Hwang v DQ Mktg. & Pub. Relations Group
2009 NY Slip Op 32387(U)
September 30, 2009
Supreme Court, New York County
Docket Number: 102524/08
Judge: Michael D. Stallman
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SCANNED ON 10/7/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Index Number : 102524/2008

HWANG, SUNNY

vs

DQ MARKETING

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 102524/08

MOTION DATE 6/8/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 46

The following papers, numbered 1 to 8 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-K	1-6
Answering Affidavits — Exhibits	7
Replying Affidavits - Exhibits M-O	8

Cross-Motion: Yes ☒ No

Upon the foregoing papers, it is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MICHAEL D. STALLMAN
J.S.C.

Dated: 9/30/09

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 7

SUNNY HWANG,

Plaintiff,

- against -

DQ MARKETING AND PUBLIC RELATIONS GROUP, and YVES GENTIL,

Defendants.

Index No. 102524/08

DECISION AND ORDER

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that he was subjected to sexual harassment and was unlawfully terminated by defendants, in violation of the New York State Human Rights Law (Executive Law § 296)(State HRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-107)(City HRL). The complaint also alleges causes of action for intentional and negligent infliction of emotional distress, and assault and battery. Defendants now move for summary judgment dismissing the complaint.

BACKGROUND

Defendant Yves Gentil is the sole shareholder, officer, and director of defendant DQ Marketing and Public Relations Corp. (DQ), a business which promotes travel and tourism in the province of Quebec, Canada. It is undisputed that plaintiff Sunny Hwang was employed by defendants as Sales and Marketing Coordinator for approximately two months, from about March 1, 2007, until his termination on May 2, 2007. It is also

undisputed that both Hwang and Gentil are gay men. The parties otherwise sharply dispute the material facts of this case.

In his complaint, plaintiff alleges that defendants discriminated against him, based on gender and sexual orientation (Complaint, ¶ 11), when "[d]efendant Yves Gentil created a sexually hostile environment by continually making sexual advances towards Plaintiff" (*id.*, ¶ 12), and when he was fired in retaliation for objecting to the alleged harassment (*id.*, ¶¶ 13-14). The complaint alleges five specific incidents as the basis for his claim of sexual harassment: First, plaintiff alleges that, during the week of March 12, 2007, he was asked by Gentil to buy and assemble a coatrack for defendants' workplace. When he was unable to complete assembly because he could not fit one of the coatrack hooks into a hole in the coatrack stand, Gentil allegedly intervened, forced the hook into the hole in the stand, and stated to plaintiff that he "should have experience with forcing things into holes" (*id.*, ¶ 21). The same week, plaintiff alleges, Gentil asked plaintiff to accompany him to his apartment for lunch, and to install on Gentil's home computer a program that allowed the user to download shared files, such as music and movies. Plaintiff alleges that Gentil then asked him if he could download pornography, including pornography featuring Asian boys (*id.*, ¶ 22).

The complaint then alleges that two incidents occurred

during the week of March 26, 2007, when plaintiff, Gentil, and defendants' Tour and Travel Manager, Florentina Florescu (Florescu), took a business trip to Montreal and Quebec City, Canada. On the first night of the trip, in Montreal, plaintiff alleges that Gentil demanded that he stay up and drink with him, making it clear that Gentil was "again coming on to Plaintiff" (*id.*, ¶ 24). A couple of nights later, according to the complaint, in Quebec City, plaintiff, Gentil, and Florescu were in plaintiff's hotel room, sharing chocolates left in his room by the hotel. Plaintiff alleges that, after Florescu left the room, Gentil lay down on one of the beds in the room and told plaintiff that he was too tired to go to his own room across the hall. Plaintiff claims that he had to tell Gentil to go to his own room (*id.*, ¶ 24). The fifth incident allegedly occurred a day or two after a business event in New York City attended by Gentil and plaintiff. The complaint alleges that plaintiff and Gentil were discussing a woman who was present at the event, with whom Gentil was no longer friendly, when Gentil, after stating "let me show you" how much friendlier the woman used to be, allegedly "ran his hand up Plaintiff's thigh to Plaintiff's crotch (*id.*, ¶ 25). The complaint additionally alleges that Gentil "was constantly trying to get Plaintiff to go over to his apartment and telling Plaintiff how 'young and cute' he was" (*id.*, ¶ 26), and that, in the weeks prior to his termination, plaintiff increasingly

rejected Gentil's sexual advances (*id.*, ¶ 27).

At his deposition, plaintiff explained, with respect to the first incident involving the coatrack, that no one else was present, and that he did not say anything to Gentil or anyone else; he just "laughed nervously" (Hwang Dep. at 144-145). As to the alleged comments about downloading pornography, plaintiff testified that no one else was present during that incident, and that he said nothing and "laughed it off" (*id.* at 162-163). Plaintiff further testified that he believed Gentil was coming on to him during the business trip to Montreal because after Gentil told him that he had to stay up and drink with him at their hotel, Gentil talked about when he was younger and "had a [sic] older guy that they were friends but that they would do things" (*id.* at 180-181). No one else was present during this conversation (*id.* at 180). Plaintiff then testified that, a couple of nights later, during that same business trip, at a hotel in Quebec City, he and Gentil and Florescu met in his room to share the "welcome baskets" each had received from the hotel (*id.* at 184-185). After about 15 or 20 minutes, while plaintiff was in the bathroom, Florescu left to go to her own room, and when plaintiff came out of the bathroom, Gentil was lying on a bed, and told plaintiff that he was too tired to go to his own room and would have to spend the night in plaintiff's room (*id.* at 186). Plaintiff testified that he repeatedly told Gentil to

leave the room, and Gentil left angrily, saying that he had to call his boyfriend (*id.* at 187). According to plaintiff, he spoke to Florescu about this incident, and she was sympathetic and "knew that he was making advances" (*id.* at 187, 189). Plaintiff then testified that the last incident occurred in April 2007 in defendants' office, a day or two after a networking event organized by DQ Marketing in New York City (*id.* at 193-194, 195). Plaintiff stated that Gentil rubbed his thigh, that he told him to stop, and that he said this in front of Florescu (*id.* 195-196). Plaintiff testified that the harassment was constant, and he was sure there were other incidents, although he could not recall any others (*id.* at 204-205, 206-207).

The deposition testimony of Gentil directly contradicts plaintiff's testimony. He testified that there was no incident involving the coatrack, and denied making any comments to plaintiff referring to the coatrack (Gentil Dep. at 60-61). In his affidavit in support, he states that he bought and assembled the coatrack himself, and never asked plaintiff to buy or assemble it (Gentil Aff., ¶¶ 27-28). Gentil acknowledged that plaintiff helped him install a computer program at his apartment, but testified that it occurred one day after work, when plaintiff called Gentil to ask him if he wanted to join plaintiff for burgers at Shake Shack in Madison Square Park (Gentil Dep. at 61-62). Gentil testified that he told plaintiff that he could not

join him in the park, but invited him to bring the burgers to his apartment, which was nearby (*id.* at 61-62). After plaintiff came to Gentil's home, and they started eating the burgers, Gentil's boyfriend, Paul, arrived (*id.* at 66-67). Gentil asked plaintiff to download a computer program and show Paul how to use it (*id.* at 71-73). Gentil testified that he never discussed downloading pornography with plaintiff, and has never downloaded pornography (*id.* at 74). Defendants also submit an affidavit from Paul Shio, Gentil's domestic partner, who corroborates Gentil's version of this event.

With respect to the allegations about events during the business trip to Canada, Gentil testified that he and plaintiff had dinner and drinks one evening at their hotel, that they were there about an hour and a half, and that he did not pressure plaintiff to stay out longer (*id.* at 80-82). He also testified that he was never alone in plaintiff's hotel room with him, that he was in the room with plaintiff and Florescu, sharing their welcome treats from the hotel, for about 15 or 20 minutes, and that he left the room when Florescu did (*id.* at 90-92). He denied that he ever touched plaintiff, except to shake his hand (*id.* at 101), and never made any comments to plaintiff about his looks (*id.*).

Defendants also submitted affidavits from Florescu, and another employee, Julia Levi. Florescu states that she never

heard Gentil talk to plaintiff or any employee in a sexual manner, and never heard him make any comments about plaintiff's looks (Florescu Aff., ¶¶ 6-8, 12-13). Levi also attests that she never saw Gentil sexually harass anyone, or make inappropriate sexual remarks or jokes (Levi Aff., ¶¶ 16-18).

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment the opposing party must "establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986), citing *Zuckerman*, 49 NY2d at 562. While "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact (*Zuckerman,* 49 NY2d at 562)(internal citations omitted), the evidence must be viewed in a light most favorable to the nonmoving party. *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007). The motion must be denied if there is any doubt

as to the existence of a triable issue of fact, or where the issue is "arguable." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957)(internal citations omitted); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). The key to summary judgment resolution is "'issue-finding, rather than issue-determination ....'" *Sillman*, 3 NY2d at 404 (internal citation omitted).

STATE AND CITY HRL SEXUAL HARASSMENT CLAIMS

At the outset, the branch of the motion which seeks dismissal on the basis that defendants do not meet the definition of "employer" under the State or City HRL, is denied. Both the State and City HRL exclude from liability employers with fewer than four employees. *See* Executive Law § 292 (5); Admin. Code § 8-102 (5). Although defendants acknowledge that, at the time that plaintiff was hired, they employed four persons, including one part-time employee, they argue, relying on *DeStefano v Kopelman* (265 AD2d 446 [2d Dept 1999]), that the law does not apply to them because they did not have four employees during the entire time that the alleged harassment occurred. Defendants' reliance on *DeStefano* is misplaced. In *DeStefano*, the court found that an employer was not covered by the State HRL because "[a]t no time during the period in which the alleged harassing behavior occurred did the defendant employ four or more persons" (265 AD2d at 446). Here, defendants, by their own admission, had

four employees for at least some of the time that the alleged harassment occurred. Moreover, contrary to defendants' contention, part-time employee Julia Levi appeared on defendants' payroll in both March and April 2007, the entire period during which plaintiff was employed (*see* Payroll Journals, Ex. C to Newburgh Aff. in Support).

Based on the incidents alleged in the complaint, plaintiff claims that he was subjected to both hostile work environment and quid pro quo sexual harassment, and was terminated in retaliation for complaining about the alleged harassment. Defendants move for summary judgment dismissing the complaint on the grounds that plaintiff cannot make a prima facie showing of discrimination, and cannot rebut defendants' legitimate, non-discriminatory reasons for terminating plaintiff's employment.

The standards for determining claims of sexual harassment brought under the State HRL are the same as under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2 [a] [1]) (Title VII). To prevail on a claim of hostile work environment, a plaintiff must show that 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'." *Harris v Forklift Sys., Inc.*, 510 US 17, 21 (1993), quoting *Meritor Sav. Bank v Vinson*, 477 US 57, 65, 67 (1986). Generally,

to be actionable, "[t]he incidents [of harassment] must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992); *see Clark County School Dist. v Breeden*, 532 US 268 (2001); *Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 (2d Cir 2000). Only if the alleged conduct is "extraordinarily severe" will a single incident of harassment create a hostile environment. *See Cruz*, 202 F3d at 570; *Tomka v Seiler Corp.*, 66 F3d 1295, 1305 (2d Cir 1995)(a single incident of sexual assault can create a hostile work environment).

Further, a hostile work environment claim requires proof that the alleged misconduct was both "objectively and subjectively offensive, such that a reasonable person would find the conduct hostile or abusive, and such that the plaintiff did, in fact, perceive it be so." *Matter of State Div. of Human Rights v Stoute*, 36 AD3d 257, 263 (2d Dept 2007), citing *Oncale v Sundowner Offshore Servs., Inc.*, 523 US 75, 81 (1998); *see Harris*, 510 US at 21. "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include 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 an employee's work performance." *Harris*, 510 US at 23.

In view of the above standards, the court finds that plaintiff's hostile work environment claim brought under the State HRL should be dismissed. Even when viewed in a light most favorable to plaintiff, the evidence fails to demonstrate that the conduct complained of was sufficiently severe and pervasive to create an objectively abusive working environment. *See Quinn v Green Tree Credit Corp.*, 159 F3d 759 (2d Cir 1998)(offensive comments, pornography, touching breasts with paper not severe and pervasive); *Prince v Cablevision Sys. Corp.*, 2005 WL 1060373, 2005 US Dist LEXIS 8147(SD NY 2005)(occasions of inappropriate sex talk, attempt to kiss, solicitation of sex not severe and pervasive); *Gregg v New York State Dept. of Taxation & Fin.*, 1999 WL 225534, 1999 US Dist LEXIS 5415 (SD NY 1999)(numerous inappropriate remarks, four instances of offensive touching, invitations to drinks and meals not severe and pervasive); *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 738 (2d Dept 2009) (offensive comments, touching thigh, patting buttocks not severe and pervasive); *Thompson v Lamprecht Transp.*, 39 AD3d 846 (2d Dept 2007)(derogatory names, punch in breast not severe or pervasive).

The hostile work environment claim brought pursuant to the City HRL, however, must be separately considered. Although the standards for recovery in discrimination claims brought pursuant to the City HRL were, until recently, the same as for cases

brought under Title VII, the First Department has made clear that the provisions of the City HRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]), are "to be construed more broadly than federal civil rights laws and the State HRL" in order to accomplish the "uniquely broad and remedial purposes" of the City HRL. *Williams v New York City Hous. Auth.*, 61 AD3d 62, 74-75 (1st Dept 2009); *see* Admin. Code § 8-130. To that end, courts must conduct an "independent liberal construction analysis" of claims brought under the City HRL. *Id.* at 66.

With respect to claims of sexual harassment, the court in *Williams* rejected the "severe and pervasive" standard as "unduly restrictive," noting that "[p]ermitting a wide range of conduct to be found beneath the 'severe or pervasive' bar would mean that discrimination is allowed to play some significant role in the workplace." *Id.* at 76. Rather, "questions of 'severity' and 'pervasiveness' are applicable to considerations of the scope of permissible damages, but not to the question of underlying liability." *Id.* While conduct which is "nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" is not actionable (*id.* at 80), in "borderline situations" and cases where there are issues of fact as to whether the alleged discriminatory conduct occurred, summary judgment generally should be denied. *Id.* at

78, 80.

Under that test, and considering the conflicting testimony as to plaintiff's allegations of harassment, including his allegation of offensive touching of his thigh, the court cannot find, as a matter of law, that the alleged conduct "does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams*, 61 AD3d at 80. Moreover, this case presents classic issues of credibility, raised by the conflicting testimony of the parties, as to whether the alleged incidents occurred, which are not properly assessed or decided on this motion. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). Even if the affidavits submitted by defendants, from two employees, Gentil's domestic partner, and a former supervisor of plaintiff, serve to undercut plaintiff's credibility, they do not resolve the issues. Accordingly, plaintiff's hostile work environment claim under the City HRL survives summary judgment. *See Dixon v City of New York*, 2009 WL 1117478, 2009 US Dist LEXIS 35096 (ED NY 2009)(claim of grabbing arm and threatening survives under City HRL although not under state or federal law); *cf. Wilson v N.Y.P Holdings, Inc.*, 2009 WL 873206, 2009 US Dist LEXIS 28876 (SD NY 2009)(applying different standards but reaching same result

dismissing federal, state, and city claims).

Turning to plaintiff's claim of quid pro quo sexual harassment, the distinctions between hostile work environment and quid pro quo claims are not always clear (*Carrero v New York City Hous. Auth.*, 890 F2d 569, 579 [2d Cir 1989]), but generally may be distinguished as cases involving a threat which is carried out and offensive conduct in general. *Burlington Indus., Inc. v Ellerth*, 524 US 742, 753 (1998). "The gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that adverse consequences follow from the employee's refusal." *Carrero*, 890 F2d at 579. "[T]o establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." *Karibian v Columbia Univ.*, 14 F3d 773, 777 (2d Cir), *cert denied* 512 US 1213 (1994); *see Min Jin v Metropolitan Life Ins. Co.*, 310 F3d 84, 91 (2d Cir 2002); *Kotcher*, 957 F2d at 62; *Le Prevost v New York State*, 2009 WL 856999, 2009 US Dist LEXIS 29297 (SD NY 2009).

Here, there is insufficient evidence that there were sexual advances on which plaintiff's continued employment was conditioned to sustain the quid pro quo claim. Plaintiff offers

no evidence that defendant made actual sexual demands, and plaintiff neither alleged nor testified that the alleged advances, or any other conduct, were threatening or suggestive that his continued employment depended on submitting to these advances. *See Hamilton v Bally of Switzerland*, 2005 WL 1162450, 2005 US Dist LEXIS 9319 (SD NY 2005). Further, even if plaintiff could make a prima facie case of quid pro quo harassment, defendants have proffered a legitimate, non-discriminatory basis for his termination. *Cf. Messer v Fahnestock & Co.*, 2008 WL 4934608, 2008 US Dist Lexis 93572 (ED NY 2008) (applying shifting burden analysis to quid pro quo claim and finding triable issues of fact as to pretext where employer's evidence of basis for termination was inconsistent).

Gentil testified that plaintiff was terminated, during his 90-day probationary period, based on plaintiff's inappropriate attitude, behavior, and dress at work. According to Gentil, he told plaintiff in April 2007 that he was being impolite to clients, that he was acting disrespectfully, and that wearing cut-off jeans and sneakers was inappropriate, even in an office where casual dress was allowed (Gentil Dep. at 106-108; Gentil Aff. in Support, ¶ 73). Gentil stated that he observed plaintiff sitting at his desk playing music and text-messaging and not doing any work, that he found plaintiff in his office looking through papers, and that he overheard plaintiff on the telephone

looking for other jobs (Gentil Aff. in Support, ¶¶ 77-80). Gentil also attested that plaintiff complained that Quebec, defendants' client, was a boring destination, and plaintiff told Gentil that he found his job uninteresting (*id.*, ¶¶ 76, 86). Accordingly, Gentil testified, he told plaintiff that he was not working out and terminated him on May 2, 2007 (*id.*, ¶ 93). In her affidavit, Florescu also attests that she worked with and shared office space with plaintiff, and that he complained to her that he was bored with his job and found the work uninteresting, and that at one trade show event they went to together, he left early because he was bored (Florescu Aff. in Support, ¶¶ 11, 14-15, 18-20). In opposition, plaintiff fails to even dispute defendants' evidence, or otherwise raise a triable issue of fact as to pretext.

RETALIATION

Plaintiff's retaliation claim similarly fails to survive the instant motion. State and City HRL retaliation claims, like Title VII claims, are analyzed under the familiar three-step, burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]). *See Hernandez v Central Parking Sys. of N.Y., Inc.*, 2008 NY Misc LEXIS 2228, *11-12 (Sup Ct Bronx County 2008), *affd in part and modified in part*, 63 AD3d 411 (1st Dept 2009); *Middleton v Metropolitan Coll. of NY*, 545 F Supp 2d 369, 373 (SD NY 2008); *Matter of Board of Educ. of New Paltz*

Cent. School Dist. v Donaldson, 41 AD3d 1138, 1140 (3d Dept 2007); *Baliva v State Farm Mut. Auto. Ins. Co.*, 286 AD2d 953 (4th Dept 2001); *Hanna v New York Hotel Trades Council & Hotel Assn. of N. Y. City Health Ctr., Inc.*, 18 Misc 3d 436, 445-446 (Sup Ct, NY County 2007); *see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 316 (2004); *Ferrante*, 90 NY2d at 629. Under *McDonnell Douglas Corp.*, the plaintiff has the initial burden to prove a prima facie case of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by presenting legitimate and nondiscriminatory reasons for its employment decision. If the employer articulates a nondiscriminatory reason for its actions, the presumption raised by the prima facie case is rebutted, and the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante*, 90 NY2d at 629-630. Pretext may be demonstrated "when it is 'shown *both* that the reason was false, *and* that discrimination was the real reason'." *Id.* at 630, quoting *St. Mary's Honor Ctr. v Hicks*, 509 US 502, 515 (1993) (emphasis in original).

To establish a prima facie claim of retaliation, plaintiff must show that he participated in a protected activity known to defendants, an adverse employment action was taken against him, and a causal connection existed between the adverse action and

the protected activity. *See Forrest*, 3 NY3d at 327; *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004); *Romney v New York City Tr. Auth.*, 8 AD3d 254, 254 (2d Dept 2004). Even assuming that he could establish a prima facie case, plaintiff's retaliation claim fails because, as found above, he has not rebutted defendants' legitimate, non-discriminatory reasons proffered for their actions, through evidence that the reasons are pretextual, or that retaliatory animus was nevertheless a motivating factor.

INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In an action under New York law for intentional infliction of emotional distress, a plaintiff must prove that defendant's conduct was so extreme and outrageous in degree and character as "to go beyond all possible bounds of decency" and which can be "regarded as atrocious and utterly intolerable in a civilized community." *See Howell v New York Post Co.*, 81 NY2d 115, 122 (1993); *Freihofer v Hearst Corp.*, 65 NY2d 135, 143-144 (1985); *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983). Courts also have applied that standard to claims of negligent infliction of emotional distress. *See Hernandez v Central Parking Sys.*, 63 AD3d at 411; *Sheila C. v Povich*, 11 AD3d 120, 130 (1st Dept 2004); *Dillon v City of New York*, 261 AD2d 34, 41 (1st Dept 1999); *Clayborne v OCE Bus. Servs.*,2008 WL 2971770, *2, 2008 US Dist LEXIS 60984, *10 (SD NY 2008). In this case,

defendants' alleged conduct, even if found to be harassing, was not so extreme and outrageous as to be atrocious and utterly intolerable. *See Lucas v South Nassau Communities Hosp.*, 54 F Supp 2d 141, 151 (ED NY 1998). Further, there must be intent to cause, or a disregard of a substantial probability of causing, severe emotional distress as well as the existence of severe emotional distress (*see Howell,* 81 NY2d at 121), of which no evidence has been proffered here. Moreover, to establish a claim for negligent infliction of emotional distress, plaintiff must show that defendants breached a duty owed to him which either endangered plaintiff's physical safety or caused him to fear for his safety. *See O'Reilly v NYNEX Corp.*, 262 AD2d 207, 208 (1st Dept 1999); *LaRussa v LaRussa*, 232 AD2d 297, 298 (1st Dept 1996); *Losquadro v Winthrop Univ. Hosp.*, 216 AD2d 533, 534 (2d Dept 1995). No such conduct is alleged here. To the contrary, plaintiff testified that he did not fear for his physical safety around Gentil (Hwang Dep. at 217-218). Accordingly, plaintiff's claims of intentional and negligent infliction of emotional distress should be dismissed.

ASSAULT AND BATTERY

To recover on a claim of assault, "the plaintiff must show that another person made 'an intentional attempt, displayed by violence or threatening gesture, to do injury to, or commit a battery upon,' his or her person." *Williams v Port Auth. of New*

York and New Jersey, 880 F Supp 980, 994 (ED NY 1995) (internal citation omitted). An assault claim requires proof that there was conduct that placed plaintiff in imminent apprehension of harmful or offensive contact. *See Holtz v Wildenstein & Co., Inc.*, 261 AD2d 336, 336 (1st Dept 1999); *Charkhy v Altman*, 252 AD2d 413, 414 (1st Dept 1998); *Hayes v Schultz,* 150 AD2d 522, 523 (2d Dept 1989).

