[* 1]

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

PRESENT: PART 19

Index Number : 115220/2009

FARGAS, VALENCIA

VS

COSMOPOLITAN CLUB

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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

Dated: 6/7/11

Salvatore Capella
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 19

----------X

VALENCIA FARGAS,

Plaintiff,

Index No. 115220/09

-against-

Motion Seq. No. 001

THE COSMOPOLITAN CLUB,
SUADA FERATOVIC, and PETER MILKUN,

Defendants.

----------X

Hon. Saliann Scarpulla, J.:

In this action alleging employment discrimination, defendants The Cosmopolitan Club ("the Club") and Suada Feratovic ("Feratovic") (together, "the Moving Defendants") move, pursuant to CPLR 3211 and 3212, to dismiss the complaint of plaintiff Valencia Fargas ("Fargas").

As she explains, Fargas is African American, she holds a bachelor's degree, and she is licensed by the Fire Department of the City of New York as a fire safety director. The Club is a private club that provides its members with space for different events and accommodations. Fargas was employed by the Club from May 2008 until June 2009 as a night-shift fire safety director and auditor. Her duties included computer data entry of sales charges, guest reception and accommodation, and fire safety and security maintenance (Dewailly Aff., ¶ 3; Fargas Dep. Tr., at 26-29; 11/08/10 Chung Aff., exhibit E, Job Description).

Feratovic is a Caucasian female who, during Fargas's employment, worked at the Club as a receptionist. Fargas's shift was from 11 P.M. to 7 A.M., whereas Feratovic worked from 3 P.M. to 11 P.M. Fargas and Feratovic shared work space at the front desk, including two computers. Defendant Peter Milkun (Milkun), who has not appeared in this action, was allegedly a supervisor of both Fargas and Feratovic.[1]

Fargas alleges that, at the Club, she was treated differently than other non-African American employees. Specifically, she allegedly (1) was not allowed to keep an extra pair of shoes behind the front desk, whereas other employees were allowed to do so; (2) was not allowed to speak to the Club's managers about the fire extinguishers, whereas a day-shift fire safety director, a non-African American male, was allowed to do so; and (3) was not allowed to keep personal pictures at the front-desk or on the computers, whereas Feratovic was allowed to do so (*see* Complaint, ¶¶ 9, 10, 12).

Fargas alleges that Feratovic: (1) left notes telling Fargas that she should not be using the computer, even though Fargas allegedly needed to use the computer for work; (2) complained via e-mail to the Club's general manager, nonparty Christian Dewailly (Dewailly), that Fargas used the computer for personal purposes; and (3) made frequent prank telephone calls to Fargas, during Fargas's shift, laced with racial slurs (*see id.*, ¶¶ 11,

[1] The Moving Defendants claim that Milkun has never worked at the Club (Dewailly Aff., ¶ 4).

13, 14-17; *see also* Fargas Dep. Tr., at 45-46). In June 2009, Fargas's employment with the Club was terminated.

On these facts, Fargas alleges six causes of action against all of the named defendants: (1) for harassment and race/color-based employment termination, in violation of the New York State Human Rights Law (NYS HRL) §§ 296, *et seq.*; (2) for harassment and race/color-based employment termination, in violation of the New York City Human Rights Laws (NYC HRL) §§ 8-101, *et seq.*; (3) pursuant to NYS HRL §§ 296 (6), *et seq.* for aider and abettor liability; (4) pursuant to NYC HRL §§ 8-101, *et seq.* for aider and abettor liability; (5) for retaliation in violation of NYS HRL §§ 296, *et seq.*; and (6) for retaliation in violation of NYC HRL §§ 8-101, *et seq.* (*see* Complaint, ¶¶ 20-31). Fargas seeks lost wages, benefits, as well as punitive, liquidated, and compensatory damages.

The Moving Defendants now move, pursuant to CPLR 3211 and 3212, to dismiss the complaint.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiff the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88).

To obtain summary judgment dismissing a complaint, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]). With these principles in mind, the Court examines each of Fargas's causes of action.

I. Harassment/Hostile Work Environment Causes of Action

The Moving Defendants argue that Fargas has failed to establish a claim for harassment/hostile work environment under either the New York State or New York City Human Rights Law.

A. NYS HRL

Under NYS HRL, "[a] racially hostile work environment exists '[w]hen 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'" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004], citing *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993] [emphasis added]). "[M]ere personality conflicts must not be mistaken for unlawful discrimination" (*Forrest*, 3 NY3d at 309).

> 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; ... and whether it unreasonably interferes with an employee's work performance

(*id.* at 310-311 [internal quotation marks and citation omitted]). "Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so" (*id.* at 311).

> For racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments. Thus, whether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency, and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment

(*Schwapp v Town of Avon*, 118 F3d 106, 110-111 [2d Cir 1997] [internal quotation marks and citations omitted]; *see also Forrest*, 3 NY3d at 310-311). In *Whidbee v Garzarelli Food Specialties, Inc.* (223 F3d 62, 71 [2d Cir 2000]), the Second Circuit held that an issue of fact existed as to whether a number of racial slurs said by a co-worker over several months created an objectively hostile work environment.

> On a motion for summary judgment, the question for the court is whether a reasonable factfinder could conclude, considering all the circumstances, that 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*'

(*Schiano v Quality Payroll Sys.*, 445 F3d 597, 600 [2d Cir 2006] [quoting *Whidbee*, 223 F3d at 70]).

1. The NYS HRL Hostile Work Environment/ Harassment Claim Against Feratovic

The NYS HRL is directed at employers, and an employee, who "is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others," is not individually liable for NYS HRL violation (*Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]). Indisputably, Feratovic did not have ownership interest in the Club, and she did not have any power to carry out decisions made by others. Accordingly, the claim of hostile work environment as against her is dismissed.

2. The NYS HRL Hostile Work Environment/ Harassment Cause of Action Against The Club

Under NYS HRL, "[t]o recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it" (*Barnum v New York City Transit Auth.*, 62 AD3d 736, 737-738 [2d Dept 2009] [citation and quotation marks omitted]).

> Condonation, which may sufficiently implicate an employer in the discriminatory acts of its employee ..., contemplates a knowing, after-the-fact forgiveness or acceptance of an offense. An employer's calculated inaction in response to discriminatory conduct may ... indicate condonation

(*Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]).

The Club argues that Fargas has failed to establish the elements of a hostile work environment claim. In his affidavit in support, Dewailly claims that: (a) Fargas and Feratovic's dispute pertained only to the use of shared workspace; (b) Fargas complained

about receiving annoying phone calls, which stopped after the Club's building manager instructed her on how to determine their source, and © Fargas "never complained to the Club that she was discriminated against on the basis of her race or the color of her skin" (11/08/10 Dewailly Aff., ¶¶ 5-8).

However, Fargas testified that (1) she had heated disputes with Feratovic about the use of the shared workspace and computers (Fargas Dep. Tr., at 60-63); (2) in December 2008, Feratovic sent a complaint e-mail to the Club's managers claiming that Fargas's behavior was aggressive and that Fargas refused to listen to Feratovic because Feratovic was white (*see* 11/08/10 Chung Aff., exhibit L, 12/15/08 Feratovic e-mail; Fargas Dep. Tr., at 60-63); (3) for at least several months, during her shift, Fargas regularly received prank phone calls laced with racial slurs and innuendoes[2] which she believed were made by Feratovic[3] (Fargas Dep. Tr., at 44-47, 49); (4) Feratovic regularly spoke to her in a manner that "was mocking the black race" by purposefully using "black colloquialisms" and mannerisms (*id.* at 60); (5) Fargas complained to, and met several times with, the Club's managers about the phone calls and the manner in which Feratovic spoke to her (*id.* at 70-72); (6) the managers did not take immediate steps to address the phone calls; initially told

---

[2] The caller would use "ghetto" language; make "chicken" and "animal" sounds; call Fargas by name; and ask her if she ordered some chicken (Fargas Dep. Tr., at 44-47, 49).

[3] Fargas testified that she would turn a phone speaker on so that the night-shift security guard could listen to what was said by the prank caller (*see* Fargas Dep. Tr., at 45-46).

Fargas to ignore them, and, only after Fargas made a second complaint, instructed her to keep a log and to trace the source of the phone calls by dialing *57, after which the calls stopped (*id.* at 47-48); (7) Fargas felt that the Club's managers did not take her complaints seriously (*id.* at 71-73), and Feratovic continued to make racist remarks to her and to speak in a mocking manner (*id.* at 74); (8) Fargas's new work shoes were discarded, which Fargas believes was done by Feratovic and a supervisor (*id.* at 95-98); (9) Fargas was reprimanded, and on one occasion made fun of by a catering director for eating peanuts in a way that compared her to a monkey (*id.* at 109-110); (10) unlike other employees, including Feratovic, Fargas's managers instructed her against, and reprimanded her for, eating or drinking at the front desk, using work computers for personal purposes, and displaying pictures and personal artifacts at the front desk (*id.* at 74-75; 108-110); and (11) Fargas was the only employee who was required to keep a log of what she did during her shifts (*id.* at 50-52; *see also* 12/21/10 Fargas Aff., ¶¶ 8-12).

Based on the foregoing, issues of fact exist as to whether: (a) Fargas was subjected to "a steady barrage of opprobrious racial comments" or only to "sporadic racial slurs" (*Schwapp*, 118 F3d at 110); (b) the alleged discriminatory intimidation was of such quality or quantity that a reasonable employee would find the conditions of her employment negatively altered (*see Whidbee*, 223 F3d at 70-71; *see also Schiano*, 445 F3d at 600; *cf. Forrest*, 3 NY3d at 310-311 [three racial slurs made without employer's knowledge do not create a hostile work environment]); and © the Club became a party to the alleged offensive

conduct by condoning it (*Barnum*, 62 AD3d at 736; *see also Matter of State Div. of Human Rights*, 66 NY2d at 687). Therefore, the Club's motion to dismiss the cause of action for harassment/hostile work environment pursuant to NYS HRL is denied.

B. NYC HRL

Under NYC HRL, the severe or pervasive test does not apply and the determinative issue is whether Fargas was treated unequally based on her race (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1st Dept 2009]). NYC HRL targets conduct "that falls between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other" (*id.* at 80).

> [S]ummary judgment [is] ... available where [employers] can prove that the alleged discriminatory conduct in question does not represent a 'borderline' situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences

(*id.*).

1. The NYC HRL Hostile Work Environment/ Harassment Cause of Action Against Feratovic

NYC HRL "includes fellow employees under the tent of liability, but only where they act with or on behalf of the employer ... in some agency or supervisory capacity" (*Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003]). Here, indisputably, Feratovic did not hold a supervisory position and was not an agent with authority for the Club. Hence, she may not be liable under NYC HRL, and this claim as against Feratovic is dismissed (*id.*).

2. The NYC HRL Hostile Work Environment/ - Harassment Cause of Action Against The Club

Under NYC HRL, an employer is liable for the conduct of its employees where, inter alia, it "knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take 'immediate and appropriate corrective action'" (*Zakrzewska v New School,* 14 NY3d 469, 479-480 [2010], quoting Administrative Code of City of NY § 8-107 [13] [b] [2]).

Here, as previously discussed, issues of material fact exist as to (1) whether Fargas was treated unequally by the Club's managers because of her race (*see Williams,* 61 AD3d at 79-80); (2) whether Feratovic's alleged conduct falls in the spectrum that is targeted by NYC HRL (*cf. id.* at 80-81 [an allegation of one comment that was not directed at Fargas and was possibly meant to compliment a co-worker is not actionable]); and (3) whether the Club acquiesced to discriminatory conduct or failed to take immediate and appropriate corrective steps (*see Zakrzewska,* 14 NY3d at 479-480). Accordingly, the Moving Defendants' motion on the claim of hostile working environment, pursuant to NYC HRL, is denied.

In light of the court's determination, the causes of action for aiding and abetting survive as well (*see e.g. Steadman v Sinclair*, 223 AD2d 392, 393 [1st Dept 1996] [an individual may be liable for aiding discriminatory conduct]; *see also Wenping Tu v Loan Pricing Corp.*, 21 Misc 3d 1104[A], 2008 NY Slip Op 51945[U] [Sup Ct NY County 2008]).

II. Termination

NYS HRL provides, in relevant part, that:

> [i]t shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of an individual's ... race, ... color ... to discharge from employment such individual ...

(NY Executive Law § 296 [1] [a]).

NYC HRL provides, in relevant part, that:

> [i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived ... race, ... color ... of any person ... to discharge from employment such person ...

(Administrative Code of City of NY § 8-107 [1] [a]).

"The standards for recovery under the [State HRL] ... are the same as the federal standards under title VII of the Civil Rights Act of 1964" (*Forrest*, 3 NY3d at 305 n 3). Pursuant to the Restoration Act, Local Law 85 for year 2005, an analysis under the City HRL is "more stringent than that called for under either Title VII or the ... State HRL" (*Williams*, 61 AD3d at 65). The City HRL should be interpreted broadly and liberally, and similarly worded provisions of federal and state civil rights laws are viewed "'as a floor below which the [City HRL] cannot fall ...'" (*id.* at 66).

> A Fargas alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination[, by] ... show[ing] that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment ...; and (4) the discharge ...

> occurred under circumstances giving rise to an inference of discrimination

(*Forrest*, 3 NY3d at 305).

> The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth ... legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, the Fargas must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason

(*id.* [internal citation and quotation marks omitted]).

> To prevail on their summary judgment motion, [employer] defendants must demonstrate either Fargas's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual

(*id.*; *see also Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]).

The Moving Defendants do not dispute that Fargas, as an African-American, is a member of a group that both the NYC HRL and NYS HRL intend to protect. They argue that Fargas was terminated for a nondiscriminatory reason.

Fargas's duties at the Club primarily involved: (a) computer data entry of sales and other charges to guests' accounts, called auditing, and (b) fire safety inspection. As to data entry, over the course of Fargas's employment, the Club implemented a computerized point-

of-sales system (POS System), which allowed for automatic posting of charges to guests' accounts and obviated the need for manual data entry (*see* 11/08/10 Dewailly Aff., ¶ 9).

The Club showed that, even before Fargas started her job, its Board of Governors had decided to upgrade the POS System (*see* 11/08/10 Chung Aff., exhibit O, 05/20/08 Board of Governors Meeting Minutes, § XI). Fargas herself testified that auditing was a big part of her job, and that she was aware that the Club was implementing the POS System (*see* Fargas Dep. Tr., at 26-28, 93-94).

Accordingly, the Club has shown that implementation of the POS System eliminated the auditing function of Fargas's position (*see* 11/08/10 Dewailly Aff., ¶ 9), which provides a legitimate, non-discriminatory reason for Fargas's termination (*see e.g. Bailey*, 38 AD3d at 123-124 [where a defendant hospital terminated Fargas as part of company-wide layoffs in order to lower expenses in the face of decreasing revenues, the reason behind Fargas's termination was held to be non-discriminatory]; *see also Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398, 398 [1st Dept 2007] [a defendant "hotel's perceived need to reduce expenses and implement new strategies in the face of declining revenues" was held to be a valid, non-pretextual reason to terminate Fargas]).

As to fire safety inspection, the Club assigned this responsibility to nonparty Kevin Medina, who already worked as a night-shift houseman performing general cleaning and maintenance (*see* 11/08/10 Chung Aff., exhibit P, Kevin Medina job description; *see also* 11/08/10 Dewailly Aff., ¶ 4). Mr. Medina was also a licensed fire safety director (Dewailly

Aff., ¶ 4). The Club maintains that once it eliminated the auditing aspect of Fargas's job, it "decided that it was more effective for the Houseman to assume the role of the fire safety director rather than [to] have a separate fire safety director at night" (*id.*, ¶ 9). This also provides a nondiscriminatory reason for Fargas's termination (*see Bailey*, 38 AD3d at 123-124; *Alvarado, Inc.*, 38 AD3d at 398).

In opposition, Fargas does not argue that the Club's proffered reason is false. Rather, she contends that her termination should be considered in the context of verbal harassment by Feratovic and discriminatory treatment by management. Specifically, Fargas attempts to create an impression that her termination took place soon after she complained to Dewailly that her work shoes were discarded (*see* Fargas's Mem Opp., at 17-18). However, neither Fargas's deposition transcript (*see* Fargas Dept. Tr., at 98 [Fargas could not recall the date of the shoe incident]) nor her affidavit in opposition (*see* 12/21/10 Fargas Aff., ¶ 12) supports this claim. The fact that Fargas was reimbursed for the discarded shoes on her termination date does not show that she was laid off because she complained to the management of the shoe incident.

The record before the court reveals that Fargas and Feratovic complained about each other to the management in approximately December 2008 and January 2009 (*see* 11/08/10 Chung Aff., exhibits I-M [complaint e-mails and e-mails from the Club to Fargas]). Fargas, however, was not laid off until June 2009. Accordingly, on this record, there is no evidence that discrimination was the real reason behind Fargas's termination.

Fargas has failed to raise an issue of material faet as to the nondiscriminatory reason for her termination offered by the Club (*see Forrest*, 3 NY3d at 305, 308). Therefore, the Moving Defendants are entitled to summary judgment on the claims of race-based termination pursuant to NYS HRL and NYC HRL.

III. Retaliation

> 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 of City of NY § 8-107 [7]). In order to make out the claim, plaintiff must show 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*, 3 NY3d at 312-313; *see also Williams*, 61 AD3d at 71 ["the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity"]).

Here, Fargas claims that she was terminated in retaliation for complaining to the Club's managers about Feratovic's conduct. However, as previously discussed, the Club has demonstrated that Fargas was terminated for a nondiscriminatory reason and that there was a significant time gap between her complaints and her termination. In opposition, Fargas has failed to raise an issue of fact act as to a causal connection between Fargas's protected activity and her termination, which warrants the dismissal of the causes of action for retaliation.

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants The Cosmopolitan Club and Suada Feratovic is granted to the extent that:

(1) Fargas's claims for termination based on her race and color, pursuant to NYS HRL and NYC HRL, are severed and dismissed;

(2) Fargas's claims for hostile work environment/harassment, pursuant to NYS HRL and NYC HRL, as against defendant Suada Feratovic are severed and dismissed;

(3) Fargas's causes of action for retaliation, pursuant to HYS HRL and HYC HRL, are severed and dismissed;

and the motion is otherwise denied.

This constitutes the decision and order of the Court.

ENTER:

J.S.C.

SALIANN SCARPULLA