**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

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| **JOHN ANIELLO** | **CIVIL ACTION NO. 3:20-cv-00483** |
| **Plaintiff,** | |
| **v.** | |
| **TOWN OF NEW CANAAN** | **JUNE 15, 2020** |
| **Defendant.** | |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

**The Defendant, Town of New Canaan ("Defendant" or "Town"), submits this memorandum of law in support of its motion to dismiss. The Defendant moves to dismiss the following counts of the Plaintiff's Complaint for failure to state a claim upon which relief can be granted: the Third Count (intentional infliction of emotional distress); the Fourth and Fifth Counts (hostile work environment, discrimination, and disparate treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60, *et seq.*, respectively); and the Ninth Count (breach of contract). With respect to the Third Count, the Plaintiff fails to plead conduct amounting to extreme and outrageous conduct under Connecticut law. As for the Fourth and Fifth Counts, the Plaintiff: (1) fails to plead facts showing that he experienced severe and pervasive harassment related to some protected characteristic; (2) fails to plead facts showing that he suffered an adverse employment action under circumstances giving rise to an**

**inference of discrimination on the basis of race, sex, perceived sexual orientation, or interracial association; and (3) fails to plead facts showing that he was treated differently from employees outside his protected class, respectively. Regarding the Ninth Count, the Plaintiff fails to plead that the Defendant breached an agreement between the parties or that the employee handbook which purportedly constituted a contract or agreement constituted an offer to modify the preexisting terms of his employment and that he accepted such offer.**

**The Defendant also moves to dismiss those portions of each of the Plaintiff's claims for which the underlying conduct falls outside the applicable limitations period, as the continuing-violation and continuing course of conduct doctrines do not render such conduct actionable for purposes of those claims.**

## I. FACTUAL ALLEGATIONS[1]

**The Plaintiff, John Aniello, a Caucasian male, has been employed as a firefighter for the Town since 2006. (Compl., First Count, ¶¶ 2, 8.) On or about July 12, 2018, he filed a complaint with the Connecticut Commission on Human Rights and Opportunities ("CHRO"), alleging discrimination, sexual harassment, and retaliation. The Plaintiff thereafter requested and received a Release of Jurisdiction from the CHRO on December 19, 2019. (Id. ¶ 6.) The Plaintiff timely commenced a civil action in the Superior Court of Connecticut within ninety days from the date of the Release of Jurisdiction, and within two years of the date of filing the Complaint with the CHRO. (Id. ¶ 7.) The Defendant, in turn, timely**

[1] On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court's analysis is limited to the legal feasibility of the complaint without resort to outside facts or evidence. See DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 113 (2d Cir. 2010). As such, on the instant motion, the Defendant is limited to discussing the allegations in the Plaintiff's Complaint and is not able to present facts beyond those set forth therein.

**removed the action to this Court.**

**The Plaintiff's Complaint appears to center on three issues: (1) the failure of the Defendant to promote him to lieutenant; (2) the elimination of the acting lieutenant's list from the firefighters' union contract; and (3) the alleged conduct of two of his colleagues, Captain Robert Petrone ("Petrone") and Lieutenant Duffy Sasser ("Sasser"). He makes the following allegations pertinent to these issues.**

**A. Failure To Promote**

**From 2012 to 2018, the Plaintiff was eligible for promotion to lieutenant within the New Canaan Fire Department ("NCFD") after passing the tests the Town offered to firefighters seeking promotion to lieutenant or captain, and he was also on a list of eligible acting lieutenants within the NCFD. (Id. ¶¶ 9–10.)**

**The Plaintiff maintains that he has been denied promotion opportunities since 2014 because of "direct interference and retaliation [by] Petrone and others in the [NCFD]." (Id. ¶ 110.) He alleges that he finished "No. 1 on the lieutenant list in 2014 and in 2016," yet was passed over for a lieutenant's position in 2014 in favor of Sasser. (Id. ¶ 111.) The Plaintiff further alleges that Petrone told him that he (Petrone) spoke to members of the New Canaan Fire Commission and "spoke negatively about the Plaintiff and discouraged them from promoting [him]." (Id. ¶ 112.) He claims that Petrone "was also instrumental in ending the promotional test after 2016." (Id. ¶ 113.)**

**B. Elimination of Acting Lieutenant's List**

**In or around February 2018, the acting lieutenant's list was removed from the firefighters' union contract. The Plaintiff alleges that at no time before the**

**union members' vote were the members advised that any changes had been made to the list and that the members "had been told that there would be no change to that provision of the union contract." (Id. ¶ 95.) At the time, the Plaintiff was the only firefighter on the list. After the vote, the Plaintiff alleges that he was no longer eligible for overtime as an acting lieutenant and that he was the only fire department member affected by this change in the union contract. (Id. ¶ 96.) By holding the status of acting lieutenant, the Plaintiff was eligible for more overtime opportunities than a regular firefighter. (Id. ¶ 98.) The Plaintiff claims that Petrone admitted to him that he (Petrone) "was the individual who wanted to eliminate the acting lieutenant's list because the Plaintiff was the only person on said list." (Id. ¶ 100.)**

**C. Alleged Conduct of Petrone and Sasser**

**Petrone has been a NCFD captain since 2007. (Id. ¶ 18.) The Plaintiff alleges that, beginning in or around December 2007, Petrone has engaged in a "continuing course of conduct and behavior" toward him which he characterizes as "cruel, hostile, extreme and outrageous[,] and designed to harass, humiliate, intimidate, threaten, [and] discriminate and retaliate against [him]." (Id. ¶ 19.) Specifically, the Plaintiff alleges that Petrone engaged in the following conduct:**

- **On or about December 13, 2007, Petrone allegedly wrote "I Love Niggers" in "large letters" on the passenger side of the Plaintiff's vehicle. (Id. ¶ 21 (internal quotation marks omitted).)**

- **In or around June 2009, Petrone allegedly placed a sticker stating "I Love Black Cock" on the Plaintiff's locker at the NCFD. (Id. ¶ 24.) Petrone subsequently allegedly "threatened to permanently end the Plaintiff's employment" with the Defendant and to "end his career as a firefighter" after the Plaintiff reported the incident to the NCFD Fire Chief, John Hennessey. (Id. ¶ 28 (internal quotation marks omitted).)**

- **In or around June 2009, the Plaintiff discovered pieces of trash, a brownie, and foil lodged in the toe of his boots as he tried to put them on to respond to an emergency call. (Id. ¶ 29.) Without any evidence of Petrone's involvement, he believes that it was Petrone who placed these items in his boots. (Id. ¶ 30.)**

- **In or around March 2010, at a fundraiser that the Town hosted, Petrone allegedly said to the Plaintiff, who was standing at his locker with his minor son, that "your son has a dick[-]sucking face just like his father" and grabbed the Plaintiff's son's hand and said, "I KNOW YOU LIKE PENIS." (Id. ¶ 34 (internal quotation marks omitted).)**

- **On or about February 6, 2015, the Plaintiff discussed potential overtime with Petrone, after which he left the NCFD building to go home. (Id. ¶ 45.) Petrone allegedly "immediately rushed out of the building and aggressively approached [him], backing [him] up against his vehicle while demanding to know [which] overtime shift the Plaintiff would be working." (Id. ¶ 46.) Petrone also allegedly told the Plaintiff that he was "wrong" to complain to Chief Hennessey about the 2009 sticker incident and allegedly called the Plaintiff "lazy, incompetent, and worthless." (Id. ¶ 47.)**

- **On or about November 11, 2017, and November 30, 2017, Petrone allegedly filed two written complaints against the Plaintiff for failing to have a "face-to-face check-in" with his relief before leaving the firehouse at the end of his shift, even though there allegedly was no formal policy in the NCFD requiring such a check in. (Id. ¶¶ 84–85.)**

- **On October 7, 2018, Petrone allegedly filed another complaint against the Plaintiff for his alleged failure to have a face-to-face check-in with Petrone. (Id. ¶ 106.)**

**The Plaintiff also alleges that Petrone engaged in the following conduct on an unspecified date or unspecified dates:**

- **"At all relevant times hereinafter mentioned," Petrone allegedly nicknamed the Plaintiff "Toby" or "Kunta Kinte," in reference to a character from the film "Roots," and called him by those names in the workplace in the presence of others. (Id. ¶ 23 (internal quotation marks omitted).)**

- **Petrone allegedly "frequently" sent the Plaintiff and others e-mails which were "racially derogatory and offensive" and allegedly sent the Plaintiff "racially derogatory materials" by text message that were "offensive" and "unwelcome." (Id. ¶¶ 31–33.)**

- **Petrone has allegedly "repeatedly" "mocked and insulted" the Plaintiff, calling him "stupid," "retarded," "lazy," "dick[-]sucker," "incompetent," and "the department clown," and allegedly told the Plaintiff, "I hope your kids are fags." (Id. ¶ 36 (internal quotation marks omitted).)**

- **On multiple occasions, Petrone allegedly "overemphasized" the criticism he directed at the Plaintiff when the Plaintiff made a mistake during a training drill, "ensuring that everyone, . . . [was] aware that the Plaintiff did something wrong." (Id. ¶ 38.)**

- **Petrone has allegedly "interfered with the Plaintiff's work performance by withholding important and necessary information during emergency calls." (Id. ¶ 40.)**

- **Petrone has allegedly offered the Plaintiff opportunities to work overtime as the acting lieutenant, but when the Plaintiff would arrive for those shifts, he would "frequently learn or discover" that Petrone had incorrectly filled out the overtime book and listed another firefighter as the acting lieutenant or had offered the Plaintiff overtime that was not available. (Id. ¶¶ 42–43.)**

- **During conversations with Petrone about overtime opportunities, Petrone would allegedly become "angry, confrontational, and yell at the Plaintiff, allegedly asking on at least one occasion to speak to a 'real officer'" regarding available overtime opportunities. (Id. ¶ 52.)**

- **Petrone allegedly "frequently" assigned a firefighter, rather than the Plaintiff as acting lieutenant, to schedule overtime when the Plaintiff was working as acting lieutenant, despite the Town's policy that an officer (i.e., a captain or lieutenant) was responsible for performing this task. (Id. ¶ 53.) When the Plaintiff worked as acting lieutenant on the same shift as Petrone, Petrone allegedly "regularly refused" to communicate directly with the Plaintiff regarding daily tasks and assignments in the department. (Id. ¶ 54.)**

- **Petrone has allegedly assigned the Plaintiff additional tasks that "far exceeded" the work assigned to others working on the same shift. (Id. ¶ 58.) He has also allegedly ordered the Plaintiff to perform additional tasks while the Plaintiff was in the process of performing another task, even though other firefighters were available to assist or perform some of the tasks. (Id. ¶ 59.)**

**The Plaintiff alleges that he reported each incident involving Petrone's allegedly improper conduct to the Town but that his complaints were not taken**

**seriously or properly investigated. (Id. ¶ 72.)**

**The Plaintiff also alleges that, in on around June 2017, he reported the allegedly "hostile work environment" and the Defendant's alleged "failure to take action regarding his complaints" to the Employee Assistance Program ("EAP") and that, thereafter, Sasser, allegedly with Petrone's encouragement, allegedly engaged in "retaliatory actions" designed to deter the Plaintiff from making any further complaints against Petrone. (Id. ¶¶ 75–77.) These "retaliatory actions" allegedly included:**

- **Preventing the Plaintiff from conducting, or being involved with, shift training;**
- **Failing to communicate "important and necessary" information to the Plaintiff while working together on a shift;**
- **Micromanaging the Plaintiff's work compared to other firefighters on shift and "holding [him] to different performance standards";**
- **"Actively interfering" with the Plaintiff's opportunities to take on additional tasks as an acting lieutenant and to attend educational classes while on duty;**
- **Filing a "false complaint" against the Plaintiff for "violating an alleged Town policy that did not exist";**
- **Disclosing private and sensitive information about the Plaintiff to other department members;**
- **Providing training opportunities to others while depriving the Plaintiff of those same opportunities;**
- **Removing the Plaintiff without reason or "proper" explanation from the apparatus to which he was assigned on his shift; and**
- **Preventing the Plaintiff from rotating through assignments as required by fire department policy, including driving responsibilities.**

**(Id. ¶ 78.)**

## II. LAW AND ARGUMENT

### A. Standard for Motion To Dismiss

**"In reviewing a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6), the court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff." See Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).**

**In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the United States Supreme Court explained that:**

> **Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. . . . [T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.**

**Id. at 677–78 (citations omitted; internal quotation marks omitted). The Iqbal Court further explained that:**

> **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. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.**

> **. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.**

**Id. at 678 (citations omitted; internal quotation marks omitted).**

**B. The Plaintiff fails to state actionable hostile work environment claims in violation of Title VII and the CFEPA (Fourth and Fifth Counts).**

**In the Fourth and Fifth Counts of the Complaint, the Plaintiff claims that the Defendant subjected him to a hostile work environment in violation of Title VII and the CFEPA. He maintains that the Defendant did so on the basis of his sex (male), his race (white), his association with persons of another race, and his perceived sexual orientation. (Compl., Fourth Count, ¶¶ 126–27, 129, Fifth Count, ¶ 127.) The Plaintiff fails to state plausible claims for a hostile work environment, however, as he fails to plead facts suggesting (1) that he suffered discrimination on the basis of race or interracial association or (2) that he was subjected to the alleged hostile work environment because of some protected characteristic.**

**i. Elements of Hostile Work Environment Claim**

**Title VII provides that it is unlawful for an employer:**

> **(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or**
>
> **(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.**

**42 U.S.C. § 2000e-2. Under the CFEPA, it is similarly a discriminatory practice for an employer:**

> **[T]o refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness or status as a veteran[.]**

**Conn. Gen. Stat. § 46a-60(b)(1). The CFEPA also provides that it is a discriminatory practice for an employer "to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions[,] or privileges of employment because of the individual's sexual orientation or civil union status." Id. § 46a-81c(1).**

**Under Title VII and the CFEPA, a hostile work environment exists where the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Payne v. PSC Indus. Outsourcing, Ltd. P'ship, 139 F. Supp. 3d 536, 549 (D. Conn. 2015). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). In addition, the victim must "subjectively perceive the environment to be hostile." Delgado v. City of Stamford, No. 3:11-cv-01735-VAB, 2015 WL 6675534, at *24 (D. Conn. Nov. 2, 2015) (citing Harris, 510 U.S. at 21).**

**In evaluating severity or pervasiveness, courts examine the case-specific circumstances in their totality and consider the severity, frequency, and degree of the abuse. Moll v. Telesector Resources Group, Inc., 760 F.3d 198, 203 (2d Cir.**

**2014). A plaintiff seeking to establish a hostile work environment generally "must demonstrate that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted" to constitute pervasiveness. Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000). "As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." Alfano v. Costello, 294 F.3d 365, 379 (2d Cir. 2002). "Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." Id. Furthermore, the nature and severity of the allegedly hostile conduct must be such that it unreasonably interfered with the plaintiff's work performance. See Harris, 510 U.S. at 23.**

**A plaintiff "must [also] show that the hostile work environment existed because of his or her protected status (i.e., race, color, religion, sex, or national origin)." Delgado, 2015 WL 6675534 at *25 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)); Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999)). Mistreatment at work "is actionable under Title VII only when it occurs because of an employee's sex[] or other protected characteristic." Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) (citing Oncale, 523 U.S. at 79–80); see also Tolbert v. Smith, 790 F.3d 427, 439 (2d Cir. 2015). Title VII is not a "civility code for the American workplace." McGullam v. Cedar Graphics, Inc., 609 F.3d 70, 76 (2d Cir. 2010) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks omitted)).**

**The same standard for hostile work environment claims under Title VII governs hostile work environment claims under the CFEPA. See Delgado, 2015**

**WL 6675534 at *25; Martinez v. Conn. State Library, 817 F. Supp. 2d 28, 55 (D. Conn. 2011); Craine v. Trinity Coll., 791 A.2d 518, 531 n.6 (Conn. 2002).**

**ii. The Plaintiff does not plead actionable claims for a hostile work environment on the basis of race or interracial association.**

**The Plaintiff maintains that he falls into four protected classes: (1) Caucasian; (2) male; (3) association with persons of another race; and (4) perceived sexual orientation. The first two categories do not garner protected status. As a Caucasian male, the Plaintiff is not a member of a protected class. See Holdmeyer v. Veneman, 321 F. Supp. 2d 374, 382 (D. Conn. 2004), cert. denied, Holdmeyer v. Dep't of Agriculture, 146 F. App'x 535 (2d Cir. 2005). He therefore cannot claim protected status based on his race.**

**Title VII protects against discrimination based on interracial association, sex, and sexual orientation. See Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (observing that interracial association constitutes a protected class for purposes of Title VII); Zarda v. Altitude Express, Inc., 883 F.3d 100, 128 (2d Cir. 2018) (holding that Title VII protects against discrimination because of sex, including sexual orientation), cert. granted sub nom., Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019). Regarding interracial association, the Plaintiff does not allege that he associated or interacted with members of another race or any protected class. Nor does he allege that the Defendant believed that he associated with members of another race or that it took any action against him because of any such associations. See Holcomb, 521 F.3d at 138 (observing that an employer may violate Title VII if it takes action against an employee because of**

**the employee's association with a person of another race).**

**The Plaintiff therefore cannot state actionable hostile work environment claims under Title VII or the CFPEA on the basis of race or interracial association. Accordingly, the only ground on which he could state plausible claims is that of alleged discrimination on account of sex or his perceived sexual orientation. For the reasons discussed below, the Plaintiff fails to plead facts suggesting that the Defendant subjected him to a hostile work environment on the basis of sex or perceived sexual orientation—or on the basis of any protected characteristic.**

**iii. <u>The Plaintiff fails to plead facts suggesting that the Defendant subjected him to the alleged hostile work environment because of some protected characteristic.</u>**

**Despite alleging a series of acts and behaviors by Petrone which, the Plaintiff claims, amount to severe and pervasive harassment, the Complaint is bereft of allegations suggesting that Petrone's alleged conduct was motivated by the Plaintiff's sex or perceived sexual orientation—or by any protected characteristic, for that matter. Most of the conduct in which the Plaintiff alleges Petrone engaged—including much of the alleged name-calling, overemphasis of criticism of the Plaintiff, interference with the Plaintiff's work performance, offer of overtime that was unavailable, confronting, yelling at, and berating the Plaintiff, not assigning the Plaintiff overtime hours, assigning the Plaintiff additional tasks, and filing complaints against the Plaintiff for failure to have a face-to-face check-in—bears no relationship to sex or sexual orientation.[2] Such conduct does not**

**[2] Insofar as the Plaintiff claims that Sasser's alleged conduct also contributed to the allegedly hostile work environment, he makes no allegation that the conduct was motivated by a protected characteristic of his. Indeed, the Plaintiff alleges only that it was in retaliation for him complaining**

**support an actionable claim for a hostile work environment because the Complaint does not suggest that it was based on a protected characteristic of the Plaintiff's. See Brown, 257 F.3d at 252 (observing that mistreatment at work is actionable under Title VII only when it occurs because of an employee's protected characteristic). Although the Plaintiff's allegations, construed in the manner most favorable to him, might suggest that his workplace was unpleasant and difficult, he "cannot prevail on a hostile environment claim based on a workplace that is merely unpleasant, harsh, combative[,] or difficult." Lee v. Verizon Wireless, Inc., No. 07-CV-532 (AHN), 2008 WL 4479410, at *9 (D. Conn. Sept. 26, 2008) (citation omitted; internal quotation marks omitted). Title VII "does not . . . protect plaintiffs from undiscriminating intimidation by bullish and abusive supervisors." Oncale, 523 U.S. at 81.**

**Although the Plaintiff alleges that Petrone made comments or remarks and sent him e-mails and text messages that, he claims, were racially derogatory and offensive, he does not allege that Petrone engaged in this conduct because he was aware or believed that the Plaintiff associated with members of another race. Indeed, as noted, the Plaintiff does not allege in the first place that he associated or interacted with persons of another race. Likewise, insofar as the Plaintiff alleges that Petrone engaged in conduct that could conceivably implicate sex or perceived sexual orientation—namely, the alleged sticker incident in 2009, the alleged remarks at the fundraiser in 2010, and the alleged "dick[-]sucker" comment—he does not allege that Petrone engaged in this alleged conduct**

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**to the Employee Assistance Program and, with Petrone's encouragement, to dissuade him from making any further complaints against Petrone. (Compl., First Count, ¶¶ 77–78.)**

**because he harbored certain perceptions about the Plaintiff's sexual orientation.**

**Moreover, this alleged conduct is insufficient to rise to the level of "severe and pervasive" so as to provide the Plaintiff with an actionable hostile work environment claim. Incidents "must be more than episodic" to constitute pervasive harassment; they must be "continuous and concerted." Alfano, 294 F.3d at 379. The alleged incidents concerning the writing on the Plaintiff's vehicle, the placement of the sticker on his locker, and the statements at the fundraiser occurred between December 2007 and March 2010, more than ten years ago. (Compl., First Count, ¶¶ 21, 24, 34.) They are so remote in time that they do not support the requirement of severe and pervasive harassment for a hostile work environment claim. See Gibson v. State of Connecticut Judicial Dep't Court Support Servs. Div., No. 3:05-cv-1396 (JCH), 2007 WL 1238026, at *7 (D. Conn. Apr. 25, 2007) (finding that a statement referring to the plaintiff as "another dumb black jock," made eleven years before the plaintiff filed his CHRO complaint, was "too remote to support a hostile work environment claim") (citation omitted; internal quotation marks omitted); Diggs v. Town of Manchester, 303 F. Supp. 2d 163, 182 (D. Conn. 2004) ("[A]lthough there is evidence that [p]laintiff was subjected to offensive, racially derogatory remarks in the 1980's, early in his career as a firefighter, these incidents are too remote to support an actionable hostile work environment claim."). Further, as discussed in Section II.G.i, *infra*, this alleged conduct is untimely for purposes of the Plaintiff's Title VII and CFEPA claims.**

**As for the other alleged remarks that the Plaintiff ascribes to Petrone, his**

**allegations suggest that the remarks were either isolated or that they are not recent or ongoing. The Plaintiff does not claim that Petrone allegedly calling him "Toby" or "Kunta Kinte" was frequent or that Petrone continues to call him those names. (See Compl., First Count, ¶ 23.) Similarly, the Plaintiff does not identify the content or dates of the "racially derogatory" e-mails and text messages that Petrone allegedly sent him from his personal e-mail account nor does he allege that Petrone continues to send him such e-mails and messages. (Id. ¶¶ 31–32.) Likewise, despite alleging that Petrone has "repeatedly mocked and insulted him" and called him names such as "dick[-]sucker," the Plaintiff does not allege that Petrone has consistently used this epithet against him (or even used it more than once). (Id. ¶ 36.) "[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." Harris, 510 U.S. at 21.**

**The Complaint therefore demonstrates that the conduct in which the Plaintiff claims Petrone engaged that could conceivably relate to a protected characteristic was not sufficiently severe or pervasive to give rise to actionable hostile work environment claims. See, e.g., Brown v. Coach Stores, Inc., 163 F.3d 706, 713 (2d Cir. 1998) (finding that allegations that a supervisor occasionally made racist remarks did not constitute discriminatory behavior sufficiently severe or pervasive to cause a hostile environment); Absher v. FlexiInternational Software, Inc., No. 3:02 CV 171 (AHN), 2005 WL 2416203, at *3, *5 (D. Conn. Sept. 30, 2005) (finding that four complained-about incidents in less than a two-week period by a plaintiff against her male supervisor, including allegations of physical**

**contact, were not pervasive), aff'd, 199 F. App'x 52 (2d Cir. 2006); Presley v. Pepperidge Farm, Inc., 356 F. Supp. 2d 109, 120 (D. Conn. 2005) (finding that, where one female plaintiff alleged seven sexually oriented incidents by her male supervisor over a four-month span and another female plaintiff alleged five incidents over a one-month span, the incidents were not pervasive); Husser v. N.Y. City Dep't of Educ., 137 F. Supp. 3d 253, 275–77 (E.D.N.Y. 2015) (finding ten purportedly sexually harassing incidents over three years episodic and not sufficiently continuous to qualify as pervasive); Geller v. N. Shore Long Island Jewish Health Sys., No. 10-CV-0170 (JS)(WDW), 2013 WL 5348313, at *7 (E.D.N.Y. Sept. 23, 2013) (finding that twenty incidents over a five-year period, including comments about the plaintiff's breasts, drawing a penis on a whiteboard during a meeting, and inappropriate touching of the plaintiff's knee, were insufficient to state a hostile work environment claim); Augustin v. Yale Club of New York City, No. 03-CV-1924 (KMK), 2006 WL 2690289, at *21–22 (E.D.N.Y. Sept. 15, 2006) (finding coworkers' use of phrases such as "fucking negrita" and "black bitch" to refer to the plaintiff insufficient to create a hostile work environment) (internal quotation marks omitted), aff'd, 274 F. App'x 76 (2d Cir. 2008); Stembridge v. City of New York, 88 F. Supp. 2d 276, 286 (S.D.N.Y. 2000) (finding seven racial comments over a three-year period did not create a hostile work environment).**

**Consequently, the Plaintiff's allegations are insufficient to establish that his workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of his employment and thereby constitute a hostile work environment. He therefore**

**cannot state actionable claims for a hostile work environment under Title VII or the CFEPA, and the Court should dismiss these claims from the Complaint.**

**C. The Plaintiff fails to state actionable claims for discrimination on the basis of race, sex, perceived sexual orientation, or interracial association under Title VII or the CFEPA (Fourth and Fifth Counts).**

**The Plaintiff also maintains that the Defendant subjected him to discrimination on the basis of his race as a white male, his sex or perceived sexual orientation, and his association with persons of another race. (See Compl., Fourth Count, ¶¶ 126–27, 129, Fifth Count, ¶¶ 124–25, 127.) He fails to state actionable claims, however, because he fails to plead facts suggesting that he suffered an adverse employment action under circumstances supporting an inference of discrimination.**

**i. Elements of Discrimination Claim**

**To make out a prima facie case of discrimination in violation of Title VII, a plaintiff must establish that: (1) he is a member of a protected class; (2) he performed the job satisfactorily or was qualified for the position; (3) an adverse employment action took place; and (4) the action occurred under circumstances giving rise to an inference of discrimination. Jarrell v. Hosp. for Special Care, 626 F. App'x 308, 309 (2d Cir. 2015). Once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. Id. at 309–10. The burden then shifts back to the plaintiff to present evidence that the employer's proffered reason is a pretext for an impermissible motivation. Id. at 310. Claims under the CFEPA are analyzed using this same burden-shifting framework. See DeAngelo v. Yellowbook, Inc.,**

**105 F. Supp. 3d 166, 180 (D. Conn. 2015).**

**ii. The Plaintiff does not allege facts suggesting that he was subjected to an adverse employment action under circumstances giving rise to an inference of discrimination.**

**As discussed, *supra*, the Plaintiff is not a member of a protected class, at least as to race. As a white male, he is not a member of a protected class. See Holdmeyer, 321 F. Supp. 2d at 382. Likewise, he does not allege that he associated with members of another race. See Holcomb, 521 F.3d at 138.**

**Sex (including sexual orientation) is a protected class under Title VII; see Zarda, 883 F.3d at 128; but to hold the Defendant liable because of discrimination on the basis of sex or sexual orientation, the Plaintiff must show that he suffered an adverse employment action under circumstances giving rise to an inference of discrimination. Jarrell, 626 F. App'x at 309. An "adverse employment action" is one which is "more disruptive than a mere inconvenience or an alteration of job responsibilities." Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004) (citation omitted; internal quotation marks omitted). It entails a "materially adverse change in the terms and conditions of employment." Sanders v. N.Y. City Human Resources Admin., 361 F.3d 749, 755 (2d Cir. 2004) (citation omitted; internal quotation marks omitted). Examples of such actions include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or "other indices . . . unique to a particular situation." Feingold, 366 F.3d at 152 (citation omitted; internal quotation marks omitted). A failure to promote may also constitute an adverse employment action. See Mills v. S.**

**Conn. State Univ., 519 F. App'x 73, 75 (2d Cir. 2013).**

**Based on the allegations in the Complaint, the only acts the Plaintiff alleges which might conceivably constitute adverse employment actions are: (1) his discipline in the aftermath of the alleged November 2017 complaints from Petrone; (2) the alleged elimination of the acting lieutenant's list in 2018; and (3) the alleged denial of promotion opportunities to the Plaintiff since 2014. As discussed below, the Plaintiff fails to plead facts suggesting that these acts occurred under circumstances giving rise to an inference of discrimination.**

**1. Plaintiff's Discipline**

**The Plaintiff alleges that Chief Hennessey disciplined him following Petrone's submission of complaints in November 2017 that he violated a "face-to-face check-in" policy. (Compl., First Count, ¶¶ 84, 86.) He does not claim that the alleged discipline involved a demotion, a loss of pay or benefits, a suspension, or a material change in duties or responsibilities or that it otherwise altered the terms and conditions of his employment. See, e.g., Martinez, 817 F. Supp. 2d at 41 (holding that a plaintiff who was suspended for a day without any long-term consequences from the suspension did not suffer an adverse employment action); Dobrynio v. Central Hudson Gas & Elec. Corp., 419 F. Supp. 2d 557, 564–65 (S.D.N.Y. 2006) (finding that an employee who was suspended for a day with a loss of pay did not suffer an adverse employment action); see also Chang v. Safe Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) ("[O]ral and written warnings do not amount to materially adverse conduct."). In this regard, the alleged discipline is not an adverse employment action.**

**Moreover, even if the alleged discipline could constitute an adverse employment action, the Plaintiff does not plead any facts suggesting that it occurred under circumstances giving rise to an inference of discrimination. The Complaint fails to suggest that the Plaintiff's perceived sexual orientation had anything to do with the alleged discipline. The allegations as to discrimination on the basis of perceived sexual orientation center on conduct—i.e., Petrone's alleged remarks and comments to him—that largely occurred over eight years earlier. See Vogel v. CA, Inc., 662 F. App'x 72, 75 (2d Cir. 2016) ("[T]he more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination.") (alteration in original; citation omitted; internal quotation marks omitted). The remoteness in time of Petrone's alleged conduct in relation to the alleged discipline—which Chief Hennessey, not Petrone, allegedly issued—undermines any suggestion that the Plaintiff's perceived sexual orientation played a role in the discipline.**

**2. Elimination of Acting Lieutenant's List**

**Elimination of a position which might foreclose a logical promotion path, or for which an employee seeks promotion, can constitute an adverse employment action. See Darden v. Town of Stratford, 420 F. Supp. 2d 36, 43 (D. Conn. 2006). Here, the Plaintiff claims that the acting lieutenant's list was eliminated in 2018, pursuant to a vote by the union membership. (Compl., First Count, ¶ 95.) He also claims that he was no longer eligible for overtime following the elimination of the acting lieutenant's list. (Id. ¶ 96.) As with the alleged discipline of the Plaintiff, however, this action was remote in time to the allegedly discriminatory conduct**

**of Petrone which could conceivably implicate the Plaintiff's perceived sexual orientation—again, generally eight years after that alleged conduct. The Plaintiff otherwise does not allege facts tending to show that the alleged elimination of the acting lieutenant's list was motivated by discriminatory intent. Thus, the Complaint fails to suggest that this action occurred under circumstances giving rise to an inference of discrimination.**

**3. Denial of Promotion Opportunities**

**The Plaintiff claims that he has been denied promotion opportunities since 2014.[3] (Compl., First Count, ¶ 109.) As noted, a failure to promote may constitute an adverse employment action. See Mills, 519 F. App'x at 75. The Plaintiff does not allege that there was an opening or position to which the Defendant could have promoted him, that he sought promotion to that position but was rejected for it, or that the Defendant sought candidates to fill the position. In that regard, the Plaintiff fails to allege a prima facie discrimination claim because of the Defendant's alleged failure to promote him. See Holt v. KMI-Continental, 95 F.3d 123, 129 (2d Cir. 1996) (holding that the plaintiff could not make out a prima facie case of failure to promote because the defendant did not seek applicants to fill the position in question); Breland-Starling v. Disney Pub'lg Worldwide, 166 F. Supp. 2d 826, 830 (S.D.N.Y. 2001) (holding that the plaintiff could not establish a prima facie case because of an alleged failure to promote where "the position never existed and was never occupied by anyone").**

[3] **To the extent the Plaintiff complains of discrete instances since 2014 where the Defendant allegedly failed to promote him, any such instances that occurred before September 15, 2017, and January 13, 2018, would be time-barred for purposes of Title VII and the CFEPA, respectively. See *infra* Section II.G.i.**

**Regardless, the Plaintiff fails to allege any facts suggesting that the Defendant's alleged denial of promotion opportunities was because of his perceived sexual orientation. Again, the allegedly discriminatory conduct of Petrone that could conceivably implicate the Plaintiff's perceived sexual orientation was too remote in time to the alleged denial of promotion opportunities to support an inference of discrimination.**

**4. Other Alleged Acts**

**Other supposedly adverse actions which the Plaintiff alleges do not amount to adverse employment actions. The Plaintiff alleges that, after the February 2015 incident where Petrone allegedly called him "lazy, incompetent, and worthless," he "repeatedly declined overtime opportunities on Petrone's shift and limited his overtime on other shifts out of concern that Petrone would also take overtime on those shifts." (Compl., First Count, ¶ 50.) He claims that he lost "significant income" by declining these opportunities. (Id. ¶ 51.) Since this outcome was the product of the Plaintiff's own choice, however, it cannot qualify as an adverse employment action. See, e.g., Leconte-Metellus v. Boro Park Operating Co. LLC, No. 16-CV-05632, 2019 WL 481739, at *2 (E.D.N.Y. Feb. 7, 2019) (holding that the plaintiff did not suffer an adverse employment action when she chose to take sick leave); Worrell v. Cortines, No. 90-CV-3142 (JG), 1995 WL 1079717, at *12 (W.D.N.Y. Mar. 26, 1995) ("[The plaintiff] cannot claim that her choice of assignments was an adverse action by her employer."). Moreover, the Plaintiff does not allege that he was required to take any overtime shifts, including those that coincided with Petrone's shift.**

**The Plaintiff also alleges that Petrone ordered him to perform additional tasks while he was performing other tasks, even though other officers were available to assist. He does not allege that these tasks were outside the scope of his normal responsibilities or significantly changed his responsibilities. See Bowen-Hooks v. City of New York, 13 F. Supp. 3d 179, 213–14 (E.D.N.Y. 2014). At worst, the Complaint suggests that the additional tasks were minor annoyances, which is insufficient to constitute a material adverse change in the terms and conditions of the Plaintiff's employment. See id. at 214.**

**The Plaintiff additionally claims that he was moved to a shift that did not coincide with Petrone's shift in May 2018. (Compl., First Count, ¶ 102.) Yet, the Complaint suggests that the shift change was little more than an inconvenience, as the Plaintiff does not allege that it brought with it a change in the terms or conditions of his employment. Thus, the alleged shift change does not amount to an adverse employment action. See Williams v. R.H. Donnelley Corp., 368 F.3d 123, 128 (2d Cir. 2004); Forsythe v. N.Y. Dep't of Citywide Admin. Servs., 733 F. Supp. 2d 392, 400 (S.D.N.Y. 2010).**

**Finally, the Plaintiff claims that he has "been forced to take extreme measures to avoid working with Petrone, including at times using sick, vacation[,] and personal time." (Compl., First Count, ¶ 105.) As with the allegation that he declined overtime opportunities that coincided with Petrone's shift, this alleged action does not constitute an adverse employment action because it was of the Plaintiff's own choosing. See Leconte-Metellus, 2019 WL 481739 at *2.**

**Accordingly, the Plaintiff fails to state actionable claims for discrimination**

**on the basis of race, sex, perceived sexual orientation, or interracial association in violation of Title VII or the CFEPA, and the Court should dismiss these claims.**

**D. The Plaintiff fails to state actionable claims for disparate treatment in violation of Title VII or the CFEPA (Fourth and Fifth Counts).**

**The Plaintiff alleges that the Defendant subjected him to disparate treatment because of his race, sex, perceived sexual orientation, and interracial association, in violation of Title VII and the CFEPA. (See Compl., Fourth Count, ¶¶ 125–27, Compl., Fifth Count, ¶ 125.) These claims fail because he does not allege that he was treated differently from employees outside his protected class.**

**i. Elements of Disparate Treatment Claim**

**To establish a claim for disparate treatment under Title VII, a plaintiff must first establish a prima facie case of discrimination. See Jarrell, 626 F. App'x at 309. Regarding the requirement that the plaintiff show that an adverse employment action occurred under circumstances giving rise to an inference of discrimination, to demonstrate that he was subjected to disparate treatment, the plaintiff must show that he was "similarly situated in all material respects" to the individuals with whom he seeks to compare himself. Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (citation omitted; internal quotation marks omitted). He must further show that the similarly situated employees not in the relevant protected group received better treatment than him. Carter v. New Venture Gear, Inc., 310 F. App'x 454, 457 (2d Cir. 2009). The same analysis applies for disparate treatment claims under the CFEPA. See Ameti, ex rel. United States v. Sikorsky Aircraft Corp., 289 F. Supp. 3d 350, 359 (D. Conn. 2018).**

**"What constitutes 'all material respects' . . . varies somewhat from case to**

**case and must be judged based on (1) whether the plaintiff and those []he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness." Graham, 230 F.3d at 39 (citation omitted). "In other words, there should be an objectively identifiable basis for comparability." Id. (citation omitted; internal quotation marks omitted).**

**ii. The Plaintiff fails to allege that he was treated differently from employees outside his protected class.**

**Initially, the Plaintiff cannot state an actionable disparate treatment claim because he cannot show that he was subjected to an adverse employment action that occurred under circumstances giving rise to an inference of discrimination. As discussed in Section II.C.ii, *supra*, most of the alleged workplace actions underlying the Plaintiff's claims did not constitute adverse employment actions. The only alleged actions that could conceivably constitute adverse employment actions—i.e., the Plaintiff's alleged discipline in 2017, the alleged elimination of the acting lieutenant's list in 2018, and the alleged denial of promotion opportunities to the Plaintiff since 2014—did not occur under circumstances supporting an inference of discrimination on the basis of a protected class.**

**Even if the Plaintiff can satisfy these requirements of a disparate treatment claim, he fails to set forth specific allegations tending to show that he was treated less favorably than similarly situated employees outside the protected class. He claims, for example, that: (1) he never observed Petrone criticize any other firefighter for an error or for poor performance in the manner that Petrone criticized him; (2) Sasser micromanaged his work "compared to all other**

**firefighters on shift" and "[held him] to different performance standards"; (3) Sasser provided training opportunities to others but deprived the Plaintiff of those same opportunities; and (4) no other firefighter was ever criticized, reprimanded, or disciplined for failure to follow the alleged "face-to-face check-in" policy. (Compl., First Count, ¶¶ 39, 78, 87.) Yet, the Complaint is bereft of allegations showing that the firefighters in the NCFD who were allegedly treated more favorably than the Plaintiff were outside his protected class. The Plaintiff does not allege that the other firefighters were not perceived as being gay or that they were not considered to be associating with persons of another race. The "standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of [the] plaintiff's and comparator's cases." Graham, 230 F.3d at 40. However, because the Plaintiff makes conclusory allegations that he was treated differently compared to other firefighters, without providing any facts to suggest that they were outside his protected class, there is no basis on which to make the necessary comparison. Therefore, the Plaintiff fails to state plausible claims for disparate treatment, and the Court should dismiss them.**

**E. The Plaintiff fails to state an actionable claim for intentional infliction of emotional distress (Third Count).**

**In the Third Count of the Complaint, the Plaintiff seeks to hold the Defendant liable for intentional infliction of emotional distress. The Plaintiff fails to state a claim upon which relief can be granted, however, because the allegations in the Complaint do not give rise to extreme and outrageous conduct, as defined under Connecticut law, on the part of the Defendant.**

**Liability for intentional infliction of emotional distress requires that the**

**plaintiff show: (1) that the actor intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress that the plaintiff sustained was severe. DeLaurentis v. City of New Haven, 597 A.2d 807, 827–28 (Conn. 1991). "The rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." Petyan v. Ellis, 510 A.2d 1337, 1342 (Conn. 1986) (citation omitted; internal quotation marks omitted). "Liability has only been found where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Carrol v. Allstate Ins. Co., 815 A.2d 119, 126 (Conn. 2003) (citation omitted; internal quotation marks omitted).**

**The threshold for extreme and outrageous conduct is high, particularly in the employment context. Conduct that may be insulting or distressing to the plaintiff and that may result in hurt feelings "do[es] not, . . . constitute extreme and outrageous conduct." Appleton v. Bd. of Educ. of Stonington, 757 A.2d 1059, 1063 (Conn. 2000). "Thus, it is clear that individuals in the workplace should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace."[4] Perodeau v. City of Hartford, 792 A.2d 752, 769 (Conn. 2002).**

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**[4] The Plaintiff does not expressly allege that Petrone and Sasser—whose alleged conduct appears to largely underpin the claim for intentional infliction of emotional distress—were acting at all**

**Case law is rife with instances of conduct in the employment context that exceeds the severity of the alleged conduct in this case yet fails to rise to the level of extreme and outrageous. For instance, in one case, the Supreme Court of Connecticut found that forced psychiatric examinations of the plaintiff, her forced resignation, condescending comments made in front of her colleagues, and removal of the plaintiff following her discharge under a security escort was not extreme and outrageous. Appleton, 757 A.2d at 1063. In another case, the Court found that a hypercritical examination of the plaintiff, transfer of her to a school where she did not want to work, secretly hiring someone to replace her, public admonishment of her, unnecessarily placing her under intensive supervision, and forcing her to resign was not extreme and outrageous. Dollard v. Bd. of Educ. of Orange, 777 A.2d 714, 717 (Conn. 2001).**

**With respect to Petrone's alleged use of epithets and profanity, the Complaint does not suggest that his alleged use of such language was systemic, constant, or part of a pattern of behavior motivated by interracial association or the Plaintiff's perceived sexual orientation. Rather, the Plaintiff identifies several purported instances of such conduct occurring over a roughly thirteen-year period. This is insufficient to amount to extreme and outrageous conduct. See, e.g., Williams v. Perry, 960 F. Supp. 534, 541 (D. Conn. 1996) (concluding that the complaint did not set forth extreme and outrageous conduct where the plaintiff, a Caucasian police officer engaged and later married to an African-American police officer working in another town, alleged that certain officers in her department**

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**relevant times within the scope of their employment with the Defendant. To the extent that the Court infers from the Plaintiff's allegations that they were so acting, however, for the reasons discussed herein, the alleged conduct is not extreme and outrageous under Connecticut law.**

**referred to her as a "nigger lover" and used similar racist comments around her) (internal quotation marks omitted); Parker v. Price Chopper, Inc., No. CV065002349, 2008 WL 4249796, at *3 (Conn. Super. Ct. Aug. 22, 2008) (finding that a co-worker's threatening, cursing at, and directing racial slurs at the plaintiff did not constitute extreme and outrageous behavior); Majewski v. Bridgeport Bd. of Educ., No. CV030406893, 2005 WL 469135, at *19–20 (Conn. Super. Ct. Jan. 20, 2005) (striking a claim for intentional infliction of emotional distress despite allegations that the defendant hugged and kissed her on multiple occasions, questioned her sexual orientation, made romantic or sexual advances toward her, and took adverse employment actions against her when she rebuffed him). The alleged conduct, if true, might be deemed distasteful, but that does not render it extreme and outrageous under Connecticut law. See Storm v. ITW Insert Molded Prods., a Div. of Ill. Tool Works, Inc., 400 F. Supp. 2d 443, 448–49 (D. Conn. 2005).**

**The other alleged conduct which the Plaintiff ascribes to Petrone and Sasser similarly does not constitute extreme and outrageous conduct. Unwarranted criticism, reprimanding or discipling an employee, denial of a promotion, interfering with or withholding or limiting access to information necessary for an employee to perform his or her job, and holding an employee to different performance standards do not satisfy the "extreme and outrageous" requirement. See, e.g., Jamilik v. Yale Univ., No. 3:06 CV 0566(PCD), 2007 WL 214607, at *1, *4 (D. Conn. Jan. 25, 2007) (holding that allegations that the defendants continuously harassed the plaintiff in retaliation for filing a complaint against them with the CHRO, excluded her from work meetings and social**

**gatherings, denied her access to files necessary for her to perform her job duties, implemented "demeaning and intrusive ways of interfering with her ability to do her job," and subjected her to discipline without cause did not reflect extreme and outrageous conduct); White v. Martin, 23 F. Supp. 2d 203, 208 (D. Conn. 1998) (holding that the employer's alleged discrimination based on the plaintiff's gender, including denial of a promotion, discipline, and harassment, was not extreme and outrageous), aff'd, 198 F.3d 235 (2d Cir. 1999); DeLeon v. Little, 981 F. Supp. 728, 737–38 (D. Conn. 1997) (holding that a supervisor's implementation of a discriminatory sick leave policy, threatening to replace the plaintiff with a person of a different race, and repeated degrading and humiliating criticism of the plaintiff in front of others was not sufficiently outrageous); Hill v. Pinkerton Sec. & Investigation Servs., Inc., 977 F. Supp. 148, 160 (D. Conn. 1997) (finding that paying an African-American female less money than her counterparts and disciplining, reprimanding, and transferring her to two other locations in retaliation was not extreme and outrageous); Williams, 960 F. Supp. at 542 (finding that the defendant's alleged conduct was not sufficiently outrageous where the female plaintiff was disciplined more harshly and held to higher performance standards than male co-workers and was assigned no work or minor assignments considered unfitting for male co-workers).**

**Finally, insofar as the Plaintiff premises his claim on the Defendant's alleged failure to adequately consider, respond to, or investigate his complaints or to take action against Petrone or Sasser for their allegedly improper conduct, such conduct is not extreme and outrageous, and thus is insufficient to sustain**

**his claim. See Kilduff v. Cosential, Inc., 289 F. Supp. 2d 12, 22 (D. Conn. 2003); Abate v. Circuit-Wise, Inc., 130 F. Supp. 2d 341, 348 (D. Conn. 2001).**

**Accordingly, the Plaintiff's allegations are insufficient to state a plausible claim for intentional infliction of emotional distress. The Court should dismiss the Third Count from the Complaint.**

**F. The Plaintiff fails to state an actionable claim for breach of contract (Ninth Count).**

**In the Ninth Count of the Complaint, the Plaintiff purports to allege a claim for breach of contract. He fails to state an actionable claim, however, because he does not allege that the Defendant breached an agreement between the parties. Further, he does not allege that the employee handbook which purportedly constituted a contract or agreement constituted an offer to modify the preexisting terms of his employment and that he accepted such offer.**

**A plaintiff claiming breach of contract must establish four elements: (1) formation of an agreement; (2) performance by one party; (3) breach of the agreement by the other party; and (4) damages. Sullivan v. Thorndike, 934 A.2d 827, 833 (Conn. App. 2007). In the Ninth Count, the Plaintiff alleges that, at all relevant times, the Defendant published a handbook which, he maintains, constituted a contract or agreement which he and the Defendant were bound to follow. (Compl., Ninth Count, ¶¶ 125–26.) He thereafter identifies the contents of several alleged Town policies, including Anti-Harassment, Workplace Threats and Violence, Zero Tolerance, and Non-Retaliation and Whistleblower Policies. (See id. ¶¶ 127–34.) Notably, he does not allege that the Defendant breached any of these alleged policies (or any provisions of the Town handbook for that matter);**

**rather, he merely recites their contents. Absent allegations concerning the contractual provisions that the Defendant supposedly breached, the Plaintiff cannot hold it liable for breach of contract.**

**Moreover, insofar as the alleged representations and policies in the handbook can constitute a binding contract, the Plaintiff must show that they "constitute[d] an offer to modify the preexisting terms of [the Plaintiff's] employment by substituting a new implied contract for the old." Torosyan v. Boehringer Ingelheim Pharms., Inc., 662 A.2d 89, 97 (Conn. 1995.) In addition, "the proposed modifications, like the original offers, must be accepted." Id. (citations omitted). The Plaintiff does not claim that the alleged contents of the handbook quoted in the Complaint constituted an offer to modify the preexisting terms of his employment or that he accepted such offer. This further shows that the Plaintiff's breach of contract claim fails, and the Court should therefore dismiss the Ninth Count.**

**G. The continuing-violation exception and continuing course of conduct doctrine do not apply with respect to the alleged incidents and conduct underlying the Plaintiff's claims that occurred outside the applicable statute of limitations periods.**

**Much of the alleged conduct on which the Plaintiff premises his claims occurred years before he brought suit. The statutes of limitations applicable to the claims under Title VII and the CFEPA and the claims under Connecticut common law do not save the claims with respect to that alleged conduct. In addition, the continuing-violation exception and continuing course of conduct doctrine do not apply to allow the Plaintiff to premise his claims on that conduct.**

**A federal court may entertain a statute of limitations argument on a motion**

**to dismiss. Smith v. Cingular Wireless, No. 3:05cv1149 (MRK), 2006 WL 1272612, at *1 (D. Conn. Apr. 10, 2006) (citations omitted). The Court may consider on the instant motion whether any of the Plaintiff's claims, in whole or in part, are time-barred. See Knight v. Hartford Police Dep't, No. 3:04 CV 00969, 2004 WL 2750316, at *2 (D. Conn. Nov. 1, 2004); see also New York v. Cedar Park Concrete Corp., 684 F. Supp. 1229, 1233 (S.D.N.Y. 1988) (dismissing portions of the plaintiff's claims where the relevant time period exceeded the statutes of limitation).**

**i. Title VII and CFEPA (Fourth, Fifth, Sixth, and Seventh Counts)**

**Title VII requires a claimant to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful employment action or, if the claimant has already filed the charge with a state or local equal employment agency, within 300 days of the alleged act of discrimination. See 42 U.S.C. § 2000e-5(e)(1); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996). "This requirement functions as a statute of limitations in that discriminatory incidents not timely charged before the EEOC will be time-barred upon the plaintiff's suit in district court." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 765 (2d Cir. 1998) (citations omitted). Up until October 1, 2019, the CFEPA similarly provided that a party filing a complaint thereunder had to do so within 180 days of the alleged act of discrimination.[5]**

**Here, the Plaintiff filed his complaint with the CHRO on July 12, 2018. His Title VII causes of action would therefore "normally include any incidents alleged**

**[5] The statute currently provides that complaints by persons alleging aggrievement due to a violation of Section 46a-60 of the Connecticut General Statutes (as the Plaintiff does here) that occurred on or after October 1, 2019, must be filed not later than 300 days after the date of the alleged act of discrimination. See Conn. Gen. Stat. § 46a-82(f).**

**to have occurred in the preceding 300[-]day period." Quinn, 159 F.3d at 765. Accordingly, any incidents that allegedly occurred before September 15, 2017, would be barred under the 300-day statute of limitations. Likewise, for purposes of the CFEPA claims, any incidents that allegedly occurred before January 13, 2018, would be barred under the 180-day limitations period in the statute.**

**The "continuing-violation" exception "extends the limitations period for all claims of discriminatory acts committed under [an ongoing policy of discrimination] even if those acts, standing alone, would have been barred by the statute of limitations." Annis v. Cnty. of Westchester, 136 F.3d 239, 246 (2d Cir. 1998) (citation omitted; internal quotation marks omitted). "[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." Quinn, 159 F.3d at 765 (citation omitted; internal quotation marks omitted).**

**The continuing-violation doctrine "is heavily disfavored" in the Second Circuit, and courts "have been loath to apply it absent a showing of compelling circumstances." Alleva v. N.Y. City Dep't of Investigation, 696 F. Supp. 2d 273, 281 (E.D.N.Y. 2010) (citation omitted; internal quotation marks omitted), aff'd, 413 F. App'x 361 (2d Cir. 2011). The doctrine does not apply to otherwise time-barred, "discrete discriminatory acts . . . even where they are related to acts alleged in timely filed charges." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). "Discrete" acts of discrimination, such as termination, failure to promote, denial of transfer, or refusal to hire, occur on the day that they happened, and each "starts a new clock for filing charges alleging that act." Id. at 110, 113–14.**

**Here, the Plaintiff alleges specific acts or occurrences that transpired outside the limitations period for his Title VII claims, including: (1) the alleged writing on his vehicle in December 2007; (2) the alleged sticker incident in June 2009; (3) Petrone's alleged statements at a March 2010 fundraiser; (4) Petrone allegedly "aggressively" approaching the Plaintiff and calling him "lazy, incompetent, and worthless" in February 2015; and (5) Chief Hennessey allegedly telling the Plaintiff at a meeting in April 2015 to "grow a thicker skin." (Compl., First Count, ¶¶ 67–68.) For purposes of the CFEPA claims, Petrone's alleged filing of written complaints against the Plaintiff in November 2017 and an alleged statement by Fire Commissioner Jack Horner to the Plaintiff in December 2017 that, "we are not supposed to have snowflakes in the firehouse, but we do," also fall outside the applicable limitations period. (Id. ¶¶ 89–90.)**

**The aforesaid acts "are not continuous in time with one another or with the timely acts that [the Plaintiff] has alleged." Quinn, 159 F.3d at 766. They are discrete acts sufficiently isolated in time from each other so as to break any possible continuum of discrimination. See id. (holding that a series of separate incidents occurring over a five-year period before the timely alleged acts of discrimination, each separated by several months or years, were not continuous in time with one another or the timely acts); Annis, 136 F.3d at 246 (finding that discrimination allegedly suffered before and after a six-year gap "cannot be joined as a 'continuing violation'"); Anderson v. N.Y. City Dep't of Fin., No. 19-CV-7971 (RA), 2020 WL 1922624, at *8 (S.D.N.Y. Apr. 21, 2020) (observing that, although the plaintiff alleged a range of conduct over thirteen years—from being**

**suspended and losing pay, denied promotions, repeatedly transferred, and excluded from a training to receiving negative comments from supervisors and co-workers—the incidents were insufficiently continuous and concerted to be deemed pervasive); Dickens v. Hudson Sheraton Corp., LLC, 167 F. Supp. 3d 499, 517–18 (S.D.N.Y. 2016) (finding that multiple discrete incidents over a near ten-year period, several of which were separated by gaps of a year or more, were discrete acts for which the continuing-violation doctrine did not apply to untimely Title VII claims), aff'd, 689 F. App'x 670 (2d Cir. 2017).**

**Consequently, the continuing-violation doctrine does not save those portions of the Plaintiff's Title VII and CFEPA claims premised on conduct occurring outside the applicable limitations periods. The alleged conduct underlying the Fourth, Fifth, Sixth, and Seventh Counts which occurred outside the limitations periods is thus unactionable under Title VII and the CFEPA.**

**ii. Common Law Claims (First, Second, Third, Eighth, and Ninth Counts)**

**The Plaintiff's common law claims include negligent supervision (First Count), negligent retention (Second Count), intentional infliction of emotional distress (Third Count), negligence (Eighth Count), and breach of contract (Ninth Count). The negligence-based claims have a two-year statute of limitations. See Conn. Gen. Stat. § 52-584; Ahern v. Kappalumakkel, 903 A.2d 266, 268 n.3 (Conn. App. 2006); Martin v. Univ. of New Haven, Inc., No. CV030481648S, 2006 WL 3289773, at *3–4 (Conn. Super. Ct. Oct. 24, 2006). A three-year statute of limitations applies to the claim for intentional infliction of emotional distress. See Conn. Gen. Stat. § 52-577; DeCorso v. Watchtower Bible & Tract Soc'y of New**

**York, Inc., 829 A.2d 38, 43 (Conn. App.), cert. denied, 837 A.2d 805 (Conn. 2003). A six-year statute of limitations applies to the Plaintiff's breach of contract claim. See Conn. Gen. Stat. § 52-576; Mitchell v. Guardian Sys., Inc., 804 A.2d 1004, 1007 n.3 (Conn. App.), cert. denied, 810 A.2d 269 (Conn. 2002).**

**The Supreme Court of Connecticut has recognized the continuing course of conduct doctrine in cases involving negligence-based claims, such as medical and professional malpractice. To support a finding of a continuing course of conduct that may toll the statute of limitations, there must be evidence of a breach of a duty that remained in existence after the commission of the original wrong related thereto. Watts v. Chittenden, 22 A.3d 1214, 1220 (Conn. 2011). That duty must not have terminated before the commencement of the period allowed for bringing an action for such a wrong. Id. Where the Supreme Court has upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. Id.**

**With respect to intentional infliction of emotional distress, the existence of an original duty is not necessary to apply the continuing course of conduct doctrine. Id. at 1226. In such cases, if no conduct has occurred within the three-year limitations period set forth in Section 52-577 of the Connecticut General Statutes, the plaintiff will be barred from recovering for the prior actions of intentional infliction of emotional distress. Id.**

**Concerning the Plaintiff's negligence-based claims in the First, Second,**

**and Eighth Counts, the Complaint fails to show that the Defendant breached a duty of care that remained in existence after the commission of the original wrong related thereto. The Plaintiff identifies a series of alleged discrete acts by Petrone, beginning in December 2007. Petrone's alleged acts occurring within the two-year period prior to the date on which the Plaintiff commenced this action—March 16, 2020—are separate and distinct from the alleged acts that occurred before that period. The Plaintiff alleges that Petrone wrote or communicated allegedly racially or sexually offensive remarks between 2007 and 2010, but he does not allege that Petrone has done so since March 16, 2018. The alleged conduct that specifically occurred within that two-year period bears no relationship to the conduct that allegedly occurred before then. Likewise, the alleged retaliatory conduct by Sasser is separate and distinct from any allegedly wrongful prior conduct by Petrone. For these reasons, the Plaintiff fails to plead facts tending to show that there was a breach of a duty that remained in existence after the commission of the original alleged wrong related thereto. Watts, 22 A.3d at 1220. The continuing course of conduct doctrine thus does not allow the Plaintiff to premise his negligence-based claims on conduct occurring outside the two-year limitations period for those claims.**

**As for the Plaintiff's claim for intentional infliction of emotional distress, there is a gap of five years between several of the alleged discrete acts by Petrone. After alleging that Petrone made inappropriate and offensive remarks to him at a March 2010 fundraiser, the next discrete act that the Plaintiff identifies is Petrone's alleged confronting of him and calling him "lazy, incompetent, and**

**worthless" in February 2015. This gap demonstrates that the statute of limitations for the intentional infliction of emotional distress claim expired with respect to conduct occurring before February 2015. See Watts, 22 A.3d at 1228.**

**As for the Plaintiff's claim for breach of contract, the cause of action is complete when the breach of contract occurs. Kennedy v. Johns-Manville Sales Corp., 62 A.2d 771, 773 (Conn. 1948). As noted above, the Plaintiff fails to state an actionable claim for breach of contract because he does not identify any contractual provisions that the Defendant allegedly breached. Even if the Court were to construe the Plaintiff's allegations in the manner most favorable to him, the Plaintiff cannot premise the claim on alleged breaches of the handbook or policies that occurred before March 16, 2014 (six years prior to the date on which he brought suit). Thus, insofar as they could conceivably constitute individual breaches of contract, the Plaintiff cannot use Chief Hennessey's alleged failure to take action against Petrone with respect to the sticker incident in June 2009 (Compl., First Count, ¶ 27) or the Director of Human Resources' alleged failure to correct, address, or stop the alleged abuse and retaliation by Petrone that the Plaintiff allegedly divulged to her in September 2013 (id. ¶ 61) to support his claim because they are discrete episodes that transpired outside the limitations period.**

## III. CONCLUSION

**For the foregoing reasons, the Defendant respectfully requests that the Court grant its motion to dismiss.**

**DEFENDANT,**
**TOWN OF NEW CANAAN**

**By: /s/**
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## CERTIFICATE OF SERVICE

**I hereby certify that on June 15, 2020, a copy of the foregoing 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.**

**/s/**
**Jonathan C. Zellner, Esq.**