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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

KRISTEN MCREDMOND and ALEXANDRA LIPTON,
Plaintiffs,

- v -

SUTTON PLACE RESTAURANT and BAR, INC., RICHARD KASSIS, ALAN BRADBURY, SELENA STEDDINGER, and NEIL "DOE",
Defendants.

Index No.: 112845/06
Motion Date: 09/14/10
Motion Seq. No.: 006
Motion Cal. No.: _____

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3-5
Replying Affidavits - Exhibits	6

Cross-Motion: ☐ Yes ☒ No

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

This action arises out of plaintiffs Kristen McRedmond's (McRedmond) and Alexandria Lipton's (Lipton) claims that, among other causes of action, they were subject to alleged employment discrimination under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). They claim that defendants Sutton Place Restaurant and Bar, Inc. (Sutton Place), Richard Kassis (Kassis), Alan Bradbury (Bradbury), Selena

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Steddinger (Steddinger) and Neil "Doe" (Hanafy)[1] (collectively, defendants) allowed plaintiffs to be sexually harassed, creating a hostile work environment and retaliated against them by terminating them for complaining about the discrimination. Defendants move, pursuant to CPLR 3212, for an order granting partial summary judgment dismissing plaintiffs' complaint.

Sutton Place is a restaurant located in New York City. Redmond worked as a waitress and bartender at Sutton Place from August 2004 until she was terminated on July 20, 2006. Lipton was employed as a waitress and bartender at Sutton Place from April 2006 until she was terminated on July 11, 2006.

About four months after they were each terminated, plaintiffs filed an amended complaint, alleging violations of the New York State Human Rights Law and the New York City Human Rights Law, as well as ten other causes of action.

Defendants now move, pursuant to CPLR 3212, for an order granting partial summary judgment dismissing the following causes of action: unlawful discriminatory practices in violation of NYSHRL; unlawful discriminatory practices in violation of NYCHRL; common-law unlawful imprisonment; common-law assault; common-law battery; intentional infliction of emotional distress and

[1] Neil Hanafy is sued herein as Neil "Doe" but will be referred to as Hanafy.

negligent infliction of emotional distress.[2] Defendants contend that there was no hostile work environment at Sutton Place, and that both plaintiffs were terminated for legitimate reasons.

Individual Defendants

Defendant Kassis has been the owner of Sutton Place since 1997.

Defendant Bradbury is the general manager of Sutton Place. He states that his job responsibilities included "overseeing shift managers, creating and implementing Sutton Place's employment policies and managing Sutton Place's inventories."

Defendant Steddinger is the daytime shift manager at Sutton Place. She asserts that her "duties and responsibilities are equivalent to that of a low-level supervisor and consist primarily of supervising waitresses/bartenders so as to ensure they are compliant with Sutton Place's policies." Steddinger also allegedly issued disciplinary citations for both plaintiffs before they were fired.

Defendant Hanafy is the nighttime shift manager at Sutton Place. Like Steddinger, Hanafy claims that his "duties and responsibilities are equivalent to that of a low-level supervisor

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[2] The court notes that, despite not naming individual defendants in the causes of action under the NYSHRL and the NYCHRL, both parties demonstrate, through the body of the complaint and the briefs submitted, that plaintiffs intended to litigate these claims as against Sutton Place and also each defendant individually.

and consist primarily of supervising waitresses/bartenders so as to ensure they are compliant with Sutton Place's policies."

Factual Contentions Concerning Redmond's Employment

As to Kassis

McRedmond testified at her deposition that Kassis, the owner, subjected her to sexual harassment by, among other things

- ordering her at least forty times to have a shot of alcohol at the bar whether she wanted one or not;
- during her shift, often drinking by the bar and engaging in rowdy behavior with his friends resulting in customers leaving without tipping her;
- making anti-Semitic remarks to customers; on one occasion, drawing an anti-Semitic symbol on her hand in black marker while she was working and against her will;
- getting drunk and physically assaulting patrons during her shift.

As to Bradbury

McRedmond alleges that, during her employment, she was subject to sexual harassment, including but not limited to:

- being told that she must wear tight black clothing and was not allowed to wear sweaters while working on the patio even if it was cold outside;
- not being allowed to eat food during her shifts, which could sometimes be ten hours, and, being told to watch what she eats and not to order fried food because she was fat, for example, stating to her and another waitress when they ordered fried food, "why are you ordering that? What, do you girls want to get fat up here?";
- being present during the July 6, 2006 scale incident in the basement office (see below) and

joining with Hanafy in instructing her that she could not leave the office until she got weighed.

As to Hanafy

McRedmond alleges that Hanafy subjected her to egregious harassment over the course of her employment at Sutton Place, such as

- multiple instances of his unwelcome comments and touching, some of which include: calling her a "[expletive] idiot" six or seven times, commenting on her breasts approximately twenty times during the course of her employment, and telling her that her "ass looked tight" at least thirty times;

- telling Pryor, her co-worker at the time, that Pryor's buttocks looked "tight" in her jeans;

- on June 7, 2006, pressing his crotch against her back and grabbing her breasts; from June through July 2006, grabbing her buttocks during every one of her shifts and making comments on her breasts and buttocks; commenting on her weight and sex life;

- in June 2006, asking each waitress how much she weighed;

- writing each waitresses' weight down on a spreadsheet that was posted on a website;

- on July 6, 2006, asking her to go to the basement office, shutting the door, and then directing her to get on the scale; when she refused, yelling a profanity; upon her continued refusal stating "do you think you're fat, what do you mean, you're overweight and you have no self esteem?" and grabbing her and attempting to physically put her on the scale; after breaking free from his grasp, being ordered to "better [expletive] get on the scale;" telling her should could not leave the office until she got weighed; leaving the office without having done so, but being ordered to exit through the back door of the restaurant and not to tell anyone what had occurred.

McRedmond describes being "hysterical" and crying and, over the course of the next two days after the scale incident, developing a sty in her eye as a result of the stress.

Plaintiffs submit a compact disc of a recorded phone conversation between McRedmond and another waitress at Sutton Place who stated that she had also been weighed. Brian Burke (Burke), one of plaintiff's co-worker, also testified that Hanafy would tell him that the waitresses "ate too much." On one occasion, Burke testified that another employee was crying to Burke because Hanafy made comments to her about her appearance.

McRedmond testified she was afraid to leave her job because Hanafy would make comments to her such as "you're never going to find a job like this, we know everybody." She claimed that Hanafy would warn her that he knew a lot of people in the bar business and he could "ruin her name."

Bradbury denies speaking to McRedmond while Hanafy asked her to get on the scale. Defendants claim that, after refusing to get on the scale, McRedmond willingly stayed in the office chatting for about ten minutes until she left. Defendants maintain that, although the door was shut, it was never locked. As such, defendants maintain that McRedmond could have left whenever she chose.

Factual Contentions Concerning Lipton's Employment

Lipton's allegations mirror those of McRedmond. Among other things, Lipton alleges that

- she was informed by Steddinger that she could not wear a coat out on the roof deck when it was cold outside; despite not being paid an hourly wage for working a night shift, she was expected to stay until the shift ended, even if there were no customers, which was not required of male employees.

- while she was working, Kassis would "sit at the bar and become an irate drunk, and that he would make racial and ethnic slurs, and "harass the waitresses;" "force and intimidate the waitresses into drinking when they didn't want to and they would be running away from him in fear because they didn't want to be bothered by him and his friends that were drunk;" telling her not to tell anyone that he was the owner of the bar because "he liked to get into fights and he didn't want to have any lawsuits," which statement was only made to the female waitresses.

Defendants maintain that Kassis never told the waitresses that they would lose their job if they did not accept his drink offer. Defendants deny that Kassis ever attempted to touch Lipton. They also claim that Kassis's purported comments were never directed at Lipton.

As to Hanafy, Lipton testified that

- he told her that she was not allowed to eat during her shift, which was sometimes ten hours; asked her what she weighed in front of other waitresses; although she did not respond, writing in a note pad what he believed her weight to be; instructing Lipton and another waitress on how to lose weight; causing the other waitresses to be either weighed or asked their weights;

- he touched her on a weekly basis against her will by giving her a massage and pulling her close to him while

> she tried to escape his grasp; on June 13, 2006, Hanafy asked her and another waitress to comment about certain sexual content in pornographic movies; while she worked, Hanafy would routinely make comments about the bar's female customers by saying things like "she's a stupid [expletive], she's ugly, she's fat, she's disgusting, get her the [expletive] out of here."

Defendants counter that both the male and female employees were subject to a dress code; that Sutton Place even provided fleece jackets to all employees for the cold weather; that none of the employees were allowed to eat during their shifts, i.e. restaurant policy was that employees were permitted to order food for free if they arrived prior to their shift; that policy required every employee to work their entire shift, unless they were allowed to leave early, and therefore employees should not have expected to leave before the end of their shift for lack of customers.

Defendants dispute that McRedmond was ever told to wear tight-fitting clothes or that she could not wear a sweater if she was working outside; Bradbury denies making any comments about McRedmond's weight or telling her or any other waitress that they could not order fried food. Defendants dispute the alleged comments made by Hanafy and claim that any statements made constituted appropriate reprimands concerning McRedmond's habitual violations of Sutton Place's employment policies, and merely were to inform her of these infractions. Among the alleged violations were sending text messages and being on her

phone during her shift, or eating without permission during her shift. Hanafy denies "either witnessing or participating in any of the complained of conduct;" states that he maintained a "friendly relationship" with McRedmond throughout the course of her employment; and that McRedmond would "often joke around with me about my weight, grab my stomach in connection therewith, and also joke about my accent. "

Defendants deny asking waitresses to provide their weights. They do not deny that McRedmond may have been asked to get on a scale, however, they categorize the incident as a lighthearted exchange between McRedmond and Hanafy. They contend that two male employees were trying to lose weight (both being in excess of 400 pounds) and brought the scale into Sutton Place.

Hanafy denies making any of the inappropriate comments or touching. Defendants deny that Hanafy's purported touching was inappropriate since he never propositioned Lipton for sex or grabbed her buttocks or chest. As for the weighing incident, defendants maintain that Lipton was never told that there was a weight requirement to work at Sutton Place; they never attempted to weigh Lipton. They note that Lipton did not see what Hanafy wrote down in his note pad; that female waitresses' weights were never tracked, and that the scale was in the office because two of the male employees were tracking their weight loss.

As to McRedmond's Complaint about Discrimination to Steddinger and as to Retaliation

McRedmond claims that Steddinger told the waitresses to report complaints to her. McRedmond asserts that she complained to Steddinger multiple times about the way that Hanafy acted towards her. Steddinger allegedly did not respond to McRedmond and told her to lighten up and to ignore it. In one instance, McRedmond allegedly complained to Steddinger when Hanafy grabbed her buttocks in front of a customer. In response to her complaint, Steddinger allegedly told her to ignore Hanafy's behavior and that he was "like that sometimes."

McRedmond contends that Steddinger also did not respond to her complaints about Hanafy's inappropriate sexual comments towards her. For instance, when McRedmond allegedly complained to Steddinger about Hanafy's inappropriate remarks about McRedmond's tattoo, her response was, "You have to stop taking him so seriously."

McRedmond claims that she complained to Steddinger at least thirty times about Kassis's inappropriate behavior. Steddinger purportedly brushed off complaints about Kassis since he was the boss and "you can't do anything about it."

McRedmond further alleges that she complained to Hanafy himself when she believed that Hanafy sexually harassed her. McRedmond claims that she repeatedly asked Hanafy to stop making comments about private life and body and he did not.

McRedmond also alleges that she complained to Bradbury about the weight incident and was told to "grow the [expletive] up and get over it."

Defendants deny that McRedmond made any complaints to anyone. Kassis states, "neither McRedmond nor Lipton ever complained to me about being subject to inappropriate comments or touching from another Sutton Place employee." Steddinger states, "neither McRedmond nor Lipton ever complained to me about being subject to inappropriate comments or touching from another Sutton Place employee." Hanafy denies that McRedmond ever complained to him about his alleged inappropriate comments or touching. Steddinger testified that, in passing, McRedmond may have complained to her about Hanafy being too "hard" on her, and that McRedmond may have complained, casually, about Hanafy reprimanding her for eating during her shift, for being late, and smoking during her shift or texting on her phone. Defendants note that McRedmond does not even claim that she complained to Steddinger about every alleged incident between she and Hanafy and that she alleges that she did not complain to Kassis or Bradbury at all.

According to McRedmond, on July 8, 2006 she spoke to other waitresses about the scale incident and alleges that other waitresses told her that they were also forced to get on the scale. McRedmond testified that she did not mention suing Sutton

Place, but that she spoke out against management by saying "it had gone too far, and that they, you know, shouldn't be allowed to do that. To weigh the girls."

The next day towards the end of her shift, at approximately 4 A.M., Bradbury and Hanafy allegedly asked her to meet them in the office basement. After she arrived, Bradbury purportedly said, "I thought we told you to keep your [expletive] mouth shut." Bradbury allegedly continued ranting to McRedmond about how she should not have opened her mouth, and if she thinks she will "bring" them down, they are going to "bring [her] [expletive] down." Bradbury purportedly fired McRedmond during that conversation.

McRedmond maintains that she asked for her job back saying "I need this job right now." After asking for her job, Bradbury allegedly informed her that she could have her job back, and that "if you open your mouth one more time, this is it, that is your last [expletive] chance."

On July 11, 2006, Hanafy called her repeatedly on the bar's internal line and told her he was "watching her." On July 18, 2006, McRedmond states that she spoke to another employee about the weighing incident. On July 20, 2006, Steddinger terminated McRedmond over the phone. Steddinger allegedly told McRedmond that she was being fired for not keeping her mouth shut. "They told you to keep your mouth shut, but then you had to go and

start talking about it again this week, why couldn't you keep your [expletive] mouth shut."

McRedmond claims that she started seeing a psychologist after she was terminated from Sutton Place for panic attacks. McRedmond also claims that she could not sleep and also suffered from anxiety.

Defendants allege that most of McRedmond's violations of Sutton Place policies happened after the first four months of her employment. Steddinger maintains that McRedmond was asked to train Lipton since the two of them were good friends. Defendants claim that McRedmond was terminated because, after being put on probation in June 2006, she continued to violate Sutton Place policies. Steddinger asserts that McRedmond was frequently late for work, on the phone and/or sending text messages or smoking outside during her shift, failing to attend to her customers and/or leaving her assigned section. Steddinger also claims that McRedmond would receive disciplinary citations after violating Sutton Place policies. For example, a disciplinary citation dated April 26, 2006 states that McRedmond was "late and giving drinks away to friends" and that she was warned and was now on probation for being late. Steddinger testified that Sutton Place employees did not know about these disciplinary forms, and that they were only used internally for managerial purposes. She states, "These are for our own records."

Bradbury admits that, on July 8, 2006, he learned that McRedmond was making complaints to other waitresses. He testified, "I believe she complained to Jessica and Kate." When asked how he found out, Bradbury stated, that "Jean Marie, Stu, Bobby Elliot" told him. Bradbury also testified that he was told McRedmond complained about the management and threatened to sue. After hearing these comments, Bradbury asked McRedmond if she still wanted to work for Sutton Place, in light of her comments regarding her desire to quit and/or sue. Bradbury states that McRedmond was already on probation from June 2006 for violating Sutton Place policies and told her that she had one more chance.

On July 20, 2006, McRedmond allegedly called Steddinger and told her that she would be late for her shift. Steddinger claims that this was a common practice for McRedmond. Steddinger then fired McRedmond as McRedmond "repeatedly disobeyed the rules at Sutton Place."

McRedmond claims that she never knew about the alleged disciplinary forms and that she was not reprimanded for any of the alleged violations except for the cigarette breaks. She states that she was reprimanded about ten times by Hanafy during her employment for taking cigarette breaks. McRedmond explains that Hanafy reprimanded her for smoking due to his personal opinion about smoking, rather than for violating a Sutton Place policy. Hanafy allegedly would call smoking a "disgusting

habit." She continues that she was promoted to a part-time bartender after four months of working at Sutton Place. McRedmond also claims that she was personally chosen to train new waitresses. Another waitress who worked with McRedmond testified that she was a "good waitress" and a "good bartender."

Defendants provide testimony from its employee Jeanmarie Fabiano (Fabiano), who testified that McRedmond was late "all of the time." They also submit the testimony of employee Seward Ward (Ward), who describes McRedmond as "childish and lazy" who "made it clear she didn't like being a waitress."

As to Lipton's Complaints about Discrimination and as to Retaliatory Termination

Lipton alleges that she complained to Steddinger when Hanafy asked her the question about actresses in pornographic movies. Lipton allegedly complained twice about not being able to wear a sweatshirt in the cold weather. Steddinger allegedly replied, "don't complain about it, don't get upset about it, because the more upset you get, the more reaction they get, and the more they're going to continue targeting, targeting you."

According to Lipton, in the beginning of July 2006, after she found out that defendants had weighed other waitresses, she began to voice her opinion that this behavior was illegal. Lipton specifically alleges that she told another waitress, who was also allegedly weighed, to not "go back in that office alone with them . . . it was probably illegal what they had done."

Lipton claims that one of the employees working at the time informed defendants about Lipton's comments.

The day after some of Lipton's comments, on July 11, 2006, Steddinger called Lipton and allegedly told her that she was being fired. According to Lipton, Steddinger said "we're going to have to let you go . . . we're just mixing things up a bit." Steddinger did not mention anything about any disciplinary issues, or ever disciplined or told that she was an unsatisfactory employee. She alleges that the defendants retaliated against her because she discussed with the other waitresses that defendants had asked her to give her weight and that she told the waitresses that such request was illegal.

Defendants state that Lipton never complained to Kassis, Bradbury or Steddinger about Hanafy's alleged touching. Defendants claim that Hanafy's only purported sexual comment towards Lipton was the one regarding the pornographic actresses. Steddinger states that Lipton never complained to her about being subject to inappropriate comments or touching. Defendants maintain that Lipton was terminated because she was late for work and also discourteous to customers, continually violating Sutton Place policies. Sutton Place allegedly filed disciplinary citations against Lipton from April 2006 through July 2006, but admit that none of the employees, including Lipton, knew about the disciplinary citations.

DISCUSSION

Plaintiffs' claims of disparate treatment in employment and sexual harassment state violations under the New York State and New York City Human Rights Law ("NYSHRL" and "NYCHRL").

> The standards for recovery under section 296 of the New York State Human Rights Law (see Executive Law § 296) are the same as the federal standards under Title VII of the Civil Rights Act of 1964 (42 USC § 2000 et seq; see Rainer N. Mittl, Opthalmologist, P.C. v New York State Division of Human Rights, 100 NY2d 326, ... [2003]). Thus, "[b]ecause both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms fo redress, are textually similar and ultimately employ the same standards of recover, federal case law in this area also proves helpful to the resolution of this appeal".

Forrest v Jewish Guild for the Blind, 3 NY3d 295, 391 (2004).

Pursuant to NYSHRL as set forth in Executive Law § 296 (1) (a), 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 the individual's gender.

As under Title VII of the Civil Rights Act, sexual harassment that results in a "hostile or abusive work environment" is a form of employment discrimination prohibited under NYSHRL (Meritor Savings Bank, FSB v Vinson, 477 US 57, 66 [1986]). To state a hostile work environment claim under Article VII, a plaintiff must allege that "the workplace [was] permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the

victim's employment and create an abusive working environment." Harris v Forklift Systems, Inc., 510 US 17, 21 (1993). She must claim "that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion]...because of ...sex.'" Oncale v Sundowner Offshore Services, Inc., 118 SCt 998, 1002 (1998). The "mere utterance of an...epithet which engenders offensive feelings in an employee does not sufficiently affect the condition of employment of implicate Title VII." Schwapp v Town of Avon, 118 F3d 106, 110 (2d Cir 1997).

These same principles apply to hostile work environment claims brought under state law. See Forrest v Jewish Guild for the Blind, 3 NY3d 295, 310 (2004); Espaillat v Breli Originals, Inc., 227 AD2d 265 (1st Dept 1996); Tomka v Seiler Corp, 66 F3rd 1295, 1304 n 4 (2d Cir 1995).

A hostile work environment is present when, "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." . The standard for proof for discrimination and retaliation claims brought pursuant to NYSHRL is the same for claims brought under Title VII.

"Whether a workplace may be viewed as hostile or abusive -- from both a reasonable person's standpoint as well as from the

victim's subjective perspective -- can be determined only by considering the totality of the circumstances." Matter of Father Belle Community Center v New York State Division of Human Rights, 221 AD2d 44, 51 (4th Dept 1996). These circumstances include "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 at 310-311 (interior quotation marks and citation omitted). Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive. Matter of Father Belle Community Center v New York State Division of Human Rights, 221 AD2d at 51.

As for plaintiffs' retaliation claim, the Court of Appeals has stated as follows:

> Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296[7]; Administrative Code § 8-107[7]). In order to make out a claim, plaintiff must show that (1) she [he] was engaged in protected activity, (2) her [his] employer was aware that she participated in such activity, (3) she [he] suffered an adverse employment action based upon her [his] activity, and (4) there is a causal connection between the protected activity and the adverse action.

Forrest v Jewish Guild for the Blind, 3 NY3d 295, 312-313 (2004).

The standard of proof for discrimination and retaliation claims brought pursuant to NYSHRL is the same for claims brought

under Title VII (Maher v Alliance Mortgage Banking Corp., 650 F Supp 2d 249, 259 [ED NY 2009]).

McRedmond has alleged that she was subject to a hostile work environment, by, among other things, being subject to vulgar sexual comments and inappropriate touching while at the workplace. Her account is that such incidents were not isolated or sporadic but pervasive, ongoing harassment. McRedmond perceived this conduct as offensive, as she allegedly complained to Steddinger, her supervisor, at least twenty times. She also allegedly complained to Hanafy himself.

Although Hanafy denies any of the comments, on a motion for summary judgment, credibility issues are "properly left for the trier of fact." Yaziciyan v Blancato, 267 AD2d 152, 152 (1st Dept 1999). Given the frequency and the severity of the alleged conduct, as viewing the evidence in the light most favorable to McRedmond, a reasonable person could find that Hanafy created a hostile work environment for McRedmond. See e.g. Matter of Capabilities, Inc. v State Division of Human Rights, 148 AD2d 861, 862 (3d Dept 1989) (Court confirmed the determination of the Commissioner of the State Division of Human Rights which found that plaintiff was the victim of sex discrimination when her supervisor "touched and rubbed her back, pulled on the strap of her undergarment and made inappropriate comments and suggestions concerning her appearance and attitude toward sex").

McRedmond has alleged that Kassis pressured her to drink at least forty times during the course of her employment. McRedmond witnessed Kassis become intoxicated and acting violently. On one occasion this violent behavior was directed at McRedmond in that he drew a anti-Semitic symbol on her hand in permanent marker while she was at work. McRedmond has also alleged that she saw Kassis touch one of the other waitress's buttocks and that Kassis asked her if the waitresses were single.

In order to sustain a claim for sex-based hostile work environment, plaintiff must demonstrate that Kassis's conduct exposed members of one sex to "disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Oncale v Sundowner Offshore Services, 523 US 75, 80 (1998) (internal quotation marks and citations omitted). Defendants have suggested that Kassis offered drinks to other employees and that his violent behavior was not directed at McRedmond. McRedmond states that he "was pouring shots, he was standing behind the bar, pouring shots for everybody, and everyone was getting out of control . . . ."

While plaintiff may have been exposed to a "mere offensive utterance," a reasonable person cannot find that plaintiff was subject to a hostile work environment arising out of Kassis's behavior. Brennan v Metropolitan Opera Association, 284 AD2d 66, 68, 72 (1st Dept 2001). The alleged comments and conduct, most of

which were not even aimed at plaintiff (i.e., alleged derogatory statements aimed at patrons), cannot be considered severe or pervasive. Furthermore, despite alleging that Kassis and his friends' behavior affected her ability to collect tips from customers on more than one occasion, plaintiff has not shown that any of the alleged comments or conduct affected her work performance. As such, McRedmond can not objectively demonstrate that Kassis created a hostile work environment.

McRedmond's alleges that Bradbury created a hostile work environment by questioning her food choices. The Appellate Division, First Department, has held that "a decision maker's stray remark, without more, does not constitute evidence of discrimination." Mete v New York State Office of Mental Retardation and Developmental Disabilities, 21 AD3d 288, 294 (1st Dept 2005). As such, Bradbury's comments do not rise to the level of an actionable hostile work environment.

Moreover, McRedmond maintains that she was subjected to gender discrimination in that she was not allowed to wear a sweater if working on the patio and that she was subjected to a dress code of tight-fitting clothes while the men did not have a dress code. Defendants claim that men too, had a dress code. At any rate, McRedmond's general allegations of gender discrimination concerning the dress code are "too minor to have

altered the terms and conditions of plaintiff's employment." Brennan v Metropolitan Opera Association, 284 AD2d at 77.

The Court of Appeals has held that "[a]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it." Matter of State Division of Human Rights v St. Elizabeth's Hospital, 66 NY2d 684, 687 (1985) (internal quotation marks and citation omitted). However, "[a]n employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation." Id. "Condonation . . . contemplates a knowing, after-the-fact forgiveness or acceptance of an offense." Id.

Defendants claim that Bradbury and Kassis are upper-level management and are the "only two individuals whose knowledge of any harassment could arguably be imputed to Sutton Place." McRedmond has alleged that Bradbury witnessed Hanafy's conduct towards McRedmond on an almost daily basis for a month, yet did nothing. It is undisputed that Bradbury witnessed Hanafy attempt to physically put McRedmond on a scale. McRedmond alleges that she did complain to him about this incident, and that he dismissed it as inconsequential.

Defendants' main defense for the hostile work environment claims is that defendants' alleged misconduct was neither severe nor pervasive. However, as set forth above, Hanafy's conduct,

alone, can be considered "severe and pervasive." See e.g. Mack v Otis Elevator Co., 326 F3d 116, 122 (2d Cir 2003) (holding that plaintiff's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult, . . . sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment" when her supervisor made rude and sexually inappropriate comments); see also Petrosino v Bell Atlantic, 385 F3d 210, 223-224 (2d Cir 2004) (holding that a reasonable jury could find that persistent sexually offensive remarks, a sexual assault by a drunken co-worker and sexual graffiti may be severe and pervasive).

Based upon the conflicting testimony, factual questions remain as to if McRedmond was exposed to sexual harassment/hostile work environment, and whether Sutton Place condoned this environment.

Defendants also claim that, even if McRedmond did complain, she complained to Steddinger, who was a low-level supervisor. However, this defense is without merit. McRedmond alleges that Steddinger told her to submit any complaints to her, not to Kassis. Furthermore, as the Court in Gorzynski v Jetblue Airways Corporation (596 F3d 93, 104-105 [2d Cir 2010]) aptly held, "[w]e do not believe that the Supreme Court, when it fashioned [the Faragher/Ellerth] defense, intended that victims of sexual harassment, in order to preserve their rights, must go from

manager to manager until they find someone who will address their complaints."[3] Even if McRedmond had attempted to complain to Kassis, the record indicates that McRedmond did not feel comfortable with Kassis's own behavior, and therefore, it belies logic that she would be comfortable complaining to him about the harassment.

As an aside, the court notes that defendants also allege that McRedmond's assertions cannot be corroborated. However, summary judgment should only be granted "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 US 574, 587 (1986). Given the record, this court finds that McRedmond's claims of a hostile work environment survive defendants' motion for summary judgment.

Accordingly, since questions of fact remain as to whether Sutton Place condoned or participated in a hostile work environment, defendants' motion for summary judgment dismissing McRedmond's NYSHRL hostile work environment place claim as against Sutton Place shall be denied.

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[3] In Faragher v City of Boca Raton (524 US 775, 807 [1998]) and Burlington Industries Inc., v Ellerth (524 US 742, 756 [1998]), the Court held that an employer may defeat vicarious liability for a supervisor's harassing behavior if the employer can assert that it used reasonable care to prevent and correct harassing conduct and that the plaintiff unreasonably failed to rely on the employer's preventive or corrective measures. However, this defense is only applicable if no tangible employment action was taken.

Plaintiffs have brought their claims against Sutton Place and are also suing the defendants individually. Unlike Title VII, individual liability can be established under the NYSHRL in certain circumstances. Maher v Alliance Mortgage Banking Corp., 650 F Supp 2d 249, 259 (ED NY 2009); Graaf v North Shore University Hospital, 1 F Supp 2d 318, 324 (SD NY 1998). First, under Executive Law § 296 (1), individual liability attaches if the defendant is "an 'employer' (i.e., has an ownership interest or the power to do more than carry out personnel decisions made by others) or if the individual has aided and abetted in the discriminatory conduct." Graaf v North Shore University Hospital, 1 F Supp 2d at 324. Carrying out personnel decisions has been interpreted to mean, "supervisors who, themselves, have the power to hire and fire employees." Perks v Town of Huntington, 251 F Supp 2d 1143, 1160 (ED NY 2003). As previously mentioned, questions of fact remain as to whether Sutton Place, via Hanafy, created a hostile work environment for McRedmond. Since Kassis is the owner of Sutton Place, individual liability may attach to him under Executive Law § 296 (1) and this claim may proceed. Questions of fact remain as to whether Bradbury could be considered an employer as well, since he may have had the authority to do more than carry out personnel decisions made by others.

Executive Law § 296 (6) states that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." In general, one who actually participates in the actual conduct giving rise to the discrimination claim is an aider and abettor, even though they lack the authority to either hire or fire the plaintiff. Feingold v State of New York, 366 F3d 138, 158 (2d Cir 2004). As such, an individual claim against Hanafy under Executive Law § 296 (6), for aiding and abetting discriminatory practices, is viable, since he was the alleged perpetrator of the sexual harassment/hostile work environment.

Individual claims brought pursuant to Executive Law § 296 (6) may also be viable against supervisors who failed to investigate or take appropriate measures despite being informed about the alleged conduct. See Lewis v Triborough Bridge and Tunnel Authority, 77 F Supp 2d 376, 384 (SD NY 1999) (holding "[r]ather, the case law establishes beyond cavil that a supervisor's failure to take adequate remedial measures can rise to the level of 'actual participation' under HRL § 296 [6]"); see also Romero v Howard Johnson Plaza Hotel, 1999 WL 777915 *9, 1999 US Dist LEXIS 15264, *25 (SD NY 1999) (where reasonable jury might find that a supervisor participated in the harassment by adding "fuel to the fire," summary judgment claim made by

supervisor against plaintiff's NYSHRL and NYCHRL sexual harassment claims is inappropriate).

Although McRedmond has not alleged that Steddinger participated in the sexual harassment, McRedmond claims that McRedmond complained at least twenty times to Steddinger. Steddinger allegedly brushed off McRedmond or told her to accept the harassing behavior. As such, questions of fact remain which may create individual liability for Steddinger under Executive Law § 296 (6).

Even assuming, arguendo, that Bradbury is not considered an employer, he, too, may be subject to liability as an aider and abettor under the statute, if the facts demonstrate that he ignored the harassing behavior or actually participated in it.

Accordingly, since triable issues of fact remain, summary judgment is denied with respect to McRedmond's hostile work environment claims under the NYSHRL for both Sutton Place and the individual defendants.

McRedmond alleges that the defendants retaliated against her for complaining about her weighing incident. She alleges that, the day after Hanafy attempted to place her on the scale, she spoke to some of the other waitresses about her ordeal. In speaking with them, McRedmond also learned that these waitresses had also allegedly been weighed.

That day, Bradbury allegedly warned her to keep her mouth shut and put her on probation. According to McRedmond, on July 18, 2006, less than ten days later, McRedmond claims that she discussed the weighing incident with another employee. On July 20, 2006, McRedmond's next scheduled work day, Steddinger allegedly phoned McRedmond and terminated her employment. McRedmond claims that Steddinger told her she was being fired for not being able to keep her mouth shut.

Defendants claim that they heard McRedmond talking about suing Sutton Place and not being happy working there. After speaking with McRedmond, and asking her if she still wanted to work there, they gave her one last chance. According to defendants, McRedmond had become a poor employee by, among other things, being constantly late, and talking on her phone during shifts. Defendants had allegedly been maintaining internal employee discipline forms for McRedmond, documenting her violations of Sutton Place policies. Defendants provide testimony from other Sutton Place employees who maintained that McRedmond was often late for work and would also talk on her cell phone and smoke during her shift. According to defendants, after McRedmond called on July 20, 2006 to say that she would be late for her shift, Steddinger fired her. According to defendants, this termination was due to McRedmond's violation of her probation.

The Court of Appeals has held that "it is unlawful to retaliate against an employee for opposing discriminatory practices." Forrest v Jewish Guild for the Blind, 3 NY3d at 312. When analyzing claims for retaliation, courts apply the burden shifting test as set forth in McDonnell Douglas Corp. v Green (411 US 792, 802 [1973]), which places the "initial burden" for establishing a prima facie case of retaliation on the plaintiff. Claims for retaliation under the NYSHRL and the NYCHRL are analyzed in same manner as those under Title VII. Middleton v Metropolitan College of New York, 545 F Supp 2d 369, 373 (SD NY 2008). For a plaintiff to successfully plead a claim for retaliation, she must demonstrate that:

> (1) she has engaged in 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.

Forrest v Jewish Guild for the Blind, 3 NY3d at 313.

"Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." Aspilaire v Wyeth Pharmaceuticals, Inc., 612 F Supp 2d 289, 308 (SD NY 2009). In the present case, taking the evidence in the light most favorable to McRedmond's claims, McRedmond has established that she was engaged in a protected activity, i.e., complaining about the weighing of the female staff by its male management. McRedmond demonstrates a "causal connection" in that, shortly after her

complaints, she was terminated, and told that the reason for her termination was for speaking about the weighing incident and suggesting that she might sue Sutton Place for its behavior.

Once a prima facie case of retaliation is established, the employer may still be entitled to summary judgment if it can provide a "legitimate" and nondiscriminatory reason for challenged employment decision. Pellegrini v Sovereign Hotels, Inc., 2010 WL 3723999, *6, 2010 US Dist LEXIS 96037, *19 (ND NY 2010). In their attempt to satisfy this prong, defendants state that McRedmond was terminated for being a poor employee who violated Sutton Place policies multiple times.

At this point, the employer may be entitled to summary judgment unless the plaintiff provides sufficient evidence to "permit a rational factfinder to conclude that the employer's explanation is merely a pretext for impermissible retaliation, and that the prohibited factor was at least one of the motivating factors." Id. (internal quotation marks and citations omitted).

McRedmond has alleged that she was never told about defendants' disciplinary forms, nor was she ever reprimanded for being a poor employee. She has alleged that, although she was reprimanded for smoking during her shifts, she believes that stemmed from Hanafy's personal opinion on smoking.

Defendants do not dispute that Sutton Place employees did not know about the disciplinary forms. Given McRedmond's

testimony and the proximity of the events, factual issues remain with respect to whether defendants' explanation was a pretext for impermissible retaliation. See Cottingim v County of Onondaga, 71 NY2d 623, 632 [1988] ("shifting responses, alone, especially where the first proffered explanation proves baseless, may give rise to an inference that the later justifications are pretextual.") As such, Sutton Place's motion for summary judgment with respect to McRedmond's retaliation claim shall be denied.

NYSHRL prohibits retaliation against employees for their opposition to discriminatory practices. Specifically, an employer is forbidden to "discharge, expel or otherwise 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." Executive Law § 296 (1) (e). Furthermore, Executive Law § 296 (7) states the following:

> 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.

Accordingly, liability may attach to Sutton Place as employer and Kassis, as owner/employer, under Executive Law § 296 (1) (e) or (7), and potentially to Bradbury, as McRedmond's employer.

As previously mentioned, employees may be held individually liable for aiding and abetting discriminatory practices under Executive Law § 296 (6). If McRedmond's termination is found to be done on an impermissible basis, then, based on McRedmond's testimony, Steddinger, as the supervisor who terminated her, may face liability on an individual basis under Executive Law § 296 (6) or (7). Questions of fact also remain as to Hanafy and Bradbury's involvement in the termination and their potential liability.

Accordingly, the individual defendants' motion for summary judgment with respect to McRedmond's retaliation claim for both Sutton Place and the individual defendants shall also be denied.

Lipton claims that she was subjected to sexual harassment and gender discrimination by reason of a hostile work environment. In particular, Lipton alleges that Kassis harassed her and tried to force her to drink shots. However, even viewing the totality of the evidence in Lipton's favor, the "offensive conduct was not sufficiently severe or pervasive to alter the conditions of her employment and create an objectively hostile or abusive work environment." Barnum v New York City Transit Authority, 62 AD3d 736, 738 (2d Dept 2009).

As previously stated, to prove that she was exposed to a sex-based hostile work environment, Lipton must demonstrate that Kassis's conduct exposed members of one sex to "disadvantageous

terms or conditions of employment to which members of the other sex are not exposed." Oncale v Sundowner Offshore Services, 523 US at 80 (internal quotation marks and citation omitted). As with McRedmond, although Lipton watched Kassis become rowdy at the bar with his friends, his conduct was never directed at Lipton, nor female waitresses in particular. The record does not indicate that Kassis's behavior was directed at Lipton due to her gender, but that Kassis conducted himself in the same way with both men and women. Moreover, Lipton's testimony reflects being exposed to inappropriate commentary and being offered shots on only a few occasions. Lipton testified that she found his commentary on one occasion strange and offensive.

Kassis may have been drunk and offered her shots along with other people, but given the brief amount of time that Lipton worked at the bar, coupled with the fact that Lipton's work conditions were not altered, a reasonable person could not find that Kassis created a hostile work environment.

Lipton claims that she suffered gender discrimination when, among other things, she was directed to: stay until the end of her shifts while other people could leave; not eat during her shift; not wear a sweatshirt on two occasions when it was cold outside. Lipton has failed to refute that all employees were subject to a dress code, all employees were expected to stay until the end of their shifts, and all employees were not allowed

to eat during their shifts, and has come forth with no evidence that tends to prove that she exposed to disadvantageous circumstances because of her sex. Oncale v Sundowner Offshore Services, 523 US at 80.

Hanafy allegedly asked plaintiff her weight once, asked Lipton about actresses in pornographic movies and tried to massage her while she attempted to break free from his grasp. Hanafy never touched Lipton's buttocks or breasts. Although even a single incident of harassment can create a hostile work environment if the alleged conduct is "extraordinarily severe," these sporadic occurrences do not rise to the level of being extraordinarily severe. San Juan v Leach, 278 AD2d 299, 300 (2d Dept 2000). This is particularly true as Lipton does not claim that she reported Hanafy's touching conduct to any supervisor. See e.g. Barnum v New York City Transit Authority, 62 AD3d at 738 (2d Dept 2009) (touching thigh, patting buttocks, offensive comments not severe and pervasive where employer disciplined offending supervisor based upon complaints about conduct).

Lipton does not have any sustainable allegations against Bradbury or Steddinger for creating a hostile work environment.

Since Lipton has failed to raise a triable issue of fact that she was exposed to sexual harassment which resulted in a hostile work environment, Lipton cannot sustain a claim as against Sutton Place as employer under the NYSHRL. Nor may

Lipton's claims against individual employees stand. See Priore v New York Yankees (307 AD2d 67, 74 n 2 [1st Dept 2003] [internal citations omitted), holding, "[a] separate cause of action against an employee for actively 'aiding and abetting' discriminatory practices . . . would still require proof initially as to the liability of the employer."

Accordingly, summary dismissal is granted with respect to Lipton's claims under the NYSHRL for a hostile work environment.

Lipton alleges that the defendants retaliated against her after she voiced her opinion that weighing the waitresses was illegal. According to Lipton, she was asked her weight on June 16, 2006. On July 10, 2006, Lipton discussed this incident with other employees at Sutton Place.

On July 11, 2006, Steddinger called Lipton and told her that she was being fired because Sutton Place wanted to mix things up. According to Lipton, Steddinger did not give her any other reasons for being fired. Lipton alleges that she was never disciplined while at work or told that she was a poor employee.

Defendants maintain that Lipton was terminated because she was late for work and also discourteous to customers. Sutton Place allegedly filed disciplinary citations against Lipton from April 2006 through July 2006. Defendants claim that she was fired on July 11, 2006 for continually violating Sutton Place policies.

Viewing the evidence in Lipton's favor, Lipton may be able to claim that she was retaliated against. Lipton voiced her opinion that weighing the waitresses was illegal. The very next day, Lipton was terminated.

In response, defendants allege that Lipton was a poor employee who violated Sutton Place policies.

Lipton claims that she was never told about any of these so-called violations and that she did not know about any disciplinary citations.

Defendants do not dispute that none of the employees knew about the disciplinary citations. Their response is vague, at best, as to why Lipton was terminated on the day after she complained about being weighed and voiced her opinion that it was illegal. Although Lipton complained to management only about Hanafy's conversations about pornographic films and not the restaurant's alleged gender based weighing protocols, factual questions remain as to whether management found out about these complaints. The timing of Lipton's termination coming only the day after she complained constitutes circumstantial evidence that tends to establish that the reason she was terminated was for voicing her opinion.

Accordingly, since the record supports Lipton's contention that Sutton Place's explanation is a pretext for impermissible retaliation, and there may be a "causal connection," Sutton

Place's motion for summary judgment with respect to Lipton's NYSHRL retaliation claim is denied.[4]

As explained with McRedmond, individual liability may attach to Kassis, as owner/employer, and Bradbury, as a possible employer, under Executive Law § 296 (1) (e), the law's anti-retaliation provision or section 296 (7). However, even if Bradbury is not found to be an employer under NYSHRL, depending on whether or not he participated in Lipton's termination, he may also be liable as an aider and abettor.

Additionally, as with McRedmond, if Lipton's termination was found to be done on an impermissible basis, then based on Lipton's testimony, Steddinger, as the supervisor who terminated her, may face liability on an individual basis. See e.g. Peck v Sony Music Corporation, 221 AD2d 157, 158 (1st Dept 1995) ("Executive Law 296 § [6] and [7] provide that an individual may be held liable for aiding and abetting discriminatory conduct"). Questions of fact also remain as to Hanafy's involvement in Lipton's termination and, as such, he may also face individual liability.

Accordingly, the individual defendants' motion for summary judgment with respect to Lipton's retaliation claim is denied.

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[4] The court notes that "a claim for retaliatory conduct does not necessarily fail by reason of a subsequent finding that the underlying discrimination complaint, upon which the claim of retaliation is premised, is without merit." Modiano v Elliman, 262 AD2d 223, 223 (1st Dept 1999).

As a result of revisions created to the NYCHRL in 2005 through the Local Civil Rights Restoration Act of 2005 (Restoration Act), the NYCHRL or Administrative Code § 8-130, are to be construed more liberally than its state or federal counterparts. Barnum v New York City Transit Authority, 62 AD3d at 738. Pursuant to NYCHRL, as stated in Administrative Code § 8-107 (1) (a), 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 the individual's gender. Analysis of claims under the NYCHRL is to be independent, and the court must evaluate the claims with regard for the NYCHRL's "uniquely broad and remedial purposes." Williams v New York City Housing Authority, 61 AD3d 62, 62, 79 (1st Dept 2009).

A. McRedmond's Sexual Harassment/Hostile Work Environment Claim

As the Court held in Brightman v Prison Health Services, Inc., 62 AD3d 472, 472 [1st Dept 2009]), if the plaintiff's allegations state claims under the NYSHRL, then, "[a] fortiori, they state a claim under the [NYCHRL], which is more liberal than either its state or federal counterpart [internal citations omitted]." As set forth above, summary judgment has already been denied to defendants with respect to McRedmond's hostile work

environment claims under the NYSHRL.[5] Moreover, due to the liberal construction of the NYCHRL, McRedmond may have additional claims as explained below.[6]

Under the Restoration Act, to constitute a hostile work environment, conduct need not be "severe and pervasive," although "petty slights or trivial inconveniences" are not actionable. Williams v New York City Housing Authority, 61 AD3d at 80. Applying this standard to the present case, Bradbury and Steddinger's actions would not constitute an actionable hostile work environment. However, Kassis's alleged treatment towards McRedmond may have been a "borderline" situation. Id. The Court in Williams held, "[f]or [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions 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.

Moreover, while under NYSHRL, Sutton Place or Kassis, as owner, may have had a defense to liability for an employee's

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[5] Defendants address plaintiffs' claims under the NYCHRL by merely re-stating that a hostile work environment did not exist.

[6] McRedmond alleges that a hostile work environment occurred from 2004 until 2006. The Restoration Act did not become effective until 2005, however, most of McRedmond's claims occurred in 2005 or 2006, or were continuing violations.

conduct, NYCHRL creates a strict liability for employers.[7] NYCHRL imposes liability on employers in three instances, one of which being where the offending employee exercised managerial or supervisory responsibility. Zakrzewska v The New School, 14 NY3d 469, 479 (2010). In the present case, Hanafy's actions may rise to the level of an actionable hostile work environment. As such, Sutton Place and Kassis would be strictly liable for his behavior. Bradbury, if not found to be an employer, and Steddinger may be liable as aiders and abettors under Administrative Code § 8-107 (6).

Administrative Code § 8-107 (1) (a) also states that it is a 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 the individual's gender. As such, if Hanafy's actions are found to constitute sexual harassment/hostile work environment, he can be held individually liable, and not just as an aider and abettor.

Accordingly, summary judgment is denied with respect to McRedmond's hostile work environment claims under the NYCHRL for Sutton Place and the individual defendants.

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[7] As previously noted, under certain circumstances, employers may use the Faragher-Ellerth defense to hostile work environment claims. However, this is inapplicable in the present case as the defendants' only affirmative defense is that no hostile work environment existed. Defendants would not be entitled to this defense in any case since an adverse employment action was allegedly taken against plaintiffs. See Zakrzewska v The New School, 14 NY3d 469, 479 (2010).

While NYCHRL claims are to be given an independent analysis, the Appellate Division, First Department, has also recognized that the law cannot operate as a "general civility code." Williams v New York City Housing Authority, 61 AD3d at 79 (internal quotation marks and citation omitted). After reviewing the record, this court finds that as to Lipton, the "conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." Id. at 80 (internal quotation marks omitted).

Accordingly, defendants' motion for summary judgment dismissing Lipton's hostile work environment claims under the NYCHRL is granted.

As previously mentioned, the provisions of the NYCHRL are "to be construed more broadly than federal civil rights laws and the State HRL." Williams v New York City Housing Authority, 61 AD3d at 74. Both plaintiffs have sufficiently established claims for retaliation against Sutton Place and the individual defendants under the NYSHRL. As such, plaintiffs claims of retaliation against Sutton Place, Kassis and the individual defendants under the NYCHRL survive the motion at bar. Whether or not the individual defendants are held individually liable, or as aiders and abettors for the plaintiffs' terminations are factual questions to be resolved.

Accordingly, summary judgment is denied with respect to plaintiffs' retaliation claims brought pursuant to NYCHRL.

McRedmond alleges that she was unlawfully imprisoned by Sutton Place when she was held in the manager's office after Hanafy attempted to weigh her. According to McRedmond, Bradbury yelled at her to get on the scale. After she refused to get on the scale, Hanafy attempted to pick her up and put her on the scale. Allegedly, after McRedmond was able to break free from his grasp, she was told that she could not leave the office until she got weighed. McRedmond did leave the office within ten minutes, although she claims to have been hysterically crying and disoriented.

Defendants claim that McRedmond was never told that she could not leave the office and that Bradbury did not even participate in the conversation. Defendants describe the incident as lighthearted and filled with bantering. They also allege that the door was not locked or obstructed.

In order to sustain a claim for false imprisonment, plaintiff must demonstrate the following: "1) defendant intended to confine [plaintiff], 2) the plaintiff was conscious of the confinement 3) the plaintiff did not consent, and 4) the confinement was not otherwise privileged." Arrington v Liz Claiborne, Inc., 260 AD2d 267 (1st Dept 1999).

Plaintiffs claim that the actual physical confinement occurred when Hanafy picked up McRedmond. They also state that it would be reasonable for McRedmond to still feel confined in the office based on defendants' threatening language. Regardless of what the specific act of confinement is, questions of fact remain as to whether the defendants intended to confine McRedmond and whether McRedmond consented to all or part of the alleged confinement. Although the door was not locked, the defendants allegedly closed the door once McRedmond entered, grabbed her against her will, put her on the scale, and told her that she could not leave until she was weighed. Accordingly, since questions of fact remain summary judgment is denied upon this claim.

In the complaint, plaintiffs state that they were placed in "fear of imminent harmful or offensive contact and/or death." "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact." Fugazy v Corbetta, 34 AD3d 728, 729 (2d Dept 2006) (internal quotation marks and citation omitted). Plaintiffs' counsel contends that McRedmond was placed in imminent apprehension of harmful contact after the weighing incident when it would be "reasonable for her to believe that she may be harmed at that moment if she tried to leave." However, plaintiff's deposition testimony does not support this

conclusion, as plaintiff never testified that she believed that she would be harmed if she did not get on the scale or if she attempted to leave the office. Accordingly, no triable issue of fact remains with respect to the assault cause of action and summary judgment shall be granted dismissing this cause of action.

To sustain a cause of action for battery, "a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent." Bastein v Sotto, 299 AD2d 432, 433 (2d Dept 2002). The bodily contact is that which a reasonable person would find offensive. Cerilli v Kezis, 16 AD3d 363, 364 (2d Dept 2005). The intent to cause harm is not a necessary element. Id.

McRedmond alleges that she can satisfy the standard for battery with the numerous instances where Hanafy would allegedly grab her buttocks and breasts against her will. McRedmond also claims that Hanafy committed a battery when he picked her up against her will when she did not want to get on the scale. Lipton alleges that she can satisfy the standard for battery with the numerous instances that Hanafy would grab her and hold her close to him against her will.

There is conflicting testimony as to whether the touching incidents occurred and, if so, whether it was "intended" and

"offensive." This conflicting testimony raises credibility issues which are not appropriate for a summary judgment motion. Ferrante v American Lung Association, 90 NY2d 623, 631 (1997). Accordingly, summary judgment is denied for this cause of action.

In their complaint, plaintiffs allege that defendants' conduct caused them severe emotional distress and that defendants assaulted, beat, detained, abused and terrorized them, among other things. McRedmond describes feeling humiliated and violated as a result of the weighing incident. She also describes anxiety and emotional distress as a result of defendants' treatment towards her as an employee. Lipton also describes feeling anxious as a result of losing her job and being subject to defendants' alleged conduct.

"A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." Sheila C. v Povich, 11 AD3d 120, 130 (1st Dept 2004). Similar to intentional infliction of emotional distress, a cause of action for negligent infliction of emotional distress must demonstrate that the defendants' alleged conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized community." Id. at 130-131 (internal quotation marks and citations omitted).

Plaintiffs' allegations do not rise to the level of conduct necessary to sustain a cause of action for negligent infliction of emotional distress. There is no evidence that plaintiffs feared for their safety as a result of defendants' conduct. Moreover, even if defendants' alleged conduct is found to be harassing, there is no evidence, that it was so "outrageous" and "extreme" as to be "atrocious" and "utterly intolerable."

Accordingly, defendants' motion for summary judgment on plaintiffs' cause of action for negligent infliction of emotional distress is granted.

The tort of intentional infliction of emotional distress has been described as a "last resort" theory of recovery. McIntyre v Manhattan Ford, Lincoln-Mercury, Inc., 256 AD2d 269, 270 (1st Dept 1998); see also Maher v Alliance Mortgage Banking Corp., 650 F Supp 2d at 268. This claim may not be maintained where there is another avenue for recovery under the New York Human Rights Law. McIntyre v Manhattan Ford, Lincoln-Mercury, Inc. (256 AD2d at 270 [internal citations omitted]), held, "[i]n the matter under review, emotional damages are available under the theories of sexual harassment and retaliatory discharge pursuant to the [NYCHRL] . . . [T]here is no reason to apply the theory where an

applicable statute expressly provides for the recovery of damages of emotional distress."

Plaintiffs allege that defendants' conduct caused the plaintiffs to suffer emotional distress. This alleged conduct is the same conduct which serves as a basis for plaintiffs' claims under the NYSHRL. Accordingly, defendants' motion for summary judgment on plaintiffs' cause of action for intentional infliction of emotional distress is granted.

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment is granted with respect to Alexandria Lipton's hostile work environment claims under the NYSHRL in the first cause of action and Alexandria Lipton's hostile work environment claims under the NYCHRL in the second cause of action; and it is further

ORDERED that defendants' motion for partial summary judgment is granted as to both plaintiffs' seventh cause of action for assault, and both plaintiffs' tenth and eleventh causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress; and it is further

ORDERED that defendants' motion for partial summary judgment is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue.

This is the decision and order of the court.

Dated: April 13, 2011 ENTER:

DEBRA A. JAMES J.S.C.