UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARIO POLETTI, Plaintiff, -against- TOWN OF HEMPSTEAD, MICHAEL PASTORE, GERRY MARINO, GUY BOVE AND DEBBIE BOVE, Defendants.	:	MEMORANDUM & ORDER 17-cv-07350 (ENV) (ARL)

VITALIANO, D.J.,

On December 18, 2017, plaintiff Mario Poletti filed this action, pursuant to 42 U.S.C. § 1983, against the Town of Hempstead ("Hempstead") and several of its employees, alleging he was subjected to unlawful retaliation due to his role as union shop steward in violation of his Constitutional rights under the First and Fourteenth Amendments. Defendants moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). For the reasons set forth below, defendants' motion is granted in its entirety.

Background[1]

[1] The facts are drawn from the complaint, depositions, exhibits, affidavits, and Rule 56.1 statements submitted by the parties. All reasonable inferences are drawn in favor of plaintiff as the nonmovant.

In compliance with Local Rule 56.1, which furthers the object of Federal Rule of Civil Procedure 56, each party has submitted a statement citing to admissible evidence from the record. *See* Defendants' Rule 56.1 Statement ("SOF"), Dkt. 35; Plaintiff's Counterstatement of Disputed Facts ("CSOF"), Dkt. 37. For ease of reference, the Court cites to defendants' SOF when the facts are not in dispute. But, where facts are disputed, "the sources for the claims made in dueling Rule 56.1 Statements" will be considered directly. *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 396 (S.D.N.Y. 2015).

I. The Parties

Poletti was employed by Hempstead as an Animal Control Officer ("ACO") at the Town of Hempstead Animal Shelter (the "shelter") from November 19, 2008, until his retirement on November 30, 2018. SOF ¶¶ 1–3, 20. As an ACO, Poletti's responsibilities included picking up and trapping stray, injured, and sick animals and, thereafter, preparing reports summarizing the incidents. SOF ¶¶ 24, 26, 30–31. These reports were done by hand until in or about February 2013, when the shelter began utilizing a computer program, called Pet Point, to input and preserve their incident reports. SOF ¶¶ 26–31; CSOF ¶ 40; Defs. Ex. I, Dkt. 33-10.

The four individual defendants were also employees of Hempstead. Guy Bove and Deborah Bove held supervisor positions at the shelter beginning in 2012 and 2013, respectively. SOF ¶¶ 6–7, 14–16. As road supervisor, Deborah Bove's responsibilities included preparing daily schedules for the ACOs, issuing dispatches, assisting ACOs on the road, and reviewing ACOs' paperwork. SOF ¶ 13. Guy Bove, the kennel supervisor, oversaw the animal control and kennel staff both in the field and in the shelter. SOF ¶ 18. Michael Pastore became the shelter's director in or around the summer of 2014, following the departure of former director Cindy Iacopella. SOF ¶¶ 4, 39; *see* Defs. Ex. C (Poletti Deposition Tr.), Dkt. 33-4, at 55–56. And Gerald Marino, the fifth and final defendant, was Hempstead's Commissioner of the Department of General Services. SOF ¶ 5.

Throughout his employment, Poletti was a member of the CSEA Local Union 880 (the "union"). In August 2013, Poletti became union shop steward for the shelter, a position he shared with another employee, Michael Errico. SOF ¶ 42; Poletti Tr. 57, 62, 66. As shop steward, Poletti was the interlocutor between union leadership and his fellow shelter employees regarding working conditions and other workplace concerns. SOF ¶¶ 44–45.

II. Defendants' Alleged Retaliation

Poletti claims that after he stepped into the shop steward role, he spent the next several years in defendants' proverbial doghouse. It is also undisputed, however, that although he improperly conducted his shop steward duties during his ACO working hours, he did not receive any formal reprimand for this explicit reason. SOF ¶ 47; CSOF ¶ 48. Nonetheless, Poletti flatly asserts that after becoming shop steward, he "suddenly" became the subject of "harassment and increased scrutiny" from defendants and other shelter employees, which, he says, continued until his retirement in 2018. Pl. Opp., Dkt. 36, at 3.

Poletti's complaint and motion papers sketch out the conduct that, in his view, was directed at him and constituted retaliatory harassment. For purposes of the instant motion, the conduct he grieves in this lawsuit can be sorted into two broad categories: (1) defendants' and other Hempstead employees' verbal insults, threats of disciplinary action, and anonymous complaints to shelter management, none of which, Poletti admits, resulted in any disciplinary action against him (collectively, the "non-disciplinary actions"); and (2) the issuance of several notices of discipline ("NODs") concerning Poletti's job performance that, as all parties agree, resulted in formal reprimands or suspensions.[2]

A. Non-Disciplinary Actions

The first few incidents on Poletti's list of grievances that fit into this category occurred, according to him, sometime after August 2013 and before Pastore took over for Iacopella as director in mid-2014. To begin, it is undisputed that on at least one occasion, an anonymous

[2] Notably, defendants dispute that certain of the non-disciplinary actions occurred at all and, obviously, deny all claims of retaliatory motivation. All parties agree, however, during his tenure as shop steward, Poletti was on the receiving end of the employee complaints and NODs described below.

shelter employee submitted a complaint accusing Poletti of drinking alcohol during his ACO shift. SOF ¶ 49; *see also* Poletti Tr. 75–76, 279. The complaint prompted then-director Iacopella to bring Poletti in from the road in order to smell his breath. SOF ¶ 49. Yet, Poletti does not contest that no disciplinary action resulted. SOF ¶ 50. It is likewise undisputed that Iacopella spoke with him about another employee complaint that accused him of using, and encouraging his colleagues to use, profane language towards shelter supervisors. SOF ¶ 51; CSOF ¶ 51. It is a charge Poletti denied, claiming that, instead, he was simply relaying a story about a court case that was misconstrued by the anonymous complainant. Poletti Tr. 98–99. Materially, though, Poletti admits that he was not disciplined as a result. SOF ¶ 51; CSOF ¶ 51.

It was around this same time, as he recalls it, Poletti was informed that his then-supervisor, Stacie Dabolt, had warned his female coworkers to "look out" for Poletti, insinuating that he was a threat to their safety. Poletti Tr. 79–80. On prior occasions, Poletti alleges, Dabolt, in the presence of other ACOs, had referred to him as a "troublemaker," "adamant," and another shelter employee's "bitch," which caused Poletti to complain about Dabolt's conduct to an Investigator for Hempstead. *Id.* 81–83, 85–87. Advancing another grievance, Poletti alleges that in or around May 2014, Guy Bove ordered him to go to the Hempstead Town Attorney's office, where he met with a special investigator, Anthony Mineo. According to Poletti, Mineo asked to speak to him "man to man" without involving the union and told him to "stop talking bad about" the town. *Id.* 103–04. Thereafter, Poletti claims he learned that this conversation was related to a Facebook post criticizing the shelter, which, he asserts, he had neither written nor seen because he did not have a Facebook account. *Id.* 104–06. That same day, Poletti recalls, Deborah Bove threatened him with disciplinary action because he did not include medical information about an animal's leg injury in a report, which, Poletti explained, he could not do because he did not

possess this information at the time. *Id.* 111–12. At any rate, it is undisputed that these actions too did not result in the imposition of discipline.

B. Disciplinary Actions

In early 2014, Poletti received his first of four written disciplinary notices. As kennel supervisor, it was Deborah Bove's responsibility to prepare NODs for Poletti when he failed to properly complete his paperwork. SOF ¶ 83. On February 25, 2014, she issued an NOD reprimanding Poletti for his "insubordination & refusal to complete his daily task." SOF ¶¶ 60–61. The NOD provided a detailed explanation of Poletti's misconduct, explaining that he refused to trap cats on February 4 and February 21, patrolled the wrong work area, and did not let a supervisor know when he took lunch. *See* Defs. Ex. M, Dkt. 33-14. At his deposition, Poletti explained that it was impossible to complete his cat-trapping duties given the distance between the two sites to which he was assigned, and that, as a result, he unsuccessfully grieved the reprimand through the union. Poletti Tr. 118–21, 126–27. Yet, he also admitted that he told Bove that he would not trap cats, *id.* 118–21, he patrolled a different area than he was assigned, *id.* 132–33, and he knew that ACOs were required to advise a supervisor before they took lunch, *id.* 122.

On June 12, 2014, Poletti received his second NOD, also written by Deborah Bove, which reprimanded him for insubordination and refusal to complete his daily task. SOF ¶¶ 62–63. This time, the NOD pinpointed his failure to add notes into the memo section of Pet Point. *See* Defs. Ex. N, Dkt. 33-15. Specifically, the NOD stated that Bove and another kennel supervisor had repeatedly told Poletti to add memos for an "extremely severe" dog euthanasia case into Pet Point, but Poletti failed to follow these direct orders. Defs. Ex. N. Poletti retorts that he disputed the charges and filed a grievance with his union, again to no avail. Poletti Tr.

144. During his deposition, he opined that "lack of communication" between himself and his supervisor, as well as his own "forgetfulness," was the impetus for this reprimand. *Id.* 144–45. Nevertheless, piercing the fog of dispute, he admitted that he failed to enter the memo as directed and agreed that, as of February 2013, all ACOs were required to input Pet Point memos for all cases involving sick or injured animals. *Id.* 188; *see also* Defs. Ex. I. Over the following years, Deborah Bove, sometimes accompanied by Pastore and other shelter staff, spoke with Poletti about his failure to input Pet Point memos at least six times and provided him additional trainings on the Pet Point system.[3]

There were more battles to come. Poletti received his third NOD on March 6, 2017. SOF ¶ 72. It stated that on January 25, he had violated the shelter's "trap-neuter-return" policy by failing to sign the ACO log book, which resulted in the improper return of a cat. *See* Defs. Ex. U, Dkt. 33-22. Unlike his prior two NODs, which resulted only in reprimands, the resulting action on this occasion was a one-day suspension without pay. SOF ¶ 73; Defs. Ex. U. This time, however, Poletti successfully grieved the NOD and his suspension was overturned by the Town's grievance committee. SOF ¶¶ 74–75; Defs. Ex. V, Dkt. 33-23. In litigating the grievance, Poletti contended that he had, in fact, failed to sign the log book as alleged in the NOD, but claimed that the improper cat return would have happened regardless of this error and that the suspension was issued as a mere pretext for defendants' real motivation: to punish him for another employee's mistake. SOF ¶ 74; Poletti Tr. 149–50; Defs. Ex. V.

[3] *See* Defs. Ex. O, Dkt. 33-16 (9/8/2014 note to file); Defs. Ex. P, Dkt. 33-17 (10/17/2014 note to file); Defs. Ex. Q, Dkt. 22-18 (12/23/2014 note to file); Defs. Ex. R, Dkt. 33-19 (2/3/2015 note to file); Defs. Ex. S, Dkt. 33-20 (5/28/2015 note to file); Defs. Ex. J, Dkt. 33-11 (6/17/2015 shelter policy acknowledgment form signed by Poletti); Defs. Ex. T, Dkt. 33-21 (6/17/2015 note to file); Defs. Ex. W, Dkt. 33-24 (4/15/2016 note to file); Defs. Ex. X, Dkt. 33-25 (4/22/2016 note to file); Defs. Ex. Y, Dkt. 33-26 (4/27/2016 note to file).

Poletti's fourth and final NOD was issued several weeks later, on March 24, 2017, accusing him of failing to include all necessary information on a dispatch form for two summonses and suspending him for two days. SOF ¶ 79; Defs. Ex. Z, Dkt. 33-27. Once again, Poletti grieved the NOD, claiming that he was never advised of the changes made to the shelter's policy for filling out ACO dispatch forms. SOF ¶ 81; Defs. Ex. CC, Dkt. 33-30. The grievance committee upheld the discipline, but the union thereafter negotiated with Hempstead and the shelter to reduce the two-day suspension to a loss of one-half of a vacation day. SOF ¶¶ 81–82.; Defs. Ex. DD, Dkt. 33-31.

On May 15, 2017, Poletti sent a letter to the shelter's Human Resources department regarding Pet Point. The letter stated:

> I'm writing this letter to inquire if there is a computer course given by the Town on the system used at the shelter. Documentation policies have changed at the animal shelter. We were given a 20-minute crash course on entering information into the computer. We must enter information we have acquired from our case numbers. Being a 65-year-old person I was not raised with computers and I am not computer savvy. I have made some mistakes and have been reprimanded for them. This way I will be able to do my job properly.

Poletti Tr. 182–83. Notwithstanding this concession that his limited computer skills had led to basic deficiencies in his job performance and, in turn, resulted in disciplinary reprimands, several months after authoring his concession, Poletti filed this lawsuit. He retired the following year, on November 30, 2018.

Applicable Law

A federal district court must grant summary judgment upon motion and finding, based on the pleadings, depositions, interrogatory answers, admissions, affidavits, and all other admissible evidence, that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247,

106 S. Ct. 2505, 91 L. Ed. 2d (1986); Fed. R. Civ. P. 56. The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). The court must construe all evidence in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted). Material facts are those which, given the substantive law, might affect the suit's outcome. *Anderson*, 477 U.S. at 248. That non-material facts might be disputed by the parties is of no significance in determining the motion. *See id.*

If the moving party makes a *prima facie* showing that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and put forth "specific facts showing that there is a genuine issue for trial." *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002). The nonmoving party may not, however, rely on conclusory allegations or speculation. *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir. 2004) (citations omitted). In short, to survive a motion for summary judgment, the non-moving party must proffer admissible evidence and show that reasonable minds could differ about a material fact based on that proffered evidence. *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 59 (2d Cir. 1997).

Discussion

I. First Amendment Retaliation Claim

To state a *prima facie* claim of First Amendment retaliation, a plaintiff must show that: (1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; and (3) there was a sufficient causal connection between the protected speech and the adverse employment action. *See Specht v. City of New York*, 15 F.4th 594, 600–01 (2d Cir. 2021). Although Poletti's union activities are indisputably protected by the First Amendment,

see Clue v. Johnson, 179 F.3d 57, 60 (2d Cir. 1999), fatally, he identifies no evidence from which a reasonable juror could conclude that his shop steward activities caused an adverse employment action.

A. Adverse Employment Action

Within the First Amendment retaliation context, an adverse action is one "that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Wrobel v. Cty. of Erie*, 692 F.3d 22, 31 (2d Cir. 2012) (*citing Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225–26 (2d Cir. 2006)). The "classic" types of adverse actions are "harsh measures, such as discharge, refusal to hire, refusal to promote, reduction in pay, and reprimand." *Id.* But the Second Circuit has also recognized that "a combination of seemingly minor incidents" can "form the basis of a constitutional retaliation claim once they reach a critical mass." *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002). "Thus, to prove a First Amendment retaliation claim in a situation other than the classic examples, . . . a plaintiff must show that '(1) using an objective standard; (2) the total circumstances of [his] working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." *Amato v. Hartnett*, 936 F. Supp. 2d 416, 433 (S.D.N.Y. 2013) (quoting *Phillips*, 278 F.3d at 109). At any rate, the "test for determining whether an employer has taken adverse action is not wooden: it must be tailored to the different circumstances in which retaliation claims arise." *Specht*, 15 F.4th at 604 (quotations omitted). Each category of grievance advanced by Poletti must be assessed through the prism of these standards.

1. Non-Disciplinary Actions

As Poletti concedes in his opposition brief, *see* Pl. Opp. at 8–9, no single insult, threat, or

complaint about his workplace conduct was, standing alone, so severe that it would have reasonably deterred a similarly situated individual from exercising their First Amendment rights. Indeed, assuming solely for the sake of argument that all of these alleged wrongs actually occurred, likely most insulting to Poletti was Dabolt calling Poletti a "troublemaker," "adamant," and another employee's "bitch" in front of the other ACOs. Yet, whatever the humiliation, it does not even make the catch-all theory of liability since Poletti conceded during his deposition that the ACO meetings during which Dabolt's comments were made occurred in 2011 or 2012, well before he became shop steward. *See* Poletti Tr. 94–95. Therefore, this charged conduct cannot form the basis of a retaliation claim hinged, as Poletti has pleaded, on his protected activities in his role as shop steward. *See, e.g.*, *Bernheim v. Litt*, 79 F.3d 318, 325 (2d Cir. 1996).

Although, according to Poletti, the other threats by Hempstead employees *were* made during his tenure as shop steward, none rise to the level of an adverse action. His accusation concerning Mineo's instruction that he "stop talking bad about" Hempstead, for instance, amounts to an admonishment delineated without the imposition of any adverse consequence. Grievances falling into that bucket are plainly *de minimis*. *See, e.g.*, *Wrobel v. Cty. of Erie*, 692 F.3d 22, 31 (2d Cir. 2012) (supervisor's "interrogation" and verbal admonishment unbounded by actual consequences were "*de minimis* slights and insults" that did "not amount to retaliation"). Similarly, Dabolt's alleged advisements that female employees "look out" for Poletti and threatened reprimands, were, at most, "empty threats" of future retaliation that are insufficient to constitute an adverse employment action. *See Kiernan v. Town of Southampton*, 734 F. App'x 37, 42 (2d Cir. 2018); *Conklin v. Cty. of Suffolk*, 859 F. Supp. 2d 415, 440 (E.D.N.Y. 2012); *Mateo v. Fischer*, 682 F. Supp. 2d 423, 434 (S.D.N.Y. 2010).

This reasoning applies with equal force to the anonymous employee complaints. While

Poletti was surely upset by the allegations about his drinking and use of profane language, the fact that such accusations were made by his co-worker(s) and then investigated by then-director Iacopella does not create a genuine issue of material fact. Such conduct would not have deterred a similarly situated person from exercising their First Amendment rights to engage in constitutionally protected activity where, as here, a plaintiff proffers no evidence that any municipal official prompted the complaint against him and concedes that absolutely no adverse consequences were imposed on him as a result of the admonishments.

Nor did these *de minimis* admonishments, insults, and accusations combine to establish a "critical mass of inferiority" potentially affording plaintiff a trail to success as blazed by *Phillips*. Clearly, unlike *Phillips*, which held that the defendants' "pattern of near constant harassment" supported a "critical mass" verdict, 278 F.3d at 109, the harassment and increased scrutiny challenged by Poletti was neither severe nor pervasive. None of these alleged threats or accusations resulted in any form of punishment, nor is there any evidence that, viewed objectively, they resulted in an "unreasonably inferior and adverse" work environment for Poletti. He was not, for example, banned from operating Hempstead vehicles after being accused of drunk driving or required to change the way in which he interacted with his female colleagues. These *de minimis* actions are, therefore, precisely the type of "relatively minor and infrequent" incidents that routinely fall short of the "critical mass" threshold. *See Phillips*, 278 F.3d at 109 ("[A] merely discourteous working environment does not rise to the level of First Amendment retaliation."); *Reckard v. County of Westchester*, 351 F. Supp. 2d 157, 162 (S.D.N.Y. 2004) (finding "a two-month period of dissatisfaction with [plaintiff's] work assignments and a series of other minor and occasional inconveniences" did not produce unreasonably inferior work environment). In short, with respect to this category of grievance,

Poletti fails to establish that there is a material fact in genuine dispute that requires denial of this branch of defendants' motion.

2. Disciplinary Actions

In their base barrages, defendants contend that disciplinary letters or written reprimands cannot be deemed "adverse" absent a "present, tangible effect on the employee's terms of employment." Defs. Br., Dkt. 34, at 6–7. This argument, however, incorrectly relies upon retaliation cases brought pursuant to Title VIII or the ADEA, which are governed by a "more demanding" standard for determining whether an action is "adverse" than the one applied in First Amendment retaliation cases. *See Zelnik*, 464 F.3d at 225–26 (2d Cir. 2006); *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007). In the context of this First Amendment retaliation claim, the key issue is whether the NODs and resulting consequences would have dissuaded a similarly situated employee from exercising their constitutional rights.

A reasonable juror, applying the standard the law provides, could find that defendants' discipline satisfies the adverse consequences element required of First Amendment retaliation claims. Courts in this Circuit have found that the act of filing disciplinary charges can be adverse, even if no wages or benefits are lost as a result, because the stated violations may "carry a stigma" and affect future employment or promotions. *See Ayiloge v. City of New York*, 2002 WL 1424589, at *12 (S.D.N.Y. June 28, 2002); *Pekowsky v. Yonkers Bd. of Educ.*, 23 F. Supp. 3d 269, 278–79 (S.D.N.Y. 2014) (letter of reprimand "may well lead an employee to believe (correctly or not) that his job is in jeopardy, and accordingly might dissuade a similarly situated [employee] from union advocacy" (quotations omitted)).

Such is the case here. The February 2014 NOD stated that Poletti was "insubordinate & refused to complete his daily task," detailed his defiant interactions with his supervisor, and

warned that further action would be taken if Poletti repeated his misconduct. *See* Defs. Ex. M. The June 2014 NOD similarly noted and described Poletti's insubordination and also warned of "progressive discipline" for future misconduct. *See* Defs. Ex. N. Likewise, the March 6, 2017 NOD, although ultimately overturned, misleadingly accused Poletti of returning the wrong cat, and both this and the final March 24 NOD stated that Poletti's failure to perform his duties "will result in further progressive disciplinary action up to and including termination." *See* Defs. Ex. U; Defs. Ex. Z.

Although after the smoke cleared, the only tangible punishment Poletti received was the loss of one-half a vacation day, these adverse findings could have affected his prospects for future employment and led him to believe that his job was in jeopardy and, consequently, might have dissuaded a similarly situated employee from engaging in union activities. *See Pekowsky*, 23 F. Supp. 3d at 278–79; *Ayiloge*, 2002 WL 1424589, at *12; *see also Millea v. Metro-N. R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) ("A formal reprimand issued by an employer is not a petty slight, minor annoyance, or trivial punishment[.]" (quotations omitted)).

B. Causation

Of course, the curtain does not fall on a defendant's motion for summary judgment merely as a result of finding that there is a genuine issue of material fact regarding Poletti's suffering of some adverse consequences. Indeed, Poletti's retaliation claim still fails because there is no genuine issue of fact as to the existence of a causal connection between his protected activities and the disciplinary conduct that constitutes adverse employment actions. Regardless the measure of adverse employment consequences for the plaintiff employee, he cannot succeed on his claim without a showing of causation—demonstrating the wrongfulness of the employer's imposition of these consequences. For Poletti to succeed on his First Amendment retaliation

claim, he must therefore show that his union shop steward duties were "a substantial motivating factor in" the adverse action. *Fotopolous v. Bd. of Fire Comm'rs of Hicksville Fire Dist.*, 11 F. Supp. 3d 348, 367 (E.D.N.Y. 2014) (quoting *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 167 (2d Cir.2006)). "A causal relationship can be demonstrated either indirectly by means of circumstantial evidence, including that the protected speech was followed by adverse treatment, or by direct evidence of animus." *Wrobel v. Cty. of Erie*, 692 F.3d 22, 32 (2d Cir. 2012).

Bluntly, no reasonable juror could find that defendants' adverse actions were related to—let alone, substantially motivated by—Poletti's union activities. It is undisputed that Poletti was never disciplined for performing his shop steward duties during his ACO working hours. SOF ¶¶ 47, 48. And it is abundantly clear from the record, including Poletti's testimony, that defendants took disciplinary action against him because of his perpetual failure to adhere to shelter policies and his poor performance as an ACO, not his union activities. The absence of any dispute concerning these material facts is fatal to his retaliation claim.

Reviewing the discipline imposed on Poletti with close scrutiny, the first two NODs Poletti received in 2014 credibly detailed Poletti's various failures to follow direct orders and refusals to complete his seemingly straightforward ACO duties, of which he was reminded prior to the issuance of both NODs. *See* SOF ¶¶ 40, 64. Significantly, although Poletti disputed the accuracy of certain statements in the NODs, he admitted to violating the shelter policies for which he was reprimanded. He also offered reasons for the issuance of the NODs (including miscommunication and his own "forgetfulness") that had nothing to do with his shop steward activities. Likewise, Poletti testified that the third, ultimately overturned NOD accurately accused him of violating shelter policy by failing to sign the ACO log book and claimed that this

admittedly minor violation was used as a pretext to punish him for another employee's mistake, not for his union activities. The same is true for his final NOD; Poletti admitted to committing the alleged shelter policy violation, but only because, he claims, he did not know the policy had changed. In short, nothing in the admissible proof he has proffered suggests any connection to the performance of his shop steward activities. His protests to the contrary rest, at best, on speculation and surmise.

Contrasted with the absence of any record evidence suggesting the slightest connection between the discipline imposed on Poletti and his role as union shop steward, there is a trainload of essentially uncontroverted evidence connecting Poletti's discipline to major shortcomings in his work performance. In point of fact, the record is replete with extensive documentary evidence of Poletti's years-long failure to adhere to shelter protocol for entering Pet Point memos, which was the stated basis for two of his NODs. Notably, the record reflects at least five additional instances between June 2014 and April 2016, while he was shop steward, in which Poletti failed to input the proper information into Pet Point without any disciplinary action being taken against him. *See* SOF ¶¶ 67–71, 76–78; Defs. Exs. P, Q, R, S, W.

Moreover, there is no evidence that the implementation of Pet Point was part of a scheme targeting Poletti for his shop steward work. To the contrary, Pet Point was implemented before he even became shop steward. *See* Defs. Ex. I. Worse yet for Poletti's claim is his admission that the Pet Point memo protocol was adopted after the Nassau County District Attorney's Office directed the shelter to ensure that its paperwork was properly completed because missing information could cause problems with criminal prosecutions. SOF ¶ 85. In this context, Poletti's self-admitted, repeated violations of Pet Point memo protocols walls off his performance of shop steward duties from being considered a substantial motivating factor in the

adverse employment consequences he identifies as wrongful. *See, e.g.*, *Mauze v. CBS Corp.*, 2019 WL 8137641, at *3 (E.D.N.Y. Jan. 23, 2019) ("[Plaintiff's] failure to . . . obey direct orders from her supervisor break any causal connection between [her protected activities] and her termination."); *Lytle v. JPMorgan Chase*, 2012 WL 393008, at *34 (S.D.N.Y. Feb. 8, 2012), *report and recommendation adopted sub nom.*, 2012 WL 1079964 (S.D.N.Y. Mar. 30, 2012), *aff'd*, 518 F. App'x 49 (2d Cir. 2013) (plaintiff's failure to comply with mandatory employment requirement negated inference of causation).

In a transparent attempt to deflect attention away from his undisputedly poor work performance and its fatal impact on his claims, Poletti relies on two theories in support of causation: (1) the falsity of defendants' proffered reasons for his NODs, and (2) the temporal proximity between his assumption of the shop steward role and the alleged onset of defendants' harassment and increased scrutiny. First, as noted already, Poletti's own testimony concerning the events leading up to the issuance of each NOD belies any notion of falsity. That some specific statements in the NODs were misleading or remembered differently by Poletti is not evidence of pretext given his substantial affirmance of the facts defendants contend gave rise to the NODs.

As for temporal proximity, Poletti summarily argues that after becoming shop steward, he "suddenly" was subjected to harassment and increased scrutiny in his job as an ACO "in a way that was not done previously." Pl. Opp. at 3, 10. Defendants, in turn, admit that Poletti was not disciplined before August 2013, but claim this timing is a "mere coincidence." Defs. Br. at 12. Because Poletti's formal disciplines, which were indisputably issued in February 2014, June 2014, and March 2017, are the only adverse actions taken by defendants, they are, accordingly, the only actions relevant to the issue of causation.

Although it is true that "[a] plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action," *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009), in order to "provide an *independent* basis for an inference of causation, temporal proximity must be significantly greater" than that in a case in which there is corroborating evidence of causation, *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 384 (2d Cir. 2003) (emphasis added). Here, there is a five-month gap between Poletti's assumption of the shop steward role and his first NOD. His second NOD was issued another four months after that, and his third and fourth came nearly four years after he became shop steward. This chronology falls far short of the temporal proximity required to establish, on that basis alone, an inference that the NODs were substantially motivated by Poletti's union activities, which is the case here since no other evidence of causation is present. *See, e.g.*, *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 788 F. Supp. 2d 78, 83 (E.D.N.Y. 2011) ("[A] greater than three month gap, unsupported by any other allegations showing plausible retaliation, is insufficient to raise an inference of retaliation.").

Furthermore, the record shows that there were intervening events between Poletti's assumption of the shop steward role and his NODs—namely, his failure to carry out direct orders and adhere to mandatory ACO procedures—"that provided valid, non-discriminatory reasons" for defendants' actions. *Lambert v. New York State Off. of Mental Health*, 2000 WL 574193, at *13 (E.D.N.Y. Apr. 24, 2000), *aff'd,* 22 F. App'x 71 (2d Cir. 2001) (five-month gap insufficient to infer causation due to intervening events). Poletti received his first reprimand four days after he failed to trap cats as directed and his second reprimand two days after he failed to enter notes into Pet Point, despite his supervisor's multiple reminders. His suspension and docking of vacation days occurred over two years later, during which time Poletti committed numerous

violations of the shelter's Pet Point policy. There is, therefore, no basis for a reasonable trier of fact to infer causation based on temporal proximity. *See, e.g.*, *Contes v. Porr*, 345 F. Supp. 2d 372, 383 (S.D.N.Y. 2004) (granting summary judgment where allegedly retaliatory act occurred 21 months after protected activity, and "immediately after the occurrence of a 'red flag' intervening act").

The only remaining "evidence" of a connection between his union activities and defendants' complained-of actions is Poletti's belief that such a connection exists, which is plainly tautological and insufficient. *See, e.g.*, *Petrario v. Cutler*, 187 F. Supp. 2d 26, 33 (D. Conn. 2002) (granting summary judgment where "[t]he plaintiff's principal evidence that [his employer's] actions were motivated by his union grievance is his statement in a deposition that he believes as much"). Defendants are therefore entitled to summary judgment on Poletti's first cause of action.

II. *Monell* Liability

In what has become fairly standard practice in cases like this, Poletti has interposed a second cause of action in which he seeks to hold Hempstead liable for the purported violations of his constitutional rights under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Contrary to how many of these claims are pleaded, *Monell* does not stand on the *respondeat superior* doctrine, nor does it "provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006). To state a claim for municipal liability, as distinct from a separate claim against employees or agents of the municipality, a plaintiff must allege "(1) an official policy or

custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Torraco v. Port Authority of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010). As outlined above, however, the undisputed evidence shows that defendants' allegedly retaliatory conduct did not violate Poletti's constitutional rights. Thus, element three is not met, and plaintiff's *Monell* claim necessarily fails.

Moreover, even assuming *arguendo* Poletti had been denied a constitutional right, there is not an iota of evidence in the record suggesting Hempstead employed a "widespread" and "well-settled" custom or usage of constitutional violations. *Fowler v. City of New York*, 2019 WL 1368994, at *14 (E.D.N.Y. Mar. 26, 2019), *aff'd,* 807 F. App'x 137 (2d Cir. 2020). Indeed, Poletti admits that Hempstead does not employ a formal policy of retaliation against union shop stewards, arguing instead that "the action of harassing, scrutinizing, and disciplining Plaintiff in retaliation for his union activity was so persistent as to constitute a custom." Pl. Opp. at 11. But, a "pattern or practice" *Monell* claim cannot proceed on a theory of discrimination against a single individual, and Poletti has presented no evidence that any other person employed by Hempstead—including Michael Errico, the other union shop steward for the shelter—was ever reprimanded or harassed as a result of their union activities. *See, e.g., Lockwood v. Town of Hempstead*, 2017 WL 9485687, *10 (E.D.N.Y. Feb. 24, 2017) (dismissing *Monell* claim where plaintiff presented no evidence that comparators were subjected to same adverse treatment); *Nicosia v. Town of Hempstead*, 2017 WL 3769246, *3 (E.D.N.Y. Aug. 28, 2017) ("[A]llegedly discriminating against two individuals . . . is insufficient to demonstrate 'persistent and widespread' constitutional violation."). Consequently, the Town of Hempstead is entitled to summary judgment on Poletti's second cause of action.

Conclusion

In line with the foregoing, defendants' motion for summary judgment is granted in its entirety and the complaint is dismissed.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York
February 14, 2022

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge