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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SANELA KOLENOVIC,
Plaintiff,

-against-

ABM INDUSTRIES, INC., ABM ENGINEERING SERVICES COMPANY, ABM JANITORIAL NORTHEAST, INC., AND FRANCIS NAGROWSKI,

Defendants.

INDEX NO. 402422/10

MOTION SEQ. NO. 001

The following papers numbered 1 to 6 were read on this motion by defendants for summary judgment dismissing plaintiff's complaint in its entirety.

	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 Sanela Kolenovic's (plaintiff) claim that she was subject to an alleged hostile work environment based on sexual harassment by her supervisor Francis Nagrowski (Nagrowski) under the New York City Human Rights Law (NYCHRL). ABM Industries, Inc., ABM Engineering Services Company, ABM Janitorial Northeast, Inc. (ABM Janitorial) and Nagrowski (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint in its entirety. Plaintiff is in opposition to the herein motion.

BACKGROUND

Between October 2005 and November 2006, plaintiff worked with Nagrowski as his administrative assistant for ABM Janitorial at their Merrill Lynch account. In their papers defendants allege that Nagrowski did not hire plaintiff, nor did he have the authority to approve or deny any pay raises, although he supervised her performance generally (*see* Notice of Motion ¶ C).

Beginning around October 30, 2005 and throughout her employment until the end of October 2006, plaintiff alleges that she was subjected to numerous acts of sexual harassment and discrimination based upon her gender, citizenship and natural origin by Nagrowski, her supervisor (Defendant's Exhibit A, Complaint at ¶ 27). Nagrowski allegedly, on an ongoing and continual basis, would refer to plaintiff as "My Bitch" as well as make comments to plaintiff such as, "Get over here my Bitch!" or, "These are my bitches" when referring to plaintiff and other women, as well as commenting, "Her boobs are always popping out" or, "She is wearing her thong today" (*id.* at ¶¶ 29, 30, 31).

In October 2006, after plaintiff had asked for a raise, Nagrowski allegedly told her, "I'm going to a bachelor party [on Saturday night] - Would you like to make some extra money?" (*id.* at ¶ 33). Plaintiff states that this comment offended and humiliated her (*id.*). Plaintiff also avers that Nagrowski, in referring to another female employee, would tell plaintiff that Wanda "should clean under my desk" and that "she's a little bit on the skankier side" (Kolenovic Affidavit ¶ 9). Nagrowski also allegedly nicknamed one of plaintiff's co-workers "Thong Dila" (*id.* at ¶ 11). Although plaintiffs claims that Nagrowski thought these comments were funny, she was humiliated by them (*id.* at ¶ 12).

Plaintiff allegedly complained of Nagrowski "unlawful conduct" to defendants and even requested to work at a different location away from Nagrowski, however defendants allegedly condoned Nagrowski's conduct (*id.* at ¶ 34-37). Plaintiff claims that defendants did not take the appropriate action with regard to her claims and denied her requests for a transfer and/or re-hire. However, defendants maintain that plaintiff had repeated issues properly handling her billing tasks, requiring others to step in (Notice of Motion at 6). Plaintiff allegedly told a coworker that she was quitting, a week after the bachelor party comment was made to her, and that evening plaintiff wrote an e-mail to Al Hoti, a branch manager, telling him that she quits her job (*id.*). In this email plaintiff discusses Nagrowski's comments and how they have made her

feel, how she needs a raise in salary and mentions that she has always had an issue with the billing (Notice of Motion, exhibit H). Hoti forwarded the email to Robert Kinsley, ABM Janitorial's Vice President of Human Resources, who immediately initiated an investigation (*id.*). Defendants maintain that this was the first complaint ever registered against Nagrowski. As a result of the investigation, ABM Janitorial informed plaintiff that part of her complaint regarding the bachelor party comment had been substantiated and that the appropriate actions had been taken. Nagrowski was allegedly required to take a manager sensitivity course and a disciplinary memorandum had been placed in his employment file (*id.* at 8). Additionally, the company offered plaintiff the opportunity to return to her prior position as administrative assistant, which she declined.

Plaintiff first initiated this action by the filing of a summons and complaint on January 4, 2008, in the United States District Court for the Southern District of New York, alleging claims of gender-based sexual harassment and retaliation under Title IIV of the Civil Rights Act, New York State Human Rights Law (NYSHRL), and the NYCHRL, the New York City Administrative Code Title § 8-107(1)(e); (6), (19), (13) and Title VII of the Civil Rights Act of 1964, including discrimination based upon gender, natural origin and citizenship. Issue was joined when defendants interposed their answer. Subsequently, after engaging in discovery, defendants moved for summary judgment on all of plaintiff's claims pursuant to Rule 56 of the Federal Rules of Civil Procedure, which was granted in its entirety[1] (Notice of Motion, Memorandum at 3; exhibit B). Plaintiff appealed that decision to the Court of Appeals for the Second Circuit, which affirmed the District Court's granting of summary judgment with respect to all of plaintiff's claims except her hostile work environment claim under the NYCHRL and claims under the

[1] The Southern District granted defendants summary judgment on all of plaintiff's claims, dismissing her hostile work environment claims under federal, state and city laws. Further, the Court noted that "[p]laintiff concede[d] that she did not intend to bring discrimination claims based on gender, natural origin, or citizenship" and those claims were dismissed as abandoned (Notice of Motion, exhibit B at 8).

New York City Administrative Code § 8-101 et seq.,[2] and remanded that claim to the District Court (*id.*, exhibit D). The District Court then declined to exercise jurisdiction over plaintiff's NYCHRL claim and remanded the case to this Court (*id.*). Defendants now move for dismissal of plaintiff's NYCHRL claim, pursuant to CPLR 3212.

Defendants ask that the Court apply the standard set down by the New York Court of Appeals in *Forrest v Jewish Gulid for the Blind,* 3 NY3d 295 (2004), which compels this Court to grant its summary judgment motion on plaintiff's NYCHRL claim unless plaintiff has established that she was subjected to "severe or pervasive" harassment (*id.*). However, defendants also note in their memorandum that recent decisions analyzing hostile work environment claims under the NYCHRL "have abandoned the longstanding 'severe or pervasive' criterion in favor of a 'petty slight or trivial inconvenience' standard" set forth in *Williams v New York City Hous. Auth.*, 61 AD3d 62 (1st Dept 2009) (*id.*). Defendants proffer that the *Wiliams* standard should not be used by this Court in deciding its motion, as it has not been adopted by the Court of Appeals and it does not accurately test whether, as required by section 8-107 of the NYCHRL, an employee has been discriminated against in the "terms, conditions or privileges of employment." However, should the Court decide to adopt the *Williams* standard, defendants proffer that summary judgment is still warranted in their favor. Specifically, defendants maintain that Nagrowski's "handful of isolated and innocuous comments" do not meet the "petty slights standard" and do not establish "even a borderline claim" (Notice of Motion at 1-2).

In support of their motion, defendants submit, *inter alia*, a copy of the pleadings; the Order of Justice Pauley, III, of the Southern District of New York which granted defendants' summary judgment motion; the Order of the Court of Appeals which affirmed in part and

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[2] The Court stated, in vacating this portion of the Southern District's decision that "The Local Civil Rights Restoration Act of 2005 ... , N.Y.C. Local Law No. 85 (2005), requires that claims brought under the NYCHRL be evaluated separately from counterpart claims brought under Title VII of the Civil Rights Act of 1964 . . . and the New York State Human Rights Law" (Notice of Motion, exhibit D at 2).

vacated in part the decision of Justice Pauley, III; a letter to plaintiff, dated October 20, 2005 extending the offer to work for ABM Janitorial as an Administrative Assistant; a signed acknowledgment by plaintiff that she had been provided with a copy of ABM Industries policy on Unlawful Harassment and the Sexual Harassment Information Sheet; ABM Janitorial's employee handbook; plaintiff's email to Mr. Hotl; letters to plaintiff regarding the sexual harassment investigation; affidavit of Robert Kingsley stating that he oversaw the investigation of plaintiff's complaint; affidavit and deposition transcript of Nagrowski; plaintiff's deposition transcript; and the deposition transcripts of Hotl and Kingsley.

In opposition, plaintiff maintains that defendants's motion should be denied as triable issues of fact and credibility exist and urges the Court to use the *Williams* standard. Specifically, plaintiff avers that she was regularly subjected to a hostile work environment by Nagrowski which rise above the "petty slights and trivial inconveniences" (Opposition at 3). Plaintiff maintains that, under the Administrative Code, City law is much more protective than Federal and State law, such that an employer is held strictly liable for harassment committed by a supervisor (*id.* at 4). Additionally, under the NYCHRL there is no *Farragher-Ellerth* defense. and in support attaches an affidavit of plaintiff dated February 2, 2011, excerpts from plaintiff's deposition, and the deposition transcript of non-party Hajka Kucevic.

In reply defendants maintain that plaintiff's affidavit attached to its opposition papers be disregarded, as her statements in the affidavit directly conflict with portions of her deposition testimony. Specifically, in her affidavit she states that Nagrowski made sexual and discriminatory comments toward her, [o]n an ongoing and continual basis" and,

> "[o]n numerous occasions, Francis Nagrowski would refer to me and other women employees as 'Bitches.' More specifically, on many occasions, (on at least three occasions that I can specifically recall), Francis Nagrowski referred to me and other women employees in the workplace as "My Bitch" or he would tell me 'Get Over Here My Bitch'. . ." (Opposition, Plaintiff Affidavit at ¶¶ 6,7).

However during her deposition taken on May 21, 2008, plaintiff testified as follows:

> "A. My bitch was one time, yeah.
> Q. So it's not on an ongoing and continual basis?
> A. No.
> . . .
> Q. Okay, so in reality your saying he did that one time?
> A. Saying my bitch, but bitch, the word bitch.
> Q. Right.
> A. Different times.
> Q. But my bitch, one time?
> A. Right.
> Q. And then we talked about the other comment, "Get over here my bitch.'
> A. Yes.
> Q. Was that one time or several times?
> A. That would be one time" (plaintiff EBT at 35).

Defendants maintain, and cite case law in support of the proposition, that a party cannot preclude summary judgment by alleging issues of fact created in its own self-serving affidavit which contradicts prior sworn deposition testimony (Reply at 1). Specifically, defendants assert that in opposition plaintiff is attempting create issues of fact in a self-serving affidavit, where she attempts to expand the alleged harassment to something more than it was (*id.* at 3). Further, defendants state that they have not argued for the application of the *Farragher-Ellerth* as an affirmative defense and plaintiff's argument regarding same is misplaced.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

As a preliminary matter, the Court will not consider plaintiff's affidavit, dated February 2, 2011, attached to her opposition papers as it is self-serving and appears to be an attempt to avoid the consequences of her early testimony, specifically as to the frequency of Nagrowski's alleged harassing conduct, without an explanation accounting for the disparity (*see Garcia v Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept 2009]; *Telfeyan v City of New York*, 40 AD3d 372 [1st Dept 2007] ["Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"] [internal quotations and citations omitted]; *Perez v Mekulovic*, 13 AD3d 158 [1st Dept 2004]).

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).

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 (*see 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]).

The First Department 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 Nagrowski's comments or her conditions in the office can be reasonably interpreted by a trier in fact to be no more than "petty slights and trivial inconveniences" (*id.* at 80). Although Nagrowski's comments may have been offensive, a reasonable juror would find that it is too petty and trivial to rise to an actionable level, especially given the infrequency of the comments (*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"]).

However, even assuming *arguendo* the Court were to apply the "severe and pervasive" standard as set forth in *Forrest*, defendants' motion is still granted. 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]). Accordingly, plaintiff cannot state a viable claim under the NYCHRL and her complaint is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion, pursuant to CPLR 3212, to dismiss plaintiff's 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: 7-13-12

Enter:

PAUL WOOTEN J.S.C.

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

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