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United States District Court, S.D. New York.

Charles ROBINSON, Sharon E. Mack, James Oliver, Darryll F. Simpson, Veronica Caridad, Donald Hines, James Jackson, Lord Taylor, Earl Vaughn, Plaintiffs,
v.
METRO–NORTH COMMUTER RAILROAD COMPANY, Defendant.
Raymond Norris, Marvin Edwards, Eric Jones, Daniel Canada, and Giesele Miguel, Plaintiffs,
v.
Metro–North Commuter Railroad Company, Defendant.

Nos. 94 Civ. 7374(JSR), 95 Civ. 8594(JSR). | Jan. 16, 1998.

**Opinion**

**MEMORANDUM ORDER**

RAKOFF, J.

***1** The Court telephonically advised the parties on November 26, 1997 that all of plaintiffs' claims challenged in defendant's summary judgment motion would be dismissed except for Joseph Kimbro's claim of discriminatory failure to promote under 42 U.S.C. § 1981 ("Section 1981"), 42 U.S.C. § 2000e ("Title VII"), and N.Y.Exec.Law § 290 *et seq.* (New York's Human Rights Law); James Jackson's claim under the Section 1981 and the Human Rights Law for discriminatory discipline relating to his August 5, 1992 termination; Raymond Norris' claim under Title VII, Section 1981, and the Human Rights Law for discriminatory discipline relating to his August 1995 dispute regarding overtime pay; and James Oliver's claim under Title VII, Section 1981, and the Human Rights Law for discriminatory discipline relating to his termination on March 22, 1994.[1] This memorandum will serve to confirm those rulings and briefly state the reasons therefor.

1 Defendant Metro–North did not move with respect to Donald Hines' claim of discriminatory discipline relating to manager Ruth Hoffman, Tammy Jones' claim of racial harassment by Salvatore Lupi, and Sharon Mack's claims of racial and sexual harassment. Conversely, plaintiffs, by letter dated October 15, 1997, voluntarily withdrew the following claims: all promotion claims of Daniel Canada, Veronica Caridad, Marvin Edwards, Eric Jones, Geisele Miguel and Darryll Simpson; Donald Hines' promotion claim relating to the position of Rail Traffic Controller/Train Dispatcher for the years 1980–1983; Joseph Kimbro's promotion claim relating to the position of PEP Chief Clerk in July of 1994; Earl Vaughn's promotion claims relating to the positions of Assistant Manager of Materials in 1992, Assistant Superintendent of GCT in 1992, and Assistant Manager of Passenger Accounting in 1993; all discriminatory discipline claims of Daniel Canada and Geisele Miguel; Donald Hines' discipline claim relating to tardiness in 1981 and a 1994 Payroll Department directive; Veronica Caridad's claims of racial harassment; Tammy Jones' claims of racial harassment by Howard Hanson; and Daniel Canada's claims of discrimination on the basis of his disability.

*First,* several of the plaintiffs' claims must be dismissed as untimely. Absent a "continuing violation," discussed *infra,* only events occurring within 300 days of a plaintiff's filing of an EEOC discrimination charge are actionable under Title VII. 42 U.S.C. § 2000e–5(c); *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 712 (2d Cir.1996); *Butts v. New York Dep't of Housing Preservation & Dev.,* 990 F.2d 1397, 1401 (2d Cir.1993). Likewise, absent a continuing violation, plaintiffs' claims brought pursuant to Section 1981, to the New York Human Rights Law, and/or to the New York City Administrative Code[2] all are subject to a three-year statute of limitations. *Neilson v. Colgate–Palmolive Co.,* No. 94 Civ. 7643(JSR), 1997 WL 297051, at *1 (S.D.N.Y. June 4, 1997). These limitations bar the following claims of the following plaintiffs:

2 For other reasons, discussed *infra,* all plaintiffs' claims under the Administrative Code must in any event be dismissed as a matter of law.

*Donald Hines:* Hines' EEOC charge was not filed until December 22, 1994, *see* Affidavit of Myron D. Rumeld, dated August 22, 1997 ("Rumeld Aff."), Ex. 29, and the *Robinson* Amended Complaint containing his other claims was not filed until April 13, 1995. Accordingly, all of Hines' Title VII claims based on events prior to February 25, 1994, and all of his Section 1981 and state law claims based on events prior to April 13, 1992, are time-barred.

*James Jackson:* Jackson's EEOC charge was not filed until July 8, 1994. *See* Rumeld Aff.Ex. 33. Accordingly, all of Jackson's Title VII claims based on events prior to September 11, 1993 are time-barred.

