SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **49M**

Justice

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ANNA SANDERS,

Plaintiff,

- v -

DAILY NEWS, LP, A DIVISION OF THE TRIBUNE PUBLISHING COMPANY, TRIBUNE PUBLISHING COMPANY, and ROBERT YORK

Defendants.

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INDEX NO. 158892/2020

MOTION DATE 07/21/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

Plaintiff Anna Sanders, a former employee of defendant Daily News, LP (DN), brought this action against (i) DN, (ii) DN's parent company—Tribune Publishing Company (Tribune), and (iii) the then Editor-in-Chief at DN, Robert York, alleging gender pay discrimination and retaliation in violation of New York City Human Rights Law (NYCHRL). In the instant motion, defendants move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint in its entirety. Plaintiff opposes. For the reasons below, defendants' motion is granted as to the discrimination claim, denied as to the retaliation claim, and granted as to the aiding and abetting claims against defendant Robert York.

BACKGROUND

As a media company located in New York City, DN publishes a newspaper called the New York Daily News and is operated by Tribune, its parent company (NYSCEF # 100 – pltf's response to deft's statement of undisputed material facts, ¶¶ 1, 2). At all relevant times of this action, York was DN's Editor-in-Chief, overseeing the entire operations and work product of DN, and Toni Martinez was DN's Senior Director of Human Resources, Northeast (*id.* ¶ 3; NYSCEF # 56 – Martinez aff, ¶ 2). DN had a Metro Desk department that predominantly covered New York City news (NYSCEF # 55 – York aff, ¶ 6). Each reporter in the Metro Desk department was assigned a specific subject area to cover, namely, a specific "beat," such as crimes and public safety, transportation, and politics—which included city hall news (*id.*).

Plaintiff's Employment at DN in April 2019

Plaintiff earned a bachelor's degree in journalism and environmental studies from New York University in 2013 and worked as a news reporter since her graduation (NYSCEF # 89 – Sanders Resume). In March 2019, DN had an opening for a Metro Desk reporter covering city hall, for which plaintiff applied through Janon Fisher, DN's Senior Content Editor at the time (NYSCEF # 56, ¶ 4; NYSCEF # 46 – pltf's email to Fisher in March 2019; NYSCEF # 100, ¶ 58). This position had a pay scale of $46,000 minimum and $74,600 maximum, and any requests for higher compensation must be approved by Martinez (NYSCEF # 57 – pay scale; NYSCEF # 56, ¶¶ 6, 7; NYSCEF # 55, ¶ 16).

On March 20, 2019, Fisher offered plaintiff this position (NYSCEF # 98 – pltf tr at 89:14-17). Then on March 22, 2019, plaintiff called Fisher to accept the offer and to negotiate her salary (*id.* at 89:18-21; NYSCEF # 46 at 4). In the call, Fisher initially proposed an annual salary of "around 75 [thousand]" (NYSCEF # 98 at 90:18-91:6), plaintiff counter-requested compensation of "somewhere around $78K" (NYSCEF # 46 at 4), and Fisher responded that he "would go check into it" (NYSCEF # 98 at 90:18-91:6). Plaintiff's salary request was then considered and approved by York and Martinez (NYSCEF # 56, ¶ 13; NYSCEF # 55, ¶ 20). On March 29, 2019, DN issued a formal offer letter to plaintiff, reflecting a $78,000 yearly salary, which equaled "$40.00 per hour . . . with eligibility for a 37.5 hour working week" (NYSCEF # 48 – Signed Offer Letter at 1).

