UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY PHILPOTT,

Plaintiff,

-against-

STATE UNIVERSITY OF NEW YORK,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

16 Civ. 6778 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

For the reasons stated on the record at the March 5, 2019 oral argument, Defendant's motion for summary judgment (ECF No. 58) is granted. Viewed in the light most favorable to Plaintiff, and with all reasonable inferences drawn in favor of Plaintiff, the evidence does not support any of Plaintiff's three claims under Title VII: hostile work environment, discriminatory termination, and retaliatory termination.

"To establish a prima facie case of hostile work environment [under Title VII], the plaintiff must show that the discriminatory harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Tolbert v. Smith*, 790 F.3d 427, 439 (2d Cir. 2015) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)). A court must "consider the totality of the circumstances, including 'the 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 employee's work performance.'" *Littlejohn v. City of New York*, 795 F.3d 297, 321 (2d Cir. 2015) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). "As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in

order to be deemed pervasive. Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Id.* (quoting *Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002)). I hold that the offensive statements allegedly made by Dr. David Heath and other employees of the State University of New York ("SUNY") to Plaintiff do not meet the threshold of severity or pervasiveness required to establish a prima facie case of hostile work environment.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) sets forth a three-step framework for analyzing discriminatory termination claims. First, the plaintiff must establish a prima facie case by showing that: "(1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to an inference of discrimination." *United States v. City of New York*, 717 F.3d 72, 102 (2d Cir. 2013) (quoting *Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 492 (2d Cir. 2010)). If the plaintiff can establish a prima facie claim, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). If the defendant meets its burden, the burden shifts back to the plaintiff to show that the "proffered reason" for the adverse employment action was "a pretext for discrimination." *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804).

I hold that the circumstances under which Plaintiff was terminated do not give rise to an inference of discrimination. None of the allegedly discriminatory comments were temporally proximate to the decision to terminate Plaintiff's employment, and none suggested that Plaintiff's sexual orientation should have any bearing on his employment status. The undisputed evidence shows that, knowing Plaintiff was gay, Heath gave Plaintiff positive performance reviews for at least the first three years of his employment, expanded Plaintiff's job

responsibilities after his third year, and approved a pay increase of $10,000 soon after that. Accordingly, Plaintiff has failed to establish a prima facie case of discriminatory termination.

With respect to the retaliatory termination claim, the *McDonnell Douglas* framework "developed in the context of claims for discrimination under Title VII [also] applies to . . . claims of retaliation under Title VII." *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012). I hold that Plaintiff has established a prima facie retaliation claim; that Defendant has met its burden of articulating a legitimate, nondiscriminatory reason for Plaintiff's termination—namely, his poor work performance and attendance; and that, under the third *McDonnell Douglas* step, Plaintiff has failed to make any showing that Defendant's proffered reasons for his termination were a pretext for retaliation. Plaintiffs acts of insubordination in connection with his "emergency" leave request and his poor work performance over the prior two academic years caused Heath to believe that Plaintiff's continued employment would not be in the best interest of SUNY College of Optometry. No reasonable jury could find that those reasons were pretextual. Accordingly, Defendant is entitled to summary judgment on the retaliatory termination claim.

The Clerk shall enter judgment for defendant, with costs to be taxed by the Clerk. The Clerk shall terminate the motion (ECF No. 58), and mark the case closed.

SO ORDERED.

Dated: March 11, 2019
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge