UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DAVID COLES,

Plaintiff,

-against-

MEMORANDUM & ORDER
12-CV-5060(JS)(AKT)

TOWN OF SOUTHAMPTON, SOUTHAMPTON TOWN BOARD, ANDREW KUROSKI, in his official and individual capacities, and JONATHAN ERWIN, in his official and individual capacities,

Defendants.
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APPEARANCES
For Plaintiff: Frederick K. Brewington, Esq.
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Hempstead, NY 11550

For Defendants: Anne C. Leahey, Esq.
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SEYBERT, District Judge:

Plaintiff David Coles ("Coles" or "Plaintiff") commenced this action against defendants the Town of Southampton (the "Town"), the Southampton Town Board (the "Board"), Andrew Kuroski[1] ("Kuroski"), and Jonathan Erwin ("Erwin" and collectively, "Defendants") alleging, inter alia, that he was unlawfully

[1] In deposition transcripts and other filings, Kuroski is sometimes referred to by his nickname, Such.

subjected to a hostile work environment based upon his race and unlawfully retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 29 U.S.C. § 2000e et seq.; the New York State Human Rights Law ("NYSHRL"), N.Y. EXEC. LAW § 296 et seq.; the United States Constitution; and 42 U.S.C. § 1981. Plaintiff also asserts a claim for the intentional infliction of emotional distress under New York State law.

Pending before the Court is Defendants' motion for summary judgment. (Docket Entry 33.) For the following reasons, Defendants' motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND[2]

Plaintiff, and African-American male, is employed by the Town as a Groundskeeper II. (Defs.' 56.1 Stmt. ¶¶ 1, 9.) His duties included maintaining grounds, snow removal, grass cutting, lawn aeration, and ground related work. (Defs.' 56.1 Stmt. ¶¶ 1, 205.) He has held his position since January 2003, and has been employed by the Town since August 2001. (Defs.' 56.1 Stmt. ¶ 2.)

[2] The following facts are drawn from the parties' Local Rule 56.1 Statements, their evidence in support, and the Court's independent review of the record. On consent, Defendants submitted a revised Rule 56.1 Statement. (See Defs.' 56.1 Stmt., Docket Entry 33-3.) Plaintiff, in response, submitted a revised Rule 56.1 Counterstatement. (Pl.'s Counterstmt, Docket Entry 31-1). The Court has synthesized these documents in formulating a discussion of the factual background of the case. Any relevant factual disputes are noted.

As a result of his long tenure, Plaintiff has gained significant seniority and has become a Senior Crew Leader. (Pl.'s Dep. Tr., 127:20-22[3].) Plaintiff's immediate supervisor is Defendant Andrew Kuroski. (Defs.' 56.1 Stmt. ¶ 8.) Kuroski is a maintenance crew leader, tasked with supervising ten full-time groundsmen and maintenance mechanics, as well as any seasonal employees. (Defs.' 56.1 Stmt. ¶ 4.) Kuroski reports to Defendant Jonathan Erwin, the Parks Maintenance Supervisor. (Defs.' 56.1 Stmt. ¶¶ 5, 8.)

Plaintiff alleges that he began facing discriminatory harassment when Erwin assumed his current position, in 2005 or 2006. (Defs.' 56.1 Stmt. ¶¶ 11, 14.) Prior to taking a medical leave of absence, Plaintiff used two of the more desirable lawnmowers in the Town's fleet: one with a seventy-two inch radius, and the other with a one-hundred inch radius. (Defs.' 56.1 Stmt. ¶¶ 11-12.) Plaintiff was assigned to those mowers because, when they first became available, Plaintiff was the most senior groundskeeper that had not yet received any new equipment. (Pl.'s Dep. Tr. at 56:15-57:19.) When he returned from his leave, however, those mowers had been reassigned to another groundskeeper, and Plaintiff was given two older, forty-two inch mowers. (Defs.' 56.1 Stmt. ¶¶ 16, 19.) Erwin did not explain why Plaintiff's equipment had switched. (Defs.' 56.1 Stmt. ¶ 17.)

[3] Plaintiff's Deposition Transcript can be found at Docket Entries 35-1 through 35-6.

According to Plaintiff, the lawnmower incident marked the start of a campaign of harassment undertaken by Erwin and Kuroski on account of Plaintiff's race. Plaintiff cites as the next example a time where Defendants singled him out for disciplinary action on baseless grounds. In the summer of 2007, a seasonal employee falsely accused Plaintiff of physically assaulting him. (Defs.' 56.1 Stmt. ¶¶ 33-34.) While the seasonal employee was ultimately terminated for making the false accusation, Plaintiff takes issue with the fact that Erwin never confronted him with the substance of the seasonal employee's accusations, and instead required Plaintiff to formally meet with Allyn Jackson, the then Parks Supervisor. (Pl.'s Dep. Tr. at 112:5-19.) In contrast, when Erwin later received word of similar accusations against a white employee, Erwin did not initiate the same formal procedures to which he subjected Plaintiff. (Pl.'s Dep. Tr. at 113:4-12.)