After plaintiff was hired in April 2019, DN had another vacancy for a city hall reporter (NYSCEF # 98 at 81; NYSCEF # 100, ¶ 74). Three months later, in July or August 2019, Fisher hired Shant Shahrigian, who had a master's degree from Columbia School of Journalism and previously worked as an editor (NYSCEF # 97 – Fisher texts; NYSCEF # 51 at 143:10-16; NYSCEF # 56, ¶¶ 16, 17; NYSCEF # 100, ¶¶ 77-80). Given that Shahrigian occasionally edited plaintiff's stories when they both worked at New York Post (NYSCEF # 51 at 71:22-72:25), plaintiff asked Fisher whether Shahrigian's position at DN would be "somehow above [hers]" (NYSCEF # 97). Fisher assured plaintiff that "[y]ou guys are equals" (*id.*). Shahrigian was offered an annual salary of $80,000 (NYSCEF # 55, ¶ 23; NYSCEF # 56, ¶ 18). Plaintiff learned about Shahrigian's salary not long after Shahrigian started at DN (NYSCEF # 51 at 167). Because plaintiff viewed Shahrigian as her equal, she thought she was earning the same $80,000 salary as Shahrigian (*id.* at 167-168).

Plaintiff's Internal Complaint in April 2020

In April 2020, DN imposed company-wide pay cuts due to the impacts of Covid-19 pandemic (NYSCEF # 100, ¶ 84). On April 9, 2020, DN's human resources (HR) department emailed plaintiff about her pay cut from $78,000 to $75,660 (NYSCEF # 49 – email chain in April 2020). Plaintiff emailed back DN's HR

department that "my salary is supposed to be $80K before the reduction" and texted Shahrigian that "[m]y salary is supposed to be 80 but the letter I got says it's 78K. Does yours say 80K? What's your new salary?" (*id.*; NYSCEF # 85 – pltf's texts with Shahrigian). Shahrigian confirmed that his previous salary was $80,000, and then Shahrigian asked plaintiff "[d]id you make 80 last year?" to which plaintiff replied, "I should have" (NYSCEF # 85). At this point, Shahrigian said that plaintiff's salary information in the pay cut email "was a mistake . . . [e]ither way, messed up." Plaintiff responded that "it's not ok that you make more than me now . . . [t]his is gender discrimination" (*id.*). Shahrigian told plaintiff "I'm really sorry about this" and then informed Terry Moseley, an HR director at DN, about his conversation with plaintiff (*id.*; NYSCEF # 50). Around the same time, plaintiff complained about her pay to Moseley via Slack, and Moseley suggested to schedule a call with plaintiff, to which plaintiff replied:

> whats the point? you should call shant, hes the senior reporter; im a woman, so i guess i should get paid less, despite having better sources; im shaking, i dont know how I can work knowing i make less than a man who has the same job as me; Janon treated me like garbage for four months too, repeatedly abusive to me; so it makes sense he gave shant more money than me and pretended he didt

(NYSCEF # 50 [all grammatical errors in original]).

Moseley forwarded plaintiff's remarks to York and Martinez, who then called plaintiff to clarify plaintiff's salary was $78,000 (NYSCEF # 98 at 188-191; NYSCEF # 50). In response, plaintiff indicated that it was gender pay discrimination to pay Shahrigian more than her, because Shahrigian was "a male coworker with the same job title and function" that she has (NYSCEF # 98 at 188-191). Being accused of gender discrimination, York "blanched" and was "taken aback" and told plaintiff that "there are many men in the newsroom who get paid [less] than you"; he denied that gender was a factor in DN's employment or pay decisions (*id.*; NYSCEF # 92, ¶ 46).

Following this phone call, Martinez did not investigate into plaintiff's concerns about gender discrimination as Martinez understood the phone call to be "largely based off the [pay] decrease" and plaintiff's confusion about her salary (NYSCEF # 93 at 54-55). Martinez did not consider plaintiff's remarks in the call and in her Slack messages to Moseley as a formal workplace complaint of gender discrimination that warranted investigation (*id.*).

Four days later, on April 13, 2020, Moseley sent Martinez an email with "Anna Sanders" on the subject line asking if Martinez had time for a conversation "re: [plaintiff] and how to move forward" (NYSCEF # 82 at 1). Again, on May 7, 2020, Moseley wrote to Martinez in the same email chain, stating that "I'm writing

to see how I can change [plaintiff's] work duties and responsibilities without being accused of retaliation" as plaintiff had "been taking a sick day here and there" (*id.* at 2). Moseley ended this email by concluding: "I'd like to see if we can move her to rewrite until further notice . . . I don't want to punish [plainitff] for being unwell; I also know the status quo cannot stand" (*id.*). The next day, May 8, 2020, Martinez replied to Moseley's email, proposing that they "set time to connect and talk through" (*id.*). The content of this contemplated call is not reflected in the existing record.

Plaintiff's Termination in June 2020

In late May 2020, plaintiff had a check-in call via zoom with Corey Johnson[1] (Council Speaker), then the Speaker of the New York City Council, and his senior adviser, Jennifer Fermino (NYSCEF # 51 at 231-236; NYSCEF # 95 at 10:13-15). The call was an "off the record coffee [chat]" to help plaintiff maintain her relationship with the Council Speaker, an important source on the city council for plaintiff (*id.* at 236). Plaintiff recalled that at some point of the call, the Council Speaker and Fermino "started complaining about a story that [Shahrigian] wrote" (*id.* at 240). To that, plaintiff responded: "well, he makes more money than me. Can you believe that?" (*id.*). The Council Speaker and Fermino were surprised to learn that Shahrigian made two thousand dollars more than plaintiff (*id.*; NYSCEF # 52 – Fermino tr at 21). The Council Speaker felt that "it was wrong" to pay plaintiff less than Shahrigian as plaintiff "was like a dogged journalist who would be at Room 9 later than other reporters" (NYSCEF # 96 – Johnson tr at 21).

On June 2, 2020, the Council Speaker and Fermino had a zoom meeting with York to get to know each other and foster the city council's relationship with DN (NYSCEF # 55, ¶ 27; NYSCEF # 52 at 25:14-17, 26:2-24). During this meeting, both the Council Speaker and Fermino mentioned to York about plaintiff's lower pay in contrast to Shahrigian's (NYSCEF # 55, ¶ 28; NYSCEF # 52 at 33-35). According to York, the Council Speaker said plaintiff "had raised issues regarding her pay at the DN and had disclosed the specific amount of [Shahrigian's] pay" (NYSCEF # 55, ¶ 28). Hearing these remarks, York appeared "disturbed" and "upset" (NYSCEF # 52 at 35). York believed plaintiff had misused her position and access to raise personal grievance with the Council Speaker, disparage DN before a news source, and disclose salary information private to Shahrigian, which created an apparent conflict of interests in plaintiff's role as a city hall reporter (NYSCEF # 55, ¶¶ 29-32; NYSCEF # 94 – York tr at 63).

Three days later, on June 5, 2020, York terminated plaintiff from her position at DN (*id.* ¶ 33). Over a brief phone call among York, Martinez, and plaintiff, York told plaintiff that she was terminated for revealing personal information of a colleague and disparaging DN. York then disconnected from the call before plaintiff

[1] Council Speaker Corey Johnson was a mayoral candidate in May 2020.

had a chance to respond (NYSCEF # 82 at 4; NYSCEF # 92, ¶¶ 67, 69). After the call, Martinez emailed plaintiff a severance agreement, which would provide plaintiff with a 12-week salary if plaintiff agreed to certain confidentiality provisions and released claims against DN (NYSCEF # 79 – Severance Agreement; NYSCEF # 92, ¶ 75). Plaintiff declined to sign this agreement and later announced on her social media account that she "lost [her] job for complaining about gender pay inequity" (NYSCEF # 92, ¶ 75; NYSCEF # 87).

Procedural History

Plaintiff commenced this action in October 2020, alleging (i) gender discrimination in the form of gender-based pay disparity, in violation of New York City Human Rights Law (NYCHRL, Administrative Code of City of NY) § 8-107 (1) (a) (3); and (ii) retaliation for complaint of gender-based pay disparity in violation of NYCHRL § 8-107 (7) (NYSCEF # 1 at 5-7). Plaintiff also claims that York is liable in his individual capacity for discrimination and retaliation, as he aided and abetted the adverse employment actions plaintiff suffered (*id.*). Defendants move for summary judgment dismissing plaintiff's complaint in its entirety under CPLR 3212 (NYSCEF # 60 – MOL). Plaintiff opposes (NYSCEF # 65 – MOL in Opp).

DISCUSSION

Defendants, as movants for summary judgment, have the burden to make a prima facie showing of entitlement as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat the motion, plaintiff must establish the existence of a factual issue requiring a trial through the production of admissible evidence (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court is required to view the evidence in the light most favorable to the nonmoving party and to give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017]). Nonetheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pullman v Silverman*, 28 NY3d 1060, 1062 [2016] [bare conclusory assertions cannot defeat summary judgment]). Therefore, the party opposing summary judgment must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

The NYCHRL "explicitly requires an independent liberal construction analysis in all circumstances" to fulfill its " 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). As such, "a defense motion for summary judgment in an action brought under the NYCHRL must be analyzed under both the familiar framework of *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) and under the newer 'mixed motive' framework, which imposes

a lesser burden on a plaintiff opposing such a motion" (*Hamburg v New York Univ. School of Medicine*, 155 AD3d 66, 73 [1st Dept 2017]). Summary judgment dismissing a claim under the NYCHRL should be granted only if "no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011]).

Plaintiff's Gender Discrimination Claim– NYCHRL § 8-107 (1) (a) (3)

The *McDonnell Douglas* framework and the mixed motive framework both apply a burden-shifting analysis, where plaintiff has the initial burden to establish a prima facie case of discrimination, and then the burden shifts to the defense to present admissible evidence of legitimate, non-discriminatory reasons of its employment decision (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]). At that point, under the *McDonnell Douglas* framework, the burden shifts back to plaintiff to produce evidence that defendant's proffered reason are merely pretexts for discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). In contrast, under the mixed motive framework, plaintiff needs to come forward with evidence that defendant's employment decision is motivated at least in part by discrimination (*see Melman*, 98 AD3d at 127 ["plaintiff should prevail in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision"]).

To establish a prima facie case of discrimination under NYCHRL § 8-107 (1) (a), plaintiff must show that: "(1) she is a member of a protected class; (2) she was qualified to hold [her] position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest*, 3 NY3d at 305). Where a discrimination claim is based on disparate pay, plaintiff may raise an inference of discrimination by establishing that she "was paid less than similarly situated non-members of the class" (*Shah v Wilco Sys., Inc.*, 27 AD3d 169, 176 [1st Dept 2005]).

In this case, defendants only dispute the fourth element of plaintiff's prima facie showing. Defendants argue that (i) plaintiff cannot establish that DN's pay decision occurred under circumstances giving rise to an inference of discrimination, and (ii) even assuming plaintiff can establish her prima facie case, plaintiff fails to counter defendants' evidence of legitimate, nondiscriminatory reasons with admissible evidence that raises an issue of fact that precludes summary judgment in defendants' favor (NYSCEF # 60 at 11-15; NYSCEF # 107 – Reply MOL at 3).

Specifically, defendants contend that DN's decision on plaintiff's salary does not give rise to an inference of discrimination as it was plaintiff who "explicitly asked for" an annual salary of $78,000, which DN approved although it was above DN's pay scale for journalists (NYSCEF # 60 at 11-12). According to defendants, when plaintiff was hired, she was the highest paid Metro Desk reporter at DN,

earning more than all five male Metro Desk reporters; and after DN subsequently added more reporters, plaintiff remained the third highest paid Metro Desk reporter, topping eight out of the nine male Metro Desk reporters throughout plaintiff's employment at DN (*id.* at 11-12). Additionally, defendants assert that Shahrigian was entitled to the higher salary because he was not similarly situated to plaintiff, given his superior degree and work experience (*id.* at 13-14).

In contrast, plaintiff argues that the fact that she was paid $2,000 a year less than Shahrigian despite having the same title and position as Shahrigian suffices to make a prima facie showing of gender discrimination. Plaintiff points out that even Shahrigian admitted that it was "messed up" that plaintiff was paid less than him (NYSCEF # 65 at 7-8). Plaintiff also refutes defendants' proffered justification for DN's pay decision by disputing that DN relied on a pay scale for salary determination. Plaintiff posits that that she, like several other female reporters, were underpaid at DN because of inferior bargaining power (*id.* at 9-10). Plaintiff adds that her salary should not be compared to the salary of other DN reporters, because city hall assignments were "distinctly different from assignments given to other reporters." Plaintiff maintains that even if "a consistent pattern of discrimination" is lacking, DN still discriminated her as compared to Shahrigian, who is less qualified than her as a city hall reporter (*id.* at 11-13).

Courts have recognized that plaintiff's burden of establishing a prima facie case of discrimination is "de minimus" (*Bennett*, 92 AD3d at 37-38). But once a defendant produces evidence of non-discriminatory reasons for the challenged action, the case "move[s] to a different level of specificity" and plaintiff must submit evidence of pretext or evidence showing that defendant was motivated at least in part by discrimination (*id.* at 38-39). "[T]he task of challenging a defendant's proffered non-discriminatory reasons can frequently be onerous" (*id.*). For this purpose, "[c]onclusory allegations of discrimination are insufficient to defeat a motion for summary judgment" (*Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005]).

Under these principles, the branch of defendants' summary judgment motion dismissing plaintiff's discrimination claim is granted. At the outset, it is unclear whether the circumstances surrounding DN's pay decisions give rise to an inference of gender discrimination. Based on the record, it was plaintiff who demanded an annual salary of $78,000, and DN approved plaintiff's request without any bargaining (NYSCEF # 46 at 4; NYSCEF # 98 at 90; NYSCEF # 56, ¶ 13; NYSCEF # 55, ¶ 20). Further, DN's employee salary chart confirms that plaintiff's pay was higher than eight male reporters at DN (NYSCEF # 58 – DN reporter salary), which undercuts plaintiff's discrimination claim (*see Shah*, 27 AD3d at 177 [plaintiff's "disparate pay claim fails because he cannot establish that he was paid less than similarly situated" employees]; *see also Herrington v Metro-N. Commuter R. Co.*, 118 AD3d 544, 545 [1st Dept 2014]). Plaintiff's attempt to create an inference of discrimination by taking Shahrigian's remark out of context is also unavailing. In that text exchanges between plaintiff and Shahrigian, plaintiff told Shahrigian that

her salary was supposed to be $80,000 but the figure in her pay cut email was $78,000; Shahrigian then stated that the information in the email must be mistaken or "messed up" (NYSCEF # 85). Plaintiff's characterization of this email as Shahrigian's acknowledge[ement of] how 'messed up' it was that [plaintiff] earned less than he did" does not serve her (NYSCEF # 65 at 7).

Nevertheless, bearing in mind that NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible," the court assumes that an inference of discrimination may be drawn from DN's pay decision. Thus, plaintiff has carried her "de minimis burden of showing a prima facie case of [gender] discrimination" (*Melman*, 98 AD3d at 115).

Even then, defendants have come forward with admissible evidence that it had legitimate, independent, and nondiscriminatory reasons for paying Shahrigian a higher salary. Defendants explain that Shahrigian's salary considered Shahrigian's superior education background – he had a master's degree in journalism while plaintiff had only a bachelor's degree (NYSCEF # 51 at 143; NYSCEF # 56, ¶ 18; NYSCEF # 89). Moreover, unlike plaintiff, Shahrigian had editing experience, which was valuable to DN (NYSCEF # 56, ¶ 18; NYSCEF # 94 at 46; *see Kent v Papert Companies, Inc.*, 309 AD2d 234, 244 [1st Dept 2003] [plaintiff was not similarly situated to employees who had greater experience and more valued and impressive backgrounds than her]).

Plaintiff fails to raise a triable issue of fact as to whether defendants' reasons were pretextual or whether DN was motivated at least in part by gender discrimination when determining plaintiff's pay. To the extent that plaintiff claims that she was paid less than other city hall reporters working at the Wall Street Journal, Politico, and the New York Post (NYSCEF # 92, ¶ 16), she "did not establish how [her] achievements compared with the achievements of [other reporters] . . . of comparable departments at other institutions" (*Melman*, 98 AD3d at 108). Moreover, plaintiff's allegations of gender-based pay disparity at DN are conclusory and insufficient to defeat defendants' motion for summary judgment (*see Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] [conclusory assertions, devoid of evidentiary facts, are insufficient to defeat a summary judgment motion]; *see also Dickerson*, 21 AD3d at 329 [same]).

Plaintiff relies on a few sentences in the affidavit of plaintiff's best friend, Mara Gay, to assert that plaintiff had better credentials than Shahrigian and that DN underpaid female reporters (NYSCEF # 51, pltf's tr at 207; NYSCEF # 91, Gay aff, ¶¶ 32-33, 46-47 ["[plaintiff's] work was known to be buzzier, punchier, and more impactful than [Shahrigian's]"). Similarly, Gay's statement that "[plaintiff] was paid less because of her gender" (NYSCEF # 91, ¶ 56) is deficient because Gay has no personal knowledge of DN's pay decision—Gay was only briefly employed by DN in 2013, six years before plaintiff and Shahrigian worked at DN (*id.* ¶¶ 4, 7; *see Mejia v Unique Developers Holding Corp*, 188 AD3d 574, 575 [1st Dept 2020] [an affidavit is "deficient for lack of personal knowledge of the [relevant] activities"]). Having alleged little facts to support these conclusions, Gay's affidavit lacks probative value

and cannot defeat defendants' summary judgment motion (*see Cillo v Resjefal Corp.*, 16 AD3d 339, 340 [1st Dept 2005] [affidavit had no probative value for lack of "any facts to support a conclusion"]; *Chekowsky v Windemere Owners, LLC*, 114 AD3d 541, 542 [1st Dept 2014] [statements unsupported by admissible evidence raise no triable issue of fact]).

Plaintiff then relies on her own affidavit to dispute that DN used a pay scale to determine reporters' wages (NYSCEF # 92, ¶¶ 16, 17 ["I do not believe that [DN] relies upon a pay scale or written formula in setting the compensation for reporters . . . I was not advised at the time I was hired that [DN] maintain[ed] a pay scale for the position for . . . a City Hall reporter"]). However, such mere belief is insufficient to overcome the evidence that DN produced for its pay scale (NYSCEF # 57; NYSCEF # 56, ¶¶ 6, 7; *see Grullon*, 297 AD2d at 263-264). And even if taken as true, this allegation only shows that plaintiff was not aware of a pay scale, not that DN did not maintain one.

Therefore, plaintiff "fail[s] to raise triable issues of fact as to whether [DN's] proffered reasons for [its pay] decisions were pretextual or incomplete" (*Hamburg*, 155 AD3d at 81 [granting summary judgment dismissing NYCHRL discrimination claim]). The branch of defendants' summary judgment motion dismissing plaintiff's NYCHRL discrimination claim is granted.

Plaintiff's Retaliation Claim – NYCHRL § 8-107 (7)

Turning to plaintiff's claim for retaliation under NYCHRL § 8-107 (7), an employer is prohibited from retaliating against an employee for opposing discriminatory practices (*see Forrest*, 3 NY3d at 313). To establish a prima facie case of retaliation under NYCHRL, plaintiff must show that: "(1) she has engaged in a protected activity; (2) her employer was aware that she participated in such activity; (3) she suffered an adverse employment action based upon her activity; and (4) there is a causal connection between the protected activity and the adverse action" (*id.* at 314). A time span of less than a month is "short enough to permit a jury to infer a causal connection" (*Alfano v Starbucks Corp*, 2012 N.Y. Slip Op. 31548[U] [Sup Ct, Nassau County 2012]; *see Krebaum v Capital One, N.A.*, 138 AD3d 528, 529 [1st Dept 2016]).

