

Torres v Vittoria Corp.
2008 NY Slip Op 32072(U)
July 21, 2008
Supreme Court, New York County
Docket Number: 0114667/2007
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Carol Edmead
Justice

PART 35

Torres, Lastenia

INDEX NO. 114667/07

MOTION DATE 3/7/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Victoria

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Based on the foregoing, it is hereby
 ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the first cause of action under the New York State Labor Law as against all defendants is denied; and it is further
 ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the fifth and tenth causes of action as against all defendants is granted, and such causes of action are dismissed; and it is further
 ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against individual defendants and against the corporate defendants to the extent that these causes of action seek punitive damages is granted; and it is further
 ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against the individual and corporate defendants to the extent that these causes of action are time-barred is granted, except that plaintiff may allege discriminatory conduct performed since February 2000 in support of her hostile work environment causes of action under the New York State and City Human Rights Laws; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against the individual defendants on the ground that co-employees cannot be held liable under New York State Human Rights Law is denied as to Arrigo, Guisepppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against the individual defendants on the ground that co-employees cannot be held liable under New York State Human Rights Law is granted as to Aldo, Jorge, Gary, Sam and William and the second and third causes of action against said defendants are dismissed; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the fourth cause of action (New York State Human Rights Law Aider and Abettor) against the individual defendants and Giuseppe Cipriani, and against the corporate defendants to the extent that these causes of action are time-barred is granted, except that any claims of discrete acts occurring prior to November 1, 2004 that are related to plaintiff's hostile work environment claim are not dismissed; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the seventh, eighth, and ninth causes of action to the extent that these causes of action are time-barred is granted, except that plaintiff may allege discriminatory conduct performed since February 2000 in support of her hostile work environment causes of action under the New York State and City Human Rights Laws; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that defendants shall serve and file an Answer to plaintiff's Complaint within 30 days of entry of this order; and it is further

ORDERED that the parties appear for a preliminary conference on October 14, 2008, 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JUL 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated 7/21/08

ENTER: [Signature], J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X
LASTENIA AMPARO TORRES,

Plaintiff,

Index No. 114667-2007

-against-

VITTORIA CORPORATION, VITTORIA CORPORATION d/b/a HARRY CIPRIANI, HARRY CIPRIANI RESTAURANT SERVICES, INC., HARRY CIPRIANI, INC., CIPRIANI GROUP, INC., CIPRIANI FIFTH AVENUE, LLC, DOWNTOWN RESTAURANT COMPANY, LLC, DOWNTOWN RESTAURANT CORP., ARRIGO CIPRIANI, GUISEPPE CIPRIANI, HASSAN ELGARRAHY, SERGIO VACA, CARLOS MARIANI, RICCARDO (aka RICARDO) FLORES, RAFAEL MORALES, FERNANDO SALVATIERRA, LEONE PASSERINI, ALDO ELKASHASH, JORGE RAMIREZ, GARY (aka GINTEAN SARACHI), SAM ELMOHAMADI JAD & WILLIAM PAZMINO,

Defendants.

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JUL 23 2008
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NEW YORK

MEMORANDUM DECISION

Having to deal with offensive names like "brute," "stupid," and "dumb Indian," and offensive comments like plaintiff was "only good for bed," "home and for sex," should "stay home like a woman should," "only good to take care of kids," "didn't deserve to work there," "should work somewhere else," and "crazy and lazy because she was not getting any sex," are some of the bases for this gender discrimination action.

Plaintiff, Lastenia Amparo Torres ("plaintiff"), commenced this action for damages resulting from defendants' discriminatory acts allegedly dating back to February 2000.

Defendants, comprising alleged owners, operators, and employees of the Sherry Netherland Cipriani restaurant ("Cipriani") located in Manhattan, move pursuant to CPLR

3211(a)(7) to dismiss the (1) first, fifth, and tenth causes of action as against all defendants; (2) second and third causes of action as against the individual defendants Arrigo Cipriani, Hassan Elgarrahy, Sergio Vaca, Carlos Mariani, Riccardo Flores, Rafael Morales, Leone Passerini, Fernando Salvatierra, Aldo Elkashash, Jorge Ramirez, Gary Sarachi, Sam Elmohamadi Jad and William Pazmino (the “individual defendants”),¹ and against Vittoria Corporation, Vittoria Corporation d/b/a Harry Cipriani, Harry Cipriani Restaurant Services, Inc., Harry Cipriani, Inc., Cipriani Group, Inc., Cipriani Fifth Avenue, LLC, Downtown Restaurant Company, LLC, and Downtown Restaurant Corp. (collectively, the “corporate defendants”) to the extent that these causes of action seek punitive damages, are time-barred, and not authorized under the law; (3) fourth cause of action against the individual defendants and Giuseppe Cipriani, and against all defendants to the extent that these causes of action are time-barred; and (4) seventh, eighth, and ninth causes of action to the extent that these causes of action are time-barred.

¹ Plaintiff alleges the following in her Complaint:

Arrigo Cipriani (“Arrigo”), “chairman and/or Chief Executive Officer,” Guisepe Cipriani (“Guisepe”), President and/or Managing Member, Hassan Elgarrahy (“Hassan”), Senior General Manager, Sergio Vaca (“Sergio”), Assistant Manager/Maitre’ D, Carlos Mariani (“Carlos”), Acting Assistant Manager/ Maitre’ D from April 2007 through October 2007, were plaintiff’s “immediate supervisor[s]” and “exercised power and control over” plaintiff’s employment at Cipriani. Hassan was hired and under the direct supervision of Arrigo and/or Guisepe. Sergio and Carlos was hired and under the direct supervision of Arrigo, Guisepe and/or Hassan.

Riccardo (aka Ricardo) Flores (“Riccardo”), Rafael Morales (“Rafael”), Leone Passerini (“Leone”) and Fernando Salvatierra (“Fernando”), from February 2000 to June 2005, were Captains of the corporate defendant and plaintiff’s “immediate supervisors” and “exercised power and control over” plaintiff’s employment at Cipriani. These defendants were hired by and under the direct supervision of Arrigo, Guisepe, Hassan, Sergio, and/or Carlos.

Aldo Elkashash (“Aldo”) and Jorge Ramirez (“Jorge”), and from April 2007 to October 2007, Ricardo, Rafael, Leone and Fernando, were servers. Gary Saraci, Sam Elmohamadi Jad and William Pazmino were bus persons. Each was hired by and under the direct supervision of Arrigo, Guisepe, Hassan, Sergio, Carlos, Riccardo, Rafael, Leone and/or Fernando.

Riccardo, Rafael, Fernando, Leone, Aldo, Jorge, Gary, Sam and William were given express authority to supervise plaintiff and exercised power and control over the plaintiff’s employment.

Arrigo, Guisepe, Hassan, Sergio, Carlos, Riccardo, Rafael, Fernando, Leone, Aldo, Jorge, Gary, Sam and William aided and abetted under New York State Executive Law §§ 296 and 297.

Complaint

Plaintiff, born in Columbia, was hired in February 2000 by the corporate defendants, and Arrigo and Guiseppe to work as a server (waiter) at Cipriani, a restaurant located in the Sherry Netherland Hotel on 5th Avenue in Manhattan (“Cipriani”). Since then, plaintiff has been employed as a “server.”

From February 2000 through October 2007, plaintiff experienced a hostile work environment, disparate treatment, unequal compensation based on gender, unlawful discrimination based on her sex, and retaliation for complaints she made concerning same, from the male employees and supervisors, Hassan, Sergio, Carlos, Riccardo, Rafael, Fernando, Leone, Aldo, Jorge, Gary, Sam, and William. Plaintiff was subjected to a hostile work environment and continually harassed by male employees and supervisors because she is a female. The hostile work environment was so pervasive, it became part of the culture of the work environment, effecting all female captains, servers, bus persons and other female staff. Defendants’ conduct included verbal abuse disparaging her gender, gender specific name calling, offensive and derogatory comments about females, comments indicating a general hostility toward women and women in the workplace and intimidation tactics directed at plaintiff because of her gender. Offensive names included “brute,” “stupid,” “dumb Indian.” Offensive comments included statements that plaintiff was “only good for bed,” should “stay home like a woman should,” “women didn’t deserve to work there,” that plaintiff “should work somewhere else,” that women were “only good to take care of kids, for home and for sex,” and that some customers did not want to be served by women. Defendants also made fun of other female employees, saying “they didn’t know if she was a man or a woman . . . ,” she was “crazy and lazy because she was not

getting any sex.” As a result, a few woman quit during 2000 through 2007.

Plaintiff informed Hassan, Sergio, Carlos, Riccardo, Rafael, Fernando, Leone, Aldo, Jorge, Gary, Sam and William that their comments and actions were unwelcome. However, defendants failed to cure their behavior. Plaintiff complained to the supervisors and managers Hassan, Sergio, Carlos, Riccardo, Rafael, Fernando, Leone, Arrigo and Guiseppe, who also witnessed such behavior, but they took no proactive measures to cure the hostile work environment.

The defendants’ conduct unreasonably interfered with plaintiff’s work performance.

Further, the corporate defendants’ training of management and employees was wholly inadequate, and they did not provide such training until May 2007.

In addition, the disparate treatment favoring male over female employees by the managers at Cipriani took the form of unfair and unequal shift assignments of captains, waiters, and bus persons; unfair and unequal distribution of tips and earning; disciplinary action taken by management and staff layoffs. For example, after plaintiff became a union member, she was not given full-time hours as guaranteed under the collective bargaining agreement. Plaintiff was the only server assigned part-time hours to work. Plaintiff was consistently assigned the breakfast shift that was notorious for generating lower tips than the lunch and dinner shifts.

Plaintiff commenced this action alleging hostile work environment, disparate treatment, unlawful discrimination based on plaintiff’s sex and retaliation, pursuant to New York State Labor Law §§ 190 and 194, New York State (Human Rights) Executive Law §§ 290, 296, and 297, and New York City (Human Rights) Administrative Code §§ 8-101, 8-102, and 8-107.

Plaintiff seeks damages for back pay, front pay, emotional distress, compensatory

damages, and punitive damages for mental anguish.

Defendants' Motion to Dismiss

In support of dismissal, defendants argue that plaintiff's New York State Labor Law (Unequal Wage) (the "Labor Law") cause of action alleges nothing more than language mirroring the statutory language, and is thus, insufficient to survive dismissal. Even accepting the allegation that plaintiff was assigned to the less favorable breakfast shift because of her gender, the proper inquiry in an unequal wage claim is not whether male employees were assigned to higher paying shifts, but rather, whether female and male employees working the *same shifts* were paid equally by the employer. Plaintiff cannot maintain a discriminatory shift assignment claim, because she fails to proffer any facts that men and women working the same shifts, or performing "equal work" were paid at different wage rates. For example, plaintiff fails to allege facts about how much men were paid, how much she was paid, that the hourly wage rate of the lunch and dinner shifts were higher than the breakfast shift, or that her average weekly wages were lower than the average weekly wages of male employees performing equal work.

Also, there are no allegations that the individual defendants had sufficient ownership interests in the corporate employers, or power to do more than carry out personnel decisions made by others, so as to maintain a Labor Law suit against them. The mere allegation that the individual defendants were supervisors and exercised control over plaintiff's employment is insufficient.

Further, any alleged violations of the Labor Law statute related to plaintiff's equal pay claims that occurred six years prior to the filing of her Complaint are time-barred. Thus, plaintiff's Labor Law cause of action should be dismissed.

In addition, plaintiff's second and third causes of action under the New York State Human Rights Law fail against the individual defendants because as with the Labor Law, said defendants cannot be held individually liable simply based on the allegation that they are plaintiff's supervisors or that they exercised power and control over her employment.

Nor can plaintiff's claim for punitive damages in her second and third causes of action be sustained, since such damages are not recoverable under the New York State Human Rights Law.

Plaintiff's fourth cause of action against the individual defendants also fails because individuals employed by the same corporate employer as plaintiff are not subject to liability as aiders and abettors pursuant to New York State Human Rights Law. Further, claims that the individual defendants aided and abetted discrimination and retaliation are barred to the extent that they are based on conduct that allegedly occurred prior to November 1, 2004.

Furthermore, to the extent the claims underlying plaintiff's second, third, seventh, eighth and ninth causes of action for discrimination, retaliation and aiding and abetting same pursuant to the New York State and City Human Rights Law occurred prior to November 1, 2004 (or three years prior to the filing of her Complaint), such claims are time-barred.

Plaintiff's fifth and tenth causes of action for negligence and negligent infliction of emotional distress fail because (1) plaintiff failed to allege that the individual defendants owed her any duty or breached that duty, (2) negligence claims are expressly preempted by the Workers' Compensation Law, and (3) the negligence claims are duplicative of plaintiff's statutory claims, which seek damages for emotional distress based on the same alleged conduct.

Plaintiff's Opposition and Cross-Motion

In opposition, plaintiff argues that defendants' motion, unsupported by any affidavits or evidence, is insufficient. Also, no discovery has been exchanged. Further, the Complaint describes a multitude of actions by defendants, including first hand accounts and conversations heard by plaintiff. Plaintiff claims that her complaint alleges sufficient factual details to support her claims under the New York Labor Law and New York State and City Human Rights Laws. Plaintiff also submits tip earning spreadsheets/schedules prepared by defendants, demonstrating that the shift assignments and tip earnings were based on gender with respect to servers. New York Labor Law and New York State Human Rights Laws have been successfully applied to unequal shift assignment/unequal tip earnings in restaurants.

Plaintiff argues that the individually named defendants who actually participate in the conduct giving rise to a discrimination claim may be held personally liable under the New York State and New York City Human Rights Laws. Even if caselaw required that the individual defendants have an ownership interest and power to do more than carry out personnel decisions made by others, Arrigo, as chairman and/or CEO, Guiseppe, as President and/or Managing Member, satisfy this element. Further, Hassan played a major role in how employees are treated at Cipriani. Elgaharry, as "Senior General Manager" was plaintiff's immediate supervisor, with control over hiring and firing employees, shift assignments, and discipline of employees without consulting Arrigo or Guiseppe. Sergio, as Assistant Manager/Maitre' D, Carlos as Acting Assistant Manager/Maitre' D, and Captains Riccardo, Rafael, Leone, and Fernando, were plaintiff's immediate supervisors and exercised power and control over her employment. Sergio and Carlos had authority to hire staff and assign shifts to servers and bus persons.

The remainder of the individually named defendants aided and abetted the discriminatory acts, as having actually participated in the conduct giving rise to the discrimination, and may be held personally liable. Furthermore, even if the Court were to dismiss plaintiff's New York Labor Law claims against the individually named defendants, all individually named defendants may still be held liable under the aider and abetter theories under New York State Human Rights Law and New York City Human Rights Law for the reasons noted above. The Complaint contains numerous factual allegations against the individual defendants for acts of sexual discrimination, retaliation, and aiding and abetting said discrimination and retaliation, including name calling, threats, and comments.

Further, the facts occurring outside the six-year statute of limitations are not barred in light of the "continuing violation doctrine." The violations by defendants of the New York Labor Law have continued from February 2000 until November 1, 2007, and thus constitute an ongoing, "continuous policy or practice" of defendants under the "continuing violation doctrine," and are not isolated events. The continuous violation doctrine applies to violations of the New York Equal Pay Act and her hostile work environment, disparate treatment and retaliation at her workplace.

Plaintiff's negligent infliction of emotional distress claim is also adequately pled. Plaintiff alleged fear of physical safety, felt humiliated and nervous, and became physically ill.

Nor is plaintiff's sexual harassment claim barred by the Worker's Compensation Law. Defendants have not even shown that they have worker's compensation insurance and that such insurance would be a remedy available to plaintiff.

Furthermore, plaintiff's negligence and reckless claims are not duplicative of her statutory

claims. One may plead alternative, even conflicting theories of liability based on the same conduct.

As to her punitive damages, plaintiff contends that while such damages are not recoverable under New York State Human Rights Laws, they are recoverable under the New York City Human Rights Laws.

Plaintiff also cross moves to vacate the *ex parte* order of the Court (Stackhouse, J.) pursuant to CPLR 5015(a)(3), which granted defendants an extension of time to Answer the Complaint on the ground that the order was based on a misrepresentation by defendants. Plaintiff disputes defense counsel's representations made in support of the *ex-parte* order, that plaintiff's counsel was unreasonable in denying a request for more time to Answer. Plaintiff's counsel agreed to an extension of time on the condition that defendants waive the affirmative defense of lack of jurisdiction, a defense defendants waived by failing to raise it in their first CPLR 3211 motion. Thus, defendants should not have the benefit of an extension which was granted on their attorneys' misrepresentation. Upon *vacatur* of the order granting defendants an extension of time to Answer, a default judgment should be entered against them for failing to submit an Answer within 20 days of plaintiff's service of the Complaint between November 1, 2007 and November 7, 2007.

Based on the frivolous actions of defendants, costs, and attorneys' fees against defendants should be awarded plaintiff pursuant to NYCRR 130-1.² Defendants' conduct, including making the instant motion, has had the effect of prolonging this litigation without just cause.

² By correspondence dated March 31, 2008, plaintiff later withdrew her original request for sanctions.

Opposition to Cross-Motion and Reply In Support of Motion

In opposition to plaintiff's cross-motion, defendants claim that its seeking of an *ex-parte* order for an extension of time was reasonable, and not based on any misrepresentation or fraudulent statement to the Court. Further, defendants never asserted the defense of lack of personal jurisdiction. Nor is there any basis in law or in fact for the entry of default judgment against defendants. Defendants properly sought an extension of time to answer, have done nothing to warrant a *vacatur* of the court order, and defendants' pre-answer motion to dismiss was timely filed, which extends defendants' time to answer to 10 days after service of the order deciding the motion with notice of entry.

In further support of its motion, defendants argue that they are not seeking dismissal of plaintiff's hostile work environment claim as insufficiently pled on its face. For her New York Labor Law claim, plaintiff must allege that female employees were paid less than male employees for equal work. Instead, plaintiff's New York Labor Law claim, which consists solely of allegations of discriminatory shift assignments and layoffs, is devoid of any allegation of discriminatory pay for equal work. While allegations of discriminatory shift assignments and layoffs may support a discriminatory treatment claim under New York State and City Human Rights Laws, they cannot support a claim under the New York Labor Law. The caselaw cited by plaintiff in support of her Labor Law claim did not involve New York Labor Law. Even if they could, plaintiff's New York Labor Law claim against her co-workers fails because they are not subject to individual liability thereunder. None of the caselaw plaintiff cites in support of holding the individual defendants liable even mention New York Labor Law. Holding a managerial title or exercising control over plaintiff's employment is insufficient.

Further, plaintiff's claims against the individual defendants fail because the Complaint does not allege facts sufficient to show that they are her "employer." The aider and abetter language provision only applies to parties outside the employment relationship who may assist in employment discrimination. Moreover, claims against the individual defendant based on the same conduct supporting the aiding and abetting claim must fail because a primary actor cannot be an aider and abettor of his own actions. Similarly, plaintiff's retaliation claims against the individual defendants fail under New York State Human Rights Law, which excludes individuals in situations in which the parties are within the scope of a common employment relationship.

Defendants do not argue that plaintiff's sexual harassment claims under New York State or New York City Human Rights Laws are time-barred. Instead, to the extent plaintiff seeks to recover for discrete acts of discrimination, harassment and retaliation that occurred more than three years ago, they are time-barred. Moreover, plaintiff's retaliation claims are not subject to the continuing violation doctrine.

Further, plaintiff concedes that she cannot obtain punitive damages pursuant to New York State Human Rights Law.

Finally, plaintiff's negligence and reckless claims, and negligent infliction of emotional distress claims are barred by the exclusivity provision of the New York Worker's Compensation Law, fail to state a cause of action, and are duplicative of plaintiff's statutory claims. Defendants do not have to show that plaintiff would be entitled to payment under the applicable Workers' Compensation policy for plaintiff's negligence claims to be barred by New York Worker's Compensation Law. Moreover, while plaintiff can plead alternatively, plaintiff cannot plead claims duplicative of statutory claims. Also, plaintiff's negligent infliction of emotional distress

claim is barred by the three-year statute of limitation, and here, the alleged physical conduct occurred more than seven years prior to the filing of the Complaint.

Sur-Reply

Plaintiff argues that she is not required to prove her case in the Complaint alone. Defendants failed to provide any evidence of acts that are “discrete” and outside of the three-year statute of limitations. Defendants also failed to provide evidence that the individual defendants do not fall within the definition of employer under the New York State Human Rights Law. Further, the issue of retaliation was not briefed at all by defendants in their original motion papers and should be discounted as improper as a subject for reply papers. Similarly, defendants’ arguments raised for the first time in reply regarding the continuous violation doctrine should be ignored. Further, the submission of the Attorney General Press Release is proper to show defendants’ propensity to discriminate and their policy to do so.

Further, though not required here, plaintiff has proof of physical violence in the workplace based on her sex and subsequent retaliation by male co-workers. The violence was a part of the continuing violation of defendants.

Analysis

In determining a motion to dismiss, the Court’s role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On a motion to dismiss made pursuant to CPLR § 3211, the pleading must be liberally construed and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*see* CPLR

§3026; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Dismissal of First, Fifth, and Tenth Causes of Action as Against All Defendants

As to plaintiff's first cause of action, New York Labor Law § 194 (Equal Wage) provides that:

No employee shall be paid a wage at a rate less than the rate at which an employee of the

opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar conditions. . . .

To sustain a claim under the New York Labor Law § 194, the plaintiff must allege that (1) the employer pays different wages to members of the opposite sex, (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility, and (3) the jobs are performed under similar working conditions (*see Quinn v JPMorgan Chase & Co.*, 12 Misc 3d 1160, 819 NYS2d 212 [Sup Ct New York County 2006]). Allegations that merely mirror the statutory language are insufficient to allege an unequal pay claim (*Kent v Papert Companies, Inc.*, 309 AD2d 234, 764 NYS2d 675 [1st Dept 2003]).

In support of her New York Labor Law claim, plaintiff essentially alleges that there was a marked tip earning differential among the breakfast, lunch and dinner shifts, and that she was consistently assigned the breakfast shift which generated lower tips.³

Defendants insist that the proper inquiry is whether males and females working the *same* shift received the same wages. At first blush, defendants' contention that men and women consistently assigned to the "breakfast" shift are paid equally would appear to defeat plaintiff's New York State Labor Law claim. However, the Court is not inclined to adopt the strictures proffered by defendants. Defendants' practices are discriminatory in operation since women are assigned to the lower earning breakfast shift. Moreover, there is no legal support for such a

³ Although the "Legislature elected not to define that term ["wages"] in Labor Law § 190(1) so expansively as to cover all forms of employee remuneration" the "wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled" (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220 [2000]). Defendants have not contested that gratuities or tips do not fall within the definition of "wages" under New York State Labor Law.

restrictive approach to the statute. In fact, courts have rejected an employer's assignment of males to higher paying shifts while assigning women to lower paying shifts (*see e.g., Hodgson v Corning Glass Works*, 474 F2d 226 [2d Cir. 1973] *affd.* 417 US 188 [1974] [violation of Equal Pay Act where male night inspectors were paid more than day women inspectors]; *Brennan v Sheridan Lanes, Inc.*, 9 Fair Empl. Prac. Cas. (BNA) 990]).

The differentials here at issue arise, not because of the gender of the employee assigned to a particular shift, but because of the nature of the goods provided during different times of the day. The differentials in tip earnings between the breakfast and lunch/dinner shifts exist even if the breakfast and lunch/dinner shifts were assigned to both men and women equally. However, based on a reading of the Complaint, plaintiff claims that she and other women were consistently assigned to the position of "breakfast" servers, which received less wages, and that she performed the same work as male "lunch" or "dinner" servers, under substantially similar working conditions, and that these assignments were based on the employees' gender. Further, there appears to be no difference from shift to shift in the performance of the employees' jobs as servers and that the skill exercised by breakfast shift servers and lunch/dinner servers is substantially equal (*see Hodgson v Corning Glass Works*, 474 F2d 226; *Brennan v Sheridan Lanes, Inc.*, 9 Fair Empl. Prac. Cas. (BNA) 990). Thus, the allegations that male employees were paid at higher wage rates compared with females due to job assignments based on gender, that plaintiff received a lower wages, *i.e.*, gratuities, as a result of her assignment to the breakfast shift, and that such assignments were based on gender, sufficiently state a claim under New York State Labor Law.

Although plaintiff's allegations are sufficient to sustain a New York State Labor Law

violation claim, such allegations are insufficient as to certain individual defendants. A corporate employee, even with a title as an officer, manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on age or sex under New York State Labor Law if it is not alleged that he or she has any ownership interest or any power to do more than carry out personnel decisions made by others (*Patrowich v Chemical Bank*, 63 NY2d 541 [1984]).

The decisions to which plaintiff cites for the contention that individuals may be held liable for "state employment discrimination claims" do not warrant a different result, as they were not decided under New York State Labor Law, but under New York State and/or City Human Rights Laws (*Steadman v Sinclair*, 223 AD2d 392 [1st Dept 1996] [holding individual liable as aider and abettor of wrongful retaliation under Executive Law § 296(6), as supported in case law holding that "an individual may be held liable for aiding discriminatory conduct"]; *Peck v Sony Music Corp.* (221 AD2d 157 [1st Dept 1995] [Executive Law §§ 296(6) and 296(7) provide that an individual may be held liable for aiding and abetting discriminatory conduct]). Furthermore, *Tomka v Seiler Corp.* (66 F3d 1295 [2d Cir 1995]), which intimates that individual defendants with mere supervisory control may be held liable for Labor Law violations, does not represent the current state of the law as articulated by the Court of Appeals. The Court of Appeals has not modified the requirement that an individual be found to have either an ownership interest or power to do more than carry out personnel decisions made by others prior to the imposition of individual Labor Law liability.

Here, plaintiff alleges that Arrigo, as chairman and/or CEO, Guiseppa, as President and/or Managing Member, satisfy this element. Further, Hassan, as Senior General Manager,

played a major role in how employees are treated at Cipriani. Elgaharry, as "Senior General Manager" was plaintiff's immediate supervisor, with control over hiring and firing employees, shift assignments, and discipline of employees without consulting Arrigo or Guiseppe. Sergio, as Assistant Manager/Maitre' D, Carlos as Acting Assistant Manager/Maitre' D, and Captains Riccardo, Rafael, Leone, and Fernando, were plaintiff's immediate supervisors and exercised power and control over her employment. Sergio and Carlos had authority to hire staff and assign shifts to servers and bus persons. According plaintiff the benefit of every possible favorable inference, and in the absence of any documentary evidence flatly contradicting the allegations, it may be reasonably inferred that any of these individuals had the power to do more than carry out personnel decisions made by others. Thus, such allegations are sufficient to state a claim against Arrigo, Guiseppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando for employment discrimination, hostile work environment, and retaliation. Plaintiff need not prove these allegations at this juncture. Therefore, defendants' motion to dismiss the first cause of action as against the individual defendants is denied as to Arrigo, Guiseppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando.

However, the first cause of action against Aldo, Jorge, Gary, Sam and William is dismissed, given that the Complaint merely alleges that they were given authority by several of the other defendants to criticize plaintiff's work; it is not alleged that any of such defendant has any ownership interest or any power to do more than carry out personnel decisions made by others.

As to the timeliness of plaintiff's New York State Labor Law claims, it is undisputed that claims under this statute are governed by a six-year statute of limitations (N.Y. Labor Law §

198[3]). While discrete acts occurring prior to the six-year period are barred (*Quinn v JPMorgan Chase & Co.*, 12 Misc 3d 1160, 819 NYS2d 212 [Supreme Court New York County 2006]), the “continuous violation doctrine” has been applied to equal pay claims under New York Labor Law (*Summers v County of Monroe*, 147 AD2d 949, 537 NYS2d 703 [4th Dept 1989] [equal pay for equal work claim is properly maintained against the county. As a continuing wrong, it is not barred by the Statute of Limitations]). “In the context of the Equal Pay Act, the statute of limitations does not dictate which co-workers the plaintiff may submit as comparators” (*Kent v Papert Companies, Inc.*, 309 AD2d 234, *supra* [Thus, “it is no defense . . . that unequal payments began prior to the statutory period that is, before the three-year limitations period, when Picano and Huck were paid more than plaintiff was for comparable work]). As *Brinkley-Obu* teaches, evidence of greater wage payments made to male counterpart(s) for similar work occurring outside the limitations period may be used to prove the existence of discrimination in that plaintiff was paid less on account of her sex within the statutory period (*Id.*). Thus, to the extent plaintiff’s Complaint alleges acts of unequal wage payments dating back to February 2000, and that they evidence that plaintiff was paid less within the statutory period as a result of her gender, such claims are not time-barred. Therefore, defendants’ claim that plaintiff’s New York State Labor Law claim must be limited to the six-year period preceding the filing of the complaint lacks merit. And, defendants’ application to dismiss plaintiff’s first cause of action pursuant to New York Labor Law is denied.

As to plaintiff’s fifth cause of action for negligence, carelessness, and recklessness, even assuming, *arguendo*, that plaintiff has adequately stated a cause of action for such claims, they are barred by the Workers’ Compensation Law (*Gerson v Giorgio Sant’Angelo Collectibles*,

Inc., 176 Misc 2d 388, 671 NYS2d 958 [Supreme Court New York County 1998]). Workers' Compensation Law § 29(6) states that “[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee ... when such employee is injured or killed by the negligence or wrong of another in the same employ.” Therefore, since negligence is exclusively covered by the Workers' Compensation Law, the fifth cause of action is dismissed.

As to plaintiff's tenth cause of action for negligent infliction of emotional distress, since negligence is exclusively covered by the Workers' Compensation Law, the claim for negligent infliction of emotional distress must therefore be barred (*Gerson v Giorgio Sant'Angelo Collectibles, Inc.*, 176 Misc 2d 388, *supra*; *Jones v Eastman Kodak Co.*, 8 Misc 3d 1001 [Supreme Court New York County 2005]). Therefore, the tenth cause of action is dismissed.

Dismissal of Second and Third Causes of Action as Against Individual Defendants

Defendants seek dismissal of plaintiff's second (discrimination/hostile work environment) and third (retaliation) causes of action under the New York State Human Rights Law as asserted against the individual defendants.

In *Patrowich (supra)*, the New York Court of Appeals expressly held that an employee may not be sued individually under the New York State Human Rights Law “if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others” (63 NY2d at 542; *see also, Dorvil v Hilton Hotels Corp.*, 25 AD3d 442 [1st Dept 2006]; *Gallegos v Elite Model Mgmt. Corp.*, 28 AD3d 50 [1st Dept 2005]). According plaintiff the benefit of every possible inference, and in the absence of any documentary evidence to the contrary, the allegations in support of plaintiff's Labor Law claim are equally sufficient to sustain her claims against Arrigo, Guisepppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando

for employment discrimination, hostile work environment, and retaliation. Therefore, defendants' motion to dismiss the second and third causes of action as against the individual defendants is denied as to Arrigo, Guiseppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando.

However, the second and third causes of action against Aldo, Jorge, Gary, Sam and William is dismissed, for the same reasons supporting dismissal of plaintiff's Labor Law claim against them.

Defendants' separate basis for dismissal of the third cause of action (retaliation) against the individual defendants rests on the theory the term "person" proscribed therein does not include "individuals in situations in which the parties stand within the scope of a common employment."⁴ Such argument is improperly raised for the first time in reply. Furthermore, such contention is unpersuasive to support dismissal of the third cause of action as against all individual defendants in light of *Patrovich*, and thus, cannot defeat the claims alleged against Arrigo, Guiseppe, Elgarrahy, Sergio, Riccardo, Rafael, Leone, and Fernando, who allegedly have ownership interests or power to do more than carry out personnel decisions made by others.

Dismissal of Punitive Damage Claim in the Second and Third Causes of Action

Further, defendants' request that the punitive damages claim alleged in plaintiff's second and third causes of action as against the corporate defendants be dismissed is granted. Plaintiff concedes that punitive damages are not recoverable under the New York State Human Rights

⁴ NY Exec. Law § 296 (7) provides: It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

Law. Therefore, plaintiff's claim for punitive damages in her second and third causes of action is dismissed and stricken from her Complaint.

Dismissal of Second, Third, Seventh, Eighth and Ninth Causes of Action as Time-Barred

Plaintiff's second, third, seventh, and eighth causes of action for employment discrimination, hostile work environment, and discriminatory retaliation under New York State and City Human Rights Laws, and ninth cause of action for aiding and abetting same under the New York City Human Rights Law are governed by a three year statute of limitations (N.Y. Executive Law § 297(9); CPLR § 214(2); NYC Admin Code § 8-502[d]).

Ordinally, a discrete discriminatory act which occurs outside the statute of limitations is not actionable, even when it relates to other acts which occurred within the period (*Quinn v JPMorgan Chase & Co.*, 12 Misc 3d 1160, 819 NYS2d 212 [Supreme Court New York County 2006] citing *National RR Passenger Corp. v Morgan*, 536 US 101, 113 [2002]). "However, a hostile work environment consists of a series of separate discriminatory acts that collectively constitute one unlawful employment practice. . . . Thus, so long as at least one discriminatory act falls within the statutory period, the action is timely" (*Id.*)

As such, plaintiff's claims for discrimination based on sex and retaliation arising from discrete acts occurring before November 1, 2004, including claims related to being laid off in 2001 and 2002 and discriminatory assignments of shift, are time-barred. However, acts alleged in support of plaintiff's hostile work environment claim that occurred prior to November 1, 2004 are actionable, provided they are part of an overall hostile work environment claim of which at least one act occurred within the statutory period (*Quinn v JPMorgan Chase & Co.*, 12 Misc 3d 1160, 819 NYS2d 212 [Supreme Court New York County 2006]).

In this regard, the Court notes that plaintiff alleges that since February 2000 and continuing through October 2007, the sexual harassment she underwent became so pervasive that it became part of the culture of the work environment. There was a marked tip differential between the breakfast, lunch and dinner shifts at Cipriani. Plaintiff was consistently assigned the breakfast shift, which was known as generating lower tips than the other shifts. Plaintiff was also the only server assigned part-time hours to work. Plaintiff made repeated formal complaints to Local 6. Although defendants were made aware of plaintiff's complaints to the Union, defendants did nothing to address her complaints. Plaintiff was also assigned tasks outside of her usual duties as a server, such as cashier, room service, food preparation and set up. However, none of the male servers or other employees at Cipriani were given tasks outside of their duties or titles. When plaintiff was hired in 2000, there were no female captains or female locker rooms. Complaints were filed with the Office of Attorney General, which later posted a "Notice" in the restaurants owned by the corporate defendants, instructing employees of their rights to file complaints against any of the corporate defendants. In 2000, a co-employee "squeezed her hard" in attempt to cause her to drop the trays she was carrying "so that she would be fired." Ricardo harassed plaintiff with comments that he "enjoyed Columbian women," asked her to perform the job of a captain when she was a runner, and discouraged her from complaining further. When plaintiff returned to work after the lay off period, plaintiff found packages of meat in her locker. Cipriani closed its dining room from June 2005 to April 2007 and only provided room service, plaintiff was not one of the staff members asked to work there. Cipriani reopened its doors to the public in April 2007, and continued making offensive comments about plaintiff's sex life and scheduling her and other female staff for the breakfast shifts while scheduling the male staff for

lunch and dinner shifts. Management even thwarted plaintiff's attempts to change shifts with another server. Thus, to the extent such claims support her hostile work environment claims, they are not time-barred.

Therefore, defendants' motion to dismiss claims in the second, third, seventh, eighth and ninth causes of action for employment discrimination, hostile work environment, and discriminatory retaliation under New York State and City Human Rights Laws, and ninth cause of action for aiding and abetting same under the New York City Human Rights Law occurring beyond the three-year period prior to the filing of the Complaint is granted, except that plaintiff may allege discriminatory conduct performed since February 2000 in support of her hostile work environment causes of action under the New York State and City Human Rights Laws.

Fourth Cause of Action

Defendants' claim that they cannot be held individually liable under the aider and abettor provision of the New York State Human Rights Law lacks merit.

While it has been stated that only employers and employee-owners or those with specified authority are subject to employment discrimination suits under the Human Rights Law (*Trovato v Air Express Intern.*, 238 AD2d 333, 655 NYS2d 656 [2d Dept 1997] citing Executive Law § 296(1) (a); *Patrowich v Chemical Bank*, *supra*; compare, Executive Law § 296(3)(b)), New York State Human Rights Law makes it unlawful for "any person to aid, abet, incite, compel or coerce" such discrimination (N.Y. Exec. Law § 296(6)). This provision creates individual liability for any person who "actually participates in the conduct giving rise to a discrimination claim" (*Henry v Wyeth Pharmaceuticals, Inc.*, 2007 WL 4526525 [SDNY 2007]).

Defendants' contention that individuals employed by the same corporate employer as

plaintiff are not subject to liability as aiders and abettors pursuant to New York State Human Rights Law is unpersuasive. Defendants rely upon the conclusion reached by the Monroe County Supreme Court in *Foley v Mobil Chem. Co.* (170 Misc 2d 1 [1996]), that the “Legislature intended application of the aider and abettors provision only to ‘parties outside the employment relationship who may assist in employment discrimination’” and the statement by the Second Department in *Trovato v Air Express Intern.* (238 AD2d 333, *supra*), that “To find a coemployee liable as an aider and abettor would ignore the statutory and legal authority limiting the parties who may be sued for employment discrimination.”

However, in the following year, the Second Department first explained in *Murphy v ERA United Realty* (251 AD2d 469 [1998]) that the employer’s acts of unlawful discrimination serves as the predicate for imposing “liability on others for aiding and abetting,” and therefore, plaintiff stated a cause of action against the coemployees under New York State Human Rights Law. Notably, the Court held that *Patrowich v Chemical Bank*, did not discuss liability under the aiding and abetting theory, and therefore, did not warrant a different conclusion. Next, the Second Department concluded that its “broad language in *Trovato* . . . should not be read to rule out a cause of action pursuant to Executive Law § 296 (6) against a coemployee who is alleged to have actively aided and abetted the employer in acts prohibited under Executive Law article 15” (emphasis added). The Second Department distinguished *Trovato* on the facts, concluding that the plaintiffs in *Trovato* were “not classic direct victims of sexual harassment for whom the Human Rights Law protections were created.” The *Murphy* Court then found that the plaintiff therein alleged wrongful conduct by the owner-employer which the coemployees aided and abetted and that there was a pervasive course of conduct by three individuals against the plaintiff.

Therefore, contrary to defendants' contention, individuals employed by the same corporate employer as plaintiff may be subject to liability as aiders and abettors pursuant to New York State Human Rights Law.

The Court notes that defendants' contention, that an employee cannot be held liable for aiding or abetting their own violations of the New York State Human Rights Law is improperly raised for the first time in reply. In any event, defendants' reliance on *Strauss v New York State Dept. of Education* (26 AD3d 67, 805 NYS2d 704 [3d Dept 2005]) for this contention is misplaced. In *Strauss*, the plaintiff brought a Title VII and New York State Human Rights Law action against her employer, State Education Department ("SED"), the Department of Labor ("DOL"), and a director at DOL ("Mr. Drago"), with whom plaintiff interacted in administering apprenticeship programs established by DOL. The Court concluded that as there was no evidence that Mr. Drago or DOL had any authority to hire, transfer, promote, discharge or discipline plaintiff, SED and DOL were not "a single employer" for purposes of determining liability under Title VII and the New York State Human Rights Law. Further, Mr. Drago, who did not have authority to hire or discharge plaintiff, was not "subject to [individual] liability under Title VII." In determining whether Mr. Drago could be held liable under the aiding and abetting provision of the New York State Human Rights Law, the Court stated that "Where no violation of the Human Rights Law by another party has been established, we find that an individual employee cannot be held liable for aiding or abetting such a violation." It was in this context that the Court further stated that "individuals cannot be held liable under Executive Law § 296(6) for aiding and abetting their own violations of the Human Rights Law."

However here, the Court is not presented with a motion for summary judgment and there

has been no finding that none of the defendants violated the New York State Human Rights Law.

Therefore, plaintiff may seek to hold the individual defendants liable as aiders and abettors of prohibited discriminatory acts under New York Labor Law (*Steadman v Sinclair*, 223 AD2d 392, 636 NYS2d 325 [1st Dept 1996] [“an individual may be held liable for aiding discriminatory conduct]).

Here, plaintiff’s Complaint alleges specific acts by the individual defendants in aiding and abetting sexual discrimination and retaliation by name calling, comments, actions, gestures, threats, physical abuse, and interference with plaintiff’s ability to perform her tasks, all based on plaintiff’s gender. Plaintiff also alleges that the individual defendants witnessed discriminatory conduct and were told of same, but failed to take any steps to end the discrimination.

In light of the above, defendants’ application to dismiss the fourth cause of action on the ground that the individual defendants cannot be held liable under the aider and abetter provision of the New York State Human Rights Law is denied.

However, given that plaintiff’s New York State Human Rights Law claims for gender discrimination and retaliation arising from discrete acts occurring beyond three year prior to November 1, 2007 are time-barred (see pages 21-23), any claims against the individual and corporate defendants for aiding and abetting such actions are likewise time-barred.

Therefore, defendants’ application to dismiss the fourth cause of action against the individual and corporate defendants as time-barred is granted, except that any claims of discrete acts occurring prior to November 1, 2004 that are related to plaintiff’s hostile work environment claim are not dismissed.

Plaintiff's Cross-Motion for Default Judgment

Notwithstanding the discrepancy between plaintiff's and defendants' counsel regarding defendants' request for the extension of the time to submit an Answer, the Court concludes that vacatur of the Court's order (Stackhouse, J.) is unwarranted. In light of the strong public policy in favor of resolving cases on the merits, and the absence of any indication of an intent to abandon the defense of this discrimination action, the Court declines to vacate the order or enter a default judgment against the defendants (*see White v Incorporated Village of Hempstead*, 13 Misc 3d 471, 819 NYS2d 463 [Supreme Court New York County 2006]). Therefore, plaintiff's application in this regard is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the first cause of action under the New York State Labor Law as against all defendants is denied; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the fifth and tenth causes of action as against all defendants is granted, and such causes of action are dismissed; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against individual defendants and against the corporate defendants to the extent that these causes of action seek punitive damages is granted; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to

dismiss the second and third causes of action as against the individual and corporate defendants to the extent that these causes of action are time-barred is granted, except that plaintiff may allege discriminatory conduct performed since February 2000 in support of her hostile work environment causes of action under the New York State and City Human Rights Laws; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against the individual defendants on the ground that co-employees cannot be held liable under New York State Human Rights Law is denied as to Arrigo, Guiseppe, Elgarahy, Sergio, Riccardo, Rafael, Leone, and Fernando; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the second and third causes of action as against the individual defendants on the ground that co-employees cannot be held liable under New York State Human Rights Law is granted as to Aldo, Jorge, Gary, Sam and William and the second and third causes of action against said defendants are dismissed; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the fourth cause of action (New York State Human Rights Law Aider and Abettor) against the individual defendants and Giuseppe Cipriani, and against the corporate defendants to the extent that these causes of action are time-barred is granted, except that any claims of discrete acts occurring prior to November 1, 2004 that are related to plaintiff's hostile work environment claim are not dismissed; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 3211 (a)(7) to dismiss the seventh, eighth, and ninth causes of action to the extent that these causes of action are

time-barred is granted, except that plaintiff may allege discriminatory conduct performed since February 2000 in support of her hostile work environment causes of action under the New York State and City Human Rights Laws; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

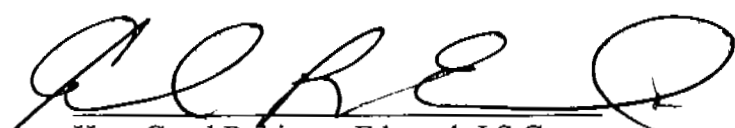
ORDERED that defendants shall serve and file an Answer to plaintiff's Complaint within 30 days of entry of this order; and it is further

ORDERED that the parties appear for a preliminary conference on October 14, 2008, 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 21, 2008


Hon. Carol Robinson Edmead, J.S.C.

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COUNTY CLERK'S OFFICE
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