The disparate treatment of Plaintiff in light of the seasonal employee's allegations approached violence on one occasion. While Erwin, Allyn Jackson, and Plaintiff were in the garage discussing the seasonal employee's false allegations against Plaintiff, Plaintiff suggested that his version of events could be corroborated by his colleagues. At that, "Erwin snapped [his] chair back and ran over like he was going to hit [Plaintiff]." (Pl.'s Dep. Tr. at 86:8-13.) Though Plaintiff did

not respond to Erwin's provocation, Erwin continued to stand over Plaintiff in a menacing manner until Allyn Jackson was forced to intervene to prevent escalation. (Pl.'s Dep. Tr. at 87:8-19.)

Kuroski also took part in the humiliation of Plaintiff. In the spring of 2010, the Town received a new lawnmower. (Pl.'s Dep. Tr. at 158:2-5.) When it arrived at the Town's facility, the groundskeepers, at the instruction of Erwin and Kuroski, took turns test driving it around the parking lot. (Pl.'s Dep. Tr. at 160:19-161:22.) After a few employees had driven it, Kuroski exclaimed, "maybe we'll let David Coles drive it," and the surrounding employees began laughing. (Pl.'s Dep. Tr. at 161:13-162:5.) Plaintiff was not given a chance to test the new equipment on that day. (Pl.'s Dep. Tr. at 162:8-167:21.) Erwin states that he does not recall Kuroski's remark, but insists that Plaintiff was given an opportunity to test the machine. (Erwin Dep. Tr., Docket Entry 33-12, 21:18-22:8.)

Erwin and Kuroski also failed to take any measures to prevent their subordinates or other Town employees from harassing Plaintiff. On one occasion, while Plaintiff and Roosevelt Sykes--another African-American groundskeeper--were working at a Town field, an unidentified Town employee arrived and berated them both with racist insults. (Pl.'s Dep. Tr. at 193:12-17). Specifically, the employee shouted at Coles, "you got a mother fucking problem, too, this morning, nigger." (Pl.'s Dep. Tr. at 194:14-17.)

Pursuant to Town policy, Plaintiff immediately reported the incident to his supervisor, Kuroski. (Pl.'s Dep. Tr. at 195:5-20.) Nonetheless, when Plaintiff later told the story of his verbal assault to Darlene Trogue, the Town's "affirmative action lady," (Pl.'s Dep. Tr. at 188:15-16), Plaintiff learned that neither Kuroski nor Erwin reported Coles' abuse to the appropriate Town individuals, (Pl.'s Dep. Tr. at 195:21-25). Another time, Plaintiff was present while two Town employees texted one another about a fictitious plan to "kill the niggers," starting with Barack Obama. (Pl.'s Dep. Tr. at 182:12-183:2). According to Plaintiff, while one of the offending employees was terminated, Erwin did not appropriately discipline the other. (Pl.'s Dep. Tr. at 182:23-183:2, 184:4-7) ("[Erwin and the employee] were sitting in the truck watching me cut grass, that was his discipline.").

Additionally, Plaintiff feared violence at work from not only Erwin and the unnamed town employee--who had never been disciplined for his verbal abuse of Plaintiff--but also Kuroski. When Plaintiff asked Kuroski why he did not investigate or report up the chain of command Plaintiff's complaint of his verbal assault by the unidentified Town employee, Kuroski got violent. (Pl.'s Dep. Tr. at 186:12-24.) According to Plaintiff, ["Kuroski] ran over there to swing to hit me. When he did, the [union] vice president] . . . grabbed him. He started trying to get loose to hit me." (Pl.'s Dep. Tr. at 186:23-187:3.)

Kuroski's aggression toward Plaintiff was not limited to this one occasion. Plaintiff's deposition testimony is replete with allegations that Kuroski would routinely block doorways though which he was trying to pass. (Pl.'s Dep. Tr. at 167:22-25, 177:6-9.) On another occasion, Kuroski told Plaintiff that he had "some MF nerve," and insisted that he was "this far from losing [his] cool with [Plaintiff.]" (Pl.'s Dep. Tr. at 180:15-24.)

Meanwhile, during the time period of the alleged discrimination, Plaintiff's chances of being upgraded from a Groundskeeper II to a Groundskeeper III waned. In 2006, a number of more-senior Groundskeeper IIs were upgraded to Groundskeeper III, and Plaintiff was told that he would be next. (Defs.' 56.1 Stmt. ¶ 130.) In 2009, when he returned from leave, Plaintiff, having still not been upgraded, discussed the planned promotion with Erwin, who indicated that there were no open positions. (Defs.' 56.1 Stmt. ¶¶ 139, 142.) When a Groundskeeper III retired at the end of 2010, the Town--despite budgeting to fill the vacancy--did not attempt to fill the position. (Defs.' 56.1 Stmt. ¶¶ 156-158.) Plaintiff remains a Groundskeeper II, though he alleges that much the work he performs is consummate with a Goundskeeper III title. (Pl.'s Counterstmt ¶ 28.)

In September 2011, Plaintiff filed a complaint against the Town pursuant to the Town's anti-harassment policy. (Pl.'s

Dep. Tr. at 218:17-23; Brewington Decl. Ex. F[4].) Sandra Cirincione, an attorney in the Town's Human Resources Department was tasked with the investigation. (Defs.' 56.1 Stmt. ¶ 177.) Cirincione hosted an investigatory meeting with Plaintiff and other Parks Department personnel on October 20, 2011. (Defs.' 56.1 Stmt. ¶ 182.) At the conclusion of the meeting, Cirincione told Plaintiff to expect a response to his allegations within thirty days. (Defs.' 56.1 Stmt. ¶ 191.) Plaintiff was not contacted by Cirincione until April 18, 2012, when he received a Record of Resolution stating that the matter had been resolved. (Brewington Decl. Ex. H.) Plaintiff refused to sign the Record of Resolution, and instead requested a formal hearing as to his grievances. (Pl.'s Counterstmt ¶ 37.) Nonetheless and in violation of Town policy, Plaintiff was not given the opportunity for such a hearing until after he had retained counsel. (Defs.' 56.1 Stmt. ¶¶ 201-204.)

Since Plaintiff's filing of his grievance, Plaintiff maintains that his harassment has not improved. He has again been prohibited from using new machinery, been assigned lawn aeration

[4] In opposition to Defendants' motion for summary judgment, Plaintiff's counsel submitted a declaration that attaches Exhibits A-EE. Though the exhibits to the declaration have been electronically filed at Docket Entries 35-1 through 36-6, the declaration has not. To ensure completeness of the electronic record, Plaintiff's counsel is ORDERED to refile his declaration and exhibits in a format that complies with this Court's rules.

duty with greater frequency than his counterparts, and was not selected to train a new employee. (Pl.'s Br., Docket Entry 35, at 22.) Additionally, Plaintiff alleges that due to his race, he was told to mow an entire cemetery that had been neglected by the Town for years. (Pl. Dep. Tr. at 213:8-215:2.)

DISCUSSION

Before reaching the merits of Defendant's motion for summary judgment, the Court will first discuss the applicable legal standard.

I. Legal Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202, 211 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). "In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997).

"The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment."

Id.; see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1611, 26 L. Ed. 2d 142, 162 (1970). A genuine factual issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248, 106 S. Ct. at 2512, 91 L. Ed. 2d at 213-14. To defeat summary judgment, "the non-movant must 'set forth specific facts showing that there is a genuine issue for trial.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 256, 106 S. Ct. at 2514, 91 L. Ed. 2d at 217). "[M]ere speculation or conjecture as to the true nature of the facts" will not overcome a motion for summary judgment. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986); see also Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) ("Mere conclusory allegations or denials will not suffice." (citation omitted)); Weinstock, 224 F.3d at 41 ("[U]nsupported allegations do not create a material issue of fact.").

The fact-intensive nature of discrimination cases counsels that courts considering a motion for summary judgment do so with an extra measure of caution. See, e.g., Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994); Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996) ("[T]rial courts must be especially chary in handing out summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue."). Nonetheless,

"summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact." McLee, 109 F.3d at 135; see also Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases.").

II. Hostile Work Environment Claims

Plaintiff alleges that Defendants created and maintained a hostile work environment in violation of Title VII, the NYSHRL, 42 U.S.C. § 1981, and the United States Constitution. Defendants challenge both the timeliness and the merits of Plaintiff's hostile work environment claims. The Court first visits the timeliness issue.

A. Timeliness

Defendants first argue that Plaintiff's Title VII, NYSHRL, 42 U.S.C. § 1981, and 42 U.S.C. § 1983 claims for hostile work environment are barred by their respective statutes of limitations.

Each of Plaintiff's four causes of action are subject to a different limitations period. First, a Title VII claim is time barred where the plaintiff does not file a charge with the EEOC within 300 days of "the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 133 (2d Cir. 2003). Plaintiff filed his discrimination

charge with the EEOC on May 2, 2012. (Brewington Decl. Ex. W.) Thus, a claim accruing before 300 days earlier, July 7, 2011 would be time barred. Second, NYSHRL claims "are subject to a three-year statute of limitations, which is tolled for the period between the filing of an EEOC charge and the issuance by the EEOC of a right-to-sue letter." DeNigris v. N.Y.C. Health & Hosps. Corp., 861 F. Supp. 2d 185, 192 (S.D.N.Y. 2012). Plaintiff received his right to sue letter on July 11, 2012, seventy days after he filed his EEOC charge (Brewington Decl. Ex. BB), and filed this action on October 9, 2012. (See Compl.) Based on these dates, a NYSHRL claim would be time barred if it accrued prior to the three-year limitations period, as tolled for seventy days by the EEOC process, or July 31, 2009. Third, the statute of limitations for a section 1981 claim is four years. Lawson v. Rochester City Sch. Dist., 446 F. App'x 327, 328 (2d Cir. 2011). Thus, a section 1981 claim that accrued prior to October 9, 2008 would be untimely. Fourth, to be timely, a claim brought pursuant to 42 U.S.C. § 1983 for an action arising in New York must be brought within three years of accrual, see Owens v. Okure, 488 U.S. 235, 250, 109 S. Ct. 573, 582, 102 L. Ed. 2d 594, 606 (1989) (stating that section 1983 claims are governed by the forum state's statute of limitations for personal injury actions); N.Y. C.P.L.R. § 214(5), so a section 1983 claim would be barred to the extent it accrued prior to October 9, 2009.

Because a hostile work environment claim asserts a cause of action for a violation that is continuous, an employee need not demonstrate that the entirety of the harassment falls within the limitations period; the law requires only that the last act demonstrating the challenged work environment occurs within the limitations period. Petrosino v. Bell Atl., 385 F.3d 210, 220 (2d Cir. 2004); Linder v. City of N.Y., 263 F. Supp. 2d 585, 594 (E.D.N.Y. 2003) (finding timely a hostile work environment claim where the plaintiff was assaulted by a coworker prior to the limitations period, but was forced to work in close proximity to her assailant within 300 days of the date on which plaintiff filed her EEOC complaint). Moreover, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S. Ct. 2061, 2074, 153 L. Ed. 2d 106, 124 (2002).

Thus, a hostile work environment is timely--and the Court will consider harassment occurring before the limitations period--where (1) at least one act of harassment falls within the limitations period, and (2) that act is part of the unlawful employment practice. See Petrosino, 385 F.3d at 220; Patterson v. Cnty. of Oneida, 375 F.3d 206, 220 (2d Cir. 2004) (finding hostile work environment claim untimely were plaintiff was terminated

within the limitations period because said termination was not "in furtherance of the alleged practice of [ ] harassment").[5]

The later acts of harassment incurred by Plaintiff fall well within the limitations periods outlined above. For instance, Plaintiff alleges that in September 2011, and on account of his race, he was told to mow an entire cemetery that the Town had neglected for years. (Pl. Dep. Tr. at 213:8-214:2.) While not in themselves actionable, the Court cannot say as a matter of law that these timely instances of harassment are so unrelated to the pre-limitations instances such they are not "part of the whole." Morgan, 536 U.S. at 118, 122 S. Ct. at 2075, 153 L. Ed. 2d at 125; Drees v. Cnty. of Suffolk, No. 06-CV-3298, 2007 WL 1875623, at *8 (E.D.N.Y. June 27, 2007) ("[P]laintiff has clearly alleged acts within the 300-day period that she contends contributed to a hostile work environment and, on that basis alone, that claim is

[5] Plaintiff argues that his hostile work environment claims are saved by the "continuing violation" doctrine. "This argument mistakenly conflates adverse employment action claims, to which the continuing violation doctrine applies, with hostile work environment claims, which are subject to their own rules." Clarke v. InterContinental Hotels Grp., PLC, No. 12-CV-2671, 2013 WL 2358596, at *8 (S.D.N.Y. May 30, 2013). Thus, the Court's decision is based not upon its application of the continuing violation doctrine, but rather upon the independent recognition that hostile work environment claims by their very nature, involve repeated conduct over a long period of time. Morgan, 536 U.S. at 115, 122 S. Ct. at 2073, 153 L. Ed. 2d at 123.

not time-barred."). After all, these later acts were perpetrated by the same supervisors--Erwin and Kuroski--as the earlier, more severe ones. C.f. Anderson v. City of N.Y., No. 06-CV-5726, 2012 WL 6720694, at *2 (E.D.N.Y. Dec. 27, 2012) (refusing to consider time-barred actions in plaintiff's hostile work environment claim because they occurred at the hands of "different co-workers and supervisors at different trucks"). The lack of any intervening period of placidity between these actions and the would-be time barred ones further suggests that each incident was part of the same unlawful campaign. C.f. Benjamin v. Brookhaven Sci. Assocs., 387 F. Supp. 2d 146, 154 (E.D.N.Y. 2005) (finding acts that occurred six years apart were not part of the same unlawful practice).

Accordingly, because certain, albeit minor, acts of harassment that can reasonably be said to constitute part of the challenged unlawful practice occurred within the limitations period, Plaintiff's hostile work environment claims are timely. See, e.g., Drees v. Cnty. of Suffolk, 2007 WL 1875623, at *8; Dahbany-Miraglia v. Queensboro Cmty. Coll., No. 03-CV-8052, 2004 WL 1192078, at *5 (S.D.N.Y. May 27, 2004).

B. Presence of a Hostile Work Environment[6]

"In order to survive summary judgment on a claim of hostile work environment harassment, 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 victim's employment." Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000) (internal quotation marks and citation omitted). Whether a hostile work environment exists involves an objective and subjective inquiry; "the misconduct shown must be 'severe or pervasive enough to create an objectively hostile or abusive work environment,' and the victim must also subjectively perceive that environment to be abusive." Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295, 301 (1993)). Additionally, the Court must consider the "case-specific circumstances in their totality," and relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere

[6] Because the standard for showing a hostile work environment under Title VII, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the NYSHRL is essentially the same, See Schiano v. Quality Payroll Systems, Inc., 445 F.3d 597, 609 (2d Cir. 2006); Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2, 798 F. Supp. 2d 443, 451 (E.D.N.Y. 2011), the Court conducts a singular substantive analysis for all.

offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. (citing Harris, 510 U.S. at 23, 114 S. Ct. at 367, 126 L. Ed. 2d at 302-03).

Plaintiff must also show that the harassing conduct occurred because of his race, for harassment absent an unlawful animus is not actionable. Alfano, 294 F.3d at 374; Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999) ("A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class."). The racially-charged nature of the harassment need not be blatant, however, as "[f]acially neutral incidents may be included, of course, among the totality of the circumstances that courts consider in any hostile work environment claim, so long as a reasonable fact-finder could conclude that they were, in fact, based on [race]." Alfano, 294 F.3d at 378 (internal quotation marks omitted).

Applying this standard, the Court finds that a material issue of fact exists as to whether the harassment of Plaintiff rises to the level of a hostile work environment. Extending to Plaintiff the benefit of all reasonable inferences, the Court believes that a reasonable jury could conclude that Defendants' conduct was both sufficiently pervasive and severe--Plaintiff was routinely precluded from using the Town's new equipment, subject to aggression by his supervisors, threatened with violence on at

least two occasions, and subjected to brutally racial attacks from others. See, e.g., Anderson v. Nassau Cnty. Dep't of Corr., 558 F. Supp. 2d 283, 295-96 (E.D.N.Y. 2008) (finding hostile work environment claim withstood summary judgment where plaintiff alleged a number of sexually-offensive remarks, inappropriate discipline, and different treatment than her male counterparts); Patterson, 375 F.3d at 230 (declining summary judgment where Plaintiff was subjected to racial remarks and was punched on one occasion). Plaintiff was also allegedly humiliated on more than one occasion. Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000) (finding one act of humiliation sufficient to state hostile work environment claim). While each of these occasions may not, in themselves, be severe enough to amount to a hostile work environment, the "cumulative effect" of these acts raises at least a triable question of fact. See Morgan, 536 U.S. at 115, 122 S. Ct. at 2074, 153 L. Ed. 2d at 123; (noting that a hostile work environment claim is based on the cumulative effect of individual acts, which may not in themselves be actionable); Redd v. N.Y. Div. of Parole, 678 F.3d 166, 176 (2d Cir. 2012) ("The court must take care, however, not to view individual incidents in isolation. . . . the court should not view the record in piecemeal fashion.") (citation omitted).

Similarly, a reasonable jury could conclude that the campaign of harassment against Plaintiff was due to his race.

Kuroski allegedly ignored--and therefore effectively buried--Plaintiff's complaint that a town employee had used a racially offensive term toward him. Erwin, for his part, allegedly did not adequately discipline one of Plaintiff's coworkers who had participated in a plan to "[k]ill the niggers." See Schwapp v. Town of Avon, 118 F.3d 106, 112 (2d Cir. 1997) (holding that the effect of racial slurs of which plaintiff was aware were "factual issues that should be resolved by a trier of fact"); Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 433 (2d Cir. 1999) (hostile work environment claim stated where colleagues made racial comments in plaintiff's presence); Smith, 798 F. Supp. 2d 443, 453 (E.D.N.Y. 2011) (single display of a noose sufficient to state hostile work environment claim). Thus, "the [race]-based character of much of [plaintiff's supervisors'] behavior permits the inference that the remainder of [their] harassing conduct was also due to [Plaintiff's race]." Gregory v. Daly, 243 F.3d 687, 695 (2d Cir.), as amended, (Apr. 20, 2001).

Accordingly, the Court declines to award Defendants summary judgment on the grounds that no hostile work environment exists. Patterson, 375 F.3d 206, 227 (2d Cir. 2004) ("Where reasonable jurors could disagree as to whether alleged incidents of racial insensitivity or harassment would have adversely altered the working conditions of a reasonable employee, the issue of

whether a hostile work environment existed may not properly be decided as a matter of law.").

C. Liability

Having found that a reasonable jury could conclude that Plaintiff was subject to a hostile work environment under Title VII, the NYSHRL, 42 U.S.C § 1981, and 42 U.S.C. § 1983, the Court considers whether a reasonable jury could find each of the Defendants liable.

1. The Town[7]

To prevail against the Town on his claims of hostile work environment under Title VII and the NYSHRL, Plaintiff must demonstrate that there is reason to impute the existence of the hostile work environment to the Town. Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir. 1998). Where, as here, the hostile work environment is allegedly created by the plaintiff's supervisors, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633, 655 (1998).

[7] In addition to the Town, Kuroski, and Erwin, Plaintiff also names as a defendant the Board of the Town of Huntington. Even assuming the Board can be sued independent of the Town, the Court finds that the record is devoid of any facts related to the Board's involvement of any of Plaintiff's claims. As a result, Defendants' motion for summary judgment on all of Plaintiff's claims is GRANTED to the extent those claims are asserted against the Board.

"[W]hen the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment," the employer is strictly liable for the supervisor's harassment. Dawson v. Cnty. of Westchester, 351 F. Supp. 2d 176, 188 (S.D.N.Y. 2004) (internal quotation marks and citation omitted); see also Burlington Indus., Inc., 524 U.S. at 765, 118 S. Ct. at 2270, 141 L. Ed. 2d at 655. In contrast, where there has been no tangible employment action, the employer is liable for a hostile work environment created by its supervisors unless it establishes as an affirmative defense that "(a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Petrosino, 385 F.3d at 225 (internal quotation marks and citation omitted).

Here, the Court finds that there are issues of fact surrounding whether the conduct of Kuroski and Erwin may be imputed to the Town. It is unclear whether Kuroski and Erwin's harassment culminated in a tangible employment action because the parties dispute why Plaintiff was not given the title upgrade promised to him. Even assuming that the conduct of Erwin and Kuroski did not result in a tangible employment action, it remains unclear whether the Town may avail itself of the applicable affirmative defense.

In short, because a reasonable jury could find sufficient basis upon which to impute the discriminatory harassment of Erwin and Kuroski to the Town, the Court declines to award the Town summary judgment on that basis.

To prevail against the Town on his section 1981 and section 1983 claims, Plaintiff must show that the challenged acts were performed pursuant to a municipal policy or custom. Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611, 638 (1978); Patterson, 375 F.3d at 226. In this context, "liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure, the conduct becomes an accepted custom or practice of the employer." Gierlinger v. N.Y. State Police, 15 F.3d 32, 34 (2d Cir. 1994).

For the same reasons that the Court concludes that issues of fact surround whether the Town may be liable under Title VII and the NYSHRL, the Court concludes that issues of fact preclude summary judgment on the grounds that the Town may not be held liable under Monell. At the very least, a reasonable jury could find that Plaintiff's allegations against Kuroski and Erwin were not properly investigated, and the discriminatory conduct of those supervisors thus continued with the Town's tacit authorization.

2. Kuroski and Erwin Individually[8]

Plaintiff may not pursue his Title VII claims against Kuroski and Erwin individually because Title VII only protects against employer action. Tomka v. Seiler Corp., 66 F.3d 1295, 1313–16 (2d Cir. 1995), abrogated on other grounds by Burlington Indus., Inc., 524 U.S. at 742, 118 S. Ct. at 2257, 141 L. Ed. 2d at 633; Darcy v. Lippman, 356 F. App'x 434, 437 (2d Cir. 2009).

In contrast to Title VII, individual liability is available under the NYSHRL, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. The NYSHRL prohibits aiding and abetting the "doing of any of the acts forbidden under this article." N.Y. EXEC. LAW § 296(6); Feingold v. N.Y., 366 F.3d 138, 157 (2d Cir. 2004); Ramirez v. Hempstead Union Free Sch. Dist. Bd. of Educ., 33 F. Supp. 3d 158, 168-69 (E.D.N.Y. 2014). Thus, an individual who "actually participates" in the conduct giving rise to the claim may be held personally liable. Ramirez, 33 F. Supp. 3d at 168-69 (quoting Wei Hong Zheng v. Wong, No. 07-CV-4768, 2009 WL 2601313, at *6 (E.D.N.Y. Aug. 24, 2009)). Additionally, "the case law establishes

[8] Kuroski and Erwin are also named in their official capacities, and the Court deems those claims as brought against the Town. Seri v. Town of Newtown, 573 F. Supp. 2d 661, 671 (D. Conn. 2008) ("Section 1983 claims against municipal employees sued in their official capacity are treated as claims against the municipality itself." (citing Patterson, 375 F.3d at 226)).

beyond cavil that a supervisor's failure to take adequate remedial measures can rise to the level of actual participation." Lewis v. Triborough Bridge & Tunnel Auth., 77 F. Supp. 2d 376, 384 (S.D.N.Y. 1999) (internal quotation marks omitted). Similarly, an individual may be held liable under section 1983 and section 1981 where he is personally involved in the alleged constitutional violation. Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996) (requiring personal involvement as a prerequisite to individual liability under section 1983); Whidbee, 223 F.3d at 75 ("[I]n order to make out a claim for individual liability under § 1981, a plaintiff must demonstrate some affirmative link to causally connect the actor with the discriminatory action.") (internal quotation marks and citation omitted). In this context, "[p]ersonal involvement can mean either (1) direct participation, (2) failure to remedy the wrong after learning of it, (3) creation of a policy or custom under which the unconstitutional practices occurred, or (4) gross negligence in managing subordinates." Dawson v. Cnty. of Westchester, 351 F. Supp. 2d 176, 196 (S.D.N.Y. 2004) (quoting Zappala v. Albicelli, 980 F. Supp. 635, 639-40 (N.D.N.Y. 1997), aff'd, 173 F.3d 848 (2d Cir. 1999)).

In Plaintiff's case, the record contains sufficient facts so that a reasonable jury could conclude that Erwin and Kuroski both actually participated and were personally involved in Plaintiff's harassment. Indeed, Erwin and Kuroski were apparently

at the forefront of it. Accordingly, Erwin and Kuroski may be held personally liable under the NYSHRL, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

To summarize, the Court finds that Plaintiff's hostile work environment claims under Title VII, the NYSHRL, 42 U.S.C. § 1981, and 42 U.S.C. § 1983 are timely. Moreover, issues of fact regarding whether the alleged harassment was sufficiently severe and pervasive to alter Plaintiff's working conditions and whether the harassment was motivated by the Defendant's racial animus toward Plaintiff preclude summary judgment in favor of either party. Issues of fact surrounding whether the alleged discrimination was the result of a custom or policy, and whether the individual defendants actively participated in the discrimination further precludes the entry of summary judgment. All of Plaintiff's hostile work environment claims may proceed against the Town, and Plaintiff's NYSHRL, 42 U.S.C. § 1983, and 42 U.S.C. § 1981 claims may proceed against Kuroski and Erwin.

III. Retaliation Claims

Plaintiff next alleges that in retaliation for his filing a complaint under the Town's anti-harassment policy, Defendants denied his use of new equipment, an increase in workload as a result of being assigned extra work, and prohibited him from training a new employee. (Pl.'s Br. at 22) As with Plaintiff's

hostile work environment claims, all of his retaliation claims are analyzed under the same framework, Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010), and the Court conducts a singular analysis for all.

The familiar McDonnell-Douglas burden-shifting framework governs Plaintiff's retaliation claims. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Williams v. R.H. Donnelley Corp., 368 F.3d 123, 126 (2d Cir. 2004). The establishment of a prima facie case creates a rebuttable presumption of discriminatory animus that shifts the burden to the defendant to proffer a legitimate, nondiscriminatory reason for its adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677. Once the defendant provides such a reason, the burden shifts back to the plaintiff to present competent evidence that the reasons offered by the defendants were not the true reasons, but were a pretext for discrimination or retaliation. Fleming v. MaxMara USA, Inc., 371 F. App'x 115, 117 (2d Cir. 2010).

With this framework in mind, the Court turns to Plaintiff's claims.

Defendants insist that Plaintiff has not established a prima facie case of retaliation because he has not suffered an

adverse employment action. To establish a prima facie case of retaliation, a plaintiff must show: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." McMenemy v. City of Rochester, 241 F.3d 279, 282-83 (2d Cir. 2001); Hicks, 593 F.3d at 164.

An adverse employment action is one that would dissuade a reasonable worker from making or supporting a charge of discrimination. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345, 359 (2006). The Second Circuit has announced a number of principles to aid lower courts in determining whether certain conduct amounts to an "adverse employment action" for the purposes of a retaliation claim. Hicks, 593 F.3d at 165. First, the phrase "adverse employment action" takes a broader meaning in the context of retaliation than it does in the discrimination context. Id. Second, the phrase is not so broad so as to render actionable "petty slights or minor annoyances that often take place at work and that all employees experience." Burlington N. & Santa Fe Ry. Co., 548 U.S. at 68, 126 S. Ct. at 2415, 165 L. Ed. 2d at 359. Third, while the question of whether a challenged act constitutes an adverse employment action is objective one, the context and circumstances of both the Plaintiff and the working environment

should be considered. Hicks, 593 F.3d at 165. Fourth, a campaign of lesser-harassment may be actionable as a retaliation claim because the "alleged acts of retaliation need to be considered both separately and in the aggregate." Id. at 165.

Even extending to Plaintiff the benefit of every favorable inference and mindful of the relatively low threshold required for an action to qualify as an adverse employment action in the retaliation context, the Court concludes that Plaintiff has not suffered an adverse employment action. Plaintiff's conclusory allegations that he was prohibited from using new equipment and was assigned the undesirable lawn aeration duty more frequently than his counterparts are belied by his own deposition testimony. Regarding the new equipment, Plaintiff concedes that he was allowed to use the equipment on those days where he was responsible for the work for which the new equipment was purchased.[9] (Pl.'s Dep. Tr. at 210:5-6.) While Plaintiff's counsel asserts that his assignment to lawn aeration duty was punitive, Plaintiff makes

[9] The Court is aware that Plaintiff's deposition testimony use can be read to suggest that while Plaintiff was only permitted to the new equipment on certain projects, another groundskeeper was allowed to use it on others. (Pl.'s Dep. Tr. at 211:21-24.) Insofar as Plaintiff takes issue with the Town's somehow cabining his use of the new equipment, the Court finds that such action is insufficient to constitute a materially adverse change. See Rodas v. Town of Farmington, 918 F. Supp. 2d 183, 191 (W.D.N.Y. 2013), aff'd, 567 F. App'x 24 (2d Cir. 2014) (removal of town-owned tools, reassignment to hydrant duty, exclusion from a heavy equipment "fun day" insufficient to rise to an adverse action).

clear that he does not prefer any one assignment to another. (Pl.'s Dep. Tr. at 237:10-238:2.) Finally, Plaintiff's position does not require that he train new personnel, and the Court cannot see how the Town's selection of another groundskeeper to take on the additional task of training a new employee is an adverse action. See Mabry v. Neighborhood Defender Serv., 769 F. Supp. 2d 381, 399 (S.D.N.Y. 2011) (exclusion from non-essential office functions insufficient to state an adverse action).

Accordingly, because Plaintiff has not suffered an adverse employment action, his retaliation claim fails. See Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 722 (2d Cir. 2010) (affirming summary judgment based upon plaintiff's failure to demonstrate adverse action).

IV. Intentional Infliction of Emotional Distress

Citing the same facts that form the basis of his hostile work environment claims, Plaintiff also brings a claim in tort for the intentional infliction of emotional distress. In briefing, the parties devote little attention to this claim and are apparently content to let it rise and fall with Plaintiff's other claims. Accordingly, because this claim is based upon the same facts--and thus plagued by the same issues of fact--as Plaintiff's hostile work environment claims, the Court finds that summary judgment is inappropriate at this time.

CONCLUSION

For the foregoing reasons, Defendants' motion for Summary Judgment (Docket Entry 33) is GRANTED IN PART and DENIED IN PART. Defendants' motion is GRANTED insofar as it seeks judgment on all claims against Defendant Southampton Town Board, Plaintiff's retaliation claims against Defendant Town of Huntington, and Plaintiff's retaliation and Title VII hostile work environment claims against Defendants Erwin and Kuroski. Defendants' motion for summary judgment is DENIED in all other respects.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: March 31, 2015
Central Islip, New York