Plaintiff claims that Gentil, while describing how the conduct of a female business acquaintance "used to be" friendlier, rubbed his hand on his thigh (Hwang Dep at 195). Plaintiff does not allege or prove that he was put in imminent apprehension by a violent or threatening gesture. By his own testimony, he did not feel physically in danger from Gentil (*id.* at 217-218). The assault cause of action therefore is dismissed.

To sustain a cause of action for battery, a plaintiff must prove that "there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact." *Laurie Marie M. v Jeffrey T.M.*, 159 AD2d 52, 55 (2d Dept 1990), *affd* 77 NY2d 981 (1991); *Bastein v Sotto*, 299 AD2d 432, 433 (2d Dept 2002); *also see Roe v Barad,* 230 AD2d 839, 840 (2d Dept 1996). "The intent required for battery is 'intent to cause a bodily contact that a reasonable person would find offensive'." *Cerilli v Kezis*, 16 AD3d 363, 364 (2d Dept 2005), quoting *Jeffreys v Griffin*, 1 NY3d 34, 41 n 2 (2003).

In this case, there is conflicting testimony as to whether Gentil grabbed plaintiff's thigh, and if so, if it was intended and offensive. Neither defendant's testimony nor the affidavit of Florescu, stating that she never saw Gentil behave inappropriately in a sexual manner with any employee, is sufficient to eliminate triable issues of fact as to whether such touching occurred, whether it was intended, and whether it was offensive. Rather, the conflicting testimony raises credibility issues not properly decided on a summary judgment motion. *See Ferrante*, 90 NY2d at 631; *Capelin Assoc.*, 34 NY2d at 341.

DAMAGES

To the extent that defendants seek dismissal on the ground that plaintiff has shown no damages, that branch of the motion is denied. "It is well settled that an award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, and that an award may be based solely on complainant's testimony" (*Matter of 119-121 E. 97th St. Corp. v New York City Commn. on Human Rights*, 220 AD2d 79, 83-84 [1st Dept 1996][internal citation and quotation marks omitted]), "corroborated by reference to the circumstances of the alleged misconduct." *Matter of New York City Tr. Auth. v State Div. of Human Rights*,, 78 NY2d 207, 216 (1991); *see Cullen v Nassau County Civ. Serv. Commn.*, 53 NY2d 492, 497 (1981). The extent of such damages, if any, should be

determined at trial, considering evidence of the "duration, severity, consequences and physical manifestations of the mental anguish." *Gleason v Callanan Indus.*, 203 AD2d 750, 752 (3d Dept 1994); *see Matter of New York City Tr. Auth.*, 78 NY2d at 218; *Matter of Bronx Cross County Med. Group v Lassen*, 233 AD2d 234, 235 (1st Dept 1996); *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 57 (4th Dept 1996); *Matter of 119-121 E. 97th St. Corp.*, 220 AD2d at 84; *Matter of Horgan v New York State Div. of Human Rights*, 194 AD2d 674 (2d Dept 1993).

Plaintiff's causes of action for "aiding and abetting" are also dismissed, as there are no allegations of discriminatory actions against any party other than Gentil. As to plaintiff's cause of action, under the City HRL, for employer liability of defendant DQ for the alleged discriminatory conduct of defendant Gentil (8th cause of action), defendants do not dispute that DQ can be vicariously liable, and that cause of action therefore remains.

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted in part and denied in part to the extent that it is

ORDERED that the first, second, and third causes of action, brought pursuant to the State HRL, are dismissed; and it is

further

ORDERED that the fourth cause of action, brought pursuant to the City HRL, is dismissed except as to plaintiff's claim based on hostile work environment; and it is further

ORDERED that the fifth, sixth, and seventh causes of action, brought pursuant to the City HRL, are dismissed; and it is further

ORDERED that the ninth cause of action is dismissed except as to the claim for battery; and it is further

ORDERED that the tenth cause of action, for intentional and negligent infliction of emotional distress, is dismissed; and it is further

ORDERED the remaining claims are severed and shall continue.

Dated: September 28, 2009
New York, NY

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN, J.S.C.