Silberfeld v ABC Carpet Co., Inc.
2010 NY Slip Op 30846(U)
March 25, 2010
Supreme Court, New York County
Docket Number: 104508/08
Judge: Marylin G. Diamond
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SCANNED ON 4/14/2010

[* 1]

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

PRESENT: MARYLIN G. DIAMOND PART 48

Index Number : 104508/2008

SILBERFELD, KIVA

VS.

ABC CARPET

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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 is decided pursuant to the attached decision and order.

ENTER

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/25/10

MGD
MARYLIN G. DIAMOND J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 48

KIVA SILBERFELD,

Plaintiff,

Index No.: 104508/08

- against -

DECISION/ORDER

ABC CARPET CO., INC., MADELINE WEINRIB and JOHN LASKALZO,

Defendants.

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

MARYLIN G. DIAMOND, J.:

In this action, plaintiff Kiva Silberfeld (Silberfeld) sues to recover damages for alleged employment discrimination under the New York State Human Rights Law (Executive Law § 296 *et seq.*) (NYS HRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-101 *et seq.*) (NYC HRL), and for assault and battery, claiming that she was sexually harassed by a coworker, defendant John Loscalzo, s/h/a John Laskalzo (Loscalzo). The complaint asserts causes of action for gender-based employment discrimination and retaliatory discharge against defendant ABC Carpet Co., Inc. (ABC), and for aiding and abetting retaliation, against defendant Madeline Weinrib (Weinrib). As against defendant Loscalzo, the complaint alleges causes of action for aiding and abetting discrimination, and for assault and battery.

In motion sequence number 001, defendants ABC and Weinrib move for summary judgment dismissing all claims as against them. In motion sequence number 002, defendant Loscalzo moves for

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partial summary judgment dismissing the aiding and abetting claims as against him.

Background

Plaintiff Silberfeld was employed in the Madeline Weinrib Atelier division of ABC (Atelier), from about June 2006 until her termination in October 2007, as a personal assistant to Weinrib and a part-time, weekend sales associate. The Atelier, which sold, among other items, carpets designed by Weinrib, was located on the sixth floor of ABC's main store at 888 Broadway in Manhattan. The sixth floor also was the location of ABC's oriental carpet department. Defendant Loscalzo worked as a salesman in the oriental carpet department from 1990 until his termination in April 2008.

Silberfeld and Loscalzo apparently had a cordial working relationship up until May 2007. Silberfeld Dep. at 171-172. They greeted each other in passing, engaged in small talk, and occasionally played around together during work. *Id.* at 172, 183-184; Loscalzo Dep. at 77-78; Sen Dep. at 24. Silberfeld organized a birthday celebration for Loscalzo at work, and, knowing that he was gay, brought him a birthday gift that was "a little man that grows in the water." Silberfeld Dep. at 184-185, 186-187.

In May 2007, an incident occurred which changed their relationship. One morning, plaintiff, walking by the carpet

department, made a remark to a group of salesmen, including Loscalzo, that they looked like a "gentlemen's club" (*id.* at 240), to which Loscalzo took offense. An altercation between plaintiff and Loscalzo followed. Silberfeld claims that Loscalzo jumped up and grabbed her by the shoulders and shook her, calling her a "bitch" and a "piece of shit," until two other salesmen pulled him away from her. *Id.* at 246, 250. Silberfeld testified that she was crying and yelling, called him an "asshole," and told him to leave her alone. *Id.* at 247, 248. Although Loscalzo claims that Silberfeld walked into him and that he put his hands up only to defend himself (Loscalzo Dep. at 17, 20-21), Duval Buford (Buford), one of the salesmen present during the May 2007 incident, testified that "words were exchanged" between Silberfeld and Loscalzo, she then moved towards him, he moved towards her, and he shoved or pushed her. Buford Dep. at 48-49, 50-51, 53, 14. Buford and another salesman then pulled them apart. *Id.* at 16; Silberfeld Dep. at 249; Loscalzo Dep. at 34. Buford did not recall that Loscalzo called plaintiff a bitch that day, but he did recall that he called her a loser. Buford Dep. at 23. Peter Kwan (Kwan), Vice President and Senior Manager of Sales of the oriental rug department, testified that he was present on the sales floor at the time of the May 2007 incident and, although he did not see any physical contact between Loscalzo and Silberfeld, he heard them screaming at each other

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and saw them standing face-to-face. Kwan Dep. at 14. According to Kwan, he told them to break it up, and they went back to their respective work areas. *Id.* at 15-16.

Following the May 2007 incident, both Silberfeld and Loscalzo testified, they did not speak, and stayed away from each other (Silberfeld Dep. at 273-274, 276, 277; Loscalzo Dep. at 36-37), although Silberfeld claims that Loscalzo mumbled "bitch" under his breath whenever he saw her, and made fun of her. Silberfeld Dep. at 277-278. While she could not actually hear what he was saying, and no one told her what he said, she knew he was talking about her because he pointed at her and mumbled. *Id.* at 278-279. Loscalzo denied that he ever called Silberfeld a bitch, or any other derogatory terms. Loscalzo Dep. at 37, 39.

In September 2007, a second confrontation occurred between plaintiff and Loscalzo. On Sunday, September 30, 2007, plaintiff was talking with the receptionist in the carpet department when Jerome Weinrib, ABC's president, telephoned, wanting to speak to a manager in the carpet department. Silberfeld Dep. at 315-322. Because the receptionist did not know where the managers were, Silberfeld walked over to one of the salesmen to ask, and was told by one of the salesmen that they were out. *Id.* at 323-325. Silberfeld testified that Loscalzo then told her to "shut the f*** up," told her that he was in charge, and when she walked back to her department, he followed her and started yelling at

her, "getting very violent and aggressive," called her a bitch, said that he would kill her, and then left. *Id.* at 326, 330-331. Although she was screaming at him to get out and leave her alone, no one heard her. *Id.* at 332-333. After this incident, plaintiff never again spoke to or had any communications with Loscalzo. *Id.* at 334. She claims that, on the day that this incident occurred, Loscalzo continued to mumble "bitch" to her during the remaining part of the work day. *Id.* at 338, 347.

According to Loscalzo, on September 30, 2007, when Silberfeld came running onto the floor yelling that Mr. Weinrib was on the phone, he told her to stop, that he was in charge and would handle it, and told her to go in the back; she called him an "asshole" and a "jerk," and was "irate" and yelling. Loscalzo Dep. at 40. He acknowledged that he confronted her in the Atelier and loudly told her to shut up, but denied that he used any swear words, or called her "bitch" or other names, or threatened her. *Id.* at 40-42.

Following this confrontation, Silberfeld met with Ellen Flamholz, ABC's Director of Human Resources, to complain about Loscalzo's conduct. Flamholz conducted an investigation into the incident, and as a result, Loscalzo was given a "final warning" that he would be terminated if he engaged in any similar conduct again. *Id.* at 48, 51-52, 54. He was terminated in April 2008 after he yelled at another female employee on the selling floor

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of the store.

Discussion

A. Plaintiff's Sexual Harassment/Hostile Work Environment Claims

Under both the New York State and New York City Human Rights Laws, it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of sex (Executive Law § 296 [1] [a]) or gender (Admin. Code § 8-107 [1] [a]). It is well settled that sexual harassment which results in a hostile or abusive work environment constitutes a violation of the human rights laws. *See Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 64-65 (1986); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 75 (1st Dept 2009). It also is "'axiomatic that in order to establish a sex-based hostile work environment [claim] ..., a plaintiff must demonstrate that the conduct occurred because of her sex'." *Mass v Equinox Fitness Club*, 2009 WL 4255560, *1, 2009 US App LEXIS 26047, *3 (2d Cir 2009), quoting *Alfano v Costello*, 294 F3d 365, 374 (2d Cir 2002), citing *Brown v Henderson*, 257 F3d 246, 252 (2d Cir 2001); *see Brennan v Metropolitan Opera Assn.*, 192 F3d 310, 318 (2d Cir 1999); *Sharpe v MCI Communications Servs., Inc.*, __ F Supp 2d __, 2010 WL 532068, *3, 2010 US Dist LEXIS 13935, *8 (SD NY 2010). "[W]orkplace harassment, even harassment between men

and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale v Sundowner Offshore Servs., Inc.*, 523 US 75, 80 (1998), quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 25(1993) (Ginsburg, J., concurring); *see Alfano*, 294 F3d at 374; *Leibovitz v New York City Transit Auth.*, 252 F3d 179, 189 (2d Cir 2001); *Mauro v Orville*, 259 AD2d 89, 92 (3d Dept 1999).

To prevail on a hostile work environment claim under Executive Law § 296 (1) (a), as under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII), a plaintiff also must demonstrate that the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of ... [her or his] employment and create an abusive working environment'." *Harris*, 510 US at 21, quoting *Meritor Sav. Bank, FSB*, 477 US at 65, 67. Generally, to be actionable, "[t]he incidents [of harassment] must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992); *see Clark County School Dist. v Breeden*, 532 US 268 (2001); *Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 (2d Cir

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2000); *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996).

"Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance'." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310-311 (2004), quoting *Harris*, 510 US at 23. The alleged misconduct must be both "objectively and subjectively offensive, such that a reasonable person would find the conduct hostile or abusive, and such that the plaintiff did, in fact, perceive it [to] be so." *Matter of State Div. of Human Rights v Stoute*, 36 AD3d 257, 263 (2d Dept 2006), citing *Oncale*, 523 US at 81; *see Forrest*, 3 NY3d at 311.

Sexual harassment claims brought under the NYC HRL, which is "to be construed more broadly than federal civil rights laws and the State HRL" *(Williams*, 61 AD3d at 74), require an independent analysis. *Id.* While the First Department has rejected the "severe and pervasive" standard as "unduly restrictive" (*id.* at 77), it continues to recognize that the law cannot operate as a "'general civility code.'" *Id.* at 79 (citation omitted); *see Forrest*, 3 NY2d at 309. The Court in *Williams* also reiterated that "the primary issue for a trier of fact in harassment cases .

. . is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." *Id.* at 78; *see Fleming v MaxMara USA, Inc.*, 644 F Supp 2d 247, 268 (ED NY 2009); *La Marco v New York State Nurses Assn.*, 118 F Supp 2d 310, 317 (ND NY 2000). "In other words, an environment which is equally harsh for both men and women . . . does not constitute a hostile working environment under the civil rights statutes." *Brennan*, 192 F3d at 318; *see Macri v Newburgh Enlarged City School Dist.*, 2004 WL 1277990, *10, 2004 US Dist LEXIS 10515, *23 (SD NY 2004).

Here, even assuming that Loscalzo's conduct toward plaintiff could be "properly characterized as hostile (i.e., antagonistic, malicious, unfriendly)" *(Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 79 [1st Dept 2001]), and without reaching the question of "severe and pervasive," evidence fails to demonstrate that the complained of conduct occurred because of plaintiff's gender, or that she was "exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed." *Oncale*, 523 US at 80. Rather, evidence shows that Loscalzo was indiscriminately abusive and that his name-calling was directed at men and women alike.

By plaintiff's own acknowledgment, Loscalzo was rude and insulting to everyone around him, including male and female salespeople and customers, and he regularly called the stockmen

"stupid" and "assholes." Silberfeld Dep. at 205-209. She called him "crazy" (*id.* at 340), and found the workplace at ABC, with people yelling at each other, was "not a normal work environment." *Id.* at 208. Kwan described the workplace as involving many conflicts between salespeople, who were competing with each other, and explained that yelling and screaming was part of the business and "the nature of the game." Kwan Dep. at 28, 65, 74.

Coworkers of Loscalzo uniformly described him as confrontative, and testified that both men and women were abused and called names by Loscalzo, who was considered an "equal opportunity insulter." Buford Dep. at 55. Buford testified that he was difficult, loud, condescending, abusive and rude, to him and to other salespeople and stockpeople. *Id.* at 21, 25, 29-31, 42. Pradeep Sen, manager of the oriental carpet department, testified that Loscalzo had a negative attitude toward everyone, was moody, agressive and rude to him, argued with and degraded his male colleagues and the stockmen, using profanity. Sen Dep. at 11, 20-21, 23, 36, 39-41. Kwan testified that Loscalzo had a problem with anger and could not control his temper, and frequently yelled and screamed at his co-workers. Kwan Dep. at 51, 56, 71.

Loscalzo's conduct toward plaintiff and the two confrontations between them, in May 2007 and September 2007,

involved admittedly gender-neutral harassment, including "physical battery, assault, threatening to kill her, threatening to have her fired, and calling her a fat whale." *See* Plaintiff's Memo of Law in Opp., at 21. Plaintiff contends, however, that because Loscalzo made explicit sex-based comments to her, it is reasonable to infer that other sex-neutral offensive conduct was motivated by sex-based hostility. The explicit sex-specific comments identified here are Loscalzo's repeated references to plaintiff as a "bitch."

Plaintiff claims that Loscalzo repeatedly called her a bitch, often mumbling it under his breath. She testified, however, that she did not actually hear him most of the time, and no one told her what he was saying (Silberfeld Dep. at 278-279); nor did other employees hear him call her that. One employee testified that "bitch" was a word that Loscalzo commonly used, as he did other profanities, and he heard him use the word "bitch" with both a saleswoman and a salesman, but he never heard him call plaintiff by that term, or otherwise call her names. Sen Dep. at 12, 36. Another employee, who worked with Loscalzo for about two years, recalled that one time, "way before" the May 2007 incident, he called Silberfeld a bitch. Buford Dep. at 24. Kwan testified that he never heard Loscalzo call Silberfeld a bitch, although he heard him use that word with other people, including saleswomen who previously worked with Loscalzo and with

whom he maintained a friendly relationship. Kwan Dep. at 26-27, 28-29.

Several employees, including plaintiff, testified that Loscalzo used profanities with everyone. Sen Dep. at 40, Kwan Dep. at 33; Silberfeld Dep. at 205. Plaintiff testified that she was not generally offended by the use of profanity, and may have cursed at Loscalzo during an argument. Silberfeld Dep. at 520, 501. Loscalzo admitted that he had a temper and was loud (Loscalzo Dep. at 56-57), had heated disagreements on the floor with all the other carpet salesmen (*id.* at 55), and had once been disciplined for arguing with a man (*id.* at 68-69), but he denied calling plaintiff or other saleswomen "bitch." *Id.* at 37, 41, 60.

Even crediting plaintiff's version that she was called a bitch on multiple occasions, and recognizing that "the term 'bitch' is derogatory to women and its use may be evidence of gender-based animus" (*Dauer v Verizon Communications Inc.*, 613 F Supp 2d 446, 483 [SD NY 2009]), in this case, its use is not sufficient to create an inference that Loscalzo's harassment was discriminatory. "When a female plaintiff has been the target of sex-based insults and, unlike her male coworkers, is later subjected to additional abuse that is facially sex-neutral, it may be reasonable to infer that any further mistreatment is also sex-based." *Macri*, 2004 WL 1277990, *10, 2004 US Dist LEXIS

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10515, *23. Here, however, as the record reveals that Loscalzo was abusive, offensive, and insulting to everyone in the workplace, not just plaintiff, it is not reasonable to conclude that Loscalzo's sex-neutral hostile conduct toward plaintiff was directed at her because of her sex and not because of his tendency to belittle everyone around him. *See id.*; *Brown*, 257 F3d at 254 ("the fact that both male and female employees are treated similarly, if badly, does give rise to the inference that their mistreatment shared a common cause that was unrelated to their sex"). To the extent that plaintiff argues that Loscalzo treated her as a subordinate, there also is no evidence that he treated her any differently in that regard than other employees.

Contrary to plaintiff's argument, courts have not held that the use of the word "bitch" in the workplace, without other acts or words showing gender specific bias, is sufficient to establish a hostile work environment. *See Raniola v Bratton*, 243 F3d 610 (2d Cir 2001) (female police officers subjected to years of abuse, vulgar, sexual remarks about plaintiffs written on flyer posted in workplace, denied shifts and given more burdensome work assignments than male officers); *Braunstein v Barber*, 2009 WL 849589, 2009 US Dist LEXIS 32536 (SD NY 2009) (called bitch and told a man could do a better job); *Macri*, 2004 WL 1277990, 2004 US Dist LEXIS 10515, *supra* (multiple sex-based comments, including ball-buster, calling other females bitches, comments on

breasts, stating women know nothing); *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc 2d 795 (Sup Ct, NY County 1997) (comments about plaintiff's breasts, sexually explicit jokes, constant use of vulgar language, including references to sex acts).

"Moreover, the term 'bitch' has been held not to have a sexual connotation in circumstances very similar to those in this case," in which evidence suggests that hostility arose out of a personality conflict between coworkers. *Nowak v Lowe's Home Centers, Inc.*, 2007 WL 894214, *4, 2007 US Dist LEXIS 20339, *14 (WD NY 2007) (use of "bitch" does not transform coworkers' personality conflict into actionable sexual harassment); *see La Marco*, 118 F Supp 2d at 317 (use of "bitch," with other gender-neutral offensive conduct, is not enough to show hostility is gender-based); *Moore v Transitional Servs. of N.Y.*, 1998 WL 71824, 1998 US Dist LEXIS 1900 (ED NY 1998) (use of "fat bitch" and other insults does not show that animosity between coworkers was based on gender).

In any event, to recover against an employer for the discriminatory conduct of an employee, who, as here, was not a manager or supervisor, a plaintiff must show that "the employer became a party to such conduct by encouraging, condoning, or approving it." *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 738 (2d Dept 2009); *see Matter of Bracci v New York State Div. of*

Human Rights, 62 AD3d 1146, 1148 (3d Dept 2009); *Clayton v Best Buy Co.*, 48 AD3d 277, 277 (1st Dept 2008); *Fleming*, 644 F Supp 2d at 267. There is no evidence that ABC encouraged, condoned or approved any harassing conduct. Evidence does not show that ABC was made aware of plaintiff's complaint until after the September 30, 2007 incident, at which time it made an investigation, the result of which was a final warning to Loscalzo. Although plaintiff claims that she told Estelle Bossy, a supervisor in her department, about the May 12, 2007 incident on the same date that it happened (Silberfeld Dep. at 265, 269), defendants submit uncontested documentary evidence that Bossy was out of the country between May 11 and May 14, 2007. *See* Ex. M to Bossy Aff. Nor is there any evidence, or any testimony from plaintiff, that she claimed that she was being sexually harassed.

Evidence also shows that ABC immediately responded to her complaint by investigating both the May and September 2007 incidents, and took remedial action. There were no witnesses to the September 2007 incident, but human resources director Flamholz spoke to several witnesses to the May event. Although, after her investigation, Flamholz determined that both plaintiff and Loscalzo may have been at fault in the incidents, Loscalzo was warned that he would be terminated for any further fighting. Flamholz Dep. at 30, 36, 40, 44-45; *see Lee v Sony BMG Music Entertainment, Inc.*, 2010 WL 743948, *9, 2010 US Dist LEXIS

19481, *23 (SD NY 2010) ("mere written warning can be appropriate response if it conveys the message that further harassment will not be tolerated" [internal quotation marks and citation omitted]).

Retaliation

To establish a claim of unlawful retaliation under the NYS HRL (Executive Law § 296 [1] [e]) and the NYC HRL (Admin. Code § 8-107 [7]), as well as under Title VII, a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff; and (4) a causal connection exists between the protected activity and the adverse action. *See Forrest,* 3 NY3d at 312-313; *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004); *Lee,* 2010 WL 743948, *11 , 2010 US Dist LEXIS 19481, *30-31; *Sharpe,* 2010 WL 532068, *10, 2010 US Dist LEXIS 13935, *26; *Middleton v Metropolitan Coll. of N.Y.*, 545 F Supp 2d 369, 373 (SD NY 2008). "'"[P]rotected activity" refers to action taken to protest or oppose statutorily prohibited discrimination.'" *Sharpe,* 2010 WL 532068, *10, 2010 US Dist LEXIS 13935, *26-27, quoting *Bryant v Verizon Communications Inc.*, 550 F Supp 2d 513, 537 (SD NY 2008). "'The onus is on the speaker to clarify to the employer that [she] is complaining of unfair treatment due to [her] membership in a protected class and that [she] is not complaining merely of unfair treatment generally.'"

Id., quoting *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-09 (SD NY 2009).

To prove participation in a protected activity, a plaintiff need not establish that the conduct about which she complained in fact violated the law, but the plaintiff must demonstrate that she had a "'good faith, reasonable belief that the underlying challenged actions of the employer violated the law' [citation omitted]." *Manoharan v Columbia Univ. College of Physicians & Surgeons*, 842 F2d 590, 593 (2d Cir 1988); *see Middleton*, 545 F Supp 2d at 373. "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." *Galdieri-Ambrosini v National Realty & Dev. Corp.*, 136 F3d 276, 292 (2d Cir 1998); *Middleton*, 545 F Supp 2d at 373.

"[T]he employee cannot merely show that she subjectively believed her employer was engaged in unlawful employment practices, but also must demonstrate that her belief was '*objectively* reasonable in light of the facts and record presented.'" *Thomas v Westchester County Health Care Corp.*, 232 F Supp 2d 273, 279 (SD NY 2002) (citations omitted)(emphasis in original); *see Sullivan-Weaver v New York Power Auth.*, 114 F Supp 2d 240, 243 (SD NY 2000). Establishing a retaliation claim also requires that the employer "understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by [the Human Rights Law]." *Galdieri-*

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Ambrosini, 136 F3d at 292; *Lee*, 2010 WL 743948, *11, 2010 US Dist Lexis 19481, *31; *see Almonord v Kingsbrook Jewish Med. Ctr.*, 2007 WL 2324961, *10, 2007 US Dist LEXIS 58529, *30 (ED NY 2007).

Plaintiff argues that she had a reasonable, good faith belief that she was opposing gender discrimination because Loscalzo called her a bitch, treated her like a subordinate when he told her he was in charge and ordered her to return to her department, and took offense at a story she related involving men's genitals. *See* Plaintiff's Memo of Law in Opp., at 12. However, even if plaintiff could show that, at the time that she complained to her employer, she had more than a subjective belief that Loscalzo's comments were discriminatory, there is no evidence, nor does plaintiff allege, that she reported that she was being subjected to sex-based harassment or discrimination. Plaintiff does not allege that Loscalzo called her a bitch or otherwise harassed her prior to May 2007, nor is there any evidence that plaintiff made any complaints that Loscalzo called her a bitch prior to September 30, 2007.

On September 30, 2007, plaintiff sent an e-mail to Weinrib and other ABC supervisors, informing them that she believed it was her duty "to report dangerous behaviors that undermine our professional environment and affect our productivity and well being." *See* E-mail, Ex. 7 to Bantle Aff. in Opp. Plaintiff then met with Flamholz, and told her about the May and September

incidents, and said that Loscalzo had attacked her. Silberfeld Dep. at 372-373. At her deposition, plaintiff testified that she complained because she wanted her employer to protect her and to deal with the "issue of someone hurting another employee, a colleague." *Id.* at 382. However, "complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." *Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008).

There also is no evidence that defendant employer "understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by [the Human Rights Law]." *Galdieri-Ambrosini*, 136 F3d at 292. Flamholz testified that plaintiff did report to her that Loscalzo called her a bitch, which she considers a "dirty word," but one that is used to refer to both men and women. Flamholz Dep. at 22-23. Flamholz did not think, after meeting with plaintiff, that any issues of gender discrimination were raised; her impression was that there had been a fight between two employees, which she needed to investigate. *Id.* at 24. After she interviewed Silberfeld, Loscalzo, and three employees who witnessed the May 2007 incident, she found that everyone had a different opinion of what happened, and no one had witnessed the September 2007 altercation. *Id.* at 28-31. Flamholz determined,

following her investigation, that both were at fault in the first incident, and both were probably equally at fault in the second incident. *Id.* at 30, 36, 40.

Further, even assuming that plaintiff could establish a prima facie case of retaliation, which the court does not find, plaintiff's retaliation claim fails because she has not rebutted ABC's legitimate, non-discriminatory reasons for her termination. *See Williams v City of New York*, 38 AD3d 238, 238 (1st Dept 2007); *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 105 (3d Dept 1999); *see generally Forrest,* 3 NY3d at 312-313.

Weinrib testified that both she and plaintiff knew that the plaintiff's position as a part-time weekend sales associate was temporary, until plaintiff found other work. Weinrib Dep. at 23. Plaintiff acknowledged that, when she started working weekends in late 2006, she told Weinrib that she was looking for another job because she was not doing the kind of work that she wanted to do and was not making enough money. Silberfeld Dep. At 72-73. During the last six weeks that plaintiff was employed at ABC, she was, in fact, working another job, for which Weinrib wrote her a recommendation, and which plaintiff hoped would become full-time. *Id.* at 89, 102, 154.

Weinrib also testified that plaintiff was often late, was unreliable, did not like her job, and became increasingly disrespectful and confrontational with her. *Id.* at 23-26. For

those reasons, and because plaintiff had found another job, Weinrib terminated her. *Id.* at 27. Plaintiff does not deny that there were problems with her lateness and that other work she was doing while she was employed by ABC sometimes interfered with her weekend hours, requiring her to find someone to replace her, which created problems for Weinrib. Silberfeld Dep. at 118-120, 132-133, 138. Thus, plaintiff fails to show that the reasons for her termination were pretextual.

In view of the above findings, the plaintiff's claims for aiding and abetting cannot survive. *See Forrest*, 3 NY3d at 314.

Accordingly, in motion sequence number 001, the motion of defendants ABC Carpet Co., Inc. and Madeline Weinrib for summary judgment is granted and the complaint is hereby dismissed as against these defendants. In motion sequence number 002, the motion of defendant John Loscalzo for partial summary judgment is granted and the plaintiff's claims against him for aiding and abetting are hereby dismissed.

Thus, the sole remaining claim in this action is plaintiff's cause of action against Loscalzo for assault and battery. The court is persuaded that this claim should be litigated in Civil

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Court and, in a separate order, the proceeding is being transferred to that court pursuant to CPLR 325(d).

The foregoing constitutes the order and decision of the court.

Dated: New York, New York
March 25, 2010

MARYLIN G. DIAMOND
J.S.C.

FILED
APR 14 2010
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