UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT POLITE,

Plaintiff,

-against-

KHAN FUNDS MANGEMENT AMERICA, INC., and XUEFENG (ERIC) DAI,

Defendants.

MEMORANDUM DECISION AND ORDER

17 Civ. 2988 (GBD)

GEORGE B. DANIELS, United States District Judge:

Plaintiff Robert Polite brings this action against his former employer, Khan Funds Management America, Inc. ("KFMA"), and its principal, Xuefeng Dai (collectively, "Defendants"). (Compl., ECF No. 1, ¶¶ 5–8.) Plaintiff asserts a claim under the anti-retaliation provision of the Dodd-Frank Act ("Dodd-Frank"), 15 U.S.C. § 78u-6(h); employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-107; and a common law claim for breach of contract. (Compl. ¶¶ 43–53.) Plaintiff, an African-American, alleges that over the course of his one-year tenure with KFMA, he was subjected to discrimination based on his race and national origin, as well as retaliatory discharge stemming from his opposition to the use of his name in "glossy marketing materials" as the firm's "Financial Director" when, in fact, he was employed solely as an accountant. (*Id.* ¶¶ 20–32.) As a result, Plaintiff alleges that he suffered economic loss, emotional distress, and pain and suffering. (*See id.* at 10.) Plaintiff seeks declaratory and injunctive relief, reinstatement to the position he would have occupied but for Defendants' alleged wrongful employment actions, compensatory and punitive damages plus prejudgment interest, and attorneys' fees, as well as any other "just and proper" relief. (*Id.*)

Defendants move to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. to Dismiss, ECF No. 12; Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF No. 14, at 1–3.)

Defendants' motion to dismiss is GRANTED.

I. FACTUAL ALLEGATIONS

Defendant KFMA, which Defendant Dai established in September 2014, is a "global hedge fund" with offices located in New York City.[1] (Compl. ¶¶ 5–7.) Plaintiff's allegations are that in September 2015, he was hired to work at KFMA as a certified public accountant. (*Id.* ¶ 8.) From the beginning, however, Plaintiff sensed that something at KFMA was amiss. For instance, when he joined the firm, he noticed that there was no payroll system in place. He also realized that despite being its sole internal accountant, KFMA's books and records were never made completely available to him for his review, making simple accounting tasks such as the reconciliation of accounts difficult, if not impossible, to undertake. (*Id.* ¶¶ 9–11.)

In addition, Plaintiff began to suspect that Dai was embezzling company funds for his personal benefit by, for example, purchasing furniture and paying rent for an apartment without reporting the expenditures as payments or income and without paying the requisite income tax. (*Id.* ¶ 12.) In April 2016, Plaintiff reported his suspicions that corporate funds were being misappropriated to KFMA's Head of Financial Operations, citing Dai's furniture and rent payments, as well as a "mysterious $38,000 deposit." (*Id.* ¶ 13.) Since Dai was not permitted to take income from KFMA at the time due to restrictions on his visa, Plaintiff reported that he would have to remit

[1] According to the complaint, KFMA is a covered entity under the Securities Exchange Act of 1934 (the "1934 Act") and is a "broker," a "dealer," and/or a "broker-dealer" within the meaning of the 1934 Act, among other laws, guidelines, and regulations. Nonetheless, KFMA has failed to register with the U.S. Securities and Exchange Commission. (Compl. ¶¶ 38–40.)

the misappropriated funds back to KFMA. (*Id.* ¶ 14.) Plaintiff repeatedly raised these issues over the following months, but was ignored. (*Id.* ¶ 15.)

