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**H**Trigg v. New York City Transit Authority  
C.A.2 (N.Y.),2002.

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United States Court of Appeals, Second Circuit.

Jason TRIGG, Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY  
(N.Y.CTA), William Seabrook, Local DC 37,  
Donald Afflick, President, American Federation ofState, County and Municipal Employees, AFL-CIO,  
District Counsel 37, Local 1655,  
Defendants-Appellees.  
**Docket No. 01-9104.**

Aug. 16, 2002.

Former employee brought action against city employer for hostile work environment and retaliation in violation of Title VII and against his union for breach of its duty of fair representation and violation of Title VII based on that alleged discriminatory breach. The United States District Court for the Eastern District of New York, Israel Leo Glasser, J., 2001 WL 868336, granted summary judgment for defendants, and employee appealed. The Court of Appeals held that: (1) alleged conduct of putative supervisor did not give rise to hostile work environment; (2) termination did not result from unlawful retaliation; and (3) union did not breach duty of fair representation or violate Title VII by failing to grieve employee's discrimination claims or his termination.

Affirmed.

West Headnotes

**[1] Civil Rights 78** ⚡1192

78 Civil Rights

78II Employment Practices

78k1191 Discrimination by Reason of Sexual  
Orientation or Identity

78k1192 k. In General. Most Cited Cases

(Formerly 78k164)

Sexual-orientation discrimination is not cognizable under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**[2] Civil Rights 78** ⚡1194

78 Civil Rights

78II Employment Practices

78k1191 Discrimination by Reason of Sexual

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**Orientation or Identity**

78k1194 k. Harassment; Work Environment. Most Cited Cases

(Formerly 78k167)

Handful of derogatory comments made by putative supervisor about city employee's manliness, and supervisor's alleged generalized preference for women, and one woman in particular, were insufficient as a matter of law to demonstrate a severe or pervasive hostile work environment in violation of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**[3] Municipal Corporations 268 ↪218(3)****268 Municipal Corporations**

268V Officers, Agents, and Employees

268V(C) Agents and Employees

268k218 Removal, Discharge, Transfer or Demotion

268k218(3) k. Grounds. Most Cited

**Cases**

City employer's termination of employee was not unlawful retaliation, in violation of Title VII, as employee's discrimination complaints did not amount to substantial or motivating factor in termination decision, in view of overwhelming evidence that employee was fired for failing to report to work on time or, on many occasions, at all. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**[4] Labor and Employment 231H ↪1218****231H Labor and Employment**

231HXII Labor Relations

231HXII(D) Bargaining Representatives

231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation

231Hk1218 k. Particular Grievances.

**Most Cited Cases**

(Formerly 232Ak221 Labor Relations)

Union for city employees did not breach duty of fair representation or violate Title VII by failing to grieve employee's discrimination claims or his termination against city employer, as union had established practice of not filing grievances on behalf of probationary employees, which practice

was not arbitrary, discriminatory, or in bad faith; union official's alleged statement that employee should "shut up or get fired" did not alone support inference of bad faith or discrimination, as it could have been motivated by official's desire to protect employee until he survived probationary period and his complaints could be formally grieved. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**[5] Federal Courts 170B ↪18****170B Federal Courts**

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk18 k. Validity or Substantiality of Federal Claims and Disposition Thereof. Most Cited Cases

Where district court's dismissal of city employee's federal claims against employer and union was entirely appropriate, its decision to forgo exercising supplemental jurisdiction over employee's pendent claims under state and local law was correct as well.

Appeal from the United States District Court for the Eastern District of New York (Glasser, J.).

Chinyere Okoronkwo, New York, NY, for Appellant.

Maureen M. Stamp, New York, NY; Ivan D. Smith, on the brief, for Union Appellees.

Dorothea W. Regal, New York, NY; Kathleen L. Lowden, on the brief, for New York City Transit Authority Appellee.

Jon W. Davidson, Los Angeles, CA; Phillip Mendelsohn, Ruth E. Harlow, on the brief, Amicus Curiae Brief for Appellant.

Present JACOBS, CABRANES and F.I. PARKER, Circuit Judges.

**SUMMARY ORDER**

**\*\*1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**

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**DECREED** that the judgment of the district court be **AFFIRMED**.

Jason Trigg appeals the decision of the United States District Court for the Eastern District of New York (Glasser, J.), dismissing by summary judgment his claims against [i] the New York City Transit Authority ("NYCTA") for hostile work environment and retaliation in violation of Title VII, and [ii] his union for breach of its duty of fair representation and violation of Title VII based on that alleged discriminatory breach.

Trigg's suit arises out of the following events: [1] comments by a putative supervisor who characterized Trigg as unmanly, and who was investigated for such abuse and demoted; [2] Trigg's termination following multiple undisputed instances of being tardy or absent without leave; and [3] the union's refusal to grieve either [i] Trigg's complaints, or [ii] his ultimate termination. We affirm.

To survive summary judgment "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56(e)) (citations and footnote omitted). "Conclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir.1998).

[1][2] 1. Trigg's hostile work environment claim consists mainly of unsubstantiated and speculative allegations. Stripped of the conclusory allegations, what remains (in the light most favorable to Trigg) is one incident involving homophobic insults and threats, a handful of derogatory comments about Trigg's manliness, and a generalized preference for women (and in particular one woman) by the offending employee.<sup>FN1</sup> We do not consider the homophobic incident, because sexual-orientation discrimination is not cognizable under Title VII. See \*460 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). And the rest of the evidence is insufficient as a

matter of law to demonstrate a severe or pervasive hostile work environment. See *Alfano v. Costello*, 294 F.3d 365, 379 (2d Cir.2002) (collecting cases in which allegations far more severe and numerous could not withstand summary judgment for failure to demonstrate pervasive discrimination).

FN1. The parties dispute whether the offending employee was a supervisor for the purposes of Title VII (such that his actions should be imputed to the NYCTA).

See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). But for summary judgment purposes, we accept that the individual held a supervisory position.

[3] 2. Trigg's retaliation claim fails because no reasonable jury could find that his discrimination complaints were a "substantial" or "motivating" factor in the NYCTA's decision to terminate him. See *Raniola v. Bratton*, 243 F.3d 610, 624-5 (2d Cir.2001). The NYCTA has presented overwhelming evidence that Trigg was fired for failing to report to work on time or, on many occasions, at all. Cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" (citation omitted)).

\*\*2 [4] 3. Trigg presents no viable claim against his union either for breach of the duty of fair representation or for violation of Title VII, since the union has established that its decision not to grieve Trigg's complaints or his termination was based on its established practice of not filing grievances on behalf of probationary employee, which practice was, as a matter of law, not "arbitrary, discriminatory, or in bad faith." *Wilder v. GL Bus Lines*, 258 F.3d 126, 129 (2d Cir.2001); see also *White v. White Rose Food*, 237 F.3d 174, 179 (2d Cir.2001) (stating that union's are given "room to make discretionary decisions and choices, even if those judgments are ultimately wrong"). The sole evidence Trigg points to as evincing "discrimination

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” or “bad faith” by the union is his claim (which is disputed by the union) that a union official told him to “shut up ... or get fired” when Trigg went to the official to complain about Seabrook's conduct. But this statement, standing alone, could not support an inference of bad faith or discrimination inasmuch as it could easily have been motivated by the official's desire to protect Trigg until he survived the probationary period of his employment and his complaints could be formally grieved. *Cf. Matsushita*, 475 U.S. at 586 (a party resisting summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts”).

[5] Finally, because the district court's dismissal of these claims was entirely appropriate, its decision to forgo exercising supplemental jurisdiction over Trigg's pendent claims under state and local law was correct, as well. *See Seabrook v. Jacobson*, 153 F.3d 70, 71-72 (2d Cir.1998).

The motion for sanctions is granted to the extent that printing costs for the production of the supplemental appendix will be paid by the appellant; the motion for sanctions is in other respects denied.

For the reasons set forth above, the judgment of the district court is **AFFIRMED**.

C.A.2 (N.Y.),2002.

Trigg v. New York City Transit Authority  
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**H**

Trigg v. New York City Transit Authority  
 E.D.N.Y.,2001.

United States District Court, E.D. New York.  
 Jason TRIGG, Plaintiff,

v.

NEW YORK CITY TRANSIT AUTHORITY;  
 William Seabrook; Donald Afflick, President,  
 American Federation of State, County and  
 Municipal Employees, AFL-CIO; District Council  
 37, Local 1655 Defendants.  
 No. 99-CV-4730 (ILG).

July 26, 2001.

Cinyere Okoronkwo, Exq., New York.  
 Dorothea Regal, Esq., Hoguet Newman & Regal,  
 LLP, New York.  
 Maureen Stampf, Esq., Vladeck, Waldman, Elias &  
 Engelhard, P.C., New York.

MEMORANDUM AND ORDER  
 GLASSER, District J.

## SUMMARY

\*1 Plaintiff Jason Trigg ("Trigg") worked for the New York City Transit Authority ("the Transit Authority") as an "Assistant Cashier Level 1" in 1998 and 1999. Trigg brought this action alleging twenty-five causes of action of which four federal and sixteen state or local actions remain against the Transit Authority, and four federal claims, a breach of duty of fair representation, and a host of state and local claims remain against the American Federation of State, County and Municipal Employees, AFL-CIO, District Council 37, Local 1655 ("the Union").<sup>FN1</sup>

FN1. Donald Afflick and the Union are

collectively referred to as "the Union Defendants."

At the outset, the court feels compelled to preface comment upon the Complaint by referring to Rule 8, Fed.R.Civ.P. which provides in essence that a complaint shall contain a short and plain statement of the court's jurisdiction, a short and plain statement of the claim alleging entitlement to relief, and a demand for judgment. This Complaint occupies 52 pages. The first 104 paragraphs, spread over 40 pages are devoted to the claim for relief and evince an egregious disregard for or misunderstanding of Rule 8. By stipulation, the plaintiff dismissed all his claims against Donald Afflick in his individual and official capacities. (Stampf Aff., Ex. N) William Seabrook ("Seabrook"), the individual defendant whose conduct is alleged to be the basis for this action, was never served.

Also by stipulation, the following causes of action against the Transit Authority were dismissed with prejudice: (1) aiding and abetting Seabrook's gender and race discrimination against plaintiff (3rd cause of action); (2) negligent supervision of Seabrook and another (4th cause of action); (3) negligent retention of Seabrook (5th cause of action); (4) wrongful discharge of plaintiff (8th cause of action); (5) aiding and abetting Seabrook's slander and slander *per se* of plaintiff (9th cause of action); (6) negligently liable for Seabrook's battery of plaintiff (10th cause of action); (7) aiding and abetting Seabrook's battery of plaintiff (10th cause of action); (8) negligently liable for Seabrook's assault of plaintiff (11th cause of action); (9) strict liability for Seabrook's assault of plaintiff (11th cause of action); (10) aiding and abetting Seabrook's assault of plaintiff (11th cause of action); (11) negligently liable for Seabrook's defamation of plaintiff (12th cause of action); (12) aiding and abetting Seabrook's defamation of plaintiff (12th cause of action); (13) negligently

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liable for Seabrook's intentional infliction of severe emotional distress of plaintiff (13th cause of action); (14) strict liability for Seabrook's intentional infliction of severe emotional distress on plaintiff (13th cause of action); (15) aiding and abetting Seabrook's intentional infliction of severe emotional distress on plaintiff (13th cause of action); (16) negligently liable for Seabrook's negligent infliction of emotional distress on plaintiff (14th cause of action); (17) strictly liable for Seabrook's negligent infliction of emotional distress on plaintiff (14th cause of action); (18) aiding and abetting Seabrook's negligent infliction of emotional distress on plaintiff (14th cause of action); (19) violations of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 based on race discrimination (21st cause of action); (20) aiding and abetting Seabrook's violations of federal, state, and local law (24th cause of action); and (21) negligence *per se* for violating one or more federal and state statutes (25th cause of action).

\*2 With respect to the Union defendants, the following causes of action were dismissed with prejudice by stipulation: (1) aiding and abetting Seabrook's violations of local laws prohibiting sexual orientation discrimination (1st cause of action); (2) aiding and abetting the Transit Authority's negligent supervision of Seabrook (4th cause of action); (3) aiding and abetting the Transit Authority's negligent retention of Seabrook (5th cause of action); (4) aiding and abetting the Transit Authority's slander and slander *per se* of plaintiff (9th cause of action); (5) aiding and abetting Seabrook's slander and slander *per se* of plaintiff (9th cause of action); (6) liability under 42 U.S.C. § 1981 (21st cause of action); (7) negligence *per se* (25th cause of action); and (8) all race discrimination claims arising under federal, state, or local laws.

A perusal of the foregoing reflects a pleading of several discrete wrongs embraced by one cause of action and the pleading of wrongs which are as yet unknown to the law of torts and not yet to be found in the lexicon of civil rights violations. The Transit Authority and the Union now bring their motions for summary judgment to dismiss the remaining

claims against them. For the reasons that follow, the court grants summary judgment in favor of the Transit Authority as to Trigg's Title VII, § 1983, § 1985(3), and Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 300bb-1, claims. The court also grants the Union's motion as to Trigg's breach of duty of fair representation, Title VII, and § 1985(3) claims.

### BACKGROUND

This acrimonious employment discrimination case, which essentially stems from two inappropriate and rude remarks by a co-worker directed at Trigg, has inexplicably spawned hundreds and hundreds of pages and untold hours of attorney and court time. The Transit Authority hired Trigg on July 6, 1998 as a probationary Associate Cashier, Level 1, and assigned him to the Maspeth, Queens coin processing facility. (Trigg.Aff.¶¶ 5-7) Seabrook, a long time Transit Authority employee, worked as a "Supervising Associate Cashier [Level] 2" in the department to which Trigg was assigned. (*See, e.g.*, Okoronkwo Aff., Ex. 4)

Trigg's troubles with Seabrook apparently first surfaced when Trigg orally complained to Iris English ("English"), Manager of the Maspeth coin facility, on December 23, 1998 that Seabrook scolded him in the locker room after Seabrook allegedly overheard Trigg tell another employee that he did not like the way Seabrook was treating him and that Trigg was documenting Seabrook's behavior. (*See* EEO Intake Interview, annexed as Ex. J to Regal Dec.) Seabrook called Trigg a "faggot ass" and said that "I want to kick your ass so bad. I'm gonna put my foot so far up your ass, your mother is not going to recognize you." (*See id.*) Trigg thereafter complained in writing of that remark to the Transit Authority's Revenue Division and to the Union. (*See* Okoronkwo Aff., Ex. 3) Trigg is a gay man, and he alleges that he never informed anyone at the Transit Authority that he is gay. (*See* Trigg Aff. ¶ 13)

\*3 In his intake interview with the Transit Authority's Equal Employment Officer regarding

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the December 23rd incident, Trigg complained for the first time that more than five months earlier Seabrook told him on his first day of work on July 7, 1998, while he was carrying a 45 pound bag of coins, that he needed to carry them "more manly" and "you have to carry those bags with more strength ." (See EEOC Intake Interview) Soon after receiving Trigg's complaint, the Transit Authority Revenue Department conducted an investigation into Seabrook's alleged harassment and filed a report with Cross Siclare ("Siclar"), Director of Financial Operations, Revenue Control Division, on January 22, 1999. The investigators concluded that the incident in the locker room on December 23, 1998 occurred substantially as related by Trigg, and that Seabrook engaged in unprofessional conduct and used inappropriate language. (Transit Authority Mem. dated Jan. 22, 1999, annexed as Ex. K to Regal Dec.) The investigators also concluded that Seabrook's conduct did not constitute sexual harassment as it is defined in the Transit Authority's Sexual Harassment Policy because "there was no evidence that [ ] Seabrook made repeated sexual advances, flirtations or propositions to [ ] Trigg, nor did [ ] Seabrook make repeated commentaries about [ ] Trigg's body or conduct, or display sexually suggestive objects or pictures." (See *id.*) Key to this conclusion was the investigation's "failure to uncover a pattern or series [of] repeated incidents or behavior." (*Id.*)

Trigg complained to Melroy Slowe ("Slowe"), a Union representative, as early as September 1998 about Seabrook's harassing conduct. (See Trigg Dep., 331, annexed as Ex. 46 to Okoronkwo Aff.) The Union, however, took no action and Trigg claims that Slowe advised him not to complain because he was a probationary employee and would be fired for complaining. (See *id.* at 329, 345) Trigg complained again to Slowe in January 1999, but this time about the December 23, 1998 incident. (See *id.*, at 359) At no time did the Union grieve any of Trigg's complaints lodged with Slowe.

In addition to his difficulties with Seabrook, Trigg also accumulated a substantial lateness record during his employment with the Transit Authority. As of February 5, 1999, Trigg had accumulated 26

unexcused latenesses within a seven month period. ( See Mem. Dated Feb. 5, 1999 ("Lateness Memo"), annexed as Ex. 5 to Okoronkwo Aff.) The Transit Authority counseled Trigg on the importance of timeliness, and informed him that continued lateness could result in his dismissal. (*Id.*) The Transit Authority counseled three women on lateness in addition to Trigg on February 5, 1999. (Kriz Dep., 51, annexed as Ex. E to Regal Dec.) Trigg apparently refused to acknowledge that he was counseled. (See Lateness Memo) Trigg was again cautioned about his lateness on February 17. Prior to the last day on which he reported to work, Trigg had accumulated 34 unexcused latenesses. (Trigg Employee Record, annexed as Ex. 8 to Okoronkwo Aff.)

\*4 On March 3, 1999, Trigg called English to inform her that he would not be at work that day because his step-father had a heart attack and he wanted to stay with his mother.<sup>FN2</sup> When English asked Trigg whether he would be at work the following day, he responded that he was unsure. In any case, English informed Trigg that he should get a note from his step-father's hospital or doctor. Trigg neither came to work nor called to explain his absence the following day. (See Regal Dec., Ex. O) Trigg only called English on the afternoon of Friday, March 5 to say that he was not sure if he would be at work on Monday, March 8. (*Id.*) Trigg did not call at all on March 8, but again tardily called English on the afternoon of March 9, this time to say that he did not know when he would be returning to work, and that the reason he had not previously come to work was that he was waiting for something to be "done" about Seabrook. (*Id.*) English consulted with Robert Mesnard, Director of Labor Relations, and Siclare about Trigg's absences. As a result, English called Trigg on March 10 and directed him to return to work on March 11 or else his employment would be terminated. English also informed Trigg that the Transit Authority had in fact taken action against Seabrook. (See Regal Dec., Ex. P) Despite English's directive, Trigg did not report to work or call anyone to advise of his intent to be absent on March 11, 1999. In a letter dated March 12, 1999, the Transit Authority terminated Trigg effective March

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11, 1999. (See Regal Dec., Ex. Q) Between March 3 and March 11, 1999, the Transit Authority documented its communications with Trigg concerning his unsubstantiated absences, absence without leave, and failure to return as instructed. (See Okoronkwo Aff. Ex. 7) The Transit Authority's lateness policy provides that "employees who continue to have unexcused lateness[es] will be subject to disciplinary action, up to and including dismissal." (Regal Dec., Ex. L; English Dep., 23, annexed as Ex. C to Regal Dec.)

FN2. It is interesting to note, however, that Trigg testified in his deposition that his mother and step-father live in California. (Trigg Dep., 87, 90, annexed as Ex. A to Regal Dec.)

## DISCUSSION

### I. Summary Judgment Standard

To attempt to review the voluminous treatise, law review, and judicial literature on summary judgment would be as foolhardy as it would be superfluous. Suffice it to be cognizant of the observation made by the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986):

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' ... Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

\*5 In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), the Court said:

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' ... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'

(emphasis in original).

And finally, in *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986), the Court again emphasized that granting a motion for summary judgment requires that there be no *genuine* issue of *material* fact. "Only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment .... [S]ummary judgment will not lie if a dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court went on to instruct that "If the evidence is merely colorable, ... or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

### II. Claims against the Transit Authority

Trigg alleges four federal causes of action against the Transit Authority, each of which is addressed in turn.

#### A. Title VII

Title VII of the Civil Rights Act of 1964 makes it "unlawful for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Trigg alleges Title VII violations premised on three theories; hostile work environment, disparate treatment, and retaliation.<sup>FN3</sup> The Transit Authority characterizes Trigg's Title VII claims as sexual orientation discrimination claims, and moves

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for summary judgment because discrimination based on sexual orientation is not actionable under Title VII. In response, Trigg insists that his claims are based on gender stereotype discrimination—that is, his alleged failure to exhibit his masculinity in a stereotypical fashion. To the extent Trigg seeks redress under Title VII for sexual orientation discrimination, the Transit Authority's motion for summary judgment must be granted because the Court of Appeals for the Second Circuit has held that Title VII does not prohibit discrimination based on sexual orientation. See *Simonton v. Runyon* 232 F.3d 33, 34 (2d Cir.2000).

FN3. Trigg does not specify which types of discrimination recognized under Title VII he suffered in his Amended Complaint, but he did articulate these three at oral argument.

The Transit Authority, in its reply brief, contends that Trigg's portrayal of his claim as impermissible gender stereotyping is a patently obvious effort to escape the holding of *Simonton*. Like Trigg, the plaintiff in *Simonton* was the target of verbal assaults, and after foreclosing Title VII redress based on sexual orientation discrimination, the Second Circuit addressed sexual stereotype discrimination. Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as does Trigg, the plaintiff in *Simonton* also argued that he was a victim of gender stereotype discrimination. The Supreme Court has described gender stereotyping, in discussing a female plaintiff, in the following manner: “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Price Waterhouse*, 490 U.S. at 250. In *Price Waterhouse*, the plaintiff was denied partnership in an accounting firm in part because she was “macho,” “over-compensated for being a woman,” needed “a course at charm school,” and was “a lady using foul language.” *Id.* at 235. The Court found that Hopkins had presented sufficient proof that she was denied a partnership because of her gender and not because of some other factor. *Id.* at 250. The Second Circuit has interpreted *Price Waterhouse* as “imply[ing]

that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex.” *Simonton*, 232 F.3d at 38. Yet, the Circuit Court also issued a clear warning that “[t]his theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” *Id.* Lacking a sufficiently pled gender stereotype discrimination claim, the Second Circuit in *Simonton* refused to consider the merits of such an argument. *Id.*

\*6 In contrast to Trigg's assertion that he is a victim of gender stereotype discrimination, his Amended Complaint is rife with references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality. The Amended Complaint reads in part, “Mr. Seabrook called Mr. Trigg names associated with bigotry toward homosexual men. (i) Mr. Seabrook called Mr. Trigg a ‘fagot,’ ... ‘faggot ass,’ ... ‘sissy’ ... [and] Mr. Seabrook informed Mr. Trigg that he would have to learn how to carry bags of nickels ‘more manly.’” (Am.Compl.¶ 19(f)(i)-(iv)) The Amended Complaint repeats, almost mantralike, the phrase “Mr. Seabrook had a bigoted view of homosexuals.” Only in paragraphs 31, 43, and 44 of a 190 paragraph Amended Complaint does Trigg suggest that he was the object of discrimination based on the fact that he is a male. In his deposition testimony, Trigg complained of both sexual orientation discrimination and gender stereotype discrimination.

Q. What exactly did you tell [Slowe] about the problem with Mr. Seabrook?

A. I told him I needed some help because Mr. Seabrook was making comments that were sexually harassing, that were *about my sexual orientation*, and I felt it was inappropriate.

...

Q. What thing did you tell Mr. Slowe that you believed Seabrook was doing that was sexually harassing, first of all?

A. I told him that he had told me I wasn't going to make it in the job if I was not more manly. I told him that this was very threatening to me. I told him

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that he makes me wait until he does things for women first.... I told him that I could be by my own self doing my job exactly how I'm supposed to do and he would come up and start making comments about the way I was working, *comparing it to women ....*

(Trigg Dep., 331-334, annexed as Ex. 46 to Okoronkwo Aff.) (emphasis added)

This excerpt of Trigg's own words and of his own perception of the import of Seabrook's taunts, without more, compel the conclusion that sexual orientation and not gender stereotyping are the *sine qua non* of his grievance. It was "about my sexual orientation" that Seabrook was commenting upon, Trigg testified. And, assuming without deciding that Seabrook's comments about the way Trigg was working in comparison to women and about being more manly could be construed as gender stereotypical, they are the "sporadic use of abusive language, gender-related jokes and occasional teasing," which when properly applied, Title VII filters out as they are too isolated to amount to a change in the terms and conditions of employment. See B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992), quoted in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Trigg nonetheless insists that there exist triable issues of fact as to whether Seabrook's behavior was offensive, hostile, and gender-motivated. The Transit Authority urges the court to follow the Seventh Circuit in *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir.2000), *cert. denied*, 121 S.Ct. 1656 (2001), which affirmed the grant of summary judgment in favor of defendant and found that plaintiff was harassed not because of his gender but because of his sexual orientation since his co-workers perceived him as too feminine to fit the male image at Ford Motor Company. The Seventh Circuit found that vulgar statements such as "little bitch," "gay ass," and "Aids [sic] kills faggots dead" directed at plaintiff were motivated, not by plaintiff's gender, but because of acrimony over work-related disputes and because of his apparent homosexuality. *Id.* at 1085. An objective reading of

the words uttered by Seabrook about which Trigg complains drives to the conclusion that it is his homosexuality at which they are aimed and not his gender. If the lack of civility, boorishness, or intolerance of Seabrook is deemed to be discriminatory, it is discriminatory against Trigg because he is a homosexual and not because he is a man.

\*7 Setting aside for a moment Trigg's theories of discrimination, the court must first determine whether the Transit Authority may be held liable for the acts of Seabrook based on the theory of *respondeat superior*. Guided by the federal common law of agency, the Supreme Court has held that employers are presumptively liable under Title VII for acts of harassment perpetrated by an employee's "supervisor." See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages ...." *Burlington Industries*, 524 U.S. at 765. The employer may affirmatively defend by demonstrating by a preponderance of the evidence: " (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* Conversely, the harassing acts of a co-worker or "co-employee" are generally not imputed to the employer " 'unless the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it.' " *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir.1998) (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir.1995)).

Thus, the Transit Authority's liability turns on whether Seabrook was Trigg's "supervisor" or "co-employee." The Second Circuit has not voiced

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an opinion on the criteria used to identify a supervisor versus a co-employee, but the Seventh Circuit has adopted the following sound statement on how to differentiate the two:

[i]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

*Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir.1998).

The Transit Authority insists that Seabrook is a co-employee who functioned like the foreman of a crew, and that he is a supervisor in name only. Trigg takes the opposite view. Seabrook was a supervisor in the sense that he oversaw the daily work assignments of other cashiers in the coin room, dealt with operational issues in the coin room, and signed off on each of the cashiers' work at the end of each day. (Siclare Aff. ¶ 3) Siclare stated in an affidavit that Seabrook did not have the authority to change or alter the terms or conditions of Trigg's employment. (*Id.*) The record before the court is devoid of any evidence to the contrary, and the court concludes that Seabrook must be considered a co-employee within the meaning of Title VII.

\*8 Next, to even consider the Transit Authority's liability based on Seabrook's actions as a co-employee, the court must find that the Transit Authority either provided no reasonable avenue of complaint or knew of the harassment against Trigg but did nothing about it. See *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir.1998). No reasonable jury could conclude on the evidence before the court that the Transit Authority failed to provide its employees a reasonable avenue of complaint or otherwise failed to act despite its knowledge of the allegations against Seabrook. Indeed, the Transit Authority acted forcefully and in a timely manner in response to Trigg's complains. Within one month of receiving Trigg's letter of

December 23, 1998, the Transit Authority completed an investigation of the allegations against Seabrook and issued a report in which it concluded that Seabrook's behavior was hostile and unprofessional, but "did not meet the criteria to establish a case for sexual harassment." (Transit Authority Mem. dated Jan. 22, 1999, annexed as Ex. K to Regal Dec.) Thereafter, Alan Putre, Assistant Chief Revenue Officer, Division of Revenue, recommended to Christopher Johnson, Senior Director, Office of Labor Relations, that Seabrook be summoned to a Trial Board Hearing on charges of sexual harassment related to the December 23, 1998 incident. (Transit Authority Mem. dated Feb. 25, 1999, annexed as Ex. R to Regal Dec.) Inexplicably, Trigg refused to testify at a hearing against Seabrook which significantly limited the Transit Authority's ability to seek Seabrook's discharge. The Transit Authority ultimately settled with Seabrook in July 1999, and demoted him to an Associate Cashier II with a 25 percent reduction in salary. (See Ellis Aff. ¶¶ 4-5; Stipulation of Settlement, annexed as Ex. F to Stampff Aff.) Accordingly, the Transit Authority may not be held liable for Seabrook's harassment of Trigg because Seabrook was not a supervisor, and for the additional reason that the Transit Authority comprehensively responded to Trigg's complaints.

#### i. Hostile Work Environment

Trigg seeks to hold the Transit Authority liable for the conduct of Seabrook who, he alleges, created a hostile work environment. Such an environment is created when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citation omitted). The existence of such an environment requires a "workplace that is permeated with 'discriminatory intimidation, ridicule and insult' ... that is 'sufficiently severe or pervasive to alter the condition of the victim's employment....'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank*, 477 U.S. at 65, 67).

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Even if Seabrook's acts could be imputed to the Transit Authority, which has already been determined to the contrary, Trigg did not work in a hostile work environment as *Harris* makes plain, and in any event, Seabrook's two boorish comments could not conceivably be regarded as anything other than the isolated, sporadic and gender-related utterances of an intolerant, narrow-minded man. Trigg insists that he was subjected to "unabated" harassment, and was "incessantly" compared to female coworkers. (Pl.'s Mem. of Law in Opp'n to Transit Authority's Mot. for Summ. J., 3, 6) These purportedly numerous and unremitting hostilities are unsubstantiated. In his deposition, Trigg could not specifically identify any harassing statements made by Seabrook between December 24, 1998 and March 3, 1999 despite insisting that Seabrook targeted him. (Trigg Dep., 19-21, annexed as Ex. B to Regal Reply Dec.) Trigg also relies on two of his co-worker's statements made during the Transit Authority's investigation of his claim between December 1998 to January 1999 to support the contention that Seabrook's taunts were incessant. Katherine Kwok recalled Seabrook telling Trigg to carry a money bag "like a man." (Kwok Interview Dated Jan. 14, 1999, annexed as Ex. 4 to Okoronkwo Aff.) Nancy Brown remembered an incident where Seabrook commented to Trigg that "the women can pack a skid better." (Brown Interview Dated Jan. 14, 1999, annexed as Ex. 4 to Okoronkwo Aff.)

\*9 Without more, the court must find that Trigg essentially complains of two incidents, the July 7, 1998 "manly" comment and the December 23, 1998 locker room incident. Although Seabrook's behavior during both episodes was reprehensible, the incidents are neither sufficiently severe nor pervasive to establish a hostile working environment claim. See *Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir.1999). That the two or three isolated occasions at which Seabrook's comments were made do not call Title VII into play is the teaching of the Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), which is particularly applicable here. ... Title VII does not prohibit 'genuine but innocuous differences in the ways men and women

routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing,' ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.' We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.

*Id.* (citations omitted). Therefore, the Transit Authority's motion for summary judgment as to Trigg's hostile work environment claim is granted.

#### ii. *Disparate Treatment*

Trigg's disparate treatment claim is premised on imputing Seabrook's harassing acts to the Transit Authority, and because the court has already determined that it would be inappropriate to do so, its motion for summary judgment on Trigg's disparate treatment claim is also granted.

#### iii. *Retaliation*

To state a claim of retaliation, an employee must show: "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 134 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999) (internal quotation omitted). The Transit Authority argues that Trigg cannot demonstrate a causal connection between his complaint about Seabrook and his termination. In his opposition papers, Trigg identifies five additional adverse employment actions: the Transit Authority's February 17, 1999

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reprimand for lateness; its denial of his transfer request on March 2, 1999, its withdrawal of authorized leave for his absences of March 3 to March 10, 1999; its post-discharge efforts to deny Trigg unemployment benefits; and its post-discharge fabrication of a performance evaluation.

**\*10** The court first looks to the employment actions allegedly taken against Trigg to determine whether they satisfy the second element of a retaliation claim. An employment action is adverse if it causes the plaintiff to endure a "materially adverse change" in the terms and conditions of employment. *See Galabya v. New York City Bd of Educ.*, 202 F.3d 636, 640 (2d Cir.2000); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997). Neither the reprimand, the denial of Trigg's transfer request, nor the effort to deny unemployment benefits amount to "adverse employment actions." *See, e.g., Bennett v. Watson Wyatt & Co.*, No. 00 CIV. 491, 2001 WL 267001, at \* 7 (S.D.N.Y. March 19, 2001) (collecting cases and stating that repeated reprimands for lateness alone could not constitute an adverse employment action); *Duncan v. Shalala*, No. 97 CV 3607, 2000 WL 1772655, at \*4 (E.D.N.Y. Nov. 29, 2000) (finding denial of plaintiff's transfer request not to rise to the level of an adverse employment action); *Roman v. Cornell Univ.*, 53 F.Supp.2d 223, 245 (N.D.N.Y.1999) (in the context of a former employee's application for unemployment benefits, opposition to the application for benefits, particularly when that employee has been dismissed for cause, is not an adverse employment action).

In support of his allegation that the Transit Authority engaged in retaliatory post-discharge fabrications of his employment record, Trigg highlights the fact that the Transit Authority evaluated him over an eleven month period even though he only worked for eight months and that he was rated "unsatisfactory" in several categories. Negative evaluations alone, without any accompanying adverse consequence, are not adverse employment actions. *See Pellei v. International Planned Parenthood Federation*, No. 96 Civ. 7014, 1999 U.S. Dist. LEXIS 15338 at \*33

(S.D.N.Y. Sept., 30, 1999); *Castro v. New York City Bd. of Educ. Personnel Dir.*, No. 96 Civ. 6314, 1998 U.S. Dist. LEXIS 2863 at \*22 (S.D.N.Y. March 11, 1998). Trigg does not allege any tangible loss or other adverse consequence attendant to the negative evaluation. Regarding the Transit Authority's alleged withdrawal of its authorized leave for Trigg's absences of March 3 to March 10, 1999, there is no indication that it ever authorized Trigg's absence or that Trigg's absence was otherwise excused. For the six work days between March 3 and March 10, 1999, Trigg did not notify the Transit Authority on March 4 or 8 of his intention to be absent nor had he substantiated any of his absences as of March 10. That the Transit Authority labeled Trigg's absences between March 3 and 10 as "without leave" is an accurate reflection of his status, not a retaliatory act. In sum, the allegation that the Transit Authority withdrew previously authorized leave is unsubstantiated, and as such cannot constitute an adverse employment action.

Turning to Trigg's termination, which is clearly an adverse employment action, the court must conclude that there is no nexus between his complaints about Seabrook and his termination. The Transit Authority credibly asserts that it dismissed Trigg for his record of excessive lateness, failure to report to work for a week in March 1999, and for disobeying instructions to return to work on March 11, 1999. As Siclare simply stated in her deposition:

**\*11 Q.** What was the basis of the decision to fire Mr. Trigg?

A. Mr. Trigg had been verbally warned of his lateness, counseled of his lateness in writing, warned again in writing, and ordered to return to work or he would be terminated. He did not return, and he was fired. He was also in a probationary status and it was judged that he could be fired for those offenses.

Q. Were there any further grounds on which the decision to fire him was made?

A. No.

(Siclar Dep., 68 annexed as Ex. B to Regal Decl.)

The Transit Authority has persuasively established

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that it terminated Trigg for his failure to comply with its lateness policy which amounted to a failure to complete his probationary employment period. Trigg, however, has not proffered any evidence that reasonably supports a finding of any unlawful discrimination, and certainly not gender discrimination, surrounding his termination. Trigg contends that he was discharged within two days of informing the Transit Authority that he desired to seek legal counsel for his issues with Seabrook. This temporal proximity, without more, does not satisfy the causal nexus necessary for a retaliation claim. See *Philippeaux v. Fashion Inst. of Technology*, No. 93 Civ. 4438, 1996 U.S. Dist. LEXIS 4397 at \*26 (S.D.N.Y. April 8, 1996). Since Trigg cannot offer a *prima facie* case of retaliation based on his termination, the court must grant the Transit Authority's motion for summary judgment.

#### B. § 1983

Section 1983 provides in relevant part that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured...” 42 U.S.C. § 1983. Just as the Transit Authority may not be held liable under Title VII for the harassing acts of Seabrook, it may not be held liable under § 1983 solely under a theory of *respondeat superior*. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). In order to establish municipal liability for unconstitutional acts by municipal employees, a plaintiff must show that the violation of his constitutional rights resulted from a municipal policy, custom, or practice. *Id.*; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817 (1985). Trigg attempts, unpersuasively, to allege a custom or practice by suggesting that Trigg's superiors lacked sufficient sexual harassment training. This unsubstantiated assertion does not support an allegation of municipal custom or practice, and the court must grant the Transit Authority's motion for summary judgment on Trigg's § 1983 claim. See *Neighbour v. Covert*, 68 F.3d 1508, 1512 (2d

Cir.1995), *cert. denied*, 516 U.S. 1174 (1996) (“The mere allegation that the municipality failed to train its employees properly is insufficient to establish a municipal custom or policy.”) (citing *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir.1993)).

#### C. § 1985(3)

\*12 Section 1985(3) provides a remedy where “two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ...” 42 U.S.C. § 1985(3). The elements of a § 1985(3) claim are: (1) a conspiracy; (2) for the purpose of depriving any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury to the plaintiff in his person or property or deprivation of any right of a citizen of the United States. *Brown v. City of Oneonta*, 221 F.3d 329, 341 (2d Cir.1999). The conspiracy must be motivated by “some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.” *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993) (citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 829 (1983)). Trigg alleges that the Union Defendants and the Transit Authority conspired to deprive him of the equal protection of the laws because of the Transit Authority's “gender-based disparate response to [his] Title VII sexual harassment complaint.” (Pl.'s Mem. of Law in Opp'n to Transit Authority's Mot. for Summ. J., 27)

The Transit Authority argues that it is entitled to summary judgment on this claim because Trigg has not alleged a conspiracy motivated by class-based animus and there is no underlying substantive wrong. The Transit Authority is correct that sexual orientation discrimination will not support a § 1985(3) claim, but Trigg has in his opposition papers alleged gender stereotype based discrimination. See *United Bhd. of Carpenters*,

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*Local 610 v. Scott*, 463 U.S. at 835 (“[t]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”); *Segreto v. Kirschner*, 977 F.Supp. 553, 565 (D.Conn.1997) (noting that discrimination against homosexuals would not satisfy the class-based animus requirement of § 1985(3)). Even if Trigg seeks to use § 1985(3) as a remedy for gender stereotype discrimination, the court must dismiss Trigg’s § 1985(3) claim because neither his Title VII claim nor his § 1983 claim will support such a remedy. Title VII employment discrimination claims are properly pursued under that statutory scheme. See *Great American Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979); see also *True v. New York State Dept. of Correctional Services*, 613 F.Supp. 27, 32 (W.D.N.Y.1984) (“[P]laintiff has failed to plead a conspiracy regarding a federally protectable interest other than the discrimination in employment allegations which must be enforced under Title VII and not under section 1985(3).”). Since, as previously discussed, Trigg’s § 1983 claim is itself deficient, it is likewise insufficient to sustain a § 1985(3) claim. Consequently, the court is compelled to grant the Transit Authority’s motion for summary judgment on Trigg’s § 1985(3) claim.

#### D. COBRA

\*13 Since there is no private right of action for damages under COBRA, Trigg’s eighteenth cause of action for “violations of his federal rights secured under COBRA,” (Am.Compl.¶ 166), must be dismissed. See *Anderson v. Aurora Township*, No. 97 C 2477, 1997 WL 534265 at \*6 (N.D.Ill. Aug. 20, 1997).

#### III. Claims Against the Union Defendants

Trigg’s main claim against the Union is the allegation that it failed to fairly represent him with respect to his grievances against the Transit Authority. The court addresses this state law claim and Trigg’s federal claims below.

#### A. Breach of Duty of Fair Representation

Trigg alleges that the Union breached its duty of fair representation for failing to respond to complaints about Seabrook’s harassing behavior, and to grieve his termination. A breach of the duty of fair representation occurs “ ‘only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.’ ” *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372 (1990) (citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). The Union moves for summary judgment as to Trigg’s breach of duty to represent claim because it is time barred, and because in any event it did not breach such a duty. The Union is a municipal union organized under the New York State Fair Employment Act and any fair representation claim asserted against it is governed by New York Civil Service Law § 209-a (Consol.2000). Duty of fair representation claims asserted by municipal employees such as Trigg against their unions are governed by a four month statute of limitations. See N.Y. C.P.L.R. § 217(2)(a) (Consol.2000). The four month limitations period begins to run when: (1) the plaintiff knew or should have known of the union’s breach of its duty of fair representation, or (2) the plaintiff suffered harm from that breach, whichever is later. *Id.* Trigg initially commenced this action in New York Supreme Court, County of Queens when he filed a complaint on August 2, 1999. (See Compl., annexed as Ex. O to Stamp Aff.)

The Union insists that Trigg’s claim is time barred because the statute of limitations began to run when he received his termination letter on March 12, 1999. Trigg asserts that his claim is not time barred because: (1) a six month statute of limitations should apply since the Union is in receivership and is being managed by AFSCME, a national labor union, and (2) the limitations period did not start to run until May 26, 1999 because only then did he learn that the Union would not grieve his complaints. Trigg has provided no authority for his assertion that because the Union is in receivership and is being managed by AFSCME the court should apply a six month statute of limitations period nor is the relevance of that fact, if it were established,

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apparent. Thus, the court concludes that the four month statute of limitations is controlling. *See* N . Y. C.P.L.R. § 217(2)(a).

\*14 Trigg alleges that in September 1998 he reported Seabrook's "manliness" comment to Slowe who warned Trigg that if he complained about sexual harassment while on probation, he would be terminated. (Trigg Dep., 326, annexed as Ex. 46 to Okoronkwo Aff.) In January 1999, Trigg again requested Slowe's assistance, but "[Slowe] did nothing." (Trigg Aff. ¶ 29, Trigg Dep., 497 annexed as Ex. J to Stamp Aff.) Trigg argues that he did not know that the Union had breached its duty of fair representation based on his harassment complaints, and his termination, until the Union affirmatively denied his requests on May 26, 1999. The Union persuasively contends that Trigg should have known of any breach by his termination date because as early as September 1998 Slowe told Trigg that he should wait until the end of his probation period before filing a grievance. Reading all inferences in Trigg's favor, his breach of duty of fair representation claim based on his complaints of Seabrook's harassment are time barred.

In contrast, Trigg's claim of breach based on the Union's alleged failure to grieve his termination is timely. Trigg wrote to the Union at least twice after his termination, specifically on April 19 and May 26, 1999, to request that the Union grieve his dismissal. (*See* Okoronkwo Aff. Ex. 38) Absent any evidence to the contrary, all reasonable inferences suggest that only on May 26, 1999 did Trigg know the Union would not grieve his termination. (*See*, Trigg Dep., 495, annexed as Ex. J to Stamp Aff.)

Even though this aspect of Trigg's breach of the duty claim is timely, the Union's motion for summary judgment must be granted because it did not breach its duty. The Union argues that it did not act arbitrarily, discriminatorily, or in bad faith for the simple reason that it could not grieve Trigg's discharge because he was a probationary employee at the time of discharge and the discharge of probationary employees is not a grievable issue under the collective bargaining agreement. (*See* Afflick Dep. 70, annexed as Ex. M to Stamp Aff.)

At oral argument, the Union further explained that the collective bargaining agreement with the Transit Authority does not explicitly prohibit the grievance of dismissals of probationary employees, but it was the established practice of the parties. Since the Union acted in accordance with past practice, it cannot be said to have acted arbitrarily. *See Giordano v. Local 804, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 634 F.Supp. 953, 956 (S.D.N.Y.1986) (union's reliance on past practice did not constitute bad faith or arbitrariness); *see also, Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir.1981). The Union has not breached its duty of fair representation, and its motion for summary judgment is hereby granted.

#### B. Discrimination

Trigg alleges in his Amended Complaint that the Union discriminated and retaliated against him on the basis of his gender and sexual orientation in violation of federal, state, and local laws. (Am.Compl.¶¶ 111-120, 164-65) The Union's unlawful discriminatory behavior, Trigg alleges, was its failure to grieve his complaints about Seabrook's behavior and his discharge. (*See* Trigg Dep, 346-47) Thus, Trigg's Title VII claim is essentially a breach of duty of fair representation claim. A union may be liable for failing to represent some members in the same way or to the same extent as others when the distinction is based on a prohibited criterion such as gender or race. *See L.N. McDonald v. Sante Fe Trail Trans. Co.*, 427 U.S. 273, 285 (1976). The parties agree that Title VII liability may be premised on a breach of duty of fair representation based on gender, but the Union insists that Trigg may only prevail upon also showing that discriminatory animus motivated the breach. *Compare Nweke v. Prudential Ins. Co. of America*, 25 F.Supp.2d 203, 221 (S.D.N.Y.1998) (requiring a show of discriminatory animus) *with Agosto v. Correctional Officers Benevolent Ass'n*, 107 F.Supp.2d 294, 305 (S.D.N.Y.2000) (requiring only a breach of duty of fair representation to satisfy Title VII). Regardless of which test is to be applied, the court must dismiss Trigg's Title VII

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claim against the Union because, as previously stated, it did not act arbitrarily since Trigg's complaints were not grievable under the Union's past practices with its members and the Transit Authority.

\*15 As for Trigg's retaliation claim, he has utterly failed to identify any material issues of fact satisfying the elements of a retaliation claim, let alone allege the elements of this cause of action. Accordingly, the Union's motion for summary judgment on all of Trigg's federal discrimination claims is granted. Trigg's claims against the Union for aiding and abetting the Transit Authority and Seabrook's pattern and practice of race, gender, and sexual orientation discrimination is so patently frivolous as to warrant no discussion.

#### C. § 1985(3)

The court must also grant the Union's motion for summary judgment on Trigg's § 1985(3) claim because § 1985(3)'s remedial powers may not be invoked to redress alleged Title VII injuries. *See Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *see also True v. New York Ste Dept. of Correctional Services*, 613 F.Supp. 27, 32 (W.D.N.Y.1984) (“[P]laintiff has failed to plead a conspiracy regarding a federally protectable interest other than the discrimination in employment allegations which must be enforced under Title VII and not under section 1985(3) .”). Consequently, the Union's motion for summary judgment is granted as to Trigg's § 1985(3) claim.

#### IV. Supplemental Jurisdiction Over State Law Claims

Finally, the court declines to exercise jurisdiction over Trigg's remaining state and local law claims against the Transit Authority and the Union. A district court has broad discretion to decide whether to exercise its supplemental jurisdiction over state claims. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966). Having dismissed Trigg's federal claims and his New York

statutory breach of duty to fair representation claim, the court declines to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c)(3). *See Dunton v. Suffolk County*, 729 F.2d 903, 911 (2d Cir.1984), *amended*, 748 F.2d 69 (2d Cir.1984).

#### CONCLUSION

For all of the foregoing reasons, the Transit Authority's motion for summary judgment is granted as to Trigg's Title VII, § 1983, § 1985(3), and COBRA claims, and the Union's motion for summary judgment is granted as to Trigg's breach of duty of fair representation, Title VII, and § 1985(3) claims. The court declines to exercise jurisdiction over Trigg's remaining state and local law claims against the Transit Authority and the Union.

SO ORDERED.

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