

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAYMOND NORRIS , *
Plaintiff *
* CIVIL NO. 3:06-CV-00439 (JBA)
VS. *
*
METRO-NORTH COMMUTER *
RAILROAD COMPANY, ET AL *
Defendants * MAY 7, 2007

**PLAINTIFF'S MOTION IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule of Civil Procedure 56(a)(2), the plaintiff, Raymond Norris hereby respectfully objects to the defendants' Motion for Summary Judgment, dated March 30, 2007. Plaintiff asserts there are a multiplicity of genuine issues of material fact contained in the record before the Court to warrant a full adjudication of plaintiff's claims on the merits. The factual and legal basis in support of plaintiff's Motion in Opposition are more fully set forth in the attached Memorandum of Law, Exhibits and Local Rule 56(a)(2) statement, respectively.

WHEREFORE, in light of all of the foregoing, as well as the attached documents, which are incorporated herein by reference, plaintiff respectfully prays defendant's Motion for Summary Judgment be denied in its entirety.

PLAINTIFF, RAYMOND NORRIS

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CERTIFICATION

I hereby certify that on this 7th day of May, 2007, a copy of the foregoing Plaintiff's Motion in Opposition was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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W. Martyn Philpot, Jr..

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION
IN OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Defendant, Metro-North Commuter Railroad Company ("Defendant" or "Metro-North"), is a public benefit corporation incorporated under the laws of the State of New York and is responsible for providing commuter rail transportation between New York City and its northern suburbs. Raymond Norris, (the "plaintiff" or "Norris") is African American of race and black of color and began employment with the defendant in July of 1987 as a lineman apprentice in its power department. Some nine (9) years later, in 1998 Norris finally was promoted to the position of foreman within the Catenary Department.¹

Since on or about April of 2002, Norris has applied for at least four (4) promotional opportunities within Metro-North. Plaintiff asserts that his being repeatedly passed over for promotions is unequivocally related to his race and his

¹ See ¶7 of Corrected Second Amended Complaint, dated September 15, 2006.

color.² Moreover, plaintiff has asserted that he has been subjected to a hostile work environment and retaliated against as a result of his participation in various types of protected activities including, but not limited to, his participation in a federal civil rights class action against Metro-North, as well as a number of informal and formal complaints and grievances filed against and with regard to the ongoing discriminatory and harassing employment practices of the defendant. Additionally, Norris has asserted claims of discrimination and retaliation against the Director of the Power department, James Gillies (“Gillies”), as well his General Supervisor, Joseph Cleary (“Cleary”), both of who are Caucasian of race and white of color.

II. STATEMENT OF FACTS

By way of background, it is noteworthy that a class action was commenced in the United States District Court for the Southern District of New York by complaint filed in October 1994. The class included all “African Americans/black employees who were actively employed by Metro-North at anytime during the period from January 1, 1985 to January 30, 2002.” The complaint alleged, *inter alia*, both disparate treatment and disparate impact claims in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; and 42 U.S.C. §1981. Specifically, the complaint alleged a “company-wide policy of delegating to department supervisors, discretionary authority to make employment decisions related to discipline and promotion and that this delegated authority had been

² See ¶13 of Corrected Second Amended Complaint.

implemented in a racially discriminatory manner”... See, generally *Robinson, et al v. Metro-North*, Docket Nos. 00-9417, 00-9423; Ex. A. Norris was a lead plaintiff in the aforescribed class action and joined it because even in the 1990s, he had been turned down for several foreman positions without so much as an interview. Norris Deposition Transcript at pp. 110-111.³

Having started as a lineman apprentice (or helper) on July 27, 1987, the plaintiff would do what is commonly referred to as “grunt work.” Norris DT at p. 95. Essentially, he would fill water jugs, get parts and deliver tools to lineman who were working on the Catenary wires and poles and drive the foremen to various assignments. *Id.* at p. 95. After about four (4) years, in 1991, the plaintiff successfully tested to become a “Class A Lineman”. As a Class A Lineman, plaintiff had the ability to ground high voltage conductors throughout the railroad properties. Class A linemen are also qualified to protect contractors that are on railroad property. After nine (9) years within the employ of the defendant, plaintiff became a foreman in August of 1998. *Id.* at p. 119.

Even after becoming a foreman, the plaintiff was still subjected to a hostile work environment, disparate treatment and harassment. For example, notwithstanding the fact that plaintiff was serving as a foreman on the wire train, the conductor on the train, Conductor Remolard, used a racial slur to refer to the plaintiff. Norris DT at p. 131-132; Ex. B. Although a formal complaint was made to the internal workforce diversity office of the defendant, and there was an

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For the sake of clarity, from this point forward, each reference to a Deposition Transcript will be referred to as “DT” at p. ____.

independent witness to the slur, nothing was done by way of discipline to Mr. Remolard. *Id.* at 132-133. Even prior to that, Supervisor Matt Dillon made the discriminatory statement in front of a number of witnesses that he liked keeping blacks on nights “where they belong.” *Id.* at 134. Supervisor Dillon assured all who would listen that there would never be a black foreman within the Catenary Department *Id.*

In early January of 2002, notwithstanding a doctor’s note indicating that Norris could only lift a limited amount of weight, he was ordered by Cleary to move bridge plates which weighed in excess of 200 pounds. Norris DT at p. 139. Nonetheless, Cleary discriminatorily required that Norris complete this task, although there were other able-bodied persons who could have done the job. Plaintiff considered Cleary’s actions to be both discriminatory and in the nature of retaliation for his having filed an internal complaint with the workforce diversity office, as well as the New York State Commission on Human Rights. *Id.* at 139-140; Ex. C.

In 2002, Norris applied for several promotions.⁴ The four (4) positions were as follows: (1) Supervisor, Asst. Power Director, July 2002; (2) Supervisor, Asst. Power Director, September 2002; (3) Supervisor, Power Training Procedures, December 2002 and (4) Supervisor, Catenary Department, January 2003.

With respect to the Assistant Power Director position which was

⁴ Although the Corrected Second Amended Complaint, dated September 15, 2006 indicates that the plaintiff applied for at least three (3) promotional opportunities in or after April 2002, plaintiff testified during his deposition that he applied for four (4) supervisory positions. Norris DT at p. 151.

interviewed for in July of 2002, Norris and Fred Merkel (“Merkel”) both applied for the job. However, upon Merkel, who was Caucasian and white, being told during the course of his interview that although he was the successful candidate, he would be required to work weekends as well as holidays, he promptly rescinded his bid. Merkel DT at p. 20. Surprisingly, notwithstanding the fact that Norris was the only remaining candidate for the position, Metro-North instead elected to repost the position two (2) months later. *Id.* Norris DT at p. 157. Merkel DT at p. 26; Upon reposting the position in September of 2002, Norris was again passed over and the position was instead awarded to Tony Lovermne. Norris DT at p. 157.

Norris also interviewed for the position of Supervisor, Power Training Procedures for the New Haven line. *Id.* at p. 161. Jason Wood, who was Caucasian of race and white of color and who had been employed as a substation electrician for less than three (3) years with Metro-North in 2002, was chosen as the successful candidate over the plaintiff.

Thereafter, Norris also applied for the Supervisor’s position in the Catenary Department, interviewing with Tom Maricelli. *Id.* at p. 162. Anthony Anderson, who was Caucasian of race and white of color and who had four (4) years less seniority than that of the plaintiff, was the successful candidate for this position. *Id.* at p. 163. Plaintiff, having been passed over for both the Power Training and Catenary supervisor positions, filed a complaint affidavit with the State of Connecticut Commission on Human Rights and Opportunities (“CHRO”). *Id.* at p. 163; Ex. P.

Upon Marvin Edwards (“Edwards”) successfully bidding onto Norris’ gang in or about October of 2002, an area of concern for Norris was the fact that Edwards, who was also African American, was being required to perform hazardous work in and around the electrified lines without his mandatory protective equipment. *Id.* at p. 172. Merkel, as Supervisor of Training and Procedures for the Power Department verified that one of any foreman’s primary obligations and responsibilities is the safety of his gang. Merkel DT at pp. 12-13. In furtherance of this professional responsibility, Norris initially informed Supervisor Anderson of the very real danger to not only Edwards, but also to himself as the foreman responsible for the safety and welfare of the members of his gang. Norris DT at p. 173. Indeed, in response to Norris’ concern about defendant’s failure to provide Edwards protective clothing, Supervisor Anderson eventually let Edwards borrow his oversized electrocution protective gloves. Even after repeated requests by Norris on behalf of Edwards for burn equipment, nothing was issued to Edwards *Id.* at pp. 177-180; Exs. D & F.

Despite repeated requests to Dave DiStasio (“DiStasio”), Assistant Director of Overhead Lines by Norris on behalf of Edwards, these requests for burn equipment for Edwards were discriminatorily ignored. Based upon plaintiff’s personal knowledge, every other lineman working for Metro-North at that time had a full complement of protective fire clothing and equipment. Norris DT at p. 182. Plaintiff complained that the failure of the defendant to issue proper fire protective gear to Mr. Edwards was in the nature of harassment and discrimination not only against Edwards, but also against him. *Id.* at p. 188; Ex. G.

In further support of plaintiff's claim of harassment and discrimination was the fact that when Edwards came into plaintiff's gang, Gillies abolished the only Class A Lineman position on it, a position formerly held by Edward Balisiano. *Id.*; Ex. H. Given the fact that the plaintiff, as well as his driver, were the only Class A Linemen remaining in Norris' gang of four,⁵ Cleary admitted that Norris' gang, as configured, could not fully, safely and effectively carry out their job responsibilities. Cleary DT at pp. 70-71; Ex. G. Indeed, according to Cleary, Norris' gang, for an extended period of time, improperly operated in emergency mode because it was without a Class A Lineman. *Id.*; Exs. H & I.

While Norris' gang was operating without a Class A Lineman, plaintiff also found it exceedingly difficult to get management to respond to various safety concerns. Norris DT at p. 199. For example, notwithstanding repeated complaints to Supervisor Doody concerning the unsafe condition of the vehicle of which his gang operated out of, where a mechanic had spilled hydraulic fluid all over the top of it, it took the better part of three (3) weeks and a written complaint to Gillies for any cleaning of the vehicle to occur. *Id.* at pp. 199-200; Ex. J. Norris firmly believed that the defendant's actions were motivated by both discrimination and retaliation because other vehicles were available for his gang's use, but instead he was ordered to take the unsafe one. *Id.* at pp. 200-201. Gillies admitted that it should not have required Norris to actually write a memo to him in order for plaintiff's safety concerns to be addressed. Gillies DT at pp. 110-112.

⁵ Edwards had previously been disqualified as a Class A Lineman upon successfully bidding onto Norris' gang in November of 2002.

Additionally, on a number of occasions, Norris and his gang were required to perform hazardous repairs in the rain which were of a non-emergency nature. Edwards DT at pp. 59-60; 83; Ex. E.

Since November of 2002, when Edwards joined Norris' gang, given the fact that it did not have a qualified Class A Lineman, Norris' gang was dangerously undermanned for an extended period of time. Cleary DT at pp. 70-71; Ex. I. In February of 2004, while operating a Catenary Maintenance Vehicle ("CMV"), Norris noticed blue smoke in the cab of the vehicle. Believing that he, as well as members of his gang, were being exposed to carbon monoxide, plaintiff attempted to promptly return the vehicle to the Bridgeport yard before it broke down. Norris DT at pp. 204-205. Unfortunately, upon the plaintiff turning the CMV's power back on, he inadvertently failed to remove the ground and there was an explosion. *Id.* at pp. 205-206. Significantly, no one was hurt, and no equipment damage resulted from the explosion. *Id.* As a result, however, Cleary was dispatched to take a statement from Norris about the incident, and disqualified him as a Class A Lineman. *Id.* at p. 208. The day after his Class A Lineman rights were taken by Cleary, Norris, in writing, complained to Metro-North's Legal Department and Gillies that he was the subject of disparate treatment and/or excessive scrutiny because of his race and color. *Id.* at p. 211; Ex. K. Plaintiff complained that he was "being hung out to dry." *Id.*

On February 28, 2004 Supervisor Anderson claimed that the plaintiff improperly operated a CMV in Norwalk. Norris DT at pp. 242-243; Defendants' Ex. 17. Although Anderson claimed that plaintiff was within eighteen (18) inches

of an energized track, the pentograph (which rides against the overhead wire), rather than members of Norris' gang, if it came in contact with the track, would have taken the electrical jolt. Norris DT at p. 243. Anderson's description of the manner in which this alleged incident occurred, was a further effort by Metro-North to taint his personnel file. *Id.* If anything, Norris recalls being no closer than twenty-five (25) feet from the energized track. *Id.* at pp. 244-245. At the trial, Anderson as much as admitted that plaintiff's vehicle had to be more than eighteen (18) inches from the energized track. Norris believed Anderson misstated the facts concerning the February 28, 2004 incident because DiStasio and/or Gillies were intent on getting rid of him as a foreman. *Id.* at pp. 250-252; Ex. L. Indeed, Gillies admitted that DiStasio had discussed with him his concerns about Norris remaining as foreman but, Gillies reiterated the fact that before anyone was removed, that the person must first be charged. Gillies DT at pp. 113-115.

Soon after the aforescribed incidents, DiStasio demoted the plaintiff in or about March of 2004. Norris DT at p. 214. Plaintiff asserted that his demotion was as a result of complaining to the legal department about disparate treatment, as well as exposing the flaws in the 1.3 million dollar CMV which appeared to be an important investment for the Catenary Department in Gillies' judgment. *Id.* at p. 216. Norris discovered that he had been demoted, not from any direct correspondence sent to him by Gillies, but rather upon receipt of his check stub. *Id.* at pp. 223-224. It was Norris' view that the discipline meted out for the February 18th grounding incident was unfair inasmuch as it was the defendant's

responsibility to eliminate any poisonous fumes within the cabin of the CMV. *Id.* at p. 236. Moreover, as no real investigation of the incident was ever done by management, plaintiff viewed the imposition of a sanction due to an alleged rule violation as further harassment. *Id.* at p. 237; Ex. M.

Importantly, prior to Norris being passed over for the various supervisors positions, as well as filing any complaint affidavits with the CHRO, he requested to meet with Gillies to speak frankly with him about the ongoing problems he was experiencing with Cleary and others. Norris DT at p. 253. At no time did Gillies ever agree to meet with him. *Id.* This was so, despite Gillies' claim to have had an "open door policy" for anyone that worked for him. Gillies DT at p. 141.

Subsequent to the incidents of February 18th and 28th, Norris felt it necessary to go out on a medical disability in March of 2004. Plaintiff felt that his life was in danger because of the unequivocally hostile work environment he was being forced to endure in. Ongoing harassment and preferential treatment resulted in the plaintiff experiencing emotional stress which made it very difficult for him to fully concentrate in the uncontrovertedly dangerous environment which was his workplace. Norris DT at p. 260. Indeed, as a result of his Class A rights and foreman rights being revoked, and because he became concerned about his safety and well-being as a result of the harassment imposed by Gillies and DiStasio, he began to treat with a psychologist by the name of Dr. Ralph Ford ("Dr. Ford"). Norris DT at pp. 264-265. Dr. Ford was the first mental health care provider that the plaintiff had ever treated with. *Id.* Dr. Ford determined that it was simply impossible for Norris to continue to carry out his job responsibilities

in an appropriate and safe manner given his illness. *Id.*; Ex. N. In addition to treating with Dr. Ford, plaintiff again felt compelled to file a CHRO complaint in or about March of 2004, this time asserting that the events surrounding his being disciplined for the February 2004 incidents, as well as other circumstances that arose prior to that time were in the nature of retaliation. Norris DT at p. 271; Ex. O. Dr. Ford ultimately recommended that the plaintiff also begin treating with Dr. Jay Berkowitz (“Dr. Berkowitz”), a psychiatrist. Norris DT at p. 277. Dr. Berkowitz diagnosed the plaintiff as suffering from generalized anxiety disorder and major depression. Berkowitz DT at p. 45. As a result of the discrimination he experienced at Metro-North, Norris experienced continuous nightmares, lack of sex drive, as well as rectal bleeding. Berkowitz DT at pp. 24-25, 41. Norris was prescribed Lexapro by Dr. Berkowitz which is an antidepressant which is intended to also treat anxiety. *Id.* at p. 48. Dr. Berkowitz agreed with Dr. Ford’s clinical assessment that, as of May-June of 2004, the plaintiff was unable to safely return to work due to his depressive state. Berkowitz DT at pp. 57-60.

In the latter part of 2004, the plaintiff felt well enough to return to work on his own accord. However, upon his returning to work, the plaintiff immediately became more anxious, requiring his dosage of Lexapro to be increased. Berkowitz DT at pp. 66-70. However, upon his return to the employ of Metro-North, plaintiff was subsequently also diagnosed with post-traumatic stress disorder (“PTSD”). *Id.* at p. 71. Dr. Berkowitz indicated that plaintiff’s PTSD diagnosis was directly attributable to his being continuously harassed at Metro-North. *Id.* at pp. 71-75; Exs. Q & R.

As Norris continued to work at the defendant throughout the beginning of 2005, Dr. Berkowitz confirmed his evolving diagnosis of the plaintiff as suffering from major depression and PTSD. Berkowitz DT at p. 85. Dr. Berkowitz further determined that when Norris was at work, his psychological/emotional stressors became increasingly unbearable. *Id.* at p. 88; Exs. S, T & U. Although Dr. Berkowitz generally did not believe patients who claimed to be racially harassed and/or discriminated against, it was his professional judgment that in the case of Norris, his consistent reporting had the unmistakable ring of truth. *Id.* at pp. 95-97.

Ultimately, as a result of the ongoing harassment, disparate treatment and discrimination plaintiff experienced at Metro-North in October of 2005, the plaintiff felt compelled to resign his position from the defendant, notwithstanding the fact that he attempted to make every effort to remain there. *Id.* at p. 99. Because of his ongoing difficulty in concentrating, plaintiff felt exceedingly afraid that due to the high level of stress and anxiety he was experiencing at work, he would end up making a mistake by either electrocuting himself or someone else. Ford DT at pp. 49-50. It was Dr. Ford's advice, which plaintiff ultimately followed, which was to the effect that if one could not fix a situation, one should simply move on. *Id.* at pp. 82-83. As a consequence, plaintiff resigned his position from the defendant on or about October 24, 2005. Ex. V. As of September 2006, plaintiff's psychological prognosis was deemed by Dr. Ford to be "guarded." Ford DT at p. 104.

III. ARGUMENT

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if the court determines “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Knight v. United States Fire Insurance Company*, 804 F. 3d 9, 11 (2d Cir. 1986). In considering a Motion for Summary Judgment, a court should not resolve disputed issues of fact, but assess whether there are any factual issues to be tried by resolving all ambiguities and drawing all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). Therefore, the proper role of this court is to determine whether there are any genuine issues of material fact to be tried, rather than to decide the issues. *Gallo v. Prudential Residential Services Limited Partnership*, 22 F. 3d 1219, 1224 (2d Cir. 1994).

Summary Judgment should not be granted if the dispute about a material fact is “genuine”, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* To show such a genuine dispute, the non-moving party must proffer sufficient evidence to require a jury or judge to resolve the parties’ differing versions of the truth at trial. *Anderson* at 248. In other words, summary judgment is only proper when reasonable minds cannot differ as to the meaning of the evidence presented, *Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir. 1991), and where evidence is so one-sided that one party must prevail as a matter of law. *Anderson*, at 251-252. Indeed, only if little or no evidence may be

found in support of the nonmoving party's case, and no rational jury could find in favor of the nonmoving party because the evidence to support his case is so slight, there is no genuine issue of material fact. *Gallo*, at 1223-24; *Samuels v. Mockry*, 77 F.3d 34 (2d Cir. 1996).

The Second Circuit has continually noted that summary judgment is to be especially reserved when an employer's intent is at issue in an employment discrimination case, as finding documentary evidence is highly unlikely, even where there is guilt. *Edwards v. Connecticut DOT*, 18 F.Supp. 2d 168, 171 (D. Conn. 1998) (citing *Gallo*). Moreover, "when deciding whether this drastic provisional remedy should be granted in a discrimination case, additional consideration should be taken into account. The trial court must be cautious about granting summary judgment to an employer when its intent is at issue". *Gallo*, *supra* at 1219, 1224, *quoting Montana v. First Federal Savings and Loans Association*, 869 F.2d 100, 103 (2d Cir. 1989). Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would allow an inference of discrimination.

Again, the trial court's task at the summary judgment motion stage of litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not in deciding them. The court's duty, in other words, is confined at this juncture to issue identification; it does not extend to resolution. *Id.*

B. Plaintiff Has Established a Cognizable Claim Under Title VII

Upon the three-step burden shifting test set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03 (1973) and its progeny, plaintiff must establish that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances which permit an inference of discrimination. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-510 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Upon Norris establishing his prima facie case, defendants must then articulate a legitimate, non-discriminatory justification for the challenged employment practice. *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989). Upon defendants providing such a justification, the burden shifts back to Norris to demonstrate by a preponderance of the evidence that discrimination played a substantive role in motivating the adverse action. *St. Mary's Honor Center STR v. Hicks*, 509 U.S. 502, 507 (1993).

Metro-North has conceded that Norris is a member of a protected classification, that he performed his job satisfactorily, and that he suffered certain adverse employment actions.⁶ Essentially, therefore, defendants have conceded three of the four elements in order for Norris to establish his prima facie case. However, Metro-North argues, as a matter of law, that Norris cannot establish that he was subject to any adverse employment actions under circumstances giving

⁶ See defendants' Memorandum of Law in Support of defendants' Motion for Summary Judgment at p. 11.

rise to an inference of discrimination.⁷

1. Plaintiff's Repeated Promotional Denials were Discriminatory

In total, Norris was denied at least four (4) promotions over a short period of time spanning 2002 and 2003. Norris DT at p. 151. Each and every time plaintiff sought out and applied for a higher position within Metro-North's ranks, defendants found it appropriate to fill these positions with Caucasian of race and white of color candidates. While defendants claim Norris must be able to prove that he was better qualified than the person selected for the job, "so that no reasonable person in the exercise of impartial judgment could have chosen the candidate selected over the plaintiff for the job in question", *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001), Norris is able, by a preponderance of the evidence, to carry this burden. It is generally established as a matter of law that wholly subjective and unarticulated standards to measure a candidate's performance for purposes of a promotion are improper. *Byrnie* at 104; *Knight v. Nassau Count Civil Service Commission*, 649 F.2d 157, 161 (2d Cir. 1981).

a. Assistant Power Director Position

It is uncontroverted that Norris applied on two (2) occasions for the position of Assistant Power Director. Initially, plaintiff applied on July 10, 2002 and thereafter, although not given an interview, he applied in September of 2002. Norris DT at pp. 152-159. At the times Norris applied for the position, he had been with Metro-North for fifteen (15) years, the last four (4) of which in the

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Id.

capacity of a foreman. Norris DT at p. 119. As Merkel, the successful candidate for the position in July of 2002, was leaving his interview, the “structured interview process” apparently broke down because he, even before the three panel members conferred about their individual assessments of the candidates, was told he would no longer see weekends or holidays again. Merkel DT at p. 20. As a result, Merkel rescinded his bid for the position leaving Norris as the only remaining candidate. Cleary admitted that in his forty (40) years with Metro-North, he had never seen a situation where the successful candidate rescinded his bid and the job is “pulled off the board and reposted.”

At the time Merkel was awarded the Assistant Power Director’s position, he had less than three (3) years of service with Metro-North. Gillies was of the view that Norris simply did not get the job because he did not have the proper qualifications even as a satisfactorily performing foreman within the Catenary Department. Gillies DT at p. 55. The Second Circuit has noted that plaintiffs, in accordance with *Byrnie*, are entitled to challenge the credibility of an employer’s rationale where it is claimed that a satisfactorily performing employee “lacked familiarity with the basic competencies” to effectively perform the job being applied for. *Id.* At the time Merkel was awarded the position, he was not a foreman, Gillies DT at p. 56, nor did he have much time in at Metro-North. In fact, at various times from 1998 to 2002, Merkel worked under Norris’ gang as a lineman apprentice. Merkel DT at p. 26.

While defendants now attempt to justify their refusal to promote Norris in the wake of Merkel’s withdrawal of his bid by suggesting that he misrepresented

his attendance record during the interview, this is simply a pretextual construct. Defendants claim that Norris, during his interview, misrepresented the amount of time he had been out of work for the period just prior to his July 2002 interview; the record before the court reveals otherwise. Norris DT at p. 150. Norris readily admitted, under oath, that he was out of work for three (3) months in 2002 due to receiving interferon injections related to a Hepatitis C condition. *Id.* Moreover, when specifically questioned as to whether or not he gave a misleading answer to Mr. D'Ambrosio ("D'Ambrosio") during his interview, he readily replied in the negative. *Id.* at pp. 153-154. The confusion arose as a result of an internal matter involving plaintiff's former supervisor, Matt Dillon, intentionally putting him in for sick time when the plaintiff was already collecting railroad retirement sickness benefits. Norris DT at pp. 141-147. Unfortunately, apparently D'Ambrosio drew an unwarranted negative inference as to the plaintiff's trustworthiness concerning this incident which adversely effected his best opportunity to be promoted to the Assistant Power Director position.⁸

Turning to the September 2002 reposting of the Assistant Power Director's position, apparently because D'Ambrosio continued to carry a negative perception of Norris due to the issue of his being out on leave for a period of three (3) months due to his Hepatitis C condition, he was not even afforded an interview.⁹ However, based on the fact that a Catenary Department foreman regularly interacts with the Power Director on a daily basis, Norris was far more familiar

⁸ See defendants' Memorandum of Law at p. 13.

⁹ See p. 14 of defendants' Memorandum of Law.

with the position than Tony Lovermne, who at the time of his promotion was a substation electrician, who never interacted with Power Directors. Norris DT at p. 160. Lovermne had just begun his career with Metro-North and lacked both knowledge and experience in comparison to that of Norris who had been a foreman in the Catenary Department for four (4) years. Edwards DT at pp. 47-49. A reasonable person such as Edwards, who knew both candidates and had worked at Metro-North for almost thirty (30) years, referred to the decision to promote Lovermne over Norris as “blatantly ridiculous” and clearly motivated by racial animus. *Id.* at p. 49. Hence, circumstances surrounding the decision refusing to award Norris the position of Assistant Power Director in July and September of 2002 do give rise to an inference of racial discrimination to any reasonable observer. See e.g., *Byrnie*, 243 F.3d at 103.

b. Supervisor, Power Training Position

Undeterred by his double failure to be promoted to the Assistant Power Director’s position earlier that year, in December of 2002, Norris applied again for a promotion, this time for the position of Supervisor, Power Training within Metro-North’s Power Department. The responsibilities entailed with this position required the supervisor to train Power Department personnel on the overhead lines for the New Haven line. Norris DT at p. 161. Once again, Jason Wood, a Caucasian, white individual, was the successful candidate. At the time of his promotion, he was a substation electrician and had worked for Metro-North a little less than three (3) years. *Id.*

Although defendants’ claim that Wood was a better qualified candidate for

the Power Training position *because he was an electrician*, Norris was hired by Metro-North as an electrician, a skill set which was apparently ignored by Pat Marchitto, upon making the decision to promote Wood over Norris. Norris DT at p. 171. Additionally, Marchitto was under the mistaken impression that Wood was the only candidate who did independent research for his presentation during the mock training exercise conducted during the interview process.¹⁰ The fact of the matter was Norris also did independent research in preparation for his presentation, which Marchitto conveniently overlooked. *Id.* at pp. 171-172. Given the circumstances of this promotion, plaintiff should be allowed the opportunity to challenge the credibility of Metro-North in promoting an individual with little seniority over one who had been with it in excess of fifteen (15) years. Simply because Wood had a college degree, should not have been the determinative factor in making this promotion. Gillies DT at p. 60.

c. Supervisor, Catenary Department

In early 2003, Norris again applied for a promotion, this time within his own department, the Catenary Department. He interviewed with Tom Maricelli. Norris DT at p. 162. Once again, Anthony Anderson (“Anderson”), a Caucasian, white candidate with less experience at Metro-North than he, (none as a foreman), was promoted to the position. *Id.* at p. 163. Yet again, notwithstanding plaintiff’s seniority over Anderson, for the fourth time he was discriminatorily passed over for a supervisor’s position. Edwards DT at pp. 51-53. In fact, upon Gillies discussing Metro-North’s decision to promote Anderson over Norris, he could not

¹⁰ See defendants’ Memorandum of Law at p. 15.

offer any meaningful justification. Gillies DT at p. 61.

In the case-at-bar, the court has four (4) instances of Metro-North choosing to completely ignore the experience and competence of the plaintiff for any of the aforementioned positions offered in 2002 and 2003. When these promotions are viewed as a whole, it is reasonable to conclude that plaintiff's being passed over on four (4) separate and distinct occasions gives support to an inference of discrimination. Moreover, time and time again, in the history of Metro-North, those such as the plaintiff who started as little more than helpers, were repeatedly permitted to rise through the ranks into management. Unfortunately, this opportunity was never afforded to the plaintiff. A list of those individuals who are white of color and Caucasian of race, who have been able to start from the same position as that of Norris as a helper and be promoted to the position of at least supervisor are as follows:

- Anthony Anderson..... Supervisor, Catenary Department
- Joe Balzano..... Supervisor
- Rocky Coplay..... Supervisor, Power Driver
- Robert Doody..... Supervisor, Catenary Department
- Kevin Kelleher..... Supervisor, Power Department
- Dermit Klein..... Load Dispatcher
- Fred Merkel..... Supervisor, Training & Proc.
- Dennis Murphy..... Special Training Master
- Ed Perry..... Supervisor
- James Pfiesser..... Supervisor, Engineering

- Richard Reynolds..... Supervisor
- Joe Salzillo..... Supervisor, Inspections
- Paul Steiniger..... Supervisor
- Jason Wood..... Supervisor

All the foregoing individuals have or had comparable if not less working experience with Metro-North than that of the plaintiff and yet have all been promoted to the level of supervisor or above without any impediments. Cleary DT at pp. 161-168. As Cleary conceded Norris was competent and qualified as a foreman, Cleary DT at p. 153, it strains one's credulity to believe that his competencies vanished when he applied for four separate supervisor positions in 2002-2003.

C. Plaintiff Can Establish that he was the Subject of Disparate Treatment Re Discipline

Norris can readily establish the fourth element of his prima facie case pursuant to Title VII discrimination by showing that he was treated differently than similarly situated Caucasian of race and white of color employees of Metro-North. See generally, *Harlan Associates v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). The law requires that in order for comparators to be deemed 'similarly situated', the individuals with whom Norris seeks comparison must be comparable in all material respects. *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1971).

1. The February 18, 2004 Grounding Incident

As previously described, on February 18, 2004, the plaintiff was involved

in an incident where he mistakenly left a ground on a track and an explosion occurred. Norris DT at pp. 205-206. Fortunately, although there was an explosion, no one was hurt and there was no equipment damage. *Id.* Norris specifically spoke with Foreman Danny Stewart of the Signal Department, who confirmed that there was no damage to the signal system. *Id.* at 239. However, some trains were delayed on the New Haven line. *Id.* at 240. Ultimately, plaintiff served a five (5) day suspension for the February 18th incident. Defendants' Ex. 14.

According to Cleary, upper management exercises a substantial amount of discretion in determining who is investigated and who receives discipline. Cleary DT at p.130. In recalling similar situations to Norris' February 18th incident, Cleary admitted that John Dillon, who is white of color and Caucasian of race, hooked a hot wire in New Rochelle and caused someone to be injured. Notwithstanding the fact that someone got injured, unlike Norris' situation on the 18th of February, Dillon was given one or two days suspension. Cleary DT at pp. 131-133. Prior to Merkel being offered the job of Assistant Power Director, he committed the same safety violation as Norris did on February 18, 2004. Merkel DT at pp. 37-38. Upon the Power Director sensing an explosion on the railroad's equipment, they gave Merkel a call to make sure that he was not injured. *Id.* Merkel called Cleary himself to indicate that he had "hooked a hot one." *Id.* Upon it being subsequently determined that the wire and equipment were okay, no discipline and no adverse affect on Merkel's promotional prospects resulted. *Id.* at p. 39. No official record was ever made of Merkel's safety violation, nor was

he ever disqualified and/or suspended. *Id.* at p. 40. Other comparable incidents involved Joe Chippelone and Robert Moorehouse, both of who were Caucasian and race and white of color.¹¹ Norris DT at pp. 211-212 and 261-262.

Other similarly situated foremen who committed safety violations were Dave Tooley, who was involved in the electrocution of Wayne Williams. *Id.* at p. 217. Tooley, who was white, was permitted to resign his foreman's position, and thereafter was transferred to the electrical department. Cleary DT at pp. 145-146. John Dillon, another white foreman, who did not call out the proper power, resulted in Chip Baker falling off the Catenary with his clothes on fire. *Id.* John Dillon was at work the very next day performing business as usual. Indeed, it was the injured lineman, Chip Baker, who specifically advised the plaintiff that John Dillon had not received any discipline for the aforementioned incident. Norris DT at pp. 222-223.

Another foreman, who happened to be white and Caucasian, was Edwin Perry who evidently allowed one of his gang members to come in contact with the signal line ties. Norris DT at pp. 225-228. Perry, notwithstanding this incident, was later promoted to supervisor. Cleary DT at pp. 161-169. Foreman John Frank, also white of color and Caucasian of race, called for power which resulted in an individual receiving static electricity, which is the equivalent of getting

¹¹ It must be noted that plaintiff did specifically request information from Metro-North regarding the disciplinary records of the various possible comparators. See generally, Gillies Deposition Transcript attached as Ex. Z. However, despite the execution of a protective order in January of 2007, the information produced by defendants was, by and large, generally non-responsive. The failure to preserve property for another's use as evidence in pending or reasonable foreseeable litigation, should at the minimum support an inference that the evidence would have been unfavorable to the party who failed to preserve or produce it. *Kromish v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998).

electrocuted. *Id.* at 228. The plaintiff became aware of this incident by speaking to the individual who received the jolt of static electricity, namely Jimmy Rosado. *Id.* at p. 229.

2. The February 28, 2004 Incident

The second incident of February 28, 2004 resulted in Norris receiving a twenty (20) day suspension. Defendants' Ex. 16. This ostensibly involved a CMV being operated by the plaintiff within eighteen (18) inches of an energized track. *Id.* at pp. 242-243. Plaintiff actually was operating the CMV some twenty-five (25) feet from the energized track. *Id.* at p. 245. Indeed, Supervisor Anderson's assertion that Norris was operating the CMV within eighteen (18) inches was contradicted during his testimony at the trial concerning this incident. *Id.* at pp. 250-251. It was determined that Anderson's statement concerning the close proximity of the CMV to the energized track was physically impossible as the pentograph located on top of the CMV would have exploded first had it come into close proximity with the energized track.

Far more serious a safety violation than the February 28, 2004 incident which resulted in Norris being demoted from his position as foreman in addition to his receiving a twenty (20) day suspension, was an incident involving Bill Lockery. Lockery forgot to put the CMV's pentograph down and upon moving it caused severe damage. Cleary DT at pp. 114-115. Cleary, although recalling the incident indicated that although there was significant damage to the CMV, a 1.3 million dollar piece of equipment, Lockery was never disciplined for the incident. *Id.* According to Cleary, Lockery should have been disciplined but was not.

Cleary DT at pp. 116-118, 129.

In addition to Lockery's accident, Supervisor Anderson was also involved in an incident with a CMV. On the 12th of April 2003, Anderson, when backing up a CMV, almost ran over two (2) linemen on Norris' gang. Although Norris reported this incident, no investigation or resulting discipline was ever issued against Anderson. Ex. E.

Cleary, based upon his forty (40) years at Metro-North, many of which as the General Supervisor of the Catenary Department, admitted that the twenty (20) day suspension issued to Norris for the aforescribed incident involving the CMV, where no one was injured and no property damage occurred, was excessive and harsh. Cleary DT at p. 158. Again, viewing the totality of the circumstances involving both the February 18th and February 28th incidents and comparing other discipline meted out to other foremen working at Metro-North, raises a reasonable inference that but for Norris' race and color, he would not have been disciplined in the severe manner in which he was. Again, neither incident, unlike many of those aforescribed, involved any bodily injury or damage to any property. Stanley Dowicyan ("Dowicyan"), plaintiff's union representative, who was involved in representing Norris in both trials involving the aforementioned incidents, believed it to be highly unusual for Metro-North to prosecute Norris where no one was hurt and no damage was done to any equipment. Dowicyan DT at p. 59.

D. Plaintiff Can Establish that he was Constructively Discharged

After a tumultuous and psychologically exhausting period of time with

Metro-North in its Catenary Department, on October 24, 2005, Norris reluctantly resigned. Ex. V. Plainly stated in his resignation letter is plaintiff's rationale for leaving: the deterioration of his physical, emotional and psychological health." *Id.* Indeed, Norris specifically indicated that he was "constructively resigning [his] position with Metro-North." *Id.* It has been determined that when an employer, rather than terminating an employee directly, deliberately makes working conditions so intolerable that the employee is forced into an involuntary resignation, a valid claim of constructive discharge lies. *Bennett v. Watson, Wyatt & Co.*, 136 F. Supp. 2d 236, 251 (S.D.N.Y. 2001); Exs. Q & T. A plaintiff's involuntary resignation is generally recognized as constituting a constructive discharge when his or her working conditions are so difficult or unpleasant that a reasonable person would have felt compelled to resign. *Id.*; *Stetson v. Nynax Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993).

In the case-at-bar, Norris was diagnosed as of March of 2004 with generalized anxiety disorder and major depression. Berkowitz DT at p. 45. Accompanying this diagnosis were such symptoms as continuous nightmares, rectal bleeding and overall anxiousness. *Id.* at p. 60. Although Norris indicated to both Drs. Berkowitz and Ford that he desired to return to work at Metro-North, each time he returned he became emotionally distraught to the point where his medication had to be increased two-fold. *Id.* p. 67-68. Indeed, Dr. Berkowitz determined that in addition to his previous diagnosis, Norris also, as a direct result of the work environment at Metro-North, suffered from PTSD. *Id.* at pp. 70-75. Each time, over the course of the last eighteen (18) months of his employment

with Metro-North, in otherwords from March 2004 through October 2005, when Norris attempted to return to work, as a direct result of the threats, harassment, disparate treatment and abuse suffered at the hands of defendants' agents, Dr. Berkowitz described Norris' stressors as getting "worse and worse and worse." Berkowitz DT at p. 88; Exs. Q, R, S, T & U. Plaintiff specifically testified that he felt his life was in danger working in the Catenary Department because of all of the harassment, differential treatment and stress. Norris DT at pp. 260-261.

Metro-North's pernicious conduct towards the plaintiff, was not limited to the time he was actually at work from March 2004 through October 2005. By defendants' own admission, while plaintiff was suffering and on leave with major depression, generalized anxiety disorder, as well as PTSD, Metro-North repeatedly and directly contacted him no less than nineteen (19) times regarding two (2) pending disciplinary trials and various requests for medical examinations.¹² Interestingly, on plaintiff's two (2) previous medical leaves, one in 1996 where he was out for three (3) months with a broken ankle, and in early 2002, when he was being treated for Hepatitis C, he had never once been contacted while out on medical leave. Norris DT at p. 276. Yet, in 2004, ostensibly because of the February 18th and 28th incidents involving safety infractions where no one was injured and no property damage occurred, plaintiff was hounded by Metro-North concerning the rescheduling of trials related to these incidents. Ex. Q. Indeed, DiStasio admitted that Metro-North was intent on

¹² See defendants' ¶77 of their Local Rule 56(a)(1) Statement of Undisputed Material Facts, dated March 30, 2007.

having plaintiff tried for both of the aforementioned incidents as expeditiously as possible and in fact believed that Norris' psychological/emotional difficulties were nothing more than an excuse. DiStasio DT at pp. 166-167.

Even before Norris' resignation, DiStasio was well aware that Norris was having difficulty in focusing on the risk factors attendant with working in the Catenary Department. DiStasio DT at pp. 105-107. Additionally, it was Dowicyan who recognized that it was "not normal procedure" to have a person scheduled for two (2) separate trials on incidents where no one was hurt and no property damage occurred. Dowicyan DT at p. 59. Based on this, Dowicyan admitted that it was clear that the defendants were headhunting for Norris. *Id.* at 53. Moreover, given plaintiff's emotional/psychological state, and Norris providing authorization to Dr. Ford to communicate with Metro-North directly, this was not enough for Metro-North purposes which prompted its numerous, harassing edicts directly to the plaintiff regarding mandatory medical appointments with Occupational Health Services, as well as the repeated rescheduling of the disciplinary trials. Norris DT at pp. 278-279. Metro-North aggressively and intentionally wanted to force the plaintiff into leaving; its coordinated efforts were successful. Exs. Q, T & U.

A negative inference seems to be made by the defendants with respect to plaintiff being required by Metro-North to submit to a drug screening, and his resignation in October of 2005.¹³ However, throughout the course of his eighteen (18) year career with the defendant, plaintiff had never tested positive for drug

¹³ See p. 19 of defendants' Memorandum of Law.

use. Moreover, even subsequent to his employment with Metro-North, plaintiff obtained his medical card for driving CDL vehicles, a certification which cannot be obtained without first successfully passing a drug test. Norris DT at pp. 74-75. As reported by Dr. Ford, plaintiff's good faith, consistent complaint was that he was continually being written up for work violations, as well as harassed, when others, who happened to be white, were not receiving the same harassing treatment. Ford DT at pp. 54-55. Hence, when viewed in its totality, the circumstances surrounding plaintiff's resignation in October of 2005 were as a result of repeated and harassing actions by Metro-North to selectively enforce its policies upon the plaintiff at the very time that he was the most psychologically vulnerable. Indeed, Metro-North, without the benefit of a hearing, and in direct violation of the CBA, forced the plaintiff to take leave without pay for five (5) days for an alleged insubordination relating to Norris being frustrated with repeatedly being required to report to mandatory medical appointments. DiStasio DT at p. 163; Ex. W.

E. Plaintiff Has Properly Presented a Hostile Work Environment Claim

Although Metro-North has not challenged Norris' hostile work environment claim, out of an abundance of caution, plaintiff preserves this claim.¹⁴

In order to establish a claim of hostile work environment, a plaintiff must produce evidence that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Harris v.*

¹⁴ See Paragraph 38 of the Corrected Second Amended Complaint, dated September 15, 2006.

Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Plaintiff asserts that the record before the court is replete with incidents throughout the last three (3) years of plaintiff's employment with Metro-North, which would establish that Norris' environment was objectively hostile and abusive. *Hayut v. State Univ. of NY*, 352 F.3d 733, 745 (2d Cir. 2003). In addition to being repeatedly passed over for promotions for which he was well qualified, and issued discipline for minor safety violations for which other, similarly situated non-African American employees were not sanctioned for, the entire circumstance concerning Metro-North's failure to issue burn equipment to a member of his gang, and the unusually dangerous configuration of his gang, gives rise to an environment of sufficient severity which altered the terms and conditions of Norris' employment. Ex. I & Q; *Patterson v. County of Oneida*, 375 F.3d 206, 227 (2d Cir. 2004).

Not only was Norris' gang undermanned, but on a number of occasions, despite this fact, was required to perform jobs in the rain which were of a non-emergency nature. Edwards DT at pp. 59-60, 83.

When Norris confronted DiStasio about the fact that his gang was severely undermanned and that it posed a danger to he and his men, on April 10, 2003 emotions ran high. As a result, DiStasio called the police on the plaintiff. DiStasio DT at pp. 79-82. This incident is reflective of the high level of tension and hostility which existed between Norris and upper management of Metro-North.

Upon going out on stress leave in March of 2004, DiStasio, determined to push the plaintiff to the brink, continued to vengefully send Norris communications

about disciplinary pleadings and mandatory medical examinations.¹⁵

DiStasio admitted that he had absolutely no concern about the emotional impact Metro-North's many notices regarding disciplinary proceedings and mandatory medical examinations would have on the plaintiff, notwithstanding his medically confirmed compromised emotional state. DiStasio DT at p.125. Although plaintiff pleaded that the communications stop while he was out on leave, Metro-North refused his requests. Ex. Q & R. Hence, a reasonable fact finder could conclude that the hostile environment in which Norris was immersed was sufficiently severe to alter the conditions of his employment.

F. Defendants' Proffered Reasons for Their Actions are not Worthy of Credence

Under *McDonnell Douglas*, once the defendants have proffered a non-discriminatory reason for the adverse actions taken against plaintiff, he must offer evidence that the defendants' explanations for their actions were pretextual. *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997). Defendants have explained that the repeated failure of Metro-North to promote Norris to the supervisor level was all attributable to the fact that each and every candidate against whom plaintiff competed, had superior qualifications. However, Norris had a substantial amount of more on the job training and/or seniority than each of the four (4) aforementioned successful white candidates.¹⁶ When explaining

¹⁵ See defendants' ¶77 of its 56(a)(1) Statement of Undisputed Material Facts.

¹⁶ See pp. 16-22 herein which specifically discusses the qualifications of each candidate for the four (4) positions for which plaintiff applied.

why seniority was but one factor considered by management in making promotions, DiStasio described which factors were of importance. DiStasio indicated that: (1) the ability to get along with his men; and (2) job knowledge were both important factors considered by management in making promotions. DiStasio DT at p. 144. According to DiStasio, these factors, in addition to seniority, were the ones that were considered in making promotions. *Id.* at pp. 144-145. Tellingly, however, DiStasio admitted that with respect to Norris' ability to get along with his men, as well as job knowledge, he satisfied both criteria. *Id.* Based on Metro-North's own criteria, as well as the fact that Cleary also admitted that he too found the plaintiff to be a competent, qualified foreman, could lead a reasonable jury to conclude that but for plaintiff's race, he would have been promoted. See e.g., *D'Cunha v. Genovese/Eckerd Corp.*, 04-0391 (2d Cir. 2007).

Interestingly, defendants rely upon alleged interview notes of Mr. Hawkins, primarily because he is an African American, who was one of three panelists who interviewed Norris and Merkel for the Assistant Power Director position in July of 2002.¹⁷ First, this court should not permit the defendants to rely on hearsay as it is inadmissible evidence to support their claim of a legitimate non-discriminatory explanation for its conduct. See Fed. R. of Civ. Evid. 801(c) and 802. Secondly, the manner in which Norris was passed over for this position, in light of Merkel rescinding his bid for it, was particularly reprehensible. It lacks credibility to argue as defendants do that in each case, the best candidate was awarded the position, when after Merkel withdrew his bid, plaintiff was the *only* candidate. In forty(40)

¹⁷ See p. 20 of defendants' Memorandum of Law.

years on the railroad, Cleary readily offered that whenever a promotion was bid, and there was only one (1) candidate, that candidate as a matter of past practice, always received it. Cleary DT at p. 120. Hence, a genuine issue of material fact exists in the record as to whether or not, but for Norris' race, he would have been promoted to any of the four (4) positions to which he applied.

Turning to the issue of disparate treatment with regard to the measure of discipline meted out to Norris in comparison to other foremen, not only did Dowicyan indicate that it was unusual for trials to occur when no one was injured and no property damage occurred, Dowicyan DT at p. 59, but once the trial concluded with respect to the February 28th incident, even Cleary believed the discipline issued to be harsh. Cleary DT at p. 158. Cleary also conceded that, when it comes to meting out discipline, and who gets disciplined, upper management exercises discretion, rather than applying the rules uniformly across the board. This broad discretion was utilized in the instance where Norris was given a five (5) day suspension without a hearing by Metro-North for alleged insubordination involving plaintiff not attending a meeting regarding mandatory medical examinations. Notwithstanding plaintiff's five (5) day suspension, Gillies testified that such a suspension could not happen without a hearing pursuant to the CBA. Gillies DT at p. 28. Hence, with respect to the matter of discipline issued to Norris in comparison to others who were similarly situated, a reasonable person could determine that the impermissible factor of race was considered to the detriment of Norris. To paraphrase Edwards' testimony, if you are black at Metro-North and attempt to stand up as a normal man with some measure of

dignity, you will be targeted. Edwards' DT at p. 55.

G. Plaintiff has Established a Prima Facie Case of Retaliation

In order for Norris to establish his prima facie case of retaliation, he must show: (1) that he engaged in statutorily protected activity; (2) the defendant was aware that plaintiff was engaged in protected activity; (3) plaintiff suffered an adverse action; and (4) a causal link exists between the protected activity and the adverse employment action. *Burlington Northern and Santa Fe Railroad Company v. White*, 126 S.Ct. 2405, 2409 (2006); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1996). However, Norris need not establish that the conduct he opposed was actually a violation of Title VII but rather, that he had a good faith reasonable belief that Metro-North's conduct was unlawful. *Manoharan v. Columbia University*, 842 F.2d 590, 593 (2d Cir. 1988).

In the instant matter, it is uncontested that Norris was involved in various forms of protected activity throughout a substantial portion of his tenure with Metro-North. In addition to the CHRO complaint affidavits filed by Norris in March of 2003 and 2004, Exs. O&P, Metro-North concedes that plaintiff was one of the lead plaintiffs in a class action lawsuit against Metro-North which commenced in 1994 and concluded in 2002. Norris also filed administrative charges of discrimination in 1994, 1995 and 1999.¹⁸

1. Plaintiff Had A Good Faith, Reasonable Belief to Bring Claims of Race Discrimination

The requirement that there be evidence in the record to support an

¹⁸ See defendants' footnote No. 20 on p. 21 of defendants' Memorandum of Law.

inference that plaintiff had a good faith, reasonable belief that the conduct he was opposing was unlawful, implicates both subjective and objective considerations. “The reasonableness of the plaintiff’s belief is to be assessed in light of the totality of the circumstances.” *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998). Based on the evidence in the record before the court, which supports inferences of pretext and discrimination on the part of the defendants, the trier of fact could reasonably determine that plaintiff’s beliefs were objectively reasonable.¹⁹ Particularly where Norris was not awarded the position of Assistant Power Director in July of 2002, when he was the only candidate remaining, gives rise to an inference of racial discrimination, as past practice of Metro-North was to award any singular candidate the job posted. Cleary DT at p. 120.

Additionally, the heavy-handed sanction imposed by Metro-North for the February 18th and 28th 2004 incidents upon the plaintiff also gives rise to an inference of racial discrimination. While Metro-North self-servingly characterizes these incidents as “serious”²⁰, no one was injured and no property damage occurred. A number of comparable circumstances exist in the record which suggest that DiStasio, through these February 2004 incidents, intended to follow

¹⁹ *Edwards v. Metro-North, et al*, Ruling on defendants’ Motion for Summary Judgment at p. 21.

²⁰ See p. 23 of defendants’ Memorandum of Law.

through with his threat to Norris to get rid of him as a foreman within the Catenary Department. Norris DT at p. 251. Dowlycan, upon conferring with upper management as to why they seemed to be “headhunting” Norris, testified that he was told by Frank Torre that Metro-North intended to aggressively pursue the imposition of discipline upon Norris for the February 2004 safety violations as a result of the various lawsuits he had filed against Metro-North. Dovicyan DT at pp. 41, 52-53. Additionally, Gillies specifically admitted that he was well aware Norris was involved in the class action lawsuit which resolved in 2002, as well as having filed other internal administrative and external complaints. Gillies DT at p. 122.

Defendants point to the fact that Norris filed his 2004 CHRO Complaint soon after DiStasio’s pretrial offer of a thirty (30) day disqualification was made.²¹ Defendants argue that any reasonable employee would not have believed that discipline for a safety violation was unlawful. However, in this instance, plaintiff had already been demoted from his foreman position by the very person who had previously threatened to get rid of him. Norris DT at p. 251. Further, Norris was well aware of the incident involving Dave Tooley, who was a Caucasian, white foreman in the Catenary Department who was involved in a serious accident where a person received an electrical shock, fell and broke his neck and was thereafter paralyzed. Cleary DT at pp. 145-146. Instead of being demoted, Tooley was permitted to resign from the Catenary Department and continues to work to this day as an electrician for Metro-North’s Electrical Department. *Id.*

²¹ Defendants’ Memorandum of Law at p. 23.

Hence, it was not unreasonable for Norris, rather than sitting on his rights, particularly when DiStasio had threatened to get rid of him, for him to attempt to protect his standing within Metro-North.

2. Plaintiff did Suffer Material Adverse Actions

As defendants have already conceded, while Norris was suffering from major depression and post-traumatic stress disorder, Metro-North sent him no less than nineteen (19) notices concerning either disciplinary proceedings being scheduled, or demands for mandatory medical examinations.²² Norris had previously been out on leave in or about 1996 and 2002, the first for a broken ankle, the second related to Hepatitis C treatments, and had never received any notices from Metro-North concerning mandatory medical evaluations until after his physician had returned him to duty. Norris DT at p. 276. Moreover, Norris had authorized Dr. Ford to communicate with Metro-North concerning his ability to perform his duties, which he did, and yet, the demands for further medical examinations continued. *Id.* at pp. 278-279. Vindictively, related to Metro-North's excessive mandatory medical examination demands, Norris was issued a five (5) day suspension without the benefit of a hearing. DiStasio DT at pp. 162-163; Ex. W. Hence, to suggest that no adverse action occurred for purposes of plaintiff's retaliation claim is plainly false. See e.g., *Galabaya v. N.Y. City Board of Education*, 202 F.3d 636, 640 (2d Cir. 2000). Any reasonable fact-finder could conclude that Metro-North's conduct rose to the level of an adverse employment

²² See ¶77 of defendants' 56(a)(1) statement.

action. *National RR Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Using the same rationale as referenced above, Norris' being forced to resign his position with Metro-North is also an adverse action. A reasonable factfinder could conclude that Metro-North's conduct in leading up to and resulting in plaintiff's forced separation was an adverse action. See e.g., *Richardson v. New York State Dept. of Correction Services*, 180 F.3d 426, 443 (2d Cir. 1999). (where employer took action against plaintiff "in the hopes that she would quit.")

3. A Causal Connection Exists Between Plaintiff's Protected Activity and the Adverse Actions

Norris filed, among others, two (2) CHRO complaints in March of 2003 and 2004. Exs. O & P. Moreover, the class action in which Norris was one of the lead plaintiffs, did not conclude until December of 2002, hence for defendants to suggest that the adverse actions hereinbefore complained of by the plaintiff are in no way connected to his protected activity because they are too remote in time is simply without merit.²³ The four (4) consecutive denials of plaintiff's attempts at being promoted occurred at the same time as the class action race-discrimination lawsuit was pending. DiStasio admitted that it bothered him to have to deal with the various CHRO complaints and/or lawsuits which Norris had filed alleging discrimination on the part of Metro-North. DiStasio DT at p. 139. A temporal connection between the protected activity and the adverse employment action is sufficient to support an inference of the causal connection. See e.g., *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir.1980) (eight-month

²³

See defendants' Memorandum of Law at p. 26.

gap between filing of EEOC complaint and retaliatory action suggested a causal relationship.)

It is also clear that the discipline issued to the plaintiff for the February 18th and 28, 2004 incidents was in retaliation for his being engaged in protected activity. Again, these incidents did not involve any injury to any person nor damage to any property, and yet plaintiff was disqualified as a Class A Lineman, and ultimately demoted by DiStasio from his foreman position. Norris DT at p. 214. Becoming concerned that Metro-North was being overly aggressive in headhunting Norris for minor safety violations, Dowicyan specifically asked Frank Torre as to the reason for Metro-North's conduct. Frank Torre candidly advised Dowicyan that management was upset because of the lawsuits plaintiff had brought against them. Dowicyan DT at pp. 59-61. Hence, it is fair to conclude that a reasonable fact-finder could determine Metro-North's conduct in disciplining Norris for the February 18th and 28th 2004 incidents was in the nature of retaliation. *Gordon v. New York City Board of Education*, 232 F.3d 111, 116 (2d Cir. 2000).

H. Plaintiff Has Stated A Cognizable Claim Under §1981

Norris' §1981 claim implicates the same analytical framework as Title VII.²⁴ In order to establish a prima facie case under §1981, the plaintiff must show: (1) he is a member of a racial minority; (2) an intent to discriminate on the basis of

²⁴

Unlike Title VII, §1981 also permits individual liability to validly lie against Gillies and Cleary. See *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986)..

race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). Hence, for all the reasons that plaintiff's Title VII claims should be preserved, as aforesaid, plaintiff's §1981 claim should also be permitted to survive. Moreover, the statute of limitations endorsed by the United States Supreme Court is four (4) years for any act of Congress that concerns the Civil Rights Act of 1991. *Jones, et al v. R.R. Donnelly & Sons*, 541 U.S. 369, 373 (2004); see also 28 U.S.C. §1658. Accordingly, defendants' argument that this court does not have jurisdiction to consider plaintiff's claims regarding any conduct that occurred prior to September 15, 2003 must, as a matter of law, fail.

When Edwards joined Norris' gang in part of 2002, it was widely known that Edwards did not have all the fire retardant safety equipment required for a Class A Lineman. Exs. D & F. More specifically, Edwards did not have either his coat or gloves. *Id.* Understanding the grave risk to Edwards, as well as in an effort to carry out his responsibility as a foreman concerning the safety of his men, Norris repeatedly requested safety equipment for Edwards. Norris DT at pp. 172-185; Exs. G and I. Merkel, in his capacity as Supervisor of Training and Procedures for the Power Department since the Fall of 2002 testified that one of a foreman's primary obligations is the safety of his gang. Merkel DT at pp. 12-13; Cleary DT at p. 37. Indeed, Norris specifically advised his supervisor that it was not only dangerous to Edwards, but also to the plaintiff to have a man that was going out working on the catenary lines without his mandatory protective equipment. Norris

DT at pp. 172-173; Exs. G & I. Therefore, Norris had a direct interest in Edwards being given all of his mandatory protective gear as it was his responsibility to see that members of his gang worked safely. Interestingly, notwithstanding defendants' claim that "no jackets were available"²⁵ DiStasio advised that had Edwards notified him that he did not have the necessary equipment, Metro-North would have "definitely given him equipment." DiStasio DT at p. 153.

Upon Edwards getting onto Norris' gang, the position formerly held by a Class A Lineman was abolished. Ex. H. As Edwards was disqualified as a Class A Lineman, Norris was forced to oversee a gang without any Class A Linemen. Cleary DT at p. 65; Ex. I. Essentially then, Norris' gang, upon Edwards joining it in Late 2002 and throughout 2003, was undermanned and de facto operating in emergency mode. Ex. I. Cleary DT at pp. 70-71; Edwards DT at pp. 31-33. Accordingly, a reasonable fact-finder could conclude that Metro-North's failure to issue burn equipment in response to Mr. Norris' repeated requests, as well as the abolition of a Class A Lineman position for Norris' gang, was both discrimination and in the nature of retaliation in violation of §1981.

I. Plaintiff Can Establish a Viable Claim for Intentional Infliction of Emotional Distress

In order to make out a viable claim sounding in intentional infliction of emotional distress, a plaintiff must establish: (1) that defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of its conduct; (2) that the conduct was extreme and outrageous ; (3)

²⁵ See defendants' Memorandum of Law at p. 28.

that defendants' conduct was the cause of plaintiff's distress; and (4) that the emotional distress sustained by plaintiff was severe. *Appleton v. Board of Education of the Town of Stonington*, 254 Conn. 205, 210 (Conn. 2000). Liability is determined under this cause of action only where the challenged conduct can be properly characterized as utterly intolerable in a civilized community. *Id.* at 210-11.

Defendants attempt to exclude certain conduct specifically alleged in plaintiff's complaint based upon the statute of limitations.²⁶ Plaintiff counters, however, that Connecticut courts have recognized that where there is a continuing course of conduct, the statute of limitations period does not begin to run, or is tolled until that conduct terminates. See *Ficherera v. Mine Hill Corp.*, 207 Conn. 205, 209, 541 A.2d 472, 474 (1988) (statute of limitations tolled). Hence, Metro-North's refusal to even respond to Norris' repeated complaints regarding its failure to provide fire retardant equipment to Edwards is a claim appropriate to be considered by this court as Metro-North's refusal continued throughout 2003. See e.g., Exs. D, F & G. Likewise, the elimination of the Class A Lineman in plaintiff's gang, which was in violation of the CBA, was a course of conduct which continued well into 2003, thereby permitting this court appropriate jurisdiction to scrutinize said conduct. Ex. H.

As previously asserted, the primary responsibility of each foreman in the Catenary Department is the safety of his gang members. Cleary DT at p. 37. Notwithstanding numerous verbal requests, as well as at least three (3) written

²⁶ See defendants' Memorandum of Law at p. 30.

requests to various members of management by Norris for Edwards to be provided with the mandatory burn equipment, but he was not. Exs. D & F. Indeed, this court in the *Edwards v. Metro-North, et al*, Case No. 3:04-CV-1430, found that Metro-North's failure to provide Edwards with burn equipment "could support a finding that defendants' conduct was sufficiently outrageous to support an intentional infliction of emotional distress claim."²⁷ To place Norris in the position of either refusing to do the work as ordered, or risking the life of his men in the process, is an outrageous act which should not be tolerated in any civil society. Edwards DT at pp. 35-39.

The abolition of the Class A Lineman position from Norris' gang also had an effect on the safety of Norris as well as his gang members. The fact of the matter is, at least according to Cleary, all gangs were required to have at least two (2) Class A Linemen, neither of which was the foreman. Cleary DT at pp. 24-26. Therefore, because Norris was asked to work without a Class A Lineman, as Edwards had been disqualified as such and never requalified, the assignments his gang took on became even more dangerous notwithstanding the already high level of hazard attendant with working in an environment consisting of high wires and high voltage running over operating trains. Edward DT at pp. 39-40. For Norris' gang to work undermanned for an extended period of time, only exacerbated the all too real danger of either Norris or one of his gang members being seriously injured. Cleary DT at pp. 69-71; Ex. I. A reasonable jury could

²⁷ See p. 30 of *Edwards v. Metro-North, et al*, Ruling on defendants' Motion for Summary Judgment [Docket No. 28].

conclude that placing Norris in the untenable position of having an undermanned gang in a highly dangerous environment is outrageous.

In addition to the aforementioned instances, plaintiff asserts that while certainly he or his physician were required to keep Metro-North's medical department apprised of his condition, excessive notices demanding mandatory medical examinations were intended and did cause severe emotional distress. Plaintiff having been diagnosed as suffering from major depression, general anxiety disorder and PTSD, should not have been sent nineteen (19) notices concerning disciplinary proceedings and/or mandatory medical examinations.²⁸ Indeed, DiStasio testified that he had been told, as early as February of 2004, that psychologically, plaintiff was having difficulty in concentrating on his work. DiStasio DT at pp. 105-107. Additionally, during Norris' leaves of absences which commenced in March of 2004, he was not being paid by Metro-North but rather was receiving railroad retirement sickness benefits, which amounted to about an eighth of his normal salary. Norris DT at pp. 266-267. Hence, the harassive and repeated notices directed to Norris were a deliberate and determined effort on the part of Metro-North to further aggravate plaintiff's already fragile psyche concerning his return to full time employment at Metro-North. *Id.* at pp. 260-261. Exs. Q, R, S, T & U. Moreover, for Metro-North to presume that it could determine plaintiff's psychological state in an hour long mandatory medical examination exposes the level of contempt and disregard it had for the plaintiff, his treating healthcare providers, Drs. Ford and Berkowitz, and the legitimacy of

²⁸ See ¶77 of defendants' 56(a)(1) Statement.

his three (3) stress-related leaves of absences. See e.g., Ex. Y. Indeed, Cleary admitted that he had never heard of Metro-North's Occupational Health Services ever performing independent psychological assessments on employees. Cleary DT at p. 140.

As was previously urged with respect to the impropriety of the discipline imposed for the minor safety violations which occurred on February 18th and 28th of 2004, plaintiff contends that Metro-North's conduct was also intended to inflict, and did inflict severe emotional distress upon the plaintiff. Where safety violations occurred, but no one was injured and no property damage occurred, it was unconscionable for Metro-North to attempt to taint plaintiff's good work record with harsh disciplinary sanctions. Cleary DT at p. 158.

Defendants have also claimed that plaintiff's claim for intentional infliction of emotional distress is preempted by the Railroad Labor Act ("RLA")²⁹ However, plaintiff asserts that the claims as aforescribed are not preempted by the RLA as they fall into the class of rights which are independent of, and therefore, do not require interpretation of, the CBA. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 242 (1994) (citing 45 U.S.C. §151a).³⁰

III. CONCLUSION

For all of the foregoing reasons stated herein, the plaintiff asserts that there remain a multiplicity of genuine issues of material fact which are present in the

²⁹ See defendants Memorandum of Law at p. 31.

³⁰ See also *Edwards v. Metro-North, et al*, ruling on defendants' Motion for Summary Judgment [Docket No. 28 at pp. 26-30].

record before the court. Accordingly, plaintiff requests that his claims, in their entirety, be permitted to survive defendants' summary judgment motion so that they may be submitted to a jury for full consideration and adjudication.

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CERTIFICATION

I hereby certify that on this 7th day of May, 2007, a copy of the foregoing Plaintiff's Memorandum of Law in Support of its Opposition to Defendants' Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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W. Martyn Philpot, Jr