused of discrimination to office holiday party were not severe or pervasive enough to give rise to a hostile work environment claim); see also Redd . Irons never witnessed any overt or obscene sexual conduct or gestures, nor was he subjected to explicit sexual solicitations or physical contact, and the only arguable contact he endured was eye contact from Staton while she made comments to other people about her personal and social life. See Lewis plaintiff, invited plaintiff to join his gym and have drinks with him, in his current relationship,

and asked for help dealing with his loneliness, uct

occurred a couple of times per week, was not sufficient to establish an objectively hostile working environment); Mendez-Nouel v. Gucci Am., Inc. 13) (affirming grant of summary judgment on hostile work environment claim when allegations orkplace banter about a

, told plaintiff he was gay but did not know it (citing Redd, 678 F.3d at 177)); Garone v. United

Parcel Serv., Inc., 436 F. Supp. 2d 448

sexually suggestive or offensive physical contact (quoting Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001))), Sardina v. United Parcel Serv., Inc. .

There is no indication that -month period, involving men who found her physically attractive, were regularly demeaning or disparaging to men or cast men - See Petrosino v. Bell Atl., 385 over the course of several years without supervisory intervention, stands as a serious impediment Irons may have been based on the

ents at most led to half an hour of interference with his work, where he 170:7, 172:13 23). See Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 46 47 (1st Cir. 2003) (affirming grant of summary judgment when evidence showed that complained-of conduct was

ce).

sexual prowess and sexual solicitations, his interpretation of these comments which only referenced her personal relationships and were made to other female employees at BSCLS in conversation is not objectively reasonable, based on the evidence currently before the Court. Cf. Desardouin v. City of Rochester, 708 F.3d 102, 105 (2d Cir. 2013) (finding that, although it was a close case,

relations co Bermudez v. City of New York, 783 F. Supp. 2d 560, 584 (S.D.N.Y. 2011) (finding testimony that

body, expressed romantic feelings towards her in person and over the phone, and repeatedly front of her was sufficient to state hostile work environment claim to survive motion to dismiss). hostile work environment claims.

d.

harassment complaint, in violation of Title VII and the NYSHRL. Claims of retaliation for engaging in protected conduct under Title VII and the NYSHRL are similarly examined under the McDonnell Douglas burden shifting test. See Summa, 708 F.3d at 125. Under the test, prima facie case of

retaliation. If the plaintiff succeeds, then a presumption of retaliation arises and the employer must articulate a legitimate, non- Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010) (citations omitted); see also Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005) (same). If the employer succeeds at the second stage, the presumption of retaliation dissipates, and the plaintiff must show that, but for the protected activity, she would not have been terminated. 20

See Nassar, 570 U.S. at ---, 133

20 - University of Texas Southwest Medical Center v. Nassar, 570 U.S. ---, 133 S. Ct. 2517 (2013), requiring but-for causation in Title VII retaliation cases. See Kleehammer v. Monroe Cty. whether the but-for- , 55 question as non-dispositive); Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 847 n.7 (2d Cir.

2013) Nassar - decide whether the NYSHRL claim is affected by Nassar, which by its terms dealt only with see also St. Juste v. Metro Plus Health Plan, 8 F. Supp. 3d 287, 321 n.14 (E.D.N.Y. 2014) (detailing the similarities between the statutory texts of Title VII retaliation claims). Because the NYSHRL has traditionally followed the federal discrimination S. Ct. at 2534 (emphasis added) (holding that a plaintiff asserting a Title VII retaliation claim -for cause of the alleged adverse action Joseph v. Owens & Minor Distrib., Inc., 5 F. Supp. 3d 295, 315 16 (E.D.N.Y. 2014), , 594 F. Appx 29 (2d Cir. 2015) (same); Russo v. N.Y. Presbyterian Hosp., 972 F. Supp. 2d 429, 454 (E.D.N.Y. 2013) (same).

i. Prima facie case In order to establish a prima facie case of retaliation, a plaintiff must provide evidence she engaged in protected activity; (2) the employer was aware of this activity; (3) the employee suffered a materially adverse employment action; and (4) there was a causal Kelly v. Howard I. Shapiro & , 716 F.3d 10, 14 (2d Cir. 2013) (per curiam) (quoting Lore v. City of Syracuse, 670 F.3d 127, 157 (2d Cir. 2012)); see also Summa, 708 F.3d at 125; Schiano, 445 F.3d at 608. The burden at the prima facie stage for Plaintiffs is minimal and de minimis, ne only whether proffered admissible evidence would be sufficient to permit a rational finder of fact to Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 107 (2d Cir. 2011) (quoting Hicks, 593 F.3d at 164).

Defendants contend that Plaintiffs cannot establish a prima facie case of retaliation because (1) neither Plaintiff engaged in protected activity, and (2) Plaintiffs cannot establish a . (Defs. Mem. 17 24.) It is not ; the third element of

retaliation claims. See Bowen-Hooks v. City of New York, 13 F. Supp. 3d 179, 219 22, 220 n.25 (E.D.N.Y. 2014) (applying but-for standard to retaliation claims under Title VII and NYSHRL, collecting cases). prima facie case is thus established. The Court considers the other elements below.

1. Protected activity Section 704(a) of Title VII prohibits retaliation against two kinds of protected activity: the statute. Littlejohn, 795 F.3d at 316 (citing 42 U.S.C. § 2000e-3(a) and Townsend v. Benjamin

Enters., Inc., 679 F.3d 41, 48 (2d Cir. 2012)); see also N.Y. Exec. Law § 296(1)(e), (7) (making 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). to participation in formal EEOC proceedings, and includes the filing of formal charges of discrimination with an administrative agency. Littlejohn, 795 F.3d at 316 (citing Townsend, 679 F.3d at 49); Correa v. Mana Prods., Inc., 550 F. Supp. 2d 319, 329 (E.D.N.Y. 2008) (noting that l investigations is analyzed under the opposition clause (citing McMenemy v. City of Rochester, 241 F.3d 279, 283 (2d Cir. 2001))). to management . . . and expressing support of co- Summa, 708 F.3d at 126 127 (quoting Matima v. Celli, 228 F.3d 68, 78 79 (2d Cir. 2000)); see also Amin v. Akzo Nobel Chemicals, Inc. Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000))); St. Juste v. Metro Plus Health Plan, 8 F. Supp. 3d 287, 322 (E an employee does not need to lodge a formal complaint of discrimination [to be (collecting cases)).

A. Irons Defendants argue that Irons cannot establish that he engaged in protected activity because Irons, an attorney, could not have reasonably and in good faith believed that Staton sexually Defs. Mem. 22 23.) Irons contends contradicted by the record, and that conduct far less severe than the conduct Irons alleged is sufficient to establish a good-faith belief of harassment. (Irons Mem. 12 13.)

A complaint of discrimination constitutes protected ac a good faith, reasonable belief that the underlying challenged actions of the employer violated Kelly, 716 F.3d at 14 (quoting Gregory, 243 F.3d at 701); see also Rivera v. N.Y.C. , 951 F. Supp. 2d 391, 400 (E.D.N.Y. 2013) (noting that a retaliation claim does not necessarily lack merit just because underlying discrimination complaint lacked merit, and ed Kelly, 716 F.3d at 14 15 (quoting Galdieri-Ambrosini Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998)).

Irons, a 15, 2011 and November 22, 2011 viewed in isolation did not constitute conduct prohibited

by the law. See Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1179 (2d Cir. 1996) (noting that

was isolated comment). However, Irons testified that the conduct occurred over a period of two to three months, on a regular basis which, in certain circumstances, may constitute . See Orange v. Leake & Watts Inc., No. 13-CV-6110, 2015 WL 2340649, plaint to supervisors about alleged unlawful

activity, even if the activity turned out not to be unlawful, provided that the employee had a good faith, reasonable belief that he was opposing an employment practice made unlawful by Title tation marks omitted) (quoting Rodas v. Farmington Cir. 2014))), appeal dismissed (Aug. 26, 2015). While the evidence presented ultimately belied his claim of a hostile work environment, the Court will assume for the purposes of this motion that Irons held a good-faith although mistaken hostile work environment.

B. Chandler Defendants contend that Chandler did not engage in protected activity because (1) she did not oppose harassment, because referring Irons to Alexander was simply part of her regular job

harassment. (Defs. Mem. at 23 potentially discriminatory practices and thus engaged in protected activity by contacting

Alexander and informing her that Irons had a sexual harassment complaint, communicating to Irons that she would support his sexual harassment complaint, 21

and ultimately serving as a witness in the investigation. (Pl. Defs. Mot. for Summ. J.

make inappropriate remarks of a sexual nature to Irons, and reasonably believed that Irons was

21 According to Chandler, Gilbert, Staton, Rasmussen and Hayes were all ultimately aware that Chandler volunteered to serve as a witness in the investigation, although she did not know when they were made aware. (Chandler Dep. 213:19 216:3.) Gilbert testified that her notes reflected that, in conversations with Irons after Thanksgiving, Irons mentioned Chandler as a witness. (Gilbert Dep. 55:15 56:14.) Id. at 11 12.)

While an employee may complain of

mployee is required as part of her job duties to report Littlejohn, 795 F.3d at 318.

as discussed above Gregory, 243 F.3d at 700 01, and must

communicate that belief to the employer in some manner by supporting another employee in asserting his rights, complaining to the employer, employment practices of her employer . . . , Littlejohn, 795 F.3d at 318 (quoting Sumner v. U.S.

Postal Serv., 899 F.3d 203, 209 (2d Cir. 1990)). See also Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 313 (2004) (Protected about unlawful discrimination.

complaint; she must communicate her own opposition to, or criticism of, the challenged behavior. See , 555 U.S. 271, 276

has engaged in a form of employment discrimination opposition to discrimination); Littlejohn, 795 F.3d at 318 (same, noting it holds true for all employees regardless of other job duties).

For the purposes of this motion, the Court assumes that Chandler had a good-faith belief

serious doubts as to whether Chandler opposed what she believed was sexual harassment. See Littlejohn, 795 F.3d at 318. On November 15 or 16, 2011, at Iron Verna Alexander, a member of the sexual harassment panel, because she felt that it was her duty, as Director of Finance and Administration, to assist Irons in making his sexual harassment complaint. (Defs. 56.1 ¶ 158; Pls. 56.1

¶ 158.) Chandler testified that she called Alexander because Alexander was a member of the sexual harassment panel, and told Alexander that Irons wanted to file a complaint. (Defs. 56.1 ¶ 158; Pls. 56.1 ¶ 158.) Chandler did not speak to anyone else abo er gave her back to Irons. (Defs. 56.1 ¶ 158; Pls. 56.1 ¶ 158.) d that she never made

20.) Alexander testified that

Staton speaking to someone in the office ab and she did so because it was part of her job responsibilities which does not constitute

iscrimination under the statute. See Benussi v. UBS Fin. Servs. Inc., No.12-CV- -retaliation provision of the law,

an ostensibly disapproving account of sexually obnoxious behavior . . . by a will constitute opposition (quoting Crawford, 555 U.S. at 277)).

nt complaint has another component, which may rise to the level of opposition. Chandler also told Irons that she would serve as a witness for him, and ultimately spoke with investigator Hayes during the internal investigation. (Defs. 56.1 ¶¶ 169, 179; Pls. 56.1 ¶¶ 169, 179.)

contemplated by Title VII, Jute, 420 F.3d at 175 (holding that the participation clause encompasses participating in any manner in a Title VII proceeding, including being named as a voluntary witness), as discussed above, the Second Circuit has made it clear that participating in internal investigations is not covered by the participation clause of the statute. See Littlejohn, 795 F.3d at 316 (citing 42 U.S.C. § 2000e-3(a) and Townsend participation in the investigation must have also included some element of opposition to what she believed to be sexual harassment, as discussed above. Irons ultimately told Gilbert that Chandler was a witness to his complaints, (Gilbert Dep. 56:6 14), but it is unclear whether he indicated that Chandler was a favorable witness or that she otherwise would oppose the conduct, and whether his indicating her support would qualify as protected activity. But, assuming Chandler actively supported Irons or spoke out against sexual harassment in her interview with investigator Hayes, such conduct would likely constitute protected activity. See Littlejohn, 795 F.3d at 318 (If an employee d activity under

Sumner, 899 F.2d at 209)). The Court assumes that Chandler can show that volunteering to serve as a favorable witness in support of was protected activity.

2. is not explicitly in dispute. prima facie case by showing general corporate knowledge of the protected act at the time of the alleged retaliation. See Papelino v. Albany Coll. of Pharmacy of Union Univ.

Henry, 616 F.3d at 147 488 is necessary than general corporate knowledge that the plaintiff has

engaged in protected

activity. Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 117 (2d Cir. 2000))). While the parties disagree how and when decision-makers like Staton and or Ch , that dispute is more appropriately addressed in consideration of the fourth element of the prima facie case causation not the knowledge element. See Gordon, 232 F.3d at 117 on the part of particular individual agents is admissible as some evidence of a lack of a causal

(citing Altson, 14 F. Supp. 2d at 312 13).

3. Causal connection Absent direct evidence of retaliation or circumstantial evidence of disparate treatment [a] plaintiff can indirectly establish a causal connection to support a discrimination or retaliation claim by showing that the protected activity was closely followed Gorzynski, 596 F.3d at 110 11 (quoting Gorman- Bakos v. Cornell Coop. Extension of Schenectady Cty., 252 F.3d 545, 554 (2d Cir. 2001)); Kim v. Columbia Univ. mity between protected activity and adverse action may be sufficient to satisfy the causality element of a prima facie retaliation claim . . . Feingold causal connection between his complaints and his termination is satisfied by the temporal

suspend previously planned [employment actions] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitely Lewis original) (quoting Clark Cty. Sch. Dist. t insulate itself from liability at the summary judgment stage simply by asserting that an adverse employment decision had in fact already been made, without being memorialized or conveyed to Nagle v. Marron, 663 F.3d 100, 109 (2d Cir. 2001).

Defendants contend that the evidence establishes that Defendants had decided to

Defs. Mem. 18 stepped in as Acting Project Director in July of 2011, established virtually no working

relationship with either Plaintiff, and was simply waiting until the budget required layoffs to Id. at 19 20.) Irons and Chandler both argue that the aint, and that , and their layoffs on December 2, 2011 supports a causal connection. (Irons Mem. 14 16; Chandler Mem. 12 14.) The Court addresses the timing below.

A. Date of protected activity Irons contends that he engaged in protected activity on or about November 16, 2011, channels for making a complaint. (Pls. 56.1 ¶ 155.) Irons received the information as to how to proceed the same day he asked Chandler but, according to Irons, he did not contact HR until November 23, 2011. (Defs. 56.1 ¶ 159; Pls. 56.1 ¶ 159.) Similarly, Chandler told Irons that she would serve as a voluntary witness for his complaint on or about November 16, 2011. While Irons did tell Gilbert that Chandler would serve as a witness, Gilbert testified that she learned of this after November 24, 2011. (Gilbert Dep. 55:15 56:14.) Furthermore, Chandler did not have her interview with Hayes until December 29, 2011. (Defs. 56.1 ¶ 169; Pls. 56.1 ¶ 169.)

B. Date of decision to terminate establishes that the decision to terminate Plaintiffs had been made on November 18, 2011, the

changed. On ed that Plaintiffs would be laid off, and on that same date Rasmussen e-mailed the Project Directors and informed them that two managers at BSCLS (and one at another location) were to be laid off. (Defs. 56.1 ¶¶ 104 105; Pls. 56.1 ¶¶ 104 105; E-mail dated Nov. 18, 2011 from Rasmussen re: Follow-Up from Meeting with Union Executive Committee, annexed to Rice Decl. as Ex. OO, D002758.) No documents post- employment, and Plaintiffs have pointed to no other evidence that the decision to terminate them 22

for termination on November 18, 2011. (Irons Mem. 9; Chandler Mem. 8; Pls. 56.1 ¶ 116(i).)

C. There is no e complaint prior to November 23, 2011

2015. The parties agree that Irons contacted HR for the first time on November 23, 2011. (Defs. 56.1 ¶ 159; Pls. 56.1 ¶ 159.) Rasmussen testified that he first harassment allegations on November 23, 2011, when Reynoso told him that Irons had come by the office with a complaint about Staton. (See Defs. 56.1 ¶ 161; Rasmussen Dep. 123:2 124:19.) sexual harassment complaint, which was the first time she became aware of his allegations.

(Staton Dep. 265:24 269:4; see also Perry Dep.106:14 107:2 (noting that she and Rasmussen

22 Plaintiffs admit that they have no personal knowledge about when BSCLS made the decision to lay them off, (Defs. 56.1 ¶ 141; Pls. 56.1 ¶ 141), but argue that the documents show that the budget was subject to change and frequently changing until it was approved by the -hoc justification for their -serving testimony to the contrary should be disregarded, (see, e.g., Pls. 56.1 ¶¶ 66 70, 116). Plaintiffs point to several budget workbooks that were prepared between September and early November of 2011, some of which did include the layoff and some of which did not. (Pls. 56.1 ¶¶ 66, 70.) to lay off Irons and Chandler, by November 18, 2011 at the latest. The budget was not adopted by the Board until December 10, 2011, nevertheless, Plaintiffs received their layoff notices on December 2, 2011, (Defs. 56.1 ¶¶ 108, 111; Pls. 56.1 ¶¶ 108, 111), which in addition to the documentary evidence discussed above indicates that the decision to lay off Plaintiffs could be made by Staton before the Board adopted the budget. Furthermore, the parties agree that Staton had the power to make decisions about who would be terminated. (Defs. 56.1 ¶ 17; Pls. 56.1 ¶ 17.) For evidence of causality, the relevant question is not whether the decision to terminate Plaintiffs could be changed, but whether it was made prior to the time the decision-makers became aware called Staton to discuss the complaint).) testimony should be disrega -

allegations on November 16, 2011 and the fact that the BSCLS Board, including Staton, met on November 16, 2011. (Pls. 56.1 ¶ 161; Alexander Dep. 35:15 37:3.)

she did not (Chandler Dep. 209:22 25), and Irons testified that he did not speak about it with anyone other than Chandler and his wife prior to reporting it to Reynoso on November 23, 2011, (Irons Dep. 240:20 24, 242:3 243:12, 244:21 245:7). Alexander testified that she did not convene a meeting of the sexual harassment panel after receiving the call from Chandler, and that she believed HR would

37:23 complaint with anyone else, except for a brief telephone call with Gilbert one or two weeks later wherein Gilbert informed her that th Id. at 39:19 40:16.) When asked if she sent any e-mails about the conversation with Chandler, -mail to [Gilbert] saying that Karen Chandler she [sic] asked on what day she might have sent the e-mail. (Id. at 41:9 21.) However, Gilbert testified that she

Dep. 47:16 49:13.) There is no evidence that Gilbert saw an e-mail from Alexander or that such an e-mail was ever sent. Plaintiffs, who have produced hundreds of documents in opposition to this motion, have not produced any such e-mail.

Even assuming such an e-mail was sent to Gilbert and Gilbert received it, there is no evidence form which any reasonable jury could conclude that Gilbert told Staton or anyone else the evidence explicitly contradicts such an assumption since Gilbert testified that she learned of ore Thanksgiving, November 23, 2011, and thus could not have communicated it to anyone until then. 23

Plaintiffs are, in effect, inviting the Court to assume that Gilbert received an e-mail from Alexander between November 15 and November 17, 2011, reject Gi Reynoso told her about it on November 23, 2011, and then speculate that Gilbert told Staton - moving parties must do more than simply show that there is some metaphysical doubt as to the

Bermudez v. City of New York, 790 F.3d 368, 373 74 (2d Cir. 2015) (internal quotation marks omitted) (quoting Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005)).

Accordingly, Plaintiffs have failed to point to evidence creating a genuine dispute that Staton knew Irons was making a complaint against her until November 23, 2011. See Hicks, 593

the facts to overcome a motion for summary judgment. . . . [M]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would

23 Additionally, Alexander only testified that she might have sent an e-mail to Gilbert 21.) Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995))); Richardson v. Bronx Lebanon Hosp., No. 11-CV 9095, 2014 WL 4386731, at *1 n.1 (S.D.N.Y. [deposition] testimony does not, as [p]laintiff appears to believe, suffice to controvert those Risco, 868 F. Supp. 2d at 86 n.2 (declining to inter alia, to point to admissible evidence supporting her contentions (citing Holtz, 258 F.3d at 74)). Plaintiffs

complaint to Rasmussen. (Pls. 56.1 ¶ 166(iii).)

Because there is no evidence that the relevant decision- protected activity at the time Plai , and, indeed, the evidence

that time, Plaintiffs cannot rely on the temporal proximity between the sexual harassment complaint and their termination. See Lewis (noting an employer need not suspend employment actions upon learning that the employee engaged in protected activity). Furthermore, there is no evidence, and neither of the parties argue, that the decision-makers were acting upon the direction of someone with the requisite knowledge. See Henry, 616 F.3d at 148.

D.

layoffs prior to the complaint Ultimately, when Defendants became aware of the sexual harassment complaint may be to the causation analysis, in light of the well-documented and undisputed fact that Defendants were planning long before Irons made his sexual harassment complaint. See Clark Cty. Sch. Dist., 532 U.S. at 272; see also Abril-Rivera v. Johnson, 795 causally related to closure of processing center, and thus could not form the basis for Title VII months before complaints). Where the undisputed evidence shows that the employer was

considering the adverse employment action before the protected activity occurred, the fact that

Clark Cty. Sch. Dist., 532 U.S. at 272. But see Richardson, 2014 WL 4386731, at *15 (finding that issue of fact as to whether

combination with undisputed fact that she was aware of the lawsuit at the time she fired plaintiff, sufficient to withstand summary judgment on Title VII retaliation claim.).

need to reduce staff and were considering laying off Irons and Chandler in evaluating what other (or different) budgetary cuts needed to be made. Staton, Rasmussen and Young all testified that the summer of 2011. 24

(E.g., Rasmussen Dep. 63:23 64:4, 104:5 16; Staton Dep. 137:24 24

The only facts Plaintiffs offer to dispute and Perry -Chief of Operations decided, together, in the summer of 2011 that the layoffs of Irons and Chandler would be part of the plan to meet the budget deficit at - See, e.g., Pls. 56.1 ¶¶ 83 84.) The self- and not its admissibility. See In re Dana Corp., 574 F.3d 129, 153 (2d Cir. 2009); Danzer v. Norden Sys., Inc., 151 F.3d 50, 57 (2d Cir. 1998). It is not the province of the Court on summary judgment to reject testimony as incredible. See Danzer, 151 F.3d at 57. Rather, the Court must draw reasonable inferences from the evidence before it, identifying facts that are genuinely in dispute. To the extent Plaintiffs argue that the testimony Defendants offer should be disregarded, 138:14, 139:9 140:3, 242:17 21; Young Decl. ¶¶ 4 6; see also Perry Dep. 78:2 80:25 (noting

e looking at options for helping them close a supported by contemporaneous documents, including e-mails, budget documents, and board

minutes. Cf. Nagle, 663 F.3d at 110 (finding that date of adverse action was date it was

-mailed Young and Staton in May of 2011 with the cost

July of 2011. (Defs. 56.1 ¶¶ 78, 80; Pls. 56.1 ¶¶ severance packages were calculated, and in September, some draft budgets reflected one voluntary buyout and two layoffs 21 to Willemin Decl.) On November 14, 2011, the Layoff Notice was sent to all staff indicating that BSCLS had made a decision to lay off staff. At that time, the only involuntary staff reductions reflected in 56.1 ¶ 101; Pls. 56.1 ¶ 101.)

This uncontested documentary evidence, when combined with the deposition testimony and declarations which assert that the LSNYC and BSCLS made the decision to terminate

there must be admissible evidence from which an opposing inference could be drawn Plaintiffs cannot rely on speculation alone. See Hicks, 593 F.3d at 166. temporal proximity to establish causation. See Lewis 30 (finding plaintiff could not raise inference of retaliation when he was terminated, because protected activity

review was itself related to alleged harassment); Risco, 868 F. Supp. 2d at 114 (finding temporal

proximity did not support causal connection because supervisors had taken steps to terminate plaintiff, including getting approval for her termination, at least two weeks before plaintiff complained of discrimination); White v. Pacifica Found., 973 F. Supp. 2d 363, 385 (S.D.N.Y. 2013) (finding plaintiff could not establish inference of retaliatory intent through temporal proximity when evidence included a memorandum dated three weeks prior to complaint showed that defendant was contemplating firing plaintiff, testimony that supervisors had discussions about terminating plaintiff prior to his complaint, and plaintiff was notified of first in a series of suspensions culminating in his termination before he sent his complaint); Webb v. Niagara Cty., No. 11-CV-192, 2012 WL 5499647, at *3 (W.D.N.Y. Nov. 12, 2012) (concluding that causality element of prima facie case was not established when only evidence of causation was temporal

the very least . . . fore plaintiff filed complaint (citing Clark Cty. Sch. Dist., 532 U.S. at 272) s continuation of a course of conduct that had begun before the employee complained does not constitute retaliation because, in that situation, there is no causal s prot s challenged Russo, 972 F. Supp. 2d at 456 (quoting Melman v. Montefiore Med. Ctr., 946 N.Y.S.2d 27, 42 (App. Div. 2012)); see also Redd v. N.Y. State Div. of Parole, 923 F. Supp. 2d already in the works before the R & . Thus, Plaintiffs cannot establish their prima facie case of retaliation, and their claims fail.

As discussed below, even if Plaintiffs had established a prima facie case, their claims for laying them off.

ii. Legitimate, non-discriminatory reason

budget constraints that materialized as early as the spring of 2011, morale issues among the staff and pressure from the BSCLS Board and LSNYC leadership. (Defs. Mem. 21 22.) Defendants argue that Plaintiffs were selected for layoff because they were not unionized, because their marginal productivity did not justify the high costs of maintaining them as managers, and because they were not well-liked among Board members, and contend that Plaintiffs cannot legitimately dispute those reasons for their termination. (Id. at 22; Defs. Reply Mem. 5 13.)

It is well established that organization-wide reductions in workforce due to budget constraints are a legitimate, non-discriminatory reason for discharging an employee. Maxton v. Underwriter Labs., Inc., 4 F. Supp. 3d 534, 548 (E.D.N.Y. 2014) (bona fide reduction in workforce is a legitimate nondiscrimi (quoting Chuang v. T.W. Wang Inc., 647 F. Supp. 2d 221, 234 (E.D.N.Y. 2009))); Robles, 987 F. Supp. 2d at 209 (same); see, e.g., Quarless v. Brooklyn Botanic Garden Corp. 30 (2d Cir. 2015) (t financial distress and adopted cost-saving measures including an organization-wide reduction-in-termination (citing Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1226 (2d Cir. 1994))); Louis v. Brooklyn Botanic Gardens x 603, 604 (2d Cir. 2012) (finding eteriorating financial condition [which] had resulted in layoffs and the elimination of seventeen positions mination); Turner v. NYU Hosps. Ctr. hospital-wide reduction in workforce was a legitimate reason for discharge). However, an employer still cannot select an employee for layoff based on impermissible reasons. Leibowitz v. Cornell Univ., 584 F.3d 487, 504 (2d Cir. 2009), superseded on other grounds, as recognized in Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 108 109 (2d Cir. 2013).

Defendants allege th budget constraints, job performance, and mismatch between their skills set and what was needed

for the program based on the expense of their positions. (Defs. 56.1 ¶¶ 116 17.) Defendants contend that they decided to terminate Irons and Chandler around of 2011, because Plaintiffs were expensive employees who added little value to BSCLS, and

were not well-liked amongst the staff or the BSCLS or LSNYC Boards. Defendants contend that the staff had expressed dissatisfaction with Irons and Chandler, that Staton believed they were not as productive or efficient as they could be, and that the board was pressuring her to fire them. (Defs. 56.1 ¶¶ 77 83, 117; see, e.g., Staton Dep. 124:14 125:24; 145:3 146:19, 153:18 154:8, 168:5 13; Perry Dep. 78:2 80:25; Young Decl. ¶ 4 6; E-mail from Perry to Young and Staton are the costs associated with a lay- E-mail chain between

.) These are legitimate, non-discriminatory reasons for selecting Plaintiffs for layoff. Accordingly, the

burden shifts back to Plaintiffs to show that these reasons were pretext for retaliation.

iii. Pretext Even assuming that Plaintiffs could establish a prima facie case of retaliation, Plaintiffs

complaint, they would not have been laid off. To survive summary judgment on a claim of retaliation under Title VII or the NYSHRL, Plaintiffs would have to show that retaliatory intent - cause of any wrongful actions that is, Nassar,

570 U.S. at ---, 133 S. Ct at 2533; Zann Kwan, 737 F.3d at 850 (noting that Title VII retaliation - Nassar, 570 U.S. at ---, 133 S. Ct at 2533).] plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employers proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude Richardson, 2014 WL 4386731, at *16 (quoting Zann Kwan, 737 F.3d at 846); Benussi, 2014 WL 558984, at *10 (same). However, it is well-established that temporal proximity alone is not sufficient to See Piasecki v. Shinseki Cir. 2014) (quoting El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010)); Aiossa v. Bank of Am., N.A., No. 10-CV-1275, 2012 WL 4344183, at *5 (E.D.N.Y. Sept. 21, 2012), , x 8 (2d Cir. 2013).

Plaintiffs contend that the proffered reasons for their terminations are demonstrably false, they claim: that the terminate them had been made at the March 16, 2011 BSCLS Board meeting; that Plaintiffs had received positive performance reviews and no negative feedback; that it was Staton would wait nine months between March 2011 and December 2011 to terminate Plaintiffs;

and that Defendants present inconsistent testimony as to when the decision to terminate Plaintiffs was made. (Irons Mem. 18 21; Chandler Mem. 17 20.) Irons and Chandler contend that there is no documentary evidence that the decision to terminate them was made prior to December 2, allegations of widespread dissatisfaction with their performance, pressure from the board, or early decision to terminate them. (See Pls. 56.1 ¶¶ 70, 116.) Plaintiffs also argue that there is contrary evidence that they performed well on the job and that the staff did not complain about them. (Pls. 56.1 ¶¶ 132 40.) Plaintiffs further sexual harassment (Irons Mem. 21 22; Chandler Mem. 20 21.)

1. Challenges to reasons for selecting Plaintiffs for layoff as to their performance and personality issues with others in the office as post-hoc and demonstrably false. (Chandler Mem. 17 19; Irons Mem 18-20.) though it is undisputed that Olds was not well-liked amongst the staff and Defendants experienced severe morale issues under his leadership and otherwise point to a lack of documentary evidence of any alleged performance problems or complaints about their personality. (See Pls. 56.1 ¶ 59; Olds Dep. 88:25 89:25; Irons Dec. 2010 Eval.; E-mail from Young dated Jan. 24, 2011, annexed to Willemin Decl. as Ex. 15 (congratulating Irons and Chandler for exceeding goals); see also Staton Dep. 237:5 24 (stating that there are no documents to reflect Plaint performance); Rasmussen Dep. 56:2 24 (stating that Irons and Chandler were not hurting clients).) , or illustrate that the budget was not so dire as to warrant

stated reasons are pretext for retaliation. See Turner 24.

The Court is mindful that it does not sit as a super-personnel department, and is not inclined to second-guess See Schwarzkopf v. Sikorsky Aircraft Corp., 607 82, 82 (2d Cir. 2015) issues were not well-documented may raise an inference of pretext in some situations, such as

Cf. Desir v. City of New York e record was well-documented prior to termination, plaintiff could not show reasons were pretext); Malacarne v. City Univ. of New York multiple, contemporaneously documented, and non-discriminatory reasons for her negative evaluation, plaintiff's mere allegation that her complaint about sex discrimination [motivated her Raniola v. Bratton, 243 F.3d 610, 625 (2d Cir. 2001).). However, that is not the case here. Defendants have not argued that they terminated Plaintiffs because of poor performance alone; rather, once the budget situation made

performa how to minimize the number of total layoffs. See Bailey v. Vill. of Pittsford, 981 F. Supp. 2d

178, 182 (W.D.N.Y. 2013) call into question its genuineness should this Court conclude that a reasonable trier of fact could Fleming v. MaxMara USA, Inc. Dabney v. Christmas Tree Shops, 958 F. Supp. 2d 439, 454 (S.D.N.Y. 2013),

Dabney v. Bed Bath & Beyond see also Moore v. Kingsbrook Jewish Med. Ctr., No. 11-CV-3625, 2013 WL 3968748, at *13 (E.D.N.Y. July 30, 2013) he fact that an emplo s misconduct or deficient performance, or even has evidence that the decision was objectively incorrect, does not necessarily demonstrat s proffered reasons are a pretext for Grant v. Roche Diagnostics Corp., No. 09-CV-1540, 2011 WL 3040913, at *11 (E.D.N.Y. July 20, 2011))).

The focus at the pretext stage is not whether Defendants were correct in their perception of Plaintiffs, but rather on what motivated Defendants in laying Plaintiffs off and whether, but- See Joseph, 5 F. Supp. 3d at 320. Even if the Court assumes that Plaintiffs were good employees, the burden is on Plaintiffs to show some evidence that their credentials were so superior to the credentials of others that no reasonable person, exercising impartial judgment, would have laid them off. See Turner x at 24 While Turner plainly disagrees with these relative assessments, to defeat summary judgment . . . Turner had to adduce evidence that his qualifications were so superior to [the replacement] that no reasonable person, in the exercise of impartial judgment, could have chosen [him] over the plaintiff for the job in question. (quoting Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001))). Plaintiffs have failed to make such a showing here. The record reflects a consistent need for layoffs, and the budget documents show that Plaintiffs and only Plaintiffs were consistently considered for layoffs since as early as May 30, 2011.

Plaintiffs argue that the termination, citing budget concerns, performance level

m

Richardson, 2014 WL 4386731, at *16 (collecting cases); see also Zann Kwan, 737 F.3d at 846. As these varied explanati termination are not contradictory, this also fails to raise a question of fact as to whether Defendants would not have terminated Plaintiffs but for their retaliatory motives. See Bailey, 981 F. Supp. 2d at 182.

Plaintiffs further contend that Defendants were inconsistent about when the decision was made to lay Plaintiffs off. , No. 97-CV-6235, 1998 WL 474198, at *6 (S.D.N.Y. Aug. 13, 1998) (finding issue of fact as to whether termination was retaliatory and reasonable juror could conclude that the explanation was pretext conflicted with document

In Shin, the plaintiff was terminated shortly after she made a complaint on June 6. Id. at *5. To memorialize her termination, the human resource manager sent a memorandum to Shin on June 10, which stated that the decision to terminate her was made Id. around May 13. Id. at *5. The Court found that these post-hoc, inconsistent reports called into cision. Id. at *6. 25

However, unlike the situation in Shin, there is substantial documentary evidence t documents show an ongoing need to reduce staff at BSCLS, and consistent consideration of

Plaintiffs and no others except Purdie and Son, who both eventually left BSCLS as candidates for workforce reduction.

2. Challenge to investigation of sexual harassment complaint

sexual ha

terminating Plaintiffs was pretext. (Chandler Mem. 20 21; Irons Mem. 21 22.)

contend that BSCLS and LSNYC failed to follow the stated sexual harassment policy 2009 June 30, 2012 Collective Bargaining Agreement between the Legal Services Staff

50; LS-NYC Sexual Harassment

complaint of harassment requires a member of the sexual harassment panel to notify the chair of the panel, the Project Director and the Executive Director, and provides that the complaint be

25 See, e.g., Rasmussen Dep. 63:22 August, but that Staton, Perry and he agreed that Plaintiffs would be terminated earlier in the summer); Staton Dep. 136:3 12 (stating that the board had directed her to terminate Plaintiffs even before she became Acting Project director); Perry Dep. 129:18 136:4 (examining document dated October 11, 2011, indicating that Perry, Rasmussen and Staton had assumed that Purdie would accept a buyout and that Irons and Chandler would be laid off, but that the document seemed to reflect only a working set of assumptions); Young Decl. ¶¶ 4 6 (stating he

had discussions with Staton about laying off Plaintiffs in April or May of 2011, and that Staton discussed it with the board in June of that year). investigated by a three-person panel consisting of members of a sexual harassment panel. (Policy D000485 86.) Plaintiffs contend that the Policy was not used, that Alexander took no

for Hayes, a LSNYC Board Member, and that the investigation and report were not completed within the timelines required by the Policy. (Pls. 56.1 ¶ 116; Chandler Mem. 5; Irons Mem. 6.) See Stern v. Trustees of Columbia Univ., 131 F.3d 305, 313 (2d Cir. 1997) (noting that a departure from established procedures can raise a question of improper motivation).

Alexander testified that she did not follow the policy and convene the sexual harassment panel because the panel had not met in over a year, and she believed that the director of HR could better direct Chandler. (Pls. 56.1 ¶ 158; Alexander Dep. 36:9 38:5.) Gilbert instructed Alexander that HR would handle the complaint, (Alexander Dep. 40:4 8), and Rasmussen testified that using the panel was not even considered because the allegations concerned a

complaint, (Rasmussen Dep. 134:5 135:25). Gilbert was told that the reason for engaging Hayes was that the complaint was against a Project Director. (Defs. 56.1 ¶ 164; Pls. 56.1 ¶ 164.)

As discussed above, these facts do not present a situation where the failure to follow

Cf. Gallo, 22 F.3d at 1227 (finding issue of fact as to pretext when employee discharged as part of reduction-in-force was not rehired pursuant to personnel policy to rehire employees discharged as part of staff reduction); Saenger v. Montefiore Med. Ctr., 706 F. Supp. 2d 494, 514 15 (S.D.N.Y. 2010) (noting plaintiff claimed that procedures used to investigate complaint against him, which in part led to his termination, were a sham); Bennett v. Progressive Corp., 225 F. Supp. 2d 190, 213 (N.D.N.Y. 2002) (finding issue of fact ion was violation of alcohol policy, which required mandatory termination, but plaintiff was not terminated until after she made a sexual harassment complaint). Project Directors on November 18, 2011, before Irons even reported his complaint to HR.

Focusing on the relevant inquiry, whether there is an issue of fact as to whether Defendants would have terminated Plaintiffs but for -use of a process that started after Staton not Plaintiffs simply does not further the pretext inquiry. See Saenger, 706 F. Supp. 2d at 509 ines the Byrnie, 243 F.3d at 103)). The

e. Plaintiffs allege that Staton is responsible under the NYSHRL for aiding and abetting the alleged discrimination, hostile work environment and retaliation. Because Plaintiffs have not established liability with respect to the claims of discrimination, hostile

individual liability for these claims on an aiding and abetting theory, because liability as an aider and abettor under section 296(6) can only attach when liability has been established as to the employer or

another individual. See Benson v. Otis Elevator Co. x 74, 77 (2d Cir. 2014) (dismissing aiding and abetting claims because plaintiff failed to raise a genuine factual dispute with respect to claims for primary violations (citing Strauss v. t of Educ., 805 N.Y.S.2d 704, 709 (App. Div. 2005))); Redd lity DeWitt v. Lieberman, 48 F. Supp. 2d 280, 293 (S.D.N.Y. 1999))); Davis-Bell v. Columbia Univ., 851 F. Supp. 2d 650, 688 (S.D.N.Y. . . must first be established as to the employer/ Sowemimo v. D.A.O.R. Sec., Inc., 43 F. Supp. 2d 477, 490 (S.D.N.Y. 1999))); see also Hardwick v. Auriemma, 983 N.Y.S.2d 509, 513 (App. Div. 2014 own actions give .

f.

Administrative Code. See 28 U.S.C. § ourts may decline to exercise

supplemental jurisdiction over a claim if the district court has dismissed all claims over which it -law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state- Pension Ben. Guar. Corp., 712 F.3d at 727 (citations and internal quotation marks omitted); see also ns Corp. v. JP Morgan SBIC LLC dismissed, a district court is well within its discretion to decline to assert supplemental

prejudice. III. Conclusion

urisdiction HRL claims. The Clerk of Court is directed to close this case.

SO ORDERED:

s/ MKB MARGO K. BRODIE United States District Judge Dated: September 28, 2015 Brooklyn, New York