Throughout his brief tenure with KFMA, Plaintiff observed other peculiar behavior that caused him to question the legitimacy of its operations. For example, on numerous occasions he would ask for documents to support transactions reflected in KFMA's bank accounts. Sometimes his requests were simply ignored; at other times, he was told that because he was not part of "management," he did not need to know about certain matters. (*Id.* ¶ 16.) Plaintiff also observed that when KFMA entered into contracts with foreign companies and the contracts were breached, KFMA would not pursue its remedies under the respective agreements. In July 2016, for example, a Singaporean entity breached a "biomedical consultation agreement" it had entered into with KFMA, leaving KFMA short approximately $50,000. Plaintiff raised the issue of underpayment multiple times but was ignored. According to Plaintiff, many of the foreign entities that KFMA did business with were primarily or wholly-owned by Dai and his affiliated entities. (*Id.* ¶¶ 17–19.)

A. Alleged Race and National Origin Discrimination

Apart from having his concerns about KFMA and Dai's suspicious business dealings repeatedly rebuffed, Plaintiff alleges that throughout his employment with KFMA, he was discriminated against on the basis of his race and national origin. (*Id.* ¶ 20.) As KFMA is the domestic affiliate of a network of Chinese financial companies, its shareholders and management-level staff were all Chinese. In fact, for most of the time he was employed by KFMA, Plaintiff was the only black employee; another black employee was hired in August 2016 only to be fired the next month and on the very same day as Plaintiff. (*Id.* ¶¶ 21–23.) In addition, when a group of Chinese lawyers reviewed all employees' offer letters, they provided contracts to every employee except Plaintiff. (*Id.* ¶ 24.)

Virtually every employee in the office spoke Mandarin, except Plaintiff. When Plaintiff received emails and documents in Mandarin—including ones from Human Resources pertaining to his own position and performance—he requested that they be translated into English for him, but his requests went unanswered. (*Id.* ¶ 26.) In addition, KFMA employees, including Plaintiff's supervisor, routinely spoke about Plaintiff in Mandarin, often right in front of him. While he could not understand the words they were saying, Plaintiff observed them "giggling, laughing, and mocking his gestures." (*Id.* ¶ 27.) Plaintiff asked them to stop, but his requests went unheeded. (*Id.*) Over the course of his employment with KFMA, Plaintiff lodged numerous complaints that he was being "treated differently" than the other employees. Dai promised Plaintiff on several occasions that they would hold a meeting on the issue, but no such meeting was ever held. (*Id.* ¶ 28.) Even before his termination in September 2016, Plaintiff began drafting a charge to be filed with the U.S. Equal Employment Opportunity Commission ("EEOC"). (*Id.* ¶ 29.)

B. Alleged Retaliatory Discharge

In May or early June of 2016, Plaintiff learned that despite his position with the firm as an accountant, KFMA was advertising that he served as KFMA's "Financial Director" in "glossy marketing materials used to lure investors." (*Id.* ¶ 30.) Plaintiff immediately objected and set forth his opposition to the perceived misrepresentation in "two formal letters," explaining that he was bound by the canons of professional responsibility applicable to certified public accountants.[2] (*Id.* ¶ 31.)

Throughout his employment with KFMA, Plaintiff was never "written up," nor was he ever provided with a warning, performance improvement plan, or any other indication that his job was in jeopardy. (*Id.* ¶ 32.) Notwithstanding, Plaintiff was fired in September 2016 and let go without

[2] It is not clear to whom these letters were sent.

any explanation. (*Id.*) Plaintiff filed a timely charge of employment discrimination with the EEOC. (*Id.* ¶ 33; *see also id.* ¶ 37.) In opposition to Plaintiff's discrimination charge, Defendants produced an email wherein Dai, apparently "furious" over Plaintiff's objection to the marketing materials, directed his subordinates to fire Plaintiff "as soon as possible." (*Id.* ¶ 34.) According to Plaintiff, Dai also made clear in subsequent communications that he wanted Plaintiff's replacement to be a "bean counter" rather than a certified public accountant. (*Id.* ¶ 35.)

C. Plaintiff Files Suit

On February 17, 2017, Plaintiff received a right-to-sue letter from the EEOC. This suit followed. (*Id.* ¶ 37.) Plaintiff asserts a claim against Defendants under Dodd-Frank for retaliation, as well as claims for employment discrimination under Title VII of the Civil Rights Act of 1964 and the NYCHRL. (*Id.* ¶¶ 43–50.) Plaintiff also asserts a cause of action under New York common law for breach of contract, arising out of the breach of an implicit term of Plaintiff's employment contract, namely, that he would not be required to violate the ethical duties and responsibilities of his profession. (*Id.* ¶¶ 52–53 (citing *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992)).)

II. LEGAL STANDARDS

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must demonstrate "more than a sheer possibility that a defendant has acted unlawfully"; stating a facially plausible claim requires pleading facts that enable the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Thus, the factual allegations pleaded "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

A district court must first review a plaintiff's complaint to identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. The court then considers whether the plaintiff's remaining well-pleaded factual allegations, assumed to be true, "plausibly give rise to an entitlement to relief." *Id.*; *see also Targum v. Citrin Cooperman & Co., LLP*, No. 12-CV-6909, 2013 WL 6087400, at *3 (S.D.N.Y. Nov. 19, 2013). In deciding a motion brought under Rule 12(b)(6), the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the non-moving party's favor. *See Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 495 (S.D.N.Y. 2014) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)).

III. PLAINTIFF FAILS TO STATE A CLAIM UNDER DODD-FRANK

Plaintiff's First Cause of Action alleges that Defendants violated Dodd-Frank's "whistleblower" protection provision by firing him for engaging in protected conduct. (*See* Compl. ¶ 43.)

Under Dodd-Frank's anti-retaliation provision, employers may not

> discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> > (i) in providing information to the [Securities and Exchange Commission ("SEC")] in accordance with this section;
> >
> > (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or
> >
> > (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 ["SOX"] (15 U.S.C. § 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the [SEC].

15 U.S.C. § 78u-6(h)(i-iii).

Dodd-Frank defines the term "whistleblower," in relevant part, to mean "any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]." 15 U.S.C. § 78u-6(a)(6). Thus, to state a claim under Dodd-Frank's anti-retaliation provision, a plaintiff must demonstrate that (1) he is, in fact, a whistleblower within the meaning of the statute; (2) he engaged in protected activity, and (3) as a result of engaging in such activity, he suffered an adverse employment action. *See Ott v. Fred Alger Mgmt., Inc.*, No. 11-CV-4418 (LAP), 2012 WL 4767200, at *4 (S.D.N.Y. Sept. 27, 2012) (citation omitted).

As an initial matter, Plaintiff does not qualify for whistleblower protection under Dodd-Frank since the complaint does not allege that he provided information to the SEC, as is required by the statute's definition. To be sure, the SEC has interpreted Dodd-Frank's anti-retaliation provision more broadly to also protect employees who report internally, *see* 17 C.F.R. § 240.21F-2(a); Securities Whistleblower Incentives and Protections, Release No. 34-64545, 76 Fed. Reg. 34300–01, at *34304, 2011 WL 2293084 (F.R.) (June 13, 2011), to which the Second and Ninth Circuits have deferred under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045, 1050–51 (9th Cir. 2017); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). Other courts, however, have found that the plain text of the statute controls, *see Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013), and the issue is now before the Supreme Court, which granted certiorari in *Somers* several months ago. *See Dig. Realty Tr., Inc. v. Somers*, 137 S. Ct. 2300 (Mem.) (June 26, 2017).

Even assuming for purposes of this motion that Plaintiff qualifies as a whistleblower, his claim still fails because he has not alleged that he engaged in protected activity. To be covered

under the anti-retaliation provision of Dodd-Frank, an individual "must possess a reasonable belief that the information he or she is providing . . . relates to a possible securities law violation." *Ott*, 2012 WL 4767200, at *4 (citation and quotation marks omitted). "[T]he 'reasonable belief' standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess." *Id.* (citation omitted). In addition, Dodd-Frank "does not protect whistleblowers who report violations of *any* laws or regulations subject to the SEC's jurisdiction." *Egan v. TradingScreen, Inc.*, No. 10-CV-8202 (LBS), 2011 WL 1672066, at *6 (S.D.N.Y. May 4, 2011) (emphasis added). To the contrary, as its text clearly indicates, Dodd-Frank protects only those disclosures that are explicitly "*required* or *protected*" under a rule or law within the SEC's purview. *Id.* (citation omitted).

Here, Plaintiff's complaint does not contain *any* allegation that he made a disclosure relating to a possible violation of *any* securities law. Instead, Plaintiff asserts for the first time in his opposition papers that he was reporting violations of Rule 10b-5 and the Investment Advisors Act ("IAA"). (*See* Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Opp'n"), ECF No. 27, at 6–7; Pl.'s Supp. Mem. in Opp'n to Mot. to Dismiss ("Supp. Mem."), ECF No. 30, at 5–6.) In particular, he points to complaints he made regarding (i) Defendant Dai's alleged misappropriation of company funds; (ii) KFMA's alleged failure to respond to breaches of company contracts by foreign entities; and (iii) the inclusion in "glossy marketing materials" of his name as KFMA's "financial director," despite his title as accountant. (Supp. Mem. at 2–4.) Because Plaintiff failed to raise allegations of securities fraud in his complaint, they are not properly before this Court and need not be considered. *See K.D. v. White Plains Sch. Dist.*, 921 F. Supp. 2d 197, 209 n.8 (S.D.N.Y. 2013) (holding that a

plaintiff "cannot amend [his] complaint by asserting new facts or theories for the first time in opposition to [a] motion to dismiss").

In any event, because these conclusory allegations do not save Plaintiff's Dodd-Frank claim, amendment would be futile. "The plain language of Rule 10b-5 mandates that the proscribed schemes or acts be done in connection with the purchase or sale of any security." *Taylor v. Westor Capital Grp.*, 943 F. Supp. 2d 397, 402 (S.D.N.Y. 2013) (citation omitted); *see also SEC v. Frohling*, 851 F.3d 132, 136 (2d Cir. 2016) ("Section 10(b) of the Exchange Act and Rule 10b-5 . . . prohibit fraud in the purchase or sale of a security."). Plaintiff, however, does not claim that any of the alleged misconduct he complained about took place in connection with the purchase or sale of securities. Merely because KFMA is a hedge fund that invests in securities does not make every act of indiscretion, or even criminality, at the workplace a violation of Rule 10b-5. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010) ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'") (quoting 15 U.S.C. § 78j(b)); *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 160 (S.D.N.Y. 2011) (finding that fraudulent marketing materials were insufficient to establish a defendant's liability under Section 10(b) "[a]bsent a purchase and sale" of securities); *Mfrs. Hanover Tr. Co. v. Smith Barney, Harris Upham & Co. Inc.*, 770 F. Supp. 176, 180–81 (S.D.N.Y. 1991) (finding that alleged embezzlement of securities by broker did not constitute violation of Rule 10b-5 and explaining that "Rule 10b-5 is designed to protect market transactions, not trust relationships").

Similarly deficient is Plaintiff's conclusory allegation regarding Defendants' apparent IAA violation. According to Plaintiff, Defendants violated the IAA by breaching the "affirmative duty of good faith and candor in disclosure of material facts." (Supp. Mem. at 5.) Plaintiff, however,

provides no support for the proposition that reporting a violation of the IAA even qualifies as protected activity under Dodd-Frank. *Cf. Egan*, 2011 WL 1672066, at *6 (rejecting the plaintiff's argument that reporting a violation of FINRA rules entitled him to whistleblower protection under Dodd-Frank). Moreover, nowhere has it been alleged that KFMA provides investment advisory services sufficient to fall under the scope of the IAA, nor can that fact be reasonably inferred from the singular allegation that KFMA entered into a "biomedical consultation agreement" with an undisclosed Singaporean entity. (*See* Supp. Mem. at 5; Compl. ¶ 18.)

Since Plaintiff has failed to plausibly allege that it was reasonable for him to believe that KFMA was violating securities laws, *Ott*, 2012 WL 4767200, at *4, he has not stated a claim for relief under Dodd-Frank's anti-retaliation provision. Accordingly, Plaintiff's First Cause of Action is DISMISSED.

IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE VII

Plaintiff's Second Cause of Action is for employment discrimination under Title VII.[3] (*See* Compl. ¶¶ 46–47.) Plaintiff, an African-American, claims that he "was treated like a second-class citizen on the basis of his race and/or national origin." (*id.* at 1, ¶ 20.) Specifically, Plaintiff alleges that (i) for most of his time at KFMA, he was the only black, non-Chinese employee and that when another black employee was hired, he was fired the same day as Plaintiff; (ii) every employee received an employment contract except Plaintiff; (iii) emails and documents were sent to Plaintiff in Mandarin and English translations were not provided; and (iv) his colleagues and supervisor made fun of him in Mandarin to his face. (*Id.* ¶¶ 22–28.) Accordingly, Plaintiff asserts, he was subjected to a hostile work environment and disparate treatment on account of his race and national origin. (Opp'n at 10–12.)

[3] Plaintiff's Title VII claim is asserted against Defendant KFMA alone. (*See* Opp'n at 11.)

Defendants argue that Plaintiff's Title VII claim should be dismissed because, during the relevant time period, KFMA did not have a sufficient amount of employees to meet the statutory threshold for Title VII liability.[4] (Defs.' Mem. at 9–11.) In response, Plaintiff asserts that KFMA is subject to Title VII under the "single employer" doctrine, which allows for separate corporate entities to be aggregated for purposes of meeting the fifteen-employee threshold requirement if the distinct entities have, for example, interrelated operations and common management or ownership. (Opp'n at 11–12.) Plaintiff, however, does not allege in his complaint that KFMA, together with any other entities, formed a single employer for purposes of Title VII, and he even concedes that he lacks a good faith basis to believe that such facts exist. (*See id.* at 12.)

Title VII of the Civil Rights Act of 1964 provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII has been construed to encompass claims for being required to work in a "discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To establish a hostile work environment claim under Title VII, the plaintiff must produce enough evidence to show "that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff's . . . protected characteristic." *Robinson v. Harvard Prot. Servs.*, 495 F. App'x 140, 141 (2d Cir. 2012) (citation and quotation marks omitted).

[4] According to Defendants, KFMA has never employed more than fifteen employees at any one time. (*See* Decl. of Xuefeng Dai dated June 9, 2017, ECF No. 15, ¶¶ 5–6.)

"In considering whether a plaintiff has met this burden, courts should examine the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's job performance." *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 20 (2d Cir. 2012) (citation and quotation marks omitted). An occasional slight will not give rise to a hostile work environment claim; rather, the plaintiff must demonstrate that the workplace was "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered." *Desardouin v. City of Rochester*, 708 F.3d 102, 105 (2d Cir. 2013) (citation omitted); *see also Brodt v. City of New York*, 4 F. Supp. 3d 562, 569 (S.D.N.Y. 2014) ("[C]onduct that is merely rude and derogatory does not necessarily state a claim under Title VII, which is not a general civility code.") (citation and quotation marks omitted).

"Even when a plaintiff establishes that she was exposed to an objectively and subjectively hostile work environment, she will not have a claim unless she can also demonstrate that the hostile work environment was caused by animus towards her as a result of her membership in a protected class." *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 578 (S.D.N.Y. 2011) (citation and quotation marks omitted). In other words, "[a]n environment that would be equally harsh for all workers, or that arises from personal animosity, is not actionable" under Title VII. *Id.* at 578–79. Where the acts alleged to have constituted a hostile work environment are race-neutral, as here, they may only be considered in the totality of the circumstances if there is "some basis for a reasonable fact-finder to conclude that they were in fact based on" the plaintiff's protected characteristic. *Risco v. McHugh*, 868 F. Supp. 2d 75, 116 (S.D.N.Y. 2012).

Even assuming for purposes of this motion that KFMA *is* subject to Title VII, Plaintiff's allegations still fail to state a claim for employment discrimination. Plaintiff has not alleged that his co-workers' comments and behavior were either sufficiently pervasive or severe as to create a hostile work environment. Nor has he shown that their actions were motivated by discriminatory intent or animus based on his race or national origin. Plaintiff does not even allege that the comments in Mandarin were antagonistic or disparaging, much less understood; he claims only that they were "humiliating." (Compl. ¶ 27.) At most, his co-workers' "giggling, laughing, and mocking [of] his gestures," (*id.*), belong to the class of "minor annoyances that often take place at work and that all employees experience." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). As the Supreme Court has made clear, "occasional teasing" does not create a hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Equally deficient are Plaintiff's allegations that for most of his time at KFMA, he was the only black employee and that when another black employee was hired, he was terminated on the same day as Plaintiff. The complaint does not identify the total number of individuals under KFMA's employ, nor does it allege *any* facts about the other black employee or the circumstances surrounding his termination. Accordingly, Plaintiff's allegations provide no basis for a fact finder to infer discriminatory intent. *See Mattison v. Potter*, 515 F. Supp. 2d 356, 374 (W.D.N.Y. 2007) (rejecting argument that because plaintiff was the only black, female employee in her unit, the workplace harassment she suffered was racially motivated).

Plaintiff's allegation that he did not receive emails or other office communications in a language he understood does little to save his claim. Indeed, it is well-settled that Title VII does not treat language as a protected class. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (stating that "[l]anguage, by itself, does not identify members of a suspect class"); *Brewster v. City*

of Poughkeepsie, 447 F. Supp. 2d 342, 351 (S.D.N.Y. 2006) (noting that Title VII "does not protect against discrimination on the basis of language"). Moreover, there is no indication that this behavior was motivated by any discriminatory animus whatsoever.

Plaintiff's allegations also fail to plausibly suggest that he was subjected to disparate treatment. To allege a claim for disparate treatment, a plaintiff must show that his employer treated him less favorably than another employee outside his protected group who is "similarly situated in all material respects." *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (citation omitted). Here, the sole allegation of disparate treatment is that Plaintiff was the only employee not offered an employment contract. The complaint is silent, however, with respect to any other similarly situated employees. Plaintiff has therefore failed to plausibly allege sufficient facts from which discriminatory intent may be inferred. *See Relf-Davis v. NYS Dep't of Educ.*, No. 13-CV-3717 (PAC), 2015 WL 109822, at *8 (S.D.N.Y. Jan. 7, 2015) (dismissing Title VII claim where the complaint contained "no allegations that similarly situated non-African-Americans were treated differently than plaintiff").

Because he has failed to allege a Title VII claim sufficient to survive a motion under Rule 12(b)(6), Plaintiff's Second Cause of Action is DISMISSED.

V. PLAINTIFF'S STATE LAW CLAIMS ARE DISMISSED FOR LACK OF JURISDICTION

Having dismissed the only claims over which it has original jurisdiction, this Court declines to exercise supplemental jurisdiction over the remaining state law claims at this early stage in the litigation. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . [if] the district court has dismissed all claims over which it has original jurisdiction."); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) ("[T]he exercise of supplemental jurisdiction is left to the discretion of the district court.").

VI. CONCLUSION

Plaintiff has failed to state claims for whistleblower retaliation in violation of Dodd-Frank and employment discrimination under Title VII. Accordingly, Plaintiff's First and Second Causes of Action are DISMISSED. Because this Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims, those claims are DISMISSED without prejudice to refile in state court.

The Clerk of the Court is respectfully requested to close the motion at ECF No. 12, and this case, accordingly.

Dated: New York, New York
February 5, 2018

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge