

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH GIBSON,

Plaintiff,

v.

WYETH PHARMACEUTICALS, INC.,
and PATRICIA STALTER,

Defendants.

07-CV-946 (SCR) (GAY)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
I. BACKGROUND	2
II. STALTER’S REMARK ON OCTOBER 26, 2004.....	2
III. STALTER’S REQUEST THAT GIBSON WORK A FEW HOURS OF OVERTIME.....	5
IV. GIBSON’S SUSPENSION FOR SLEEPING ON THE JOB IN MARCH 2005.....	6
V. GIBSON’S WARNING FOR VIOLATING SOPs IN FEBRUARY 2006	6
ARGUMENT.....	7
I. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON’S DISCRIMINATION CLAIMS.....	7
A. Overtime On One Day As Required By The Union Contract	9
B. Suspension For Sleeping On The Job In March 2005	10
C. Warning For Violating SOPs in February 2006	14
II. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON’S RETALIATION CLAIMS	15
A. Overtime On One Day Pursuant To Union Contract.....	16
B. Suspension For Sleeping On The Job In March 2005	17
C. Warning For Violating SOPs in February 2006	18
III. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON’S HOSTILE WORK ENVIRONMENT CLAIM.....	20
CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

	Page
<i>Alfano v. Costello</i> , 294 F.3d 365 (2d Cir. 2002).....	20
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	7
<i>Augustin v. Yale Club</i> , 2006 WL 2690289 (S.D.N.Y. Sept. 15, 2006), <i>aff'd</i> , 274 Fed. Appx. 76 (2d Cir. 2008).....	21
<i>Bern v. United Mercantile Agencies, Inc.</i> , 942 F. Supp. 217 (S.D.N.Y. 1996)	12
<i>Blake v. Potter</i> , 2007 WL 2815637 (S.D.N.Y. Sept. 25, 2007).....	15
<i>Brown v. Middaugh</i> , 41 F. Supp. 2d 172 (N.D.N.Y. 1999).....	21
<i>Burlington Industries v. Ellerth</i> , 524 U.S. 742 (1998).....	24
<i>Burlington Northern & Santa Fe Railway Co. v. White</i> , 548 U.S. 53 (2006).....	15, 16, 18
<i>Butts v. New York City Dept. of Housing</i> , 2007 WL 259937 (S.D.N.Y. 2007).....	15, 16
<i>Caridad v. Metro-North Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 1999).....	24
<i>Carter v. Cornell Univ.</i> , 976 F. Supp. 224 (S.D.N.Y. 1997), <i>aff'd</i> , 159 F.3d 1345 (2d Cir. 1998)	21
<i>Chang v. Safe Horizons</i> , 254 Fed. Appx. 838, 2007 WL 3254414 (2d Cir. 2007).....	18
<i>Clark County Sch. Dist. v. Breeden</i> , 532 U.S. 268 (2001).....	17, 19

Cruz v. Coach Stores, Inc.,
202 F.3d, 560 (2d Cir. 2000).....20

Cunningham v. Consolidated Edison, Inc.,
2006 WL 842914 (E.D.N.Y. Mar. 28, 2006).....16

Daniels v. Health Ins. Plan of Greater N.Y.,
2007 WL 27115 (S.D.N.Y. Jan. 4, 2007)21

Danzer v. Norden Sys., Inc.,
151 F.3d 50 (2d Cir. 1998).....12

Dorrilus v. St. Rose's Home,
234 F. Supp. 2d 326 (S.D.N.Y. 2002).....21

Dobrynio v. Central Hudson Gas & Electric Corp.,
419 F. Supp.2d 557 (S.D.N.Y. 2006).....10

Faragher v. City of Boca Raton,
524 U.S. 775 (1998).....21

Galabya v. New York City Bd. of Educ.,
202 F.3d 636 (2d Cir. 2000).....9, 10

Hannon v. Wilson Greatbatch, Ltd.,
2002 WL 1012971 (W.D.N.Y. Apr. 24, 2002)21

Harris v. Forklift Sys., Inc.,
510 U.S. 17 (1993).....20

Hill v. Rayboy-Brauestein,
467 F. Supp. 2d 336 (S.D.N.Y. 2006).....21

Hollander v. American Cyanamid Co.,
895 F.2d 80 (2d Cir. 1990).....18, 19

James v. Newsweek,
1999 WL 796173 (S.D.N.Y. Sept. 30, 2006),
aff'd, 213 F.3d 626 (2d Cir. 2000)17

Johnson v. County of Nassau,
480 F. Supp. 2d 581 (E.D.N.Y. 2007)13

Johnson v. Palma,
931 F.2d 203 (2d Cir. 1991).....16

Joseph v. Leavitt,
465 F.3d 87 (2d Cir. 2006).....10

Jute v. Hamilton Sundstrand Corp.,
420 F.3d 166 (2d Cir. 2005).....16

Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.,
957 F.2d 59 (2d Cir. 1992).....21

Little v. Northeast Util. Serv. Co.,
2007 WL 781450 (D. Conn. Mar. 8, 2007),
aff'd, 2008 WL 4820561 (2d Cir. Nov. 5, 2008).....21

Lloyd v. Bear Stearns & Co., Inc.,
2004 WL 2848536 (S.D.N.Y. Dec. 9, 2004)13

Mack v. Otis Elevator Co.,
326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003).....19

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....7

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....9, 15

McPherson v. NYP Holdings, Inc.,
2005 WL 2129172 (E.D.N.Y. Sept. 1, 2005),
aff'd, 227 Fed. Appx. 81 (2d Cir. 2007).....21

Meiri v. Dacon,
759 F.2d 989 (2d Cir. 1985).....9

Milligan v. Citibank,
2001 WL 1135943 (S.D.N.Y. Sept. 26, 2001).....7

Norville v. Staten Island Univ. Hosp.,
196 F.3d 89 (2d Cir. 1999).....8

O'Connor v. Viacom, Inc.,
1996 WL 194299 (S.D.N.Y. Apr. 23),
aff'd, 104 F. 3d 356 (2d Cir. 1996)12

Ofoedu v. St. Francis Hosp. & Med. Ctr.,
2006 WL 2642415 (D. Conn. Sept. 13, 2006).....15

Oliphani v. Conn. Dep't of Transp.,
2006 WL 3020890 (D. Conn. Oct. 23, 2006)14

Pagan v. N.Y. State Div. of Parole,
2003 WL 22723013 (S.D.N.Y. Nov. 18, 2003).....20

Penney v. AIG Domestic Claims, Inc.,
2007 WL 541711 (S.D.N.Y. Feb. 20, 2007).....20

Perry v. Ethan Allen, Inc.,
115 F.3d 143 (2d Cir. 1997).....20

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000).....9

Richardson v. New York State Dep't of Correctional Serv.,
180 F.3d 426 (2d Cir. 1999).....20

Sardina v. United Parcel Serv., Inc.,
254 Fed. Appx. 108, 110 (2d Cir. 2007).....19

Schwapp v. Town of Avon,
118 F.3d 106 (2d Cir. 1997).....20

Shabat v. Blue Cross Blue Shield,
925 F. Supp. 977 (W.D.N.Y. 1996),
aff'd, 108 F.3d 1370 (2d Cir. 1997)23

Shider v. Commc'n Workers of Am.,
2004 WL 613093 (S.D.N.Y. Mar. 29, 2004),
aff'd, 2005 WL 2650007 (2d Cir. Oct. 18, 2005).....8

Shumway v. United Parcel Serv., Inc.,
118 F.3d 60 (2d Cir. 1997).....12

Slattery v. Swiss Reinsurance Am. Corp.,
248 F.3d 87 (2d Cir. 2001).....13

Snell v. Suffolk County,
782 F.2d 1094 (2d Cir. 1986).....21

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993).....8

Stembridge v. City of New York,
88 F. Supp. 2d 276 (S.D.N.Y. 2000).....21

Stockley v. AT&T Info. Sys., Inc.,
687 F. Supp. 764 (E.D.N.Y. 1988)7

Texas Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981).....8

Thomas v. New York City & Hosps. Corp.,
2004 WL 1962074 (S.D.N.Y. Sept. 2, 2004).....20

Tomassi v. Insignia Financial Group, Inc.,
478 F.3d 111 (2d Cir. 2007).....12

Turner v. Nat'l R.R. Passenger Corp.,
181 F. Supp. 2d 122 (N.D.N.Y. 2002).....21

Veal v. Schlumberger Technology Corp.,
2006 WL 237006 (S.D. Tex. Jan. 31, 2006),
aff'd, 217 Fed. Appx. 406 (5th Cir. 2007).....22

Wayne v. Principli,
2004 WL 389009 (S.D.N.Y. Mar. 3, 2004)18

Weinstock v. Columbia University,
224 F.3d 33 (2d Cir. 2000).....9

Whidbee v. Garzarelli Food Specialties, Inc.,
223 F.3d 62 (2d Cir. 2000).....20

Williams v. British Airways, PLC,
2007 WL 2907426 (E.D.N.Y. Sept. 27, 2007)22

Williams v. County of Westchester,
171 F.3d 98 (2d Cir. 1999).....23

Williams v. Port Auth. Of N.Y. & N.J.,
880 F. Supp. 980 (S.D.N.Y. 1995)21, 22

Young v. Rogers & Wells LLP,
2002 WL 31496205 (S.D.N.Y. Nov. 6, 2002).....22

STATUTES

42 U.S.C.
§ 1981.....1, 7, 15

Federal Rules of Civil Procedure
Rule 56(c).....9

New York State Human Rights Law, Exec. Law
§ 296.....1

PRELIMINARY STATEMENT

Plaintiff Joseph Gibson, an operator at Defendant Wyeth Pharmaceutical, Inc.'s ("Wyeth") Pearl River, New York facility, commenced this action against Wyeth and Patricia Stalter (together, "Defendants"), a former manager at Wyeth's Pearl River facility, asserting claims of discrimination, retaliation, and hostile work environment based on his race under the Civil Rights Act of 1991, 42 U.S.C. § 1981 and the New York State Human Rights Law, Exec. Law § 296. Gibson's discrimination and retaliation claims are based on the following allegations: (1) Stalter had asked him to work a few hours of overtime on one, unspecified occasion in compliance with his Union Contract; (2) he received a three-day suspension following a Union hearing for sleeping on the job in March 2005; and (3) he received a written warning in February 2006 for failing to comply with Wyeth's standard operating procedures relating to the pharmaceutical manufacturing process. Gibson's hostile work environment claim is based on a single remark that Stalter made when referring to herself on October 26, 2004.

As demonstrated below, each of Gibson's discrimination claims must fail because Gibson cannot establish the necessary elements of his *prima facie* case or his ultimate burden of proving intentional discrimination based on his race. With respect to each of Gibson's separate and discrete claims, Defendants have presented powerful and compelling evidence demonstrating that they had legitimate and nondiscriminatory reasons for each of the challenged employment actions. Moreover, Gibson has not presented any evidence suggesting that any of the challenged employment actions were taken on account of his race.

Similarly, Gibson cannot meet his burden of proof with respect to his retaliation claims, which are based on the same employment actions as his discrimination claims, and therefore, Defendants are entitled to summary judgment with respect to all of Gibson's retaliation claims as well. Finally, Gibson cannot, as a matter of law, establish that the single comment made by

Stalter was either sufficiently severe or pervasive to establish a hostile work environment. Accordingly, Gibson's hostile environment claim should be dismissed in its entirety.

In sum, because Gibson cannot meet his burden of proof with respect to any of his claims, Defendants are entitled to summary judgment.

STATEMENT OF FACTS

I. Background

Wyeth operates a pharmaceutical manufacturing facility in Pearl River, New York. (1)¹ As a company regulated by the Food and Drug Administration ("FDA"), Wyeth is required to follow certain standard operating procedures ("SOPs") in the manufacturing process. (2)

Gibson began his employment with one of Wyeth's corporate predecessors in 1986. (3) He has received a number of promotions and has been employed principally as a biological operator in the manufacturing process at the Pearl River facility. (4-5) Operators like Gibson are union employees whose employment is governed by the terms of the contract between Wyeth and the International Chemical Workers Union, Local 143c (the "Union Contract"). (6)

Defendant Stalter was employed at Wyeth's Pearl River facility for nearly 36 years, working her way up from the position of messenger to Principal Manager II, which was the position she held when she left Wyeth earlier this year. (7-8) In July 2003, Stalter, then a manager in the Bulk Formulations Department, interviewed and hired Gibson for a position as a Biological Operator II on the first shift. (9) Gibson held this position until March 2006. (9)

II. Stalter's Remark on October 26, 2004

On October 26, 2004, Stalter's boss, Associate Director Robert Holler, informed her that two outside contractors would be arriving that morning to take a tour of the building in which she worked and that he expected her, by noon that day, to assign a supervisor to work with the

¹ The numbered references are to the paragraphs of Defendants' Rule 56.1 Statement, where the substantiating citations for the facts here summarized can be found.

contractors for an extended period of time. (21-22) Stalter felt blindsided by this directive and was upset about the lack of notice and information with which she had been provided. (23-24)

When Stalter was introduced to the two contractors that morning, she asked to meet with them before they toured the building so that she could assess their project and assign the appropriate person to work with them before the noon deadline Holler had imposed. (25) The contractors refused her request. (26) Stalter then asked if one of the contractors at least would meet with her to discuss their project immediately after the two toured the building. (27) Again, the contractors refused, and reiterated that Holler told them that Stalter would identify a supervisor to work with them by noon. (27) Frustrated with the contractors' refusal of her requests and knowing that their refusal could cause her to miss the noon deadline that Holler had just sprung upon her that morning, Stalter blurted out to the contractors that she was the "head nigger in charge" ("HNIC") and that if the contractors needed to get something done, they would have to go through her. (28-29) Stalter used the phrase spontaneously and out of frustration, as she was trying to establish her authority and convey to the contractors that she was the person in charge. (31) When Stalter made the statement, she was referring to herself and did not intend to hurt anyone with the comment. (30)

The phrase was fresh in Stalter's mind, after having recently seen the movie "Lean on Me," in which actor Morgan Freeman, playing a principal struggling to establish order in a troubled high school, referred to himself as the HNIC when arguing with the school superintendent. (16-17, 32) In addition, some of Stalter's African-American colleagues had referred to her in jest as the HNIC due to her position as a manager. (18-19)

When Stalter made this statement, she was standing near the door of the operators' office where Gibson was seated at his desk. (34) Gibson was not involved in the conversation between Stalter and the contractors. (36) However, according to Gibson, before Stalter used this phrase, she

turned and looked at Gibson and said, "Excuse me Joe." (37) Stalter denies that she said "Excuse me Joe" or looked at Gibson. (37)

On October 28, 2004, Gibson sent Stalter an email, stating that he was a "little uncomfortable" with the statement she had made to the two contractors and that, "although it was not directed at [him]," he felt that it was offensive. (38-39) Stalter was extremely upset that her statement had offended Gibson because that was not her intent. (41) Upon receiving the email, Stalter immediately called Gibson at home and left a message on his answering machine, indicating that she would like to discuss this with him. (40) The next day, Stalter invited Gibson to her office and thanked him for bringing the matter to her attention, told him that it was not her intention to offend him, and tearfully apologized for making the remark. (42-44) Gibson accepted Stalter's apology and testified that he was satisfied with the resolution of the matter. (45-46)

Shortly thereafter, James Rowan, the Associate Director, Site Labor Relations, launched an investigation during which Gibson told Rowan that: (a) Stalter's comment had not been directed at him; (b) he believed that Stalter's comment was not intended to hurt anyone; (c) Stalter had apologized to him; and (d) he believed that Stalter's apology was sincere. (48-51) When Rowan interviewed Stalter, she acknowledged that she had used the phrase, and told him about her ongoing frustrations with Holler and the contractors. (52) At the conclusion of the investigation, on December 1, 2004, Wyeth issued Stalter a written warning, placing her on notice that any future misconduct could result in termination and stating that her use of the "unacceptable language" was a "serious concern" and that she had violated Wyeth's Code of Conduct and its values. (53-55) Although Wyeth seriously considered terminating Stalter's employment, it was ultimately decided that she would be issued a written warning based on factors including the context in which the comment was made, her length of service with Wyeth and her otherwise spotless disciplinary record. (56)

III. Stalter's Request That Gibson Work A Few Hours Of Overtime

Under the Union Contract, union employees may be forced to work overtime in order of their union seniority. (59) On one unspecified date, additional workers were needed to work a few hours of overtime in the Bulk Formulations Department, and Stalter selected those additional workers based on Union seniority. (60) Consistent with the Union Contract, Stalter initially selected Robert Margro to work the overtime because he had the lowest seniority in the area at the time. (61) However, Margro told Stalter he could not work the overtime that day because he did not have anyone to watch his young children. (62) Stalter then asked Margro if he could make other childcare arrangements, and Margro explained that he could not. (63) Because Margro did not have anyone else to watch his children, Stalter excused Margro from working overtime, but warned him that, in the future, if he could not work mandatory overtime due to childcare responsibilities, he would have to find a suitable replacement for himself. (64) Margro never again claimed that he could not work overtime due to childcare responsibilities. (65)

After Stalter excused Margro, she then, consistent with the Union Contract, asked Gibson to work the overtime because he was the person with the next lowest seniority after Margro. (66) Perhaps taking a cue from Margro, Gibson told Stalter he could not work the overtime because he had to pick up his pre-teen daughter from school. (67) Like she did with Margro, Stalter responded by asking Gibson if he could make other arrangements, and Gibson responded that he could ask his mother. (68) Gibson then called his mother and reported to Stalter that she could pick up his daughter. (69) Thus, Gibson worked the overtime. (69)

On one other unspecified date, Stalter needed additional employees to work overtime for a few hours on the night shift. (70) Stalter asked Gibson if he could work overtime, and Gibson responded that he could not work overtime because he had to attend school. (70) Stalter then called Rowan and asked him whether attending school was a legitimate reason for excusing someone

from mandatory overtime under the Union Contract. (71) Rowan told Stalter that attending school was not a valid excuse under the Union Contract. (72) Rowan suggested that Stalter let Gibson go to his class since Wyeth was paying for the class as part of Wyeth's employee tuition reimbursement program, but that, if another employee filed a grievance based on this preferential treatment of Gibson, Stalter could not let Gibson use this excuse again in the future to avoid mandatory overtime. (73) Gibson admits that, after he told Stalter that he had a class to attend that night, Stalter excused him from working overtime. (74)

IV. Gibson's Suspension For Sleeping On The Job In March 2005

On March 9, 2005, Stalter observed Gibson sitting in the operators' office with his head down for at least five minutes and assumed he was sleeping. (75-77) Gibson testified at his deposition that he was sitting at a desk, resting his head on his arm with his eyes closed, but claims that he was not sleeping. (75-79) When another employee banged on Gibson's chair, Gibson opened his eyes and sat up. (80) When Gibson lifted his head up, Stalter told Gibson to get a shop steward because he had been sleeping. (81)

Before any discipline was issued, a Union hearing was held, at which Gibson was represented by Jeff Gathers, a Union Vice President. (82-83) At the hearing, Gibson explained that he had taken some medication that made him sleepy and groggy. (84) At the conclusion of the hearing, an agreement was reached between the Union and Rowan that Gibson would be suspended for three days. (85)

V. Gibson's Warning For Violating SOPs in February 2006

In February 2006, supervisors Pam Sarro and John Borek issued an "interview record" or written warning to Gibson for poor job performance because on October 7, 2005 he had failed to complete all of the required paperwork, documenting that he had performed a certain manufacturing task related to a piece of equipment which was required for FDA compliance. (95-96) Gibson's

violation of SOPs was discovered later when there was a problem with the piece of equipment and an investigation was initiated. (97-99) Stalter had no involvement with the decision to issue the interview record. (103) The written warning did not negatively impact Gibson in any way. (103) Gibson filed a grievance with the Union, claiming that the discipline was unwarranted and unfair. (105) His grievance was considered and denied by three separate individuals at the first, second and third levels of the grievance process. (105) Before his grievance could be reviewed at the fourth stage of the grievance process, the Union informed Wyeth on January 22, 2007 that it was withdrawing Gibson's grievance. (105)

ARGUMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is properly granted when, after reviewing the allegations in the pleadings and other evidentiary sources, the court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Thus, a party attempting to avoid summary judgment must do more than raise "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Similarly, the non-moving party may not rely on conclusory allegations or unsubstantiated speculation. *Milligan v. Citibank*, 2001 WL 1135943, at *3 (S.D.N.Y. Sept. 26, 2001). "The evidence adduced must exceed the chimerical scintilla; it must be 'evidence on which the jury could reasonably find for the plaintiff,' taking into consideration the burden of proof and standard of persuasion to be applied at trial." *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764, 770 (E.D.N.Y. 1988) (*quoting Anderson*, 477 U.S. at 252).

I. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON'S DISCRIMINATION CLAIMS

Discrimination claims brought under Section 1981, Title VII, and the New York Human Rights Law generally are all analyzed under the same legal framework established by the Supreme

Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999); *Shider v. Commc'n Workers of Am.*, 2004 WL 613093, at *4 (S.D.N.Y. Mar. 29, 2004), *aff'd*, 2005 WL 2650007 (2d Cir. Oct. 18, 2005). This framework provides for a three-part analysis with the burden of production shifting between the plaintiff and the defendant, but with the ultimate burden of proof always resting upon the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). First, the plaintiff has the burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. In order to establish such a *prima facie* case, a plaintiff must show that: (1) he belonged to a protected class; (2) he was qualified for the position he held or sought; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discriminatory intent. *Id.*

To establish that he suffered an adverse employment action, a plaintiff must demonstrate that he “endured a materially adverse change in the terms and conditions of employment.” *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). “To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities [and it may] be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular position.” *Id.* If the plaintiff succeeds in making a *prima facie* case of discrimination, the burden then shifts to the defendant “to articulate some legitimate, nondiscriminatory reason” for its actions. *McDonnell Douglas*, 411 U.S. at 802. This burden is a relatively light one and is met when the defendant proffers a lawful reason for its actions. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981).

Once the defendant proffers a legitimate nondiscriminatory reason, the plaintiff must introduce evidence that the defendant's reason was a pretext for discrimination – a false reason or a

cover-up for its intention to discriminate on the basis of race. *Hicks*, 509 U.S. at 507-08; *McDonnell Douglas*, 411 U.S. at 804. To establish pretext, the “plaintiff must produce not simply ‘some’ evidence, but ‘sufficient evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].” *Weinstock v. Columbia University*, 224 F.3d 33, 42 (2d Cir. 2000). In order to withstand a motion for summary judgment and reach a jury, “it is not enough . . . to disbelieve the employer; the factfinder must also believe the plaintiff’s explanation of intentional discrimination.” *Id.* at 42.

Notwithstanding the burden-shifting framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff because of her race “remains at all times with the plaintiff.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Hicks*, 509 U.S. at 507. A plaintiff cannot satisfy this burden “through reliance on unsupported assertions” or through “conjecture or surmise.” *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) (“To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all [discrimination] cases.”).

A. Overtime On One Day As Required By The Union Contract

Gibson’s claim based on Stalter’s request that he work a few hours of overtime on one occasion, as permitted by the Union Contract, must fail for a number of reasons.

First, Gibson cannot demonstrate, as he must as part of his *prima facie* case, that he suffered an adverse employment action here. It is undisputed that, under the Union Contract, Gibson was required to work the mandatory overtime hours. (59-69) Given the fact that Gibson was simply asked to fulfill his job duties by working mandatory overtime on one day, Gibson did not “endur[] a material adverse change in the terms and conditions of employment.” *Galabya*, 202 F.3d at 640. For

this reason alone, Gibson's claim must fail.

Second, even if working a few hours of mandatory overtime on one day as required under the Union Contract could constitute an adverse employment action, Gibson still cannot meet his *prima facie* burden of demonstrating that he was asked to work mandatory overtime under circumstances giving rise to an inference of discrimination or his ultimate burden of proving that he was selected to work mandatory overtime on this one occasion because of his race. It is undisputed that additional workers were needed to work on the day Stalter asked Gibson to work a few hours of overtime, that under the Union Contract workers were to be selected by order of seniority, and that, with the exception of Margro who was excused because he had no one to watch his children, Gibson was selected based strictly on his seniority pursuant to the Union Contract. (59-66) Gibson has presented no evidence to suggest that Stalter's decision to excuse Margro and to require him to work pursuant to the Union Contract was in any way discriminatory.² Thus, Defendants are entitled to summary judgment on this claim.

B. Suspension For Sleeping On The Job In March 2005

Gibson's claim that he received a three day suspension in March 2005 on account of his race must fail for several reasons. First, this event did not constitute an adverse employment action, as it had no impact on the terms and conditions of Gibson's employment. After he served the three day suspension, he returned to work and continued in the same position under the same terms and conditions of employment. *See Dobrynio v. Central Hudson Gas & Electric Corp.*, 419 F. Supp.2d 557, 564-65 (S.D.N.Y. 2006) (holding that one-day suspension without pay does not constitute adverse employment action); *see also Joseph v. Leavitt*, 465 F.3d 87 90-91 (2d Cir. 2006) (holding that five-

² Although Gibson claims that Stalter's request to have him work overtime on another occasion was also discriminatory, it is undisputed that Stalter ultimately decided to let Gibson attend a class he had and not work overtime in that instance, even though it would have been proper to force him to work the overtime under the Union Contract. (70-74) Gibson clearly cannot assert a claim based on this as he never experienced any related adverse employment action. In any event, the fact that Stalter gave Gibson preferential treatment by excusing him from overtime to attend a class negates any inference of discrimination. (70-74)

month suspension with pay pending criminal case not adverse employment action). For this reason alone, Gibson's claim must fail.

Further, Gibson cannot satisfy either his *prima facie* burden of demonstrating that he received this suspension under circumstances giving rise to an inference of discrimination or his ultimate burden of proving intentional discrimination. It is undisputed that, rather than performing his job duties on the manufacturing line on this occasion, Gibson was seated in the operators' office, with his head down in his hands, and his eyes closed.³ (75-85) Moreover, Gibson was given a full hearing, where he was represented by a Union Vice President before the suspension ultimately was agreed upon by Wyeth and the Union. (82-85)

In an attempt to show that he was treated differently than other operators, Gibson contends that he saw Stalter observe and fail to initiate disciplinary action against four operators, Chris Jenderzick, Bill Omphilous, Austin Kelly, and Paul Kelly, who were sleeping on the job on a few unspecified occasions. This attempt must fail for a number of reasons. First, to the extent Stalter saw any of these individuals sleeping on the job, it would have only been during a manufacturing shut-down period, when no manufacturing work was occurring. (91) Stalter explained that, if she observed someone sleeping during these shut-down periods, she would let it go and would not seek to discipline them. (91) Stalter testified that the only people she saw sleeping on the job outside of one of these shut-down periods were Jenderzick and Alfonso Purman. (86-91) Purman is African-American. (90)

With respect to Jenderzick, Stalter observed him sleeping at work on two occasions, which she believed were prior to 2004. (86) On one of those occasions, Stalter told Jenderzick to get a shop steward so that she could initiate discipline. (87) Jenderzick claimed that he had been coming

³ Although it was clear that Gibson was sleeping, Gibson denies that he was actually asleep. Whether he was asleep or not is irrelevant, as it remains undisputed that he was not performing his job responsibilities when he had his head down and eyes closed.

to work at 3:00 a.m. without getting paid and felt that therefore his sleeping should be excused. (87) Stalter ultimately decided to verbally reprimand Jenderzick and to warn him that he must stay awake on his shift. (87) On the other occasion, Stalter observed Jenderzick sleeping, brought him to his supervisor, Andy Coyle, so that Coyle could discipline Jenderzick, and his supervisor issued Jenderzick a written warning. (88) When Stalter learned that Coyle had only issued Jenderzick a warning notice on the one occasion, she told Coyle that she was upset that he had not sought more formal discipline. (89) Thus, Jenderzick was not similarly situated to Gibson, and therefore, is not a proper comparator. *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (holding that alleged comparators must be similarly situated in all material respects).

Finally, Stalter's remark on October 26, 2004 does not suggest any discriminatory animus with respect to Stalter's decision to discipline Gibson for sleeping on the job in March 2005. In *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111 (2d Cir. 2007), the Second Circuit explained that the probative value of a remark turns upon its tendency to "evinced[] a discriminatory state of mind" and the closeness of its "relation to the allegedly discriminatory behavior." *Id.* at 115. In other words, "the more remote and oblique the remarks are in relation to the employer's [alleged] adverse action, the less they prove that the action was motivated by discrimination." *Id.* Thus, "stray remarks in the workplace, by themselves, and without a demonstrated nexus to the complained of personnel actions" cannot be used to prove discrimination. *Bern v. United Mercantile Agencies, Inc.*, 942 F. Supp. 217, 220 (S.D.N.Y. 1996) (quoting *O'Connor v. Viacom, Inc.*, 1996 WL 194299, at *5 (S.D.N.Y. Apr. 23), *aff'd*, 104 F. 3d 356 (2d Cir. 1996)). Indeed, "[s]tray remarks [alone], even if made by a decisionmaker, do not constitute sufficient evidence to make out a case of employment discrimination." *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998).

Here, although Gibson viewed Stalter's remark on October 26, 2004 as offensive, the remark does not suggest that Stalter made the decision to discipline Gibson for sleeping on the job in March

2005 because of his race. *Tomassi*, 478 F.3d at 116 (“The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class”). It is undisputed that Stalter made the remark out of frustration with the contractors whom she felt were disregarding her reasonable requests and therefore jeopardizing her ability to meet what she viewed as an unreasonable deadline established by her boss. (21-31) She made the remark to establish her authority and to convey to the contractors that she was the person in charge. (31) The HNIC phrase was fresh in her mind after having recently heard Morgan Freeman use it in a similar context in the movie, “Lean on Me.” (16-19, 32) Although her use of this phrase to refer to herself clearly was inappropriate, it does not suggest that Stalter harbored any discriminatory animus or that she sought to discipline Gibson in March 2005 because of his race.

Further, the fact that Stalter used this phrase to refer to herself in October 2004 and that the remark was not made in the context of any employment decision relating to Gibson also establishes that the remark is not proper evidence of discriminatory animus with respect to Stalter’s decision to discipline Gibson for sleeping on the job. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 n.2 (2d Cir. 2001) (holding that remarks unrelated to alleged discriminatory action do not create inference of discrimination); *Johnson v. County of Nassau*, 480 F. Supp.2d 581, 599 (E.D.N.Y. 2007) (finding no inference of discrimination where plaintiff failed to show a nexus between stray remarks and alleged adverse acts); *Lloyd v. Bear Stearns & Co., Inc.*, 2004 WL 2848536, at *13 (S.D.N.Y. Dec. 9, 2004) (plaintiff did not establish a *prima facie* case of discrimination where she could not demonstrate a nexus between remarks and adverse employment action); *O’Connor*, 1996 WL 194299, at *5 (supervisor comparing Irish to animals and decision-maker uttering word “mick” on two occasions insufficient to demonstrate causal nexus to plaintiff’s termination). Accordingly, Stalter’s single remark on October 26, 2004 is insufficient to carry Gibson’s burden of proof with respect to

this claim.

C. Warning For Violating SOPs in February 2006

Gibson's discrimination claim based on the warning he received for violating manufacturing SOPs must fail for several reasons. First, the warning did not constitute a material adverse employment action. It is undisputed that the warning did not negatively impact Gibson in any way. (104) *See Oliphani v. Conn. Dep't of Transp.*, 2006 WL 3020890, at *5 (D. Conn. Oct. 23, 2006) ("Counseling letters, like negative evaluations or other forms of workplace reprimands, are not disruptive enough to rise to the level of 'adverse employment actions.'").

Second, Gibson cannot satisfy either his *prima facie* burden of demonstrating that he received this warning under circumstances giving rise to an inference of discrimination or his ultimate burden of proving intentional discrimination. It is undisputed that supervisors Sarro and Borek gave Gibson this warning for failing to complete all of the paperwork necessary to comply with Wyeth's SOPs as a manufacturing facility regulated by the FDA. (95-99) Moreover, Gibson filed a grievance with the Union, claiming that the discipline was unwarranted and unfair. (105) That grievance was denied at three levels before it was withdrawn by the Union, and Gibson has presented no evidence suggesting that his race played any role in the denial of his grievance at any of the three levels. (105)

Gibson's only attempt to demonstrate that this decision was made based on his race is his argument that Francine Townsend, another operator involved with the incident, should have been disciplined as well for the failure to properly complete the paperwork on this occasion. (100) This argument must be rejected. First, Townsend is African-American, and therefore, even if she had been treated differently, clearly race was not the reason for any such treatment. Second, she did not receive any type of discipline for this incident because it was not her responsibility to complete the paperwork. (102) Having adduced no evidence suggesting in any way that Sarro's and Borek's reasons for issuing Gibson a written warning were pretextual or that his race played any role in this

decision, Gibson has failed to meet his burden on this claim, and therefore, it should be dismissed as a matter of law.

II. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON'S RETALIATION CLAIMS

Section 1981 and New York State Human Rights Law claims for retaliation are analyzed under the three-step burden-shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Ofoedu v. St. Francis Hosp. & Med. Ctr.*, 2006 WL 2642415, at *22 (D. Conn. Sept. 13, 2006). To establish a *prima facie* case of retaliation, a plaintiff must show that: (i) he was engaged in a protected activity known to his employer; (ii) he suffered a materially adverse employment action; and (iii) there was a causal connection between the plaintiff's protected activity and the adverse employment action. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006); *Blake v. Potter*, 2007 WL 2815637 (S.D.N.Y. Sept. 25, 2007).

In the context of retaliation claims, to constitute a "materially adverse" change in the terms of employment, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68. By emphasizing "material" adversity, the *Burlington* Court explicitly distinguished "significant from trivial harms." *Id.* The *Burlington* Court also cautioned employees that a "decision to report discriminatory behavior cannot immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.*

With respect to the final element of the *prima facie* case, proof of the requisite causal connection between a protected activity and a materially adverse employment action may be demonstrated in the following ways: (i) directly through evidence of retaliatory animus aimed at plaintiff by the defendant; or (ii) through circumstantial evidence such as by showing that the protected activity was followed closely by discriminatory treatment. *Butts v. New York City Dept. of Housing*, 2007 WL 259937, at *15 (S.D.N.Y. 2007); *Ofoedu*, 2006 WL 2642415, at *24. Temporal

proximity without additional evidence, however, must be very close in order to establish causation. *Cunningham v. Consolidated Edison, Inc.*, 2006 WL 842914, at *19 (E.D.N.Y. Mar. 28, 2006) (a passage of two months seems to be dividing line); *Ofoedu*, 2006 WL 2642415, at *24-25 (termination thirteen months after complaint too temporally remote). The more time that passes between a plaintiff's protected activity and an adverse employment action, the weaker the inference is of discriminatory retaliation. *Butts*, 2007 WL 259937, at *18 (noting that generally time differential of greater than three months, without additional direct evidence of discrimination, is insufficient to withstand summary judgment).

If the plaintiff sets forth a *prima facie* case, the burden then shifts to the defendant to articulate some legitimate, non-retaliatory reason for its actions. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005). If the defendant succeeds in proffering such a legitimate non-retaliatory reason, the plaintiff, who continues to retain the ultimate burden of persuasion and proof, must introduce evidence to show that the defendant's reason was a pretext for retaliation. *Jute*, 420 F.3d at 173.

A. Overtime On One Day Pursuant To Union Contract

Like with his discrimination claim, Gibson has failed to meet his burden of proof with respect to his retaliation claim based on having to work mandatory overtime on one day.

First, Gibson cannot establish that having to work a few hours of mandatory overtime on one day as required by the Union Contract creates a materially adverse change in the terms and conditions of his employment. Clearly being forced to perform overtime work on one occasion in compliance with the Union Contract falls within the realm of "petty slights or minor annoyances that often take place at work and that all employees experience," which does not constitute a materially adverse change in the conditions of Gibson's employment. *Burlington*, 548 U.S. at 68. For this reason, Gibson's claim must fail.

Second, Gibson cannot demonstrate any causal connection between his complaint about Stalter's October 26, 2004 comment and Stalter's request that he work mandatory overtime on one day. As discussed above, it is undisputed that workers were needed to work mandatory overtime and Gibson was selected based solely on his seniority under the Union Contract. Moreover, because Gibson cannot recall when he was required to work mandatory overtime on this one day, he cannot establish that this event followed any protected activity or even any temporal proximity to any of his alleged protected activity. Accordingly, Gibson cannot establish the causal connection element of his *prima facie* case.

Finally, even if Gibson could establish a *prima facie* of retaliation with respect to this claim, his claim still would fail because, as explained above, Stalter had legitimate, non-retaliatory reasons for asking him to work mandatory overtime on this occasion and Gibson cannot present any evidence to show that Wyeth's reasons were pretextual or that the real reasons were intentional retaliation. Indeed, Gibson was selected based strictly on seniority as required under the Union Contract, and therefore his claim should be dismissed.

B. Suspension For Sleeping On The Job In March 2005

Gibson's retaliation claim based on his suspension for sleeping on the job must fail because Gibson cannot meet his burden of proof with respect to this claim. Gibson cannot demonstrate any causal connection between his complaint about Stalter's comment on October 26, 2004 and his suspension in March 2005. Gibson has come forward with no direct evidence linking these two events. In addition, the nearly five-month time gap between his alleged protected activity and his suspension is insufficient to establish the causal connection element of his *prima facie* case. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (three-month period between protected activity and adverse action was too long to establish temporal proximity); *James v. Newsweek*, 1999 WL 796173, at *15 (S.D.N.Y. Sept. 30, 2006) (four-month gap between protected activity and denial of promotion

was insufficient to establish causation), *aff'd*, 213 F.3d 626 (2d Cir. 2000); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990) (no causation where three and half months passed between protected activity and adverse action); *Wayne v. Principi*, 2004 WL 389009, at *13 (S.D.N.Y. Mar. 3, 2004) (holding that mere fact that adverse employment action occurred three months after protected activity is insufficient to meet plaintiff's burden).

Finally, Gibson cannot present any evidence to show that Wyeth's reason for issuing a three-day suspension to him on this occasion, as agreed upon by the Union, was pretextual or that the real reason was intentional retaliation. Although Gibson claims he was not asleep, it remains undisputed that he was found slumped over in a chair, with his head down, eyes closed, and entirely motionless for an extended period of time while he should have been working. In addition, his manager was in the same room when this happened, talking to other employees within earshot of Gibson and Gibson only lifted his head up when another employee bumped his chair. (75-81) Given these undisputed facts, Gibson cannot credibly claim that his suspension was pretextual. Accordingly, Defendants are entitled to summary judgment on this claim.

C. Warning For Violating SOPs in February 2006

Gibson's retaliation claim based on the warning he received in February 2006 for violating manufacturing SOPs must fail for several reasons. First, the warning did not constitute a material adverse employment action because it did not create a materially adverse changes in the terms and conditions of Gibson's employment. Indeed, it did not negatively impact Gibson in any way. (104) Receiving a warning with no actual impact on his employment clearly places this in the category of "petty slights or minor annoyances that often take place at work and that all employees experience," which do not constitute a materially adverse change in the condition of Gibson's employment. *Burlington*, 548 U.S. at 68; *see also Chang v. Safe Horizons*, 254 Fed. Appx. 838, 2007 WL 3254414, at *1 (2d Cir. 2007) (holding that oral and written warnings do not constitute materially adverse actions

for purposes of retaliation claim) (summary order).

Second, Gibson cannot establish as part of his *prima facie* burden any causal connection between his written warning in February 2006 and his protected activity. There is absolutely no evidence to suggest in any way that Sarro or Borek had any type of retaliatory motive. Moreover, given the significant time gap between Gibson's written warning and his complaint about Stalter's comment (approximately 15 months) and the filing of his EEOC Charge (approximately nine months), Gibson cannot establish a causal connection through temporal proximity. *See, e.g., Clark*, 532 U.S. at 268 (three-months insufficient) *James*, 1999 WL 796173, at *15 (four-months insufficient), *aff'd*, 213 F.3d 626 (2d Cir. 2000); *Hollander*, 895 F.2d at 84-85 (three and half months insufficient). Accordingly, Gibson cannot establish the final element of his *prima facie* case.

Even if Gibson could establish a *prima facie* case, his claims still would fail because he cannot present any evidence of retaliation. Sarro and Borek had legitimate reasons for issuing the warning – Gibson's failure to comply with SOPs that were required pursuant to FDA regulations. Gibson has not presented any evidence suggesting that this reason was pretextual. Nor has he put forth any evidence suggesting that Sarro and Borek gave him the warning because he had complained of discrimination. Indeed, Gibson has failed to demonstrate that either Sarro or Borek even knew of any of Gibson's protected activity. *See Mack v. Otis Elevator Co.*, 326 F.3d 116, 129 (2d Cir.) (affirming summary judgment on retaliation claims where decision makers had no knowledge of plaintiff's protected activity), *cert. denied*, 540 U.S. 1016 (2003); *Sardina v. United Parcel Serv., Inc.*, 254 Fed. Appx. 108, 110 (2d Cir. 2007) (same). Accordingly, Gibson's retaliation claim based on the written warning should be dismissed.

III. SUMMARY JUDGMENT SHOULD BE GRANTED WITH RESPECT TO GIBSON'S HOSTILE WORK ENVIRONMENT CLAIM

The standard used to evaluate hostile work environment claims is a demanding one. *Penney v. AIG Domestic Claims, Inc.*, 2007 WL 541711, at *12 (S.D.N.Y. Feb. 20, 2007). To withstand a motion for summary judgment on a hostile work environment claim, “a plaintiff must produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the [plaintiff’s] employment.” *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000).⁴ Harassment is actionable only where a plaintiff shows that “either a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted.” *Cruz v. Coach Stores, Inc.*, 202 F.3d, 560, 570 (2d Cir. 2000); see also *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997). The plaintiff is required to establish that the conduct alleged was so severe or pervasive that it created both an objectively and subjectively abusive work environment. *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002); *Richardson v. New York State*, 180 F.3d 426, 436 (2d Cir. 1999). The factors considered when evaluating a hostile work environment claim include: (i) the frequency of the alleged discriminatory conduct; (ii) its severity; (iii) whether it is physically threatening or humiliating, or a mere offensive utterance; and (iv) whether it unreasonably interferes with an employee’s work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Schwapp v. Town of Avon*, 118 F.3d 106, 110-11 (2d Cir. 1997); *Pagan v. N.Y. State Div. of Parole*, 2003 WL 22723013, at *5 (S.D.N.Y. Nov. 18, 2003). Finally, a plaintiff must show that his working environment constituted discrimination because of his race. *Richardson*, 180 F.3d at 440.

A single offensive racial remark generally is insufficient to create a hostile work environment. For racial comments or slurs to create a hostile work environment, there must be “more than a few

⁴ The same standards apply to both race-based and sex-based hostile environment claims. *Richardson v. New York State Dep’t of Correctional Serv.*, 180 F.3d 426, 436 n.2 (2d Cir. 1999).

isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.” *Schwapp v. Town of Avon*, 118 F.3d 106, 110-11 (2d Cir. 1997); *Snell v. Suffolk County*, 782 F.2d 1094, 1003 (2d Cir. 1986). Indeed, “as a general rule, isolated instances of racially hostile name-calling and offensive remarks alone are ordinarily not severe enough to alter the conditions of employment.” *Thomas v. New York City & Hosps. Corp.*, 2004 WL 1962074, at *12 (S.D.N.Y. Sept. 2, 2004). Accordingly, “[i]solated incidents or episodic conduct will not support a hostile work environment claim.” *Richardson*, 180 F.3d at 436; *see also Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992). Therefore, courts routinely find that a single, racial comment is neither sufficiently severe nor pervasive to support a claim for hostile work environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not sufficiently alter terms and conditions of employment to violate Title VII”); *Little v. Northeast Util. Serv. Co.*, 2007 WL 781450, at *9 (D. Conn. Mar. 8, 2007) (single use of racial slur insufficient as matter of law to create hostile work environment), *aff’d*, 2008 WL 4820561 (2d Cir. Nov. 5, 2008). In addition, even where racial epithets are used much more often than a single, isolated incident, such comments are nevertheless frequently considered insufficiently severe or pervasive to sustain a claim for hostile work environment.⁵

⁵ *See Daniels v. Health Ins. Plan of Greater N.Y.*, 2007 WL 27115, at *5 (S.D.N.Y. Jan. 4, 2007) (granting summary judgment with respect to hostile work environment where supervisor referred to plaintiff as “nigger” on multiple occasions); *Hill v. Rayboy-Braustein*, 467 F. Supp.2d 336, 360 (S.D.N.Y. 2006) (same); *Stembridge v. City of New York*, 88 F. Supp.2d 276, 286 (S.D.N.Y. 2000) (same); *Hannon v. Wilson Greatbatch, Ltd.*, 2002 WL 1012971, at *3-4 (W.D.N.Y. Apr. 24, 2002) (same); *Turner v. Nat’l R.R. Passenger Corp.*, 181 F. Supp.2d 122, 132 (N.D.N.Y. 2002) (repeated use of word “nigger” by employees did not create a hostile work environment); *Brown v. Middaugh*, 41 F. Supp.2d 172, 187-88 (N.D.N.Y. 1999) (same); *see also Augustin v. Yale Club*, 2006 WL 2690289, at *21-22 (S.D.N.Y. Sept. 15, 2006) (nature of four or five racial remarks over five year period was too infrequent and sporadic to give rise to hostile work environment claim), *aff’d*, 274 Fed. Appx. 76 (2d Cir. 2008); *McPherson v. NYP Holdings, Inc.*, 2005 WL 2129172, at *8 (E.D.N.Y. Sept. 1, 2005) (three racial comments made over span of more than two years do not create hostile work environment), *aff’d*, 227 Fed. Appx. 81 (2d Cir. 2007); *Dorrius v. St. Rose’s Home*, 234 F. Supp.2d 326, 335 (S.D.N.Y. 2002) (employee calling plaintiff racial slurs four times within one month insufficient to establish hostile work environment); *Carter v. Cornell Univ.*, 976 F. Supp. 224, 232 (S.D.N.Y. 1997) (six race-related, disparaging comments over three years insufficient to create hostile work environment), *aff’d*, 159 F.3d 1345 (2d Cir. 1998); *Williams v. Port Auth. Of N.Y. & N.J.*, 880 F. Supp. 980, 991-92

Further, courts have routinely found that the use of the HNIC phrase is insufficient to demonstrate that a work environment is objectively hostile. *See Young v. Rogers & Wells LLP*, 2002 WL 31496205, at *8-9 (S.D.N.Y. Nov. 6, 2002) (granting summary judgment where plaintiff's supervisor referred to herself as HNIC); *Williams v. British Airways, PLC*, 2007 WL 2907426, at *2, 10-11 (E.D.N.Y. Sept. 27, 2007) (holding that multiple incidents of alleged harassment, including supervisor referring to another employee as HNIC, was not severe enough to establish a change in plaintiff's work environment); *Veal v. Schlumberger Technology Corp.*, 2006 WL 237006, at *11-12 (S.D. Tex. Jan. 31, 2006) (summary judgment granted where employee's reference to plaintiff as HNIC did not affect term, condition or privilege of employment), *aff'd*, 217 Fed. Appx. 406 (5th Cir. 2007).

Moreover, given the context in which Stalter made the remark, this single statement was not sufficiently severe for Gibson to satisfy his burden of proof that it altered the conditions of his employment. It is undisputed that Stalter used the phrase out of frustration with the contractors whom she felt were disregarding her reasonable requests and jeopardizing her ability to meet what she viewed as an unreasonable deadline set by her boss. (22-31) She made the statement to establish her authority and to convey to the contractors that she was the person in charge. (31) When Stalter made the statement, she was referring to herself, and she did not intend to hurt anyone with the comment. (30) The phrase was fresh in her mind after having recently heard Morgan Freeman use it in a similar context in the movie "Lean on Me." (16-19, 32) Even Gibson admitted in his email to Stalter, that the statement was not directed at him. (39) *See Young*, 2002 WL 31496205, at *2 (granting summary judgment where plaintiff's supervisor referred to herself as HNIC and used word "nigger" on total of four occasions, explaining that while comments were offensive and insensitive, they were "not directed at or in reference to" plaintiff).

(S.D.N.Y. 1995) (five racial slurs by supervisors in plaintiff's presence over two years did not establish a hostile work environment).

Not only did Stalter's comment fail to create an objectively hostile work environment, the undisputed facts demonstrate that Stalter's remark did not create a subjectively abusive work environment either. In his email to Stalter, Gibson stated that the remark made him feel a "little uncomfortable." See *Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir. 1999) (plaintiff's "generalized feelings of discomfort f[a]ll well short of the proof required" to establish claim for hostile work environment). Moreover, the day after Gibson emailed Stalter, she immediately called him at home and left a message on his answering machine, indicating that she wanted to discuss the issue with him. The following day, Stalter thanked Gibson for bringing the matter to her attention, told him that it was not her intention to offend him, and tearfully and sincerely apologized for the remark. (40-44) Gibson believed that Stalter's apology was sincere, accepted her apology, and testified that he was satisfied with the resolution of the matter. (45-46) Given these undisputed facts, Gibson cannot establish that this comment created a subjectively hostile work environment and altered the conditions of his employment.

Even if Gibson were to attempt to lump his three separate and discrete disparate treatment claims into his hostile work environment theory, his hostile work environment claim still would fail. First, such separate and discrete employment actions would not properly be included in a hostile work environment claim. In any event, having to work a few hours of overtime on one day as required by the Union Contract, receiving a suspension on one occasion for sleeping on the job in March 2005, and receiving a written warning for violating SOPs in February 2006 are not actions that are sufficiently severe or pervasive to establish a hostile work environment claim. As explained above, none of these actions significantly altered the conditions of Gibson's employment. Moreover, given the significant gaps in time between each of these actions, they cannot be deemed sufficiently pervasive to establish a hostile work environment. See *Shabat v. Blue Cross Blue Shield*, 925 F. Supp. 977, 983-84 (W.D.N.Y. 1996) (finding that alleged discriminatory conduct did not

“permeate” plaintiff’s workplace where most of incidents were separated by a month or more and were therefore “far from regular occurrences”), *aff’d*, 108 F.3d 1370 (2d Cir. 1997). Further, given Wyeth’s legitimate reasons for each of these actions, Gibson cannot establish, as he must, that any of these actions were taken on account of his race. Thus, these isolated and temporally remote actions would add nothing to his hostile work environment claim.

In any event, any claim by Gibson based on these other incidents would fail for the additional reason that Gibson never properly complained of these incidents. *See Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that employer may avoid liability for alleged harassing behavior by supervisor if: (a) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer). Here, Wyeth has a written policy against unlawful discrimination and harassment under which employees are strongly encouraged to report any incidents that they believe are discriminatory or harassing in nature to a supervisor, manager, or to Human Resources. (101-06) *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999). Although Gibson was fully aware of these policies and procedures (107-110), he did not avail himself of them by complaining to a supervisor, manager, or Human Resources representative. (111) Thus, any hostile environment claim based on his disparate treatment claims must fail.

CONCLUSION

Based on the foregoing, Defendants' motion for summary judgment should be granted in its entirety and the Complaint dismissed with prejudice.

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Respectfully submitted,

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