Courts analyze NYCHRL retaliation claims under the same burden shifting framework as discussed above in the context of NYCHRL discrimination claims. Upon plaintiff's showing of a prima facie case, the burden shifts to the defendant to show that it had legitimate, nonretaliatory reasons for its conduct (*Franco v Hyatt Corp.*, 189 AD3d 569, 571 [1st Dept 2020]). The burden then shifts back to plaintiff to produce evidence "demonstrat[ing] that defendants' proffered reason for their adverse actions were pretexts or motivated at least in part by retaliation" (*see Tihan v Apollo Mgt. Holdings, L.P.*, 201 AD3d 557, 559 [1st Dept 2022], *lv to appeal denied*, 38 NY3d 913 [2022]). At this stage, a plaintiff may rely on evidence comprising her prima facie case, including temporal proximity, together with other evidence such as inconsistent employer explanations, to defeat summary judgment

(*see Krebaum v Capital One, N.A.*, 138 AD3d 528, 529 [1st Dept 2016] [plaintiff's retaliation claim survived a defense summary judgment because of factors including temporal proximity]; *see also Zann Kwan v Andalex Group LLC*, 737 F3d 834, 847 [2d Cir 2013]).

Here, plaintiff argues that she has established a prima facie case of retaliation because she engaged in a protected activity by complaining of gender discrimination at DN and to the Council Speaker and Fermino, and because there was a sufficient causal connection between her complaint and her termination given the temporal proximity (NYSCEF # 65 at 16-18). Defendants do not dispute plaintiff's prima facie case but proffer legitimate, non-retaliatory reasons for plaintiff's termination (NYSCEF #s 60, 107). Specifically, York asserts that he terminated plaintiff for "disclos[ing] the specific amount of [Shahrigian's] pay" and "engag[ing] in behavior that caused a conflict of interest with her role as a reporter" (NYSCEF # 94 at 63:20-22; NYSCEF # 55, ¶ 28). Defendants submit copies of DN's code of conduct and employee handbook, violations of which could result in disciplinary action including termination (NYSCEF #s 43-45). Plaintiff, in turn, argues that defendants' proffered justification was a pretext contrived post-litigation, given that defendants fail to specify any particular ethics rule or policy that plaintiff violated, and that Fermino did not consider plaintiff's complaint to create a conflict of interest (NYSCEF # 65 at 19-20).

Viewing the record in the light most favorable to the non-movant, plaintiff has raised questions of fact as to whether defendants' proffered reasons for termination are pretextual or incomplete, precluding summary judgment dismissing the retaliation claim.

As an initial matter, a reasonable jury may find that plaintiff's complaint to the Council Speaker and Fermino was not a violation DN's code of conduct. None of the illustrative examples of conflicts of interest in DN's code of conduct resembles plaintiff's conduct or involves complaints about pay or discrimination (NYSCEF # 43 at 7-8; NYSCEF # 44 at 3-4).[2] In fact, the employee handbook explicitly states that it does not "preclude or dissuade employees from engaging in activities protected by state or federal law . . . such as discussing wages . . . [and] raising complaints about working conditions" (NYSCEF # 45 at 1). And while York claims that he terminated plaintiff for disclosing "the specific amount of Shahrigian's pay" (NYSCEF # 55, ¶ 28), the testimonies of plaintiff, Fermino, and the Council Speaker suggest that plaintiff only revealed the wage difference between herself and Shahrigian, not the actual amount of Shahrigian's wage (NYSCEF # 51 at 240:16-19; NYSCEF # 52 at 20:12-15; NYSCEF # 52 at 18:5-8). As such, the record creates a triable issue of fact as to whether York's reasons for terminating plaintiff are excuses or pretexts for retaliation (*see Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 25 [1st Dept 2014] [denying defense summary judgment where

[2] Defendants also cite the conflicts of interest rules applicable to Tribune's *editorial* employees for terminating plaintiff, who was not an editor (NYSCEF # 59, ¶ 29; NYSCEF # 44 at 3-4).

triable issues of fact exist as to whether defendant's stated reason was a pretext for retaliation]).

Further, the circumstances surrounding plaintiff's complaints of gender discrimination and her termination raise questions of fact about whether plaintiff's termination was at least partly motivated by retaliation. After plaintiff complained of gender discrimination during her April 9, 2020 phone call with Martinez and York, Martinez did not investigate into plaintiff's complaint (NYSCEF # 93 at 54-55). But on April 13, 2020 and May 7, 2020, Martinez and Moseley exchanged emails about "how to move forward" with plaintiff and how to "change [plaintiff's] work duties and responsibilities without being accused of retaliation" (NYSCEF # 82 at 1-2). Subsequently, York terminated plaintiff only three days after he learned of plaintiff's complaint to the Council Speaker and Fermino (NYSCEF # 55, ¶¶ 27, 28, 33; NYSCEF # 52 at 25:14-17, 26:2-24). A reasonable jury may infer retaliatory motives from the close temporal proximity between plaintiff's complaints and termination (*see Krebaum v Capital One, N.A.*, 138 AD3d 528, 528-529 [1st Dept 2016] [not dismissing retaliation claim on summary judgment given the one-month temporal proximity of plaintiff's complaint and termination]) and DN's failure to investigate into plaintiff's complaint of gender discrimination (*see Franco v Hyatt Corp.*, 189 AD3d 569, 572 [1st Dept 2020] [not dismissing retaliation claim on summary judgment because of "defendants' failure to adequately investigate [plaintiff's] claims prior to his termination"]).

As such, questions of fact exist as to whether defendants' proffered reasons for termination were pretextual or incomplete. The branch of defendants' summary judgment motion dismissing plaintiff's NYCHRL retaliation claim is denied.

York's Individual Liability for Aiding and Abetting

Lastly, plaintiff's complaint alleges that York is individually liable for aiding and abetting discrimination and retaliation (NYSCEF # 1 at 6-7). Plaintiff argues that individual employees may be liable under NYCHRL if they participated in the conduct giving rise to the discrimination claim (NYSCEF # 65 at 20).

While NYCHRL imposes liability on individuals who aid and abet an employer which commits employment discrimination (NYCHRL § 8-107 [1] [a], [6], [7]), "an individual cannot aid and abet his or her own violation of the Human Rights Law" (*Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014]; *see McIntosh v City of New York*, 79 Misc 3d 1231(A) [Sup Ct, Kings County 2023]). Here, defendants prevailed on their summary judgment motion on plaintiff's gender discrimination claim. As for the retaliation claim, since plaintiff alleged that York's own actions give rise to the retaliation claim, he cannot also be held liable for aiding and abetting the same (*Hardwick*, 116 AD3d at 468; *Perez v Y & M Transportation Corp.*, 219 AD3d 1449, 1451 [2d Dept 2023] [an individual defendant "may not be held liable for aiding and abetting his own violation of the NYCHRL"]).

Therefore, the branch of defendants' summary judgment dismissing plaintiff's causes of action against York in his individual capacity for aiding and

abetting discrimination and retaliation is granted. The third and fourth causes of action in plaintiff's complaint are dismissed.

CONCLUSION

In view of the above, it is

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint is granted only to the extent that plaintiff's first cause of action for gender discrimination, and the third and fourth causes of action against defendant Robert York, individually, are dismissed.

This constitutes the Decision and Order of the court.

04/10/2024
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE