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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

YEE SING LI,

Plaintiff,

-against-

EDUCATIONAL BROADCASTING CORP.,

Defendant.

INDEX NO. 115948/2010
MOTION DATE
MOTION SEQ. NO. 001

The following papers numbered 1 to 6 were read on this motion by defendant to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Replying Affidavits (Reply Memo)	5,6

Cross-Motion: ☐ Yes ■ No

This action arises out of plaintiff Yee Sing Li's claims that he was subject to an alleged hostile work environment based on sexual harassment under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Defendant Educational Broadcasting Corp. moves, pursuant to CPLR § 3211 (a) (7), for an order dismissing plaintiff's complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff has been working for defendant since 2001 and is currently still employed there. At all times relevant for this action, plaintiff's title was the Associate Marketing Director. Plaintiff describes himself as an Asian man who is heterosexual. Defendant, formerly the Educational Broadcasting Corporation, is now Thirteen, the producer and broadcaster of the public television Channel 13/WNET.

In June 2008, plaintiff's co-worker, Alex Gutierrez (Gutierrez), approached plaintiff and while stroking his arm, stated to him, "Asian skin is so soft," and "you love it when a hot guy like

me touches you" (Defendant's Exhibit A, Complaint, ¶ 12). In July 2008, Gutierrez allegedly grabbed plaintiff's buttocks in the presence of another co-worker (*Id.*, ¶ 13).

In October 2008, plaintiff reported Gutierrez's "discriminatory conduct" to his supervisor, Kathleen Schultheis (Schultheis) (*Id.*, ¶ 14).

Plaintiff claims that defendant did not properly investigate his claims. In response, Charlene Shapiro (Shapiro), Vice President of defendant's Human Resources Division, states that her predecessor, Marc Morales (Morales) "immediately launched an investigation into Plaintiff's allegations ... the day after he received Plaintiff's complaint" (Shapiro Affidavit, ¶ 6). Although Shapiro was not present during the time of the complaints, she states that Morales provided her with his files. Shapiro continued that Morales spoke to multiple individuals regarding plaintiff's allegations, including Gutierrez and the employee who witnessed Gutierrez grabbing plaintiff's buttocks. Shapiro maintains that, even though no one corroborated the incidents which comprised plaintiff's sexual harassment claim, human resources counseled Gutierrez on the anti-discrimination and harassment policy and issued Gutierrez a final warning.

Plaintiff provides an e-mail communication between him and Morales. In the communication, among other things, plaintiff advises Morales that plaintiff is in "total disagreement" with the plan to take no action against Gutierrez (Plaintiff's Exhibit A). The e-mail also states the following, in pertinent part, "I did not particularly appreciate your comment, 'People who come here with false allegations will be terminated.' My response was ... 'then terminate me.' Your decision to rule this harassment claim just as horseplay is clearly erroneous and will be duly noted" (*Id.*). Morales's e-mail in response is as follows:

> In your reference below to "false allegations," you incorrectly quoted me and inconveniently omitted the context of our discussion. I was simply pointing out to you the risk in making allegations that would not be substantiated. Such allegations may be construed as "complaints in bad faith," and, according to Thirteen's policy, could result in the complainant's termination. I wanted you to understand that continuing to assert that a fellow

> employee is harassing you when the charge could not be proven factual could be dangerous (*Id.*).

Plaintiff contends that this e-mail communication was retaliatory in that it was threatening and would dissuade plaintiff from making grievances in the future. He also maintains that defendant "failed to believe my complaint of sexual harassment because I am a male complaining about another male" (Li Affidavit, ¶ 15). Defendant contends that this communication to plaintiff was an explanation of company policies and was not a retaliatory adverse action.

In December 2008, plaintiff received his performance evaluation. Plaintiff claims that this evaluation was noticeably different than the prior evaluations that he received. For instance, for the years 2002, 2004, 2006 and 2007, according to plaintiff, he received "stellar" performance evaluations (Complaint, ¶ 11). Plaintiff believes that his 2008 evaluation was lower than he deserved, due to defendant's retaliation towards plaintiff for complaining about Gutierrez's allegedly harassing conduct. On a scale of 0-4, plaintiff received a 2, which is defined as "meets expectations," being below "top achiever" or "exceeds expectations" (Defendant's Exhibit B, at 1). The evaluation states in pertinent part that plaintiff meets expectations, that his performance is fully satisfactory and that he consistently achieves the stated goals in agreed upon time frames (*Id.*) The evaluation also notes the following:

> [Plaintiff] performs his detail-oriented assignments with accuracy and with a positive and willing attitude. He takes on new tasks and cares about the mission of the organization. Although capable to complete his assigned tasks, he sometimes has difficulty communicating issues in the course of problem solving (*Id*).

In response, defendant claims that plaintiff's evaluation was still objectively a positive one, and that mild constructive feedback does not signify retaliatory action.

Plaintiff further believes that his treatment at work changed, also in retaliation for complaining about Gutierrez's conduct. For example, in February 2009, plaintiff was asked to

perform a work assignment which another employee allegedly described as "extra work filled with errors" (Complaint, ¶ 17). Also in February 2009, a director, Bob French (French), who is not plaintiff's supervisor, purportedly exclaimed to plaintiff, "how do you like your new position in life? Being bent over!" (*Id.*, ¶ 18). Plaintiff further notes that, in retaliation for his complaints, he was not invited to departmental meetings that he deserved to be a part of, and that he was asked to perform "menial" tasks such as being a courier (*Id.*, ¶ 19). Prior to February 2009, plaintiff had allegedly never been assigned to perform such tasks.

Defendant states that plaintiff cannot establish causation between plaintiff's complaint and this alleged new treatment. Defendant further maintains that plaintiff was not assigned to perform any tasks outside of his job description and that plaintiff's allegations are not adverse actions within the meaning of the NYSHRL and the NYCHRL.

Plaintiff took a leave of absence from his employment, from May 2009 to August 2009 and from August 2009 to December 2009, due to anxiety and depression resulting from defendant's alleged discriminatory and retaliatory conduct. Although still employed by defendant, plaintiff claims to still suffer from depression and anxiety as a result of defendant's alleged discriminatory and retaliatory conduct.

Plaintiff filed a complaint alleging six causes of action. The first two causes of action consist of a claim for sexual harassment discrimination under the NYSHRL and NYCHRL. The third and fourth causes of action claim that defendant, as an employer, violated both the State and City Human Rights Laws by creating a hostile work environment. The fifth and sixth causes of action allege that defendant retaliated against plaintiff, in violation of both the NYSHRL and NYCHRL.

Defendant moves, pursuant to CPLR § 3211, for an order dismissing the complaint. Defendant, accepting the plaintiff's allegations as true on a motion to dismiss, contends that these two incidents are trivial and isolated and do not rise to the level required to sustain a

claim for hostile work environment under the NYSHRL and the NYCHRL.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR § 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory (*P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]; *see also Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]).

II. Plaintiff's Separate Claims for Sex Discrimination and Hostile Work Environment:

Plaintiff has not set forth sufficient facts to have separate claims of both discrimination based on sex and hostile work environment. Plaintiff alleges that he was subject to a hostile work environment based on the fact that he was male and subject to discrimination based on the fact that he was male (*see e.g. Bermudez v City of New York*, 2011 WL 1218406, *24, 2011 US Dist LEXIS 33807, *64 [SD NY 2011] ["[plaintiff's] gender discrimination claims are duplicative of her sexual harassment and hostile work environment claims. All of her gender-based allegations deal with sexual harassment by certain Defendants — and sexual harassment is a form of gender discrimination. Thus, [plaintiff's] independent claims of gender discrimination are duplicative"]). Defendant also noted this, and, it appears that plaintiff has abandoned his first and second causes of action. As such, the first and second causes of action are extraneous and are dismissed.

III. New York State Human Rights Law:

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 of 1964, 42 USC § 2000 *et seq.* (Title VII), sexual harassment that results in a "hostile or abusive work environment" is prohibited as a form of employment discrimination (*Meritor Savings Bank, FSB v Vinson*, 477 US 57, 66 [1986]). The standard for 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]).

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 [interior quotation marks and citation omitted]" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]).

"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 [interior quotation marks and citation omitted]" (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 310-311). "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).

Applying the above legal standards to the present case, plaintiff's hostile work environment claims fail because they do not rise to the level of actionable harassment based on sex. As set forth in the facts, plaintiff complains that he was touched on the arm once and buttocks once, by the same employee, who said something that defendant perceived as sexually harassing. Another employee also said something that plaintiff perceived as being discriminatory.

While plaintiff may have been exposed to a "mere offensive utterance" on a few occasions, a reasonable person cannot find that plaintiff was subject to a hostile work environment (*Brennan v Metropolitan Opera Association, Inc.*, 284 AD2d 66, 72 [1st Dept 2001]).

Moreover, while plaintiff believes that he was subjected to a sexual assault by Gutierrez, "[a] work environment will be considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it" (*Brennan v Metropolitan Opera Association, Inc.*, 192 F3d 310, 318 [2d Cir 1999]). "[I]n order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive" (*Hamilton v Bally of Switzerland*, 2005 WL 1162450, *8, 2005 US Dist LEXIS 9319, *27 [SD NY 2005] [internal quotation marks and citation omitted]). Gutierrez, an employee, stroked plaintiff's arm and touched plaintiff's buttocks once. As such, no rational fact finder could conclude that these allegations, considering the time period in which they occurred and the totality of the circumstances, could alter the conditions of the plaintiff's employment so as to create a hostile work environment (*see e.g. Barnum v New York City Transit Authority*, 62 AD3d 736, 738 [2d Dept 2009] [touching thigh, patting buttocks, offensive comments not severe and pervasive]; *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 768 [2d Cir 1998] [finding no triable issue of hostile work environment where supervisor told plaintiff she had been voted the

"sleekest ass" in the office and he deliberately touched her breasts with papers he was holding]; *Gregg v New York State Department of Taxation & Finance*, 1999 WL 225534, 1999 US Dist LEXIS 5415 [SD NY 1999] [at least 10 to 15 inappropriate conversations, four instances of offensive touching and invitations to drinks and meals not severe and pervasive]; *compare Raniola v Bratton*, 243 F3d 610, 621 [2d Cir 2001] [finding a triable issue of fact where plaintiff stated that, over a period of two and a half years, she was subjected to offensive sex-based remarks, workplace sabotage, disproportionately burdensome work assignments, and one serious public threat of physical harm]).

Moreover, as set forth by defendant, if plaintiff believes that Gutierrez's conduct constitutes forcible touching, then the State of New York may prosecute Gutierrez for this alleged misdemeanor. 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 [internal quotation marks and citation omitted]" (*Matter of State Division of Human Rights v St. Elizabeth's Hospital*, 66 NY2d 684, 687 [1985]). Defendant did not encourage, condone or approve Gutierrez's alleged behavior. Even so, as defendant noted, "a pat on the buttocks, regardless of how offensive it might be to the recipient, does not qualify as 'forcible touching'" under Penal Law § 130.52 (*People v Nuruzzaman*, 8 Misc 3d 356, 358, 2005 NY Slip Op 25185 [Crim Ct, NY County 2005]).

Accordingly, plaintiff's NYSHRL hostile work environment claim set forth in the third cause of action is dismissed.

IV. New York City Human Rights Law:

As a result of revisions to the NYCHRL in 2005 through the Local Civil Rights Restoration Act of 2005 (Restoration Act), the NYCHRL or Administrative Code of City of NY (Administrative Code) § 8-130, is 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 of analysis under the NYSHRL, 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, 66 [1st Dept 2009]).

Under *Williams*, the test for dismissing a NYCHRL hostile work environment claim is whether "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.* at 80). However, despite the broader application of the NYCHRL, *Williams* also recognized that the law does not "operate as a general civility code" (*Id.* at 79 [internal quotation marks and citation omitted]).

Applying the standard set forth in *Williams* to the present case, plaintiff's allegations with respect to the gender-based conduct can also be reasonably interpreted by a trier in fact to be no more than "petty slights and trivial inconveniences" (*Id.* at 80). Although Gutierrez's and French's conduct may have been offensive, a reasonable juror would find that it is too petty and trivial to rise to an actionable level (*see e.g. Wilson v N.Y.P Holdings, Inc.*, 2009 WL 873206, *29, 2009 US Dist LEXIS 28876 [SD NY 2009] [holding that despite plaintiffs' claims that defendant discriminated against black and female employees, there was no viable hostile work environment claim under the NYCHRL when black female employees were allegedly subject to some derogatory language over a number of years, as this only resulted in "petty slights and trivial inconveniences"]).

Accordingly, plaintiff cannot state a viable claim under the NYCHRL and the fourth cause of action is dismissed.

V. Plaintiff's Claims for Retaliation under the NYSHRL and NYCHRL:

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 the 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, he/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 plaintiff's favor, plaintiff has established that he was engaged in a protected activity and that the employer knew of this activity, i.e., complaining about allegedly being touched inappropriately by another co-worker.

However, as demonstrated below, plaintiff cannot demonstrate that he suffered any adverse employment actions. An "adverse employment action" is defined as follows:

> An adverse employment action is a materially adverse change in the terms and conditions of an individual's employment. It is more disruptive than a mere inconvenience, and might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of

> benefits, significantly diminished material responsibilities, or other indices unique to a particular situation (*Hunt v Klein*, 2011 WL 651876, *5, 2011 US Dist LEXIS 14918, *14-15 [SD NY 2011] [internal quotation marks and citations omitted]).

An adverse employment action is defined the same in the NYCHRL as in the NYSHRL (*Bermudez v City of New York*, 2011 WL 1218406, *10, 2011 US Dist LEXIS 33807 at 28).

Adverse Actions:

According to plaintiff, after he complained to defendant about Gutierrez's conduct, human resources sent plaintiff a "threatening" e-mail, which was retaliatory and would deter plaintiff from making future grievances (Li Affidavit, ¶ 13).

According to Shapiro, human resources launched an investigation as soon as plaintiff voiced his complaints. Shapiro noted that human resources spoke with several people who could not corroborate the incidents that comprised the sexual harassment claim. Despite this lack of corroboration, defendant still counseled Gutierrez about defendant's anti-discrimination and harassment policy and issued him a final warning.

As evidenced, defendant adequately investigated plaintiff's claims. As part of this investigation, Morales e-mailed plaintiff and advised him, that, as per company policy, employees will be penalized for making false allegations. However, defendant's explanation of company policy does not rise to the level of a material adverse employment action and could hardly be considered "threatening." As stated in *Hunt v Klein* (2011 WL 651876, at *5, 2011 US Dist LEXIS 14918, at *15), "the application of the [employer's] disciplinary policies to [the employee], without more, does not constitute an adverse employment action [internal quotation marks and citation omitted]." As such, plaintiff has not met his burden and cannot demonstrate that the e-mail he received from human resources was an adverse employment action.

Plaintiff also alleges, without any factual evidence, that he was not allowed to attend certain meetings. Plaintiff further contends that, after he complained about Gutierrez's conduct,

he was asked to perform a useless job and that he was asked to perform menial tasks such as being a courier.

Plaintiff has not come forward with any evidence that he was needed at these meetings for any business reasons or that he was asked to perform work outside of his job description. Moreover, these three allegations do not rise to the level of a material adverse employment action and are "mere inconveniences." Plaintiff cannot allege that he experienced a "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits or significantly diminished material responsibilities." Accordingly, plaintiff has not proven that any actions alleged which occurred at work are adverse employment actions taken in retaliation for his complaints.

Plaintiff claims that he was given a lower performance evaluation in retaliation for his complaints. However, plaintiff cannot prove that this evaluation is a material adverse employment action. First of all, the evaluation is on the whole, not negative. Second, plaintiff does not provide the court with the evaluations from the years 2003 and 2005. Third, even in the other evaluations in the record, plaintiff received some negative feedback on his evaluation. For instance, in 2007, the evaluation, written by Schultheis, stated that plaintiff's "communication with colleagues is sometimes confusing to others. He and I will work together next year to find ways to work on this" (Plaintiff's Exhibit B, at 6). Fourth, it appears that, as of 2008, there was a new evaluation system in place where there were no point values given to certain skill sets, as in other years.

Finally, and most importantly, constructive criticisms are not considered an adverse employment action. As one court summarized, "oral and written warnings do not amount to materially adverse conduct" and "[n]egative performance reviews are not, in and of themselves, adverse employment actions" (*Nieves v District Council* 37 (DC 37), AFSCME, AFL-CIO, 2009 WL 4281454, *8, 2009 US Dist LEXIS 112653, *23-24 [SD NY 2009] [internal quotation marks

and citations omitted], *affd Nieves v Roberts*, 2011 WL 1654467, 2011 US App LEXIS 9031 [2d Cir 2011]).

Accordingly, since plaintiff has failed to demonstrate that these employment actions were adverse, plaintiff cannot show retaliation as a matter of law. As such, the fourth prong of a retaliation claim, which is whether or not there was causal connection, is of no import.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Education Broadcasting Corp. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: June 30, 2011 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**