*Sharon Mack:* Mack's EEOC charge was not filed until August 4, 1993, *see* Rumeld Aff.Ex. 49, and the *Robinson*

Complaint containing her other claims was not filed until October 12, 1994. Accordingly, all of Mack's Title VII claims based on events prior to October 8, 1992, and all of her Section 1981 and state law claims based on events prior to October 12, 1991, are time-barred.

*Darryll Simpson:* Simpson's EEOC charge was not filed until January 28, 1994, *see* Rumeld Aff.Ex. 87, and the *Robinson* Complaint containing his other claims was not filed until October 12, 1994. Accordingly, all of Simpson's Title VII claims based on events prior to April 3, 1993, and all of his section 1981 and state law claims based on events prior to October 12, 1991, are time-barred.

***2** *Lord Taylor:* Taylor's EEOC charge was not filed until April 28, 1994, *see* Rumeld Aff.Ex. 97, and the *Robinson* Amended Complaint containing his other claims was not filed until April 13, 1995. Accordingly, all of Taylor's Title VII claims based on events prior to July 2, 1993, and all of his Section 1981 and state law claims based on events prior to April 13, 1992, are time-barred.

*Earl Vaughn:* Vaughn's EEOC charge was not filed until January 19, 1995. *See* Rumeld Aff.Ex. 100. Accordingly, all of Vaughn's Title VII claims based on events prior to March 25, 1994 are time-barred.

*Daniel Canada:* Canada's EEOC charge was not filed until at least May 26, 1995. *See* Rumeld Aff.Ex. 16. Accordingly, all of Canada's Title VII claims based on events prior to July 30, 1994 are time-barred.

*Marvin Edwards:* Edwards' EEOC charge was not filed until December 20, 1993 (an earlier EEOC charge was filed but then withdrawn), *see* Rumeld Aff.Exs. 26, 27, and the *Norris* Complaint containing his other claims was not filed until October 10, 1995. Accordingly, all of Vaughn's Title VII claims based on events prior to February 23, 1993, and all of his Section 1981 and state law claims based on events prior to October 10, 1992, are time-barred.

*Eric Jones:* Jones' EEOC charge was not filed until September 26, 1995, *see* Rumeld Aff.Ex. 35, and the *Norris* Complaint containing his other claims was not filed until October 10, 1995. Accordingly, all of Jones' Title VII claims based on events prior to November 30, 1994, and all of his Section 1981 and state law claims based on events prior to October 10, 1992, are time-barred.

*Raymond Norris:* Norris' EEOC charge was filed on September 12, 1995,[3] *see* Rumeld Aff.Ex. 67, and the *Norris* Complaint containing his other claims was not filed until October 10, 1995. Accordingly, all of Norris' Title VII claims based on events prior to November 16, 1994, and all of his Section 1981 and state law claims based on events prior to October 10, 1992, are time-barred.

3 Norris also filed a charge in 1992 that he subsequently withdrew, *see* Rumeld Aff.Ex. 64, and a charge on May 5, 1994, *see id.* Ex. 65, relating to a 1993 suspension that Norris no longer challenges, *see* Plaintiffs' October 15, 1997 Letter, at 4.

*Tammy Jones:* Jones' EEOC charge was not filed until at least January 23, 1997, *see* Rumeld Aff.Ex. 47, and the Second Amended Complaint in *Robinson* and *Norris* containing her other claims was served (although apparently never filed) on March 25, 1997. Accordingly, all of Jones' Title VII claims based on events prior to March 29, 1996, and all of her Section 1981 and state law claims based on events prior to March 25, 1994, are time-barred.

*Joseph Kimbro:* Kimbro's EEOC charge was not filed until June 7, 1996. *See* Rumeld Aff.Ex. 48. Accordingly, all of Kimbro's Title VII claims based on events prior to August 12, 1995 are time-barred.

Plaintiffs do not contest the respective 300–day and three-year limitations, but contend that all their claims are rendered timely by the "continuing violation" doctrine. That doctrine, which is "disfavored in the Second Circuit," *Johnson v. Frank,* 828 F.Supp. 1143, 1150 (S.D.N.Y.1993), ordinarily applies only where a defendant maintained "an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests." *Van Zant,* 80 F.3d at 713. Although the doctrine may apply where a plaintiff experienced specific and related acts of discrimination that were permitted to remain unremedied for so long as to constitute a policy or practice of discrimination, "discrete incidents of discrimination that are not the result of a discriminatory policy or practice will not ordinarily amount to a continuing violation." *Id.* (internal citations omitted); *see also, e.g., Pollis v. New School for Social Research,* No. 96–9361, 1997 WL 781055, at *3 (2d Cir. Dec.22, 1997) (no continuing violation where claim "involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action").

***3** The lack of evidentiary support for plaintiffs' theory that Metro–North's expressly anti-discriminatory disciplinary policies were tacitly ignored or undercut on a company-wide basis was previously noted by this Court in the Court's rejection of plaintiffs' motion for class certification. *See* Order, August 8, 1997, at 8. Reviewed again against the standards for summary judgment, the argument once more fails to pass muster. In essence, the plaintiffs, like the Metaphysical Poets, seek by violence to yoke together as a "continuing violation" a

conglomeration of disparate allegations that bear no meaningful relation to each other. Were their approach to be accepted, the "continuing violation" exception would swallow the rule.

*Second,* with respect to plaintiffs' claims of discriminatory discipline in violation of Title VII, such claims are evaluated under the familiar three-step analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), as are the parallel claims under Section 1981, *see Hudson v. International Business Machs. Corp.,* 620 F.2d 351, 354 (2d Cir.), *cert. denied,* 449 U.S. 1066, 101 S.Ct. 794, 66 L.Ed.2d 611 (1980), the New York Human Rights Law, *see Song v. Ives Labs., Inc.,* 957 F.2d 1041, 1046 (2d Cir.1992), and the Administrative Code of the City of New York, *see Pace Univ. V. New York City Comm'n on Human Rights,* 200 A.D.2d 173, 175, 611 N.Y.S.2d 835 (1st Dep't 1994), *rev'd on other grounds,* 85 N.Y.2d 125, 623 N.Y.S.2d 765, 647 N.E.2d 1273 (1995). To establish a prima facie case of discriminatory employment discipline under this test, a plaintiff must show (1) membership in a protected group; (2) qualification for a position; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *See Shumway v. United Parcel Servs., Inc.,* 118 F.3d 60, 63 (2d Cir.1997). If an employee makes out a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for disciplining the employee. *Fisher v. Vassar College,* 114 F.3d 1332, 1335–1336 (2d Cir.1997). If the employer does so, then, in cases like the instant claims, the plaintiff must "put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's sex or race [or other protected status] was the real reason for the [[[employment] action." *Holt v. KMI–Continental, Inc.,* 95 F.3d 123, 132 (2d Cir.1996), *cert. denied,* 117 S.Ct. 1897 (1997).

Assessing plaintiffs' remaining, timely claims against these standards, the Court assumes *arguendo* that plaintiffs have carried their very modest burden of establishing a *prima facie* case for these claims; but the Court further notes that with respect to a number of these claims, plaintiffs have failed even to respond to Metro–North's evidentiary proffers of nondiscriminatory explanations for the disciplinary actions complained of. Having failed to carry their third-stage burden in such instances, plaintiffs must face dismissal of such claims. These include all timely discipline claims maintained by Joseph Kimbro, Veronica Caridad and Marvin Edwards; Sharon Mack's claim relating to her discipline on April 2, 1993; all discipline claims asserted by James Oliver, with the exception of that related to his termination on March 22, 1994 for the alleged mishandling of confidential documents; Darryll Simpson's claims relating to a charge of rudeness to a customer in 1993, a June 1995 suspension for assaulting the Medical Director, a 1992 discipline for refusing to work, and a denial of tuition reimbursements in February 1992; and Raymond Norris' claim relating to discipline imposed for failure to notify of unavailability to work on June 9, 1995.

***4** Turning to those claims where plaintiffs have endeavored to show that Metro–North's proffered explanations are a pretext for discrimination, the Court, applying summary judgment standards, finds as follows:

*James Jackson:* Jackson claims that his termination on August 5, 1992 for violating Metro–North's Safety and Operating Rules was the result of discrimination. The termination followed Jackson's testimony (at a disciplinary hearing of a Metro–North engineer charged with improperly guiding a train through a stop signal) that he had on occasion observed engineers inadvertently passing the signal in question without stopping. Based on this testimony, Metro–North terminated Jackson for failing to report, and for "covering up," signal violations. Following Jackson's appeal to the Labor Relations Department, which was denied, *see* Affidavit of Andrew J. Paul, dated August 21, 1997 ("Paul Aff."), Ex. 5, he further appealed to the Special Board of Adjustment and was reinstated, but without back pay. *Id.* Ex. 6.

Metro–North contends that its dismissal of Jackson was justified, noting that although the Special Board reduced the penalty and reinstated Jackson, it found that Jackson had in fact committed the infraction that led to his discipline. *See id.* Ex. 6. Jackson, however, emphasizes that certain Caucasian tower directors who committed comparable rail traffic infractions were not terminated, and that some were not even disciplined at all. *See* Jackson Dep. Tr. at 83–86, 126, 128–34.

Although Metro–North disputes the relevance of these infractions by other tower directors, noting that they involve commission of safety violations rather than failures to report safety violations, evidence that Jackson was disciplined more severely than Caucasian employees who committed related, though not identical, infractions of an apparently similar level of severity provides an adequate basis for a rational inference of discrimination. Accordingly, Metro–North's motion for summary judgment is denied with respect to this claim.[4]

4 Because the facts underlying this claim occurred more than 300 days before Jackson filed his EEOC charge, Jackson may maintain this claim only pursuant to Section 1981 and state law.

*Eric Jones:* Jones claims that disciplines imposed by Metro–North for his sleeping on duty in October 1993 and December 1994, for his absenteeism in July 1994 and December 1993, and for his reading a newspaper on duty in June 1994, were motivated by discrimination. Metro–North, in response, offers evidence that Caucasian employees were similarly disciplined for sleeping on duty, that Jones has a history of absenteeism, *see* Rumeld Aff.Exs. 36–44, and that Jones admitted being absent on almost all of the dates for which he was disciplined, *see id.* Exs. 37, 39–41, 44; E. Jones Dep. Tr. at 66–68, 92–93. The only evidence Jones offers in response is that he has not been disciplined at any time since Salvatore Lupi, the Caucasian supervisor who imposed the complained-of discipline, left the department. This is insufficient to raise an inference of discrimination. Accordingly, this claim is dismissed.

***5** *Sharon Mack:* Mack claims that her termination on June 10, 1993 after an altercation with a Metro–North officer, Inez Vasquez, was motivated by discrimination. Mack's appeal of her termination was denied not only by Metro–North's Labor Relations Department, *see* Paul Aff.Exs. 20, 21, but also by the National Railroad Adjustment Board, *see id.* Ex. 22, which upheld the Labor Relations Department's conclusion that Mack's account of the incident, which varied from all other evidence presented to it, was not credible. Although, as Mack points out, nine other employees in the Transportation Department were disciplined for fighting between 1983 and 1991 but were not terminated, this is insufficient to raise an inference of discrimination because, unlike Mack, none of these employees was charged with attacking a Metro–North officer—an offense regarded as particularly serious by Metro–North—nor were any formally determined to have lied in the way determined as to Mack. *See* Affidavit of David A. Bownas, dated August 21, 1997, at ¶ 24. Moreover, since January 1992, two other Metro–North employees, both of whom are Caucasian, have been terminated for fighting. *Id.* Accordingly, this claim must be dismissed.

*James Oliver:* Oliver claims that his termination on March 22, 1994 was discriminatory. Oliver, who was employed as a records clerk, alleged that after he was asked to file what he characterized at his deposition as an "extraordinary" number of documents, and after neither he nor his supervisor was able to locate the documents the following day, he was charged with mishandling confidential medical documents and terminated. *See* Affidavit of Jerry Jerome, dated August 21, 1997 ("Jerome Aff."), at ¶¶ 15–22. Oliver appealed to the Assistant Director of Metro–North's Labor Relations department, who reduced the termination to a sixty-day suspension and restricted Oliver from any position involving record-keeping duties or access to confidential information. *See* Paul Aff.Ex. 17. The Special Board of Adjustment affirmed that decision. *See id* . Ex. 18. Oliver, however, emphasizes his testimony that in this instance he was given five to ten times as many documents as was typical and asked to retrieve them abnormally fast, i.e., that he was "set up" by his supervisor. Even crediting all this, and further even taking into account (as the Court has done with respect to each of the rulings herein) whatever inferences favorable to a given claim may arise from one or more of the other claims alleged by the Complaint,[5] the evidence that this alleged "set-up" was the result of discriminatory intent is exceedingly thin. Nonetheless, the Court is not only precluded from making credibility determinations at this stage but must draw every reasonable inference in a claimant's favor; and taking all this in Oliver's favor, the Court, after combing the record before it, cannot conclude that the proffered evidence provides no basis for an inference of discrimination. Accordingly, Metro–North's motion for summary judgment is denied with respect to this claim.

5 The analysis undertaken on this motion has served, however, to confirm the Court's view that the claims alleged in the instant Complaint are, for the most part, entirely discrete and unrelated to one another, and thereby singularly inappropriate to support a class action. *See* Order, August 8, 1997.

***6** *Darryll Simpson:* Simpson claims that each of three instances of discipline by Metro–North were discriminatory. First, on April 23, 1993 Simpson was issued a reprimand for failing to exercise caution during performance of duties, after falling while walking down an icy hill without bracing himself. This reprimand, however, was removed on appeal to the Labor Relations department, which stated that a letter of caution or re-instruction would have been more appropriate. *See* Paul Aff.Ex. 10. Second, on June 4, 1993, Simpson was dismissed for failure to timely report the absence of an engineer. After first being reduced to a suspension by the department of Labor Relations, however, Simpson's dismissal was reversed by the Special Board of Adjustment, which also ordered back pay for the period of suspension. *See id.* Ex. 13. Finally, on October 26 and 27, 1993, Simpson was issued warnings, and his pay for October 27 was withheld, for his failure to wear the conductor's cap required by Rule 33 of Metro–North's agreement with the United Transportation Union. *See* Paul Aff.Ex. 2. Because, with respect to the first two instances complained of, Metro–North ultimately imposed no discipline, a discrimination claim will not lie. With respect to the third instance, Simpson does not dispute that he failed to wear the required cap, *see* Simpson Dep. Tr. At 221; Rumeld Aff.Ex. 87. His argument that Metro–North "cannot demonstrate that it regularly charges and punishes white employees for similar infractions," Plaintiffs' Opp. Br. at 39, is unsupported by any citation to the record and is wholly insufficient to satisfy Simpson's burden to establish an inference of

discrimination. Accordingly, these claims must be dismissed.

*Raymond Norris:* Norris claims that he was discriminatorily disciplined in connection with an August 5, 1995 dispute concerning overtime pay. Norris alleges that after he inadvertently placed the wrong date on his work records, he was not paid for overtime work that he had performed and was thereafter charged with falsifying work records. Norris also provides evidence that Caucasian employees who erroneously overreported hours in their work reports were permitted to correct their errors and not disciplined. *See* Dillon Dep. Tr. at 26. While Norris apparently has in fact been paid for the overtime work in question, Metro–North offers no explanation for the charge of falsifying records. Accordingly, summary judgment in favor of Metro–North is denied with respect to this claim.

Norris also complains that he was discriminatorily disciplined in connection with a 1994 charge of damaging company property. However, Norris admitted his guilt in connection with this charge. *See* Rumeld Aff.Ex. 71. Accordingly, this claim must be dismissed.

*Third,* with respect to timely claims based on allegedly discriminatory denials of promotions, the parties' burdens are defined by essentially the same three-step framework applicable to discriminatory discipline claims, with the relevant elements of a prima facie case being that (i) plaintiff belongs to a protected class; (ii) she applied for and was qualified for a promotion; (iii) she was rejected for the position; and (iv) the position either remained open or was filled by a person not a member of the protected class. *See Jackson v. City of New York Dep't of Sanitation,* No. 95 Civ. 5779(MDM), 1996 WL 571870, at *7 (S.D.N.Y. Oct.7, 1996).

***7** Here again, the Court assumes *arguendo* that plaintiffs have met their minimal burden of showing a prima facie case. But, here again, with respect to certain of the promotion claims, plaintiffs have failed to respond with specific evidence to defendants' showing that the challenged employment actions were non-discriminatory. This includes all promotion claims made by Donald Hines, James Jackson, Lord Taylor and Raymond Norris, which are, accordingly, dismissed.

The remaining promotion claims, relating to Joseph Kimbro and Earl Vaughn, are disposed of as follows:

*Joseph Kimbro:* Kimbro contends that the failure of Metro–North to promote him to the position of day shift PEP Chief Crew Dispatcher in 1996 was discriminatorily motivated. While Metro–North provides a legitimate explanation for the promotion decision, pointing to evidence that the persons responsible for the hiring decision determined that two other applicants were superior to Kimbro, *see* Affidavit of Gerard Geisler, dated August 21, 1997 ("Geisler Aff."), at ¶¶ 8–19, and that Kimbro was offered the same position on a different shift, *id.* at ¶ 17, ahead of two more senior Caucasian employees, *id.* at ¶ 19, Kimbro has provided contrary evidence that is sufficient to create a genuine issue of material fact as to whether the failure to promote was in fact discriminatorily motivated. For example, it is undisputed that Kimbro had been employed as a crew dispatcher since 1983, and also had served as chief crew dispatcher on special assignment, which could give rise to an inference that he was qualified for the Chief Crew Dispatcher position that he sought. Moreover, Kimbro himself had trained Andre Poly, one of the two Caucasian applicants that were awarded the position. *See* Kimbro Dep. Tr. at 94. Kimbro also provides evidence that the two applicants awarded the position had disciplinary records. *See id.* at 62. While not overwhelming, this and other evidence is sufficient to warrant submission of this claim to a jury.

*Earl Vaughn:* Vaughn contends that in 1994 he was paid less than three Caucasian employees who he contends were less experienced but received higher salaries.[6] *See* Vaughn Dep. Tr. at 17–18, 22. In response to Vaughn's complaints regarding the pay disparity, Metro–North gave an across-the-board salary increase to incumbent personnel, such as Vaughn, whose salaries were lower than new personnel. *See* Vaughn Dep. Tr. at 28, 36; Affidavit of Daniel Donahue, dated August 21, 1997 ("Donahue Aff."), at ¶ 10. While Vaughn argues that the across-the-board increase still left Vaughn with a lower salary than one Caucasian employee, that employee occupied a more senior position than Vaughn. *See* Donahue Aff. at ¶ 12. The increase left Vaughn with a higher salary than both of the other two Caucasian employees that Vaughn identified. *See id.* at ¶ 11. Accordingly, this claim must be dismissed.

6 Vaughn also lists a fourth employee, Tammy Jones, but she is (in addition to being a plaintiff in this action) likewise an African–American. *See* Vaughn Dep. Tr. at 22.

*Fourth,* with respect to the plaintiffs' various claims of discriminatory harassment, plaintiffs' ultimate burden is to establish that the workplace was "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.' " *Harris v. Forklift Sys.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (sexual harassment) (citation omitted); *see Torres v. Pisano,* 116 F.3d 625, 630 (2d Cir.1997) (same standard for racial harassment claim); *Shabat v. Blue Cross Blue Shield,* 925 F.Supp. 977, 981–982 (W.D.N.Y.1996) (same standard

for religious harassment claim), *aff'd,* 108 F.2d 1370 (2d Cir.1997). "[I] solated acts or occasional episodes will not merit relief." *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.,* 957 F.2d 59, 62 (2d Cir.1992). Rather, "[t]he incidents must be repeated and continuous[.]" *Id.* Moreover, to establish Metro–North's liability for the alleged acts of harassment by its employees, plaintiffs must show "that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Briones v. Runyon,* 101 F.3d 287, 291 (2d Cir.1996); *see also Torres,* 116 F.3d at 634.

***8** Many of the alleged instances of harassment simply are not actionable as a matter of law. Eric Jones, for example, complains that on one occasion his supervisor accused him of being lazy and taking drugs. Likewise, Joseph Kimbro complains that racially offensive posters of unknown origin were placed on a door in the workplace. Finally, Raymond Norris complains that, among other things, coworkers referred to the EEOC as "EIEIO" and called him a "spook." These individual acts simply lack the requisite severity or pervasiveness to constitute harassment actionable by these individual plaintiffs.[7] *Kotcher,* 951 F.2d at 62.

7 Jones' harassment claim is also undercut by his own testimony that his supervisor disliked him not because of his race, but because of Jones' repeated complaints to his union.

With respect to certain other events alleged to constitute harassment of certain other plaintiffs, it is undisputed that Metro–North responded to these plaintiffs' complaints and attempted to remedy the alleged problems. For example, although Marvin Edwards complains of being subjected to repeated racially derogatory comments by his supervisor, Metro–North investigated Edwards' complaints and charged the supervisor with violations. Likewise, while Raymond Norris's harassment claim is founded, in part, on the allegation that his supervisor, Dillon, used ethnic and racial slurs that were ignored by a higher-level supervisor, Cleary, to whom they were reported, the proof is undisputed that other officials of Metro–North conducted an internal investigation in response to Norris' complaint that resulted in Dillon being issued a formal reprimand and Cleary a letter of warning. Similarly, Metro–North investigated Geisele Miguel's complaint of religious harassment and promptly warned the individual complained of to refrain from discussing religion with his co-workers.[8] While these responses might not be sufficient in all circumstances, particularly if there were some showing, wholly lacking here, that they were intended only as the proverbial "slap on the wrist," here there is no genuine factual dispute that Metro–North responded in a manner that, absent any further proffer from plaintiffs, refutes any imputation to defendant of the alleged harassment and therefore requires the dismissal of these claims. *See, e.g., Donato v. Rockefeller,* No. 93 Civ. 4663, 1994 WL 495791 (S.D.N.Y. September 8, 1994); *Babcock v. Frank,* 783 F.Supp. 800, 809 (S.D.N.Y.1992).

8 As to Miguel's claims of sexual and racial harassment by that same supervisor, recovery is precluded because the allegations in her EEOC charge were limited to religious discrimination, *see, e.g ., Butts v. New York Dep't of Housing & Preservation,* 990 F.2d 1397, 1401 (2d Cir.1993), as were those in the complaint.

Finally, although Veronica Caridad complained of inappropriate physical contact and comments by co-workers and supervisors, she refused to cooperate with the investigation commenced by Metro–North into her allegations. Accordingly, even if these incidents could constitute harassment, the acts complained of cannot be imputed to Metro–North. *See Torres,* 116 F.3d at 634.

In addition to the claims discussed above (as well as the harassment claims of Tammy Jones and Sharon Mack that Metro–North does not challenge in its motion), plaintiffs also allege that "all of the Plaintiffs maintain claims of hostile working environment." Plaintiffs' October 15, 1997 Letter, at 5. They fail, however, to make any specific allegations or provide any particularized admissible evidence to support this general claim. Accordingly, to the extent that other plaintiffs allege a hostile work environment claim, those claims are dismissed as well. *See, e.g., Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.) ("purely conclusory allegations of discrimination, absent any concrete particulars" cannot preclude summary judgment), *cert. denied,* 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985).

***9** *Fifth,* with respect to the timely claims of Veronica Caridad, Sharon Mack, Geisele Miguel and Tammy Jones that they were discriminated against in retaliation for their complaints of discrimination, these claims are once again subject to the same three-step test applied to other discrimination claims, with the prima facie case here being established by a showing that (1) plaintiff engaged in protected activities and that defendant was aware of the activities; (2) plaintiff suffered an adverse employment action; and (3) there is a causal link between the two actions. *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 714 (2d Cir.1996). The requisite causal link can be established through either direct evidence of retaliatory motive or through inferences from circumstantial evidence. *Spencer v. Perrier Group of Am.,* No. 95 Civ. 8404, 1997 WL 282258, *2 (S.D.N.Y. May 28, 1997).

Once again, assuming *arguendo* the existence of a prima facie case, plaintiffs offer no response whatsoever to defendant's proffer of evidence of non-discriminatory explanations for the retaliatory actions alleged by

plaintiffs Caridad, Mack and Miguel. Accordingly, their claims of retaliation must be dismissed.

In the remaining retaliation claim, Tammy Jones, who began training as a Metro–North police officer in August 1996 but was discharged from the police department in December of 1996, alleges that this discharge was in retaliation for complaints she had previously made, in July 1995 and May 1996, concerning alleged discrimination in Metro–North's maintenance department, where she had previously worked. Jones offers no evidence, however, to support a rational finding that the police department discharge was causally linked to those earlier maintenance department complaints. Indeed, Metro–North has proffered undisputed evidence that the individuals in the police department who were responsible for her termination were not even aware of her earlier complaints. Accordingly, Jones' retaliation claim must be dismissed.

*Sixth,* in support of all of their claims of discrimination, plaintiffs rely on statistical opinions offered by their expert, Dr. Zellner, that they claim support inferences of discriminatory practices and intentions. For its part, defendant strongly challenges, as it did previously, *see* Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and Consolidation, dated October 1, 1996, at 74–84, the validity, reliability, and relevancy of Dr. Zellner's opinions. While the Court has previously expressed grave reservations whether Dr. Zellner's opinions, no matter how dressed in the garb of "regression analysis," satisfy even threshold evidentiary requirements of relevance and reliability in the context of class certification, *cf. General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139L.Ed.2d 508 (1997), the Court need not enter this fray in the context of summary judgment; for even assuming, *arguendo,* that Dr. Zellner's "analysis" is valid, reliable, and relevant, that analysis is not sufficient in itself to carry plaintiffs' third-stage burden on summary judgment of raising a genuine issue that defendants' proffered explanations "were false, and that more likely than not the employee's sex or race [or other protected status] was the real reason for the [employment] action." *Holt v. KMI–Continental, Inc.,* 95 F.3d 123, 132 (2d Cir.1996), *cert. denied,* 117 S.Ct. 1897 (1997).[9] Put another way, while statistical evidence may sometimes enable a plaintiff to carry its modest burden of creating a prima facie case, *see Hazelwood School Dist. v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Court is aware of no case where generalized statistical evidence has been held sufficient to refute, for summary judgment purposes, a defendant's particularized evidentiary showing of a nondiscriminatory explanation for a particular act complained of, in the absence of any other material, admissible evidence of discrimination. *See generally Raskin v. Wyatt Co.,* 125 F.3d 55, 65–68 (2d Cir.1997) (district court properly determined that proffered statistical evidence was not probative of discrimination); *Martin v. Citibank, N.A.,* 762 F.2d 212, 218 (2d Cir.1985) ("the statistical proof is not sufficient to carry the case to the jury in itself"); *Hudson v. Int'l Business Machines Corp.,* 620 F.2d 351, 355 (2d Cir.1980) (where plaintiff "has failed to establish his case ... the statistics standing alone do not create it").[10]

9 The same is true of the affidavit of Dr. Bielby, which compares the racial composition and personnel practices of Metro–North with those of the New York City Transit Authority.

10 Plaintiffs' reliance on *Wyche v. Marine Midland Bank, N.A.,* No. 94 Civ. 4022, 1996 WL 125668 (S.D.N.Y. March 20, 1996) is unavailing, since in that case plaintiffs' statistics merely bolstered other material evidence of discrimination—evidence that here, with respect to the claims the Court has dismissed, is entirely lacking.

***10** Indeed, were it otherwise, the careful three-step analysis promulgated by the Supreme Court would be rendered a nullity in any case in which plaintiffs could produce an expert willing to draw inferences of discrimination from non-particularized statistical analysis alone. One can reject Mark Twain's famous hyperbole that "there are three kinds of lies: lies, damned lies and statistics"[11] while still recognizing that plaintiffs' proposed departure from particularization would wreak havoc with established principles of individualized justice. Here, the Court has scoured the record presented on this motion to locate particularized evidence arguably refuting Metro–North's non-discriminatory explanations for individual complained-of actions, and where the Court has found even very modest evidence of this kind, it has denied summary judgment (*see, e.g.,* the discussion relating to James Oliver, *supra* ). But where such evidence is totally absent, "regression analysis" cannot fill the gap.

11 Oxford Dictionary of Quotations 249 (1992) (noting that Twain in turn attributed the quip to Disraeli).

*Seventh,* Metro–North advances two additional arguments against certain of plaintiffs' state law claims. First, it contends that plaintiffs' claims pursuant to the Administrative Code of the City of New York should be dismissed pursuant to Section 1266(8) of the New York State Public Authorities Law. That law, in referring to Metro–North's parent, the Metropolitan Transit Authority, provides that

> no municipality of political

> subdivision ... shall have jurisdiction over any facilities of the authority or any of its activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision ... conflicting with this title or any rule or regulation of the authority, shall not be applicable to the activities or operation of the authority[.]

Plaintiffs have nowhere responded to this argument, nor does the Court perceive any valid response. Accordingly, all plaintiffs' claims pursuant to the New York City Administrative Code are dismissed.

Finally, Metro–North also argues that the claims of plaintiffs Norris and Edwards pursuant to the Human Rights Law should be dismissed because, it contends, those individuals lived and worked in Connecticut during the entirety of their employment by Metro–North. *See, e.g., Beckett v. Prudential Ins. Co. of America,* 893 F.Supp. 234, 238 (S.D.N.Y.1995) ("By its terms, of course, § 298–a does not extend the coverage of the NYHRL to out-of-state discrimination against non-residents."). All of Edwards' claims already have been dismissed on other grounds. As for Norris, plaintiffs do not dispute that he lives and works in Connecticut. *See* Metro–North's Rule 56.1 Statement, Norris Facts, ¶ 2 Plaintiffs' Rule 56.1 Statement, p. 37. Accordingly, with respect to Norris' remaining claim, that claim is dismissed as to the Human Rights Law but remains in all other respects as previously set forth.

In summary, for the foregoing reasons, defendant's summary judgment motion is granted as to all claims to which it is directed except for those specified in the first sentence of this order.

***11** SO ORDERED.