

**Brannon v New York State Off. of Parks, Recreation
& Historic Preserv.**

2013 NY Slip Op 33619(U)

February 3, 2013

Sup Ct, Bronx County

Docket Number: 301391/10

Judge: Alison Y. Tuitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JANICE TURNER BRANNON,

Plaintiff(s),

- against -

NEW YORK STATE OFFICE OF PARKS, RECREATION
AND HISTORIC PRESERVATION, ROBERTO CLEMENTE
STATE PARK, AND FRANCES RODRIGUEZ,

Defendant(s).

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DECISION AND ORDER

Index No: 301391/10

In this action for alleged racial and gender discrimination, defendants move seeking an order granting them summary judgment. Defendants aver, *inter alia*, that plaintiff's claims of discrimination as against defendants NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION (OPRHP) and ROBERTO CLEMENTE STATE PARK (RC) are barred insofar as she elected to prosecute them before the New York State Division of Human Rights, which ultimately dismissed them on the merits. Defendants argue that these same claims are similarly barred as against defendant FRANCES RODRIGUEZ (Rodriguez) insofar as this action against her was commenced after the expiration of the applicable statute of limitations. With respect to plaintiff's claims pursuant to 42 USC § 1981 and § 1983, defendants contend, *inter alia*, that the law proscribes any claims pursuant to 42 USC § 1983 against a State or any of its employees acting in their official capacity and that

absent a viable claim pursuant to 42 USC 1983 against the State, there can be no claim pursuant to 42 USC § 1981. Lastly, with respect to plaintiff's claims pursuant to Title VII of the Civil Rights Act of 1964, defendants contend that the evidence establishes, beyond any factual dispute, that she was not discriminated against, not subjected to a hostile work environment nor fired for anything other than lawful reasons, namely her persistent misconduct.

Plaintiff opposes defendants' motion averring that questions of fact preclude summary judgment.

For the reasons that follow hereinafter, defendants' motion is hereby granted.

The instant action, which was commenced on February 22, 2010, is for alleged discrimination based on race and gender. Within her complaint, plaintiff alleges the following: Between 2002 and 2006, she was employed by OPRHP, a government and New York State agency, first as a seasonal Park Ranger and then as an all-year-round Park Ranger/Steward. Specifically, plaintiff worked at RC, one of the parks operated and maintained by OPRHP. Rodriguez was employed by OPRHP and was the Park Director at RC. Plaintiff reported to Barbara Connor (Connor), her immediate supervisor, and also employed by OPRHP. Plaintiff was initially hired in the Spring of 2002 as a summer seasonal employee and Park Ranger and she remained

so employed until September 2004. In April 2005, because plaintiff had performed satisfactorily as a summer seasonal Park Ranger, she was hired by Rodriguez as an all-year-round Park Ranger/Steward.

While plaintiff, an African American female, was employed by the defendants, defendants selectively applied policies and procedures, giving preferences to Hispanic and/or Male employees with regard to requirements for breaks-in-service, eligibility for time and attendance, requests for unpaid leave, allocation of overtime, and work assignment. While plaintiff was employed by the defendants, she was subjected to several episodes of sexual harassment, intimidation, hostility and disrespect. Specifically, plaintiff witnessed two female coworkers engaging in a lap dance in the women's locker room, she also witnessed Rafael Matos (Matos), a coworker, grabbing and rubbing his genitals while observing female park patrons. Plaintiff was also cursed out by Rodriguez and had a door slammed in her face by Connor.

Plaintiff complained about the foregoing events, both to Connor and Rodriguez, to no avail. Finally, in September 2006, plaintiff sent an anonymous letter to Bernadette Castro (Castro), former Commissioner of OPRHP wherein she complained about the foregoing. On October 7, 2006, plaintiff was suspended after she intervened to aid a park patron. On October 12, 2006, plaintiff

was terminated. Based on the foregoing, plaintiff alleges five causes of action. The first cause of cause of action alleges that defendants intentionally discriminated against her thereby depriving her of rights and privileges guaranteed by the United States Constitution and thereby violating Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) (Title VII) and 42 USC § 1983. The second cause of action alleges that plaintiff engaged in protected activities, namely opposing defendants' discrimination, and that she was terminated as a result in violation of Title VII. The third cause of action alleges that defendants intentionally discriminated against her thereby depriving her of rights and privileges guaranteed by the United States Constitution and thus violating 42 USC § 1981. The fourth and fifth causes of action allege that plaintiff was discriminated against based on her race and gender in violation of section 8-502(a) of the New York City Human Rights Law (N.Y.C. Admin. Code § 8-502[a]).

In support of the instant motion, defendants submit the pleadings, and to the extent relevant, also submit the following.

Defendants submit an affidavit from Rodriguez, who states, in relevant part, the following: Since April 2004, she was the director at RC, a park which is part of OPRHP. Plaintiff had been employed by defendants at RC as a summer temporary/seasonal

employee since 2002. Plaintiff reported to Connor, who in turn reported to Rodriguez. In April 2005, Rodriguez asked plaintiff if she'd like to return for the summer season and that there could be an opportunity for her to return for the winter season as well. Plaintiff accepted and worked as a seasonal park worker 3, a long term seasonal employee, from April 2005 through April 2006. In April 2006, the title of park worker 3 became a title for permanent employees only and, therefore, plaintiff was reclassified as a park and recreation aid, a title for seasonal employees. Plaintiff remained in that title until she was terminated on October 12, 2006. In each fiscal year from 2004 to 2005, plaintiff worked 404.25, 1,846.25, and 929.50 non-overtime hours, respectively. Accordingly, in 2006, she was unable to avail herself of an agreement between defendants and the employee's union, allowing long term seasonal employees, such as plaintiff, to convert to permanent employees if they had worked 1,760 non-overtime hours in two of the preceding three years. Long term seasonal employees, such as plaintiff, were required to have breaks in service to prevent them from working in excess the permissible number of hours for their title. If a seasonal employee worked in excess of the permissible number of hours, he/she would then be eligible to earn time and attendance, meaning paid leave. Earning leave, however, was not tantamount to being a permanent employee.

Due to budgetary constraints, overtime at RC was rare.

Plaintiff, however, did receive overtime assignments between 2004-2006. Overtime assignment decisions were made using factors such as the nature of the event for which overtime was needed, the seniority of the employees, and whether someone already scheduled to work could remain at work. During the course of plaintiff's employment, Rodriguez had several discussions with plaintiff about plaintiff's verbal confrontations with patrons and her inappropriate behavior. On October 7, 2006, plaintiff had a verbal confrontation with a park patron named Shaquile, who was playing with some other park patrons. On that day, Rodriguez saw Shaquile crying in the hallway of RC. A discussion ensued and Shaquile indicated that plaintiff had told other kids to stop playing with him because he was on medication. Because Shaquile was very upset, Rodriguez summoned plaintiff to her office where she corroborated Shaquile's story. Rodriguez then mentioned other events involving plaintiff's inappropriate behavior, told plaintiff that she'd forward the events to Shelley Weinreb (Weinreb), Rodriguez' supervisor, and asked plaintiff to sign out and go home. Rodriguez then asked Robert Morris (Morris) a night supervisor at RC, who had also spoken to Shaquile, to fill out an incident report. The following week, Rodriguez spoke to Weinreb regarding the foregoing event, who stated that she'd send Rodriguez a letter to execute and give to plaintiff. Rodriguez then asked Connor to contact plaintiff and tell her to return to work on October 12, 2006. That

day, Rodriguez signed and gave plaintiff a termination letter, which had been forwarded to her by Weinreb. Plaintiff then asked for a meeting to review her personnel file. Said meeting was held and Joe Lescinski (Lescinski), Special Projects Director with OPRHP, allowed plaintiff to review her personnel file. During the review, plaintiff provided Lescinski with documents detailing a host of incidents, about some of which Rodriguez was aware. As a result of the instant litigation, Rodriguez learned that on September 29, 2006, plaintiff wrote an anonymous letter to Castro wherein she complained about unprofessional conduct by RC supervisors involving favoritism.

Defendants submit an affidavit from Weinreb, who states, in pertinent part, the following: Between 2003 and 2009, she was General Park Manager III for OPRHP and was responsible for parks within the New York City region, including RC. Weinreb's duties included the termination of temporary/seasonal staff within the New York City region when their behavior and performance were in question. Park employees were hired on either a permanent or seasonal basis. Permanent employees had tenure rights, meaning that they were entitled to notice of any charges and an opportunity for a hearing prior to discipline or termination. Seasonal/temporary employees did not have such rights and were thus considered at-will employees. Based on staffing needs, defendants usually hired seasonal employees to work the summer months.

Sometimes, because defendants were unable to hire permanent staff, seasonal employees were hired for consecutive summer and winter periods and were considered long term seasonal employees. Long term seasonal employees had no tenure rights either, were not provided with written performance evaluations, and were not entitled to notice of any charges prior to termination. In 2006, defendants and the relevant employee unions entered into an agreement to convert then existing long term seasonal employees to permanent employees if they had worked at least 1,760 non-overtime hours in two of the last three fiscal years. On October 19, 2006, defendants converted 35 long term seasonal employees who met the foregoing criteria to permanent employees. The employees who were converted were of diverse race and gender. Based on information provided by Rodriguez regarding plaintiff, Weinreb terminated her by sending a form letter to Rodriguez for her signature. Specifically, plaintiff was terminated because she made derogatory remarks and shared personal information about a young park patron in front of other young park patrons.

Defendants submit a document titled "Appointment History," indicating that plaintiff was within defendant's employ from June 24, 2002 through October 13, 2006. Defendants also submit a document titled "DHR Information Request," which evinces that between December 2005 and December 2006, defendants employed 15 seasonal employees, including the plaintiff. Plaintiff was one of

three African American females among three Hispanic males, three African American males, three Hispanic females, one White male and two White females. The document further evinces that plaintiff worked more overtime hours than nine other employees, including several White, African American, and Hispanic males and Hispanic and White females.

Defendants submit a document titled "Roberto Clemente State Park Incident Report," dated October 7, 2006, authored by Morris. The report states that while walking in the hallway near the fitness room within RC, he came across a patron named Shaquile who was crying. When confronted by Morris, Shaquile indicated that he and another patron were horsing around when they were approached by plaintiff who asked them to stop because Shaquile was mentally challenged and on medication.

Defendants submit a letter dated October 12, 2006, addressed to plaintiff, and signed by Rodriguez. The letter apprises plaintiff that as the date of the letter her services were no longer required and she was, therefore, terminated.

Defendants submit a memorandum from Lescinski, dated December 20, 2006, wherein he memorializes a post-termination meeting he had with plaintiff on October 24, 2006. According to Lescinski, he had been asked by Weinreb to meet with plaintiff in order to have plaintiff review her personnel file. At the meeting, plaintiff

indicated that she had never been admonished regarding her performance while employed with defendants. She also presented Lescinski with a host of documents purporting to be official reports of various incidents occurring at RC while plaintiff was employed there. Plaintiff indicated that many of those reports had never been submitted to the defendants. Lescinski, forwarded the documents to Rodriguez. Defendants submit an email message from Rodriguez, dated October 28, 2006, wherein she describes her review of the documents submitted by plaintiff to Lescinski and whether she, Connor, or Morris were aware of the events described therein¹. According to Rodriguez, Connor was aware of two incidents, occurring on July 30, 2006 and October 1, 2006, respectively. The first event involved allegations that Connor spoke rudely to plaintiff, stating that she "was getting on [her] nerves." The second involved an allegation that Matos rudely spoke to plaintiff when she traversed floors that Matos had just mopped. With regard to the first event, Connor denied making the statement. With respect to the second event, Connor indicates that she reprimanded Matos and indicated to plaintiff that she should have waited for the floors to dry.

¹While there were many documents submitted by plaintiff and which apparently, Rodriguez, Connor, and Morris reviewed, the email message doesn't describe each document reviewed in detail, at times merely indicated whether the aforementioned parties had prior notice of the events described in the document. Hence, the Court limits its discussion to those events within the email which are described with specificity.

In her email message Rodriguez states that she was also aware of an incident occurring on July 3, 2006, where she had to reprimand plaintiff for failing to properly document an incident in an incident sheet. Rodriguez also admonished plaintiff for failing to notify the manager on duty regarding the incident. With respect to an incident occurring on July 29, 2008, Rodriguez indicates that she saw the report memorializing the same. The incident involved comments made by Nevel Gilman (Gilman), an employee with the defendants. Rodriguez indicates that she reprimanded Gilman. Rodriguez indicates that she was aware of an incident occurring on October 7, 2006, involving Shaquile, a park patron. Rodriguez, spoke to the patron and then to plaintiff. After hearing plaintiff's version of the events, Rodriguez discussed plaintiff's recurring behavior issues and sent her home. Within the email message Rodriguez also details plaintiff's history of improper conduct, requiring that she be repeatedly counseled by the staff. Specifically, plaintiff would constantly complain about other employees, which Connor described as "a nagging session about other employees." Plaintiff's complaints were such that she would call Rodriguez at home on Rodriguez' days off, prompting Rodriguez to demand that plaintiff lodge her complaints with supervisors who were actually at work when the incidents about which she complained arose.

Defendants submit an unsigned letter addressed to Castro in

Albany, NY, and dated September 29, 2006. The author of the letter indicated that the purpose of the letter was to "voice concerns about some unprofessional work practices at the Park," where the employee was employed. The letter indicated that its author worked at RC. The letter further complained about the director at RC and the management staff. Specifically, the author indicated that "Park employees are spoken to very unprofessionally such as yelling, improper language and being rudely dismissed before they are giving [sic] an opportunity to respond or explain." The author further states that "Another problem that many employees must deal with is practice [sic] of favoritism . . . Employees at my Park have voiced there [sic] concerns about how assignments are handed out." The letter has a handwritten note from Castro at the top, dated October 11, 2006, asking that Mary Ellen, defendants' employee, confirm and handle the allegations.

Defendants submit a complaint and amended complaint filed by plaintiff with the State Division of Human Rights on December 5, 2006 and February 9, 2009, respectively. Within her complaints, plaintiff alleges that OPRHP² discriminated against her because of her race and gender, was denied benefits, was subjected to a hostile work environment, and was terminated because she complained about the discrimination. Specifically, plaintiff alleges that (1)

² Neither RC nor Rodriguez are named respondents in the administrative action.

on October 24, 2005 and October 1, 2006, she was cursed at twice by Matos, a Hispanic male and coworker; (2) on January 20, 2006, she was physically pushed out of Connor's office and thereafter had the door slammed in her face; (3) on July 29, 2006 Gilman was disrespectful to her; (4) on October 7, 2006, she was sent home by Rodriguez and thereafter terminated by Rodriguez on October 12, 2006; (5) between 2002 and 2006 she observed Matos, looking at female park patrons while putting his hand on his crotch; and (6) while employed by defendants she was denied permanent status, overtime, and other benefits. Plaintiff thus claims that defendants violated the New York State Human Rights Law (Executive Law § 296) and Title VII.

Defendants submit a decision issued by the New York State Division of Human Rights, dated June 5, 2009, which evinces that plaintiff's claims were dismissed on the merits. Specifically, the decision states that

[a]fter investigation, and following opportunity to review of related information and evidence by the named parties, the Division has determined that there is NO PROBABLE CAUSE to believe that the respondents have engaged in or are engaging in the unlawful discriminatory practice complained of.

Defendants submit portions of plaintiff's deposition

transcript, wherein she testified, in pertinent part, as follows³. While employed by defendants she was supervised by Connor, but typically reported to any supervisor on duty during her shift. On October 1, 2006, plaintiff filed a written report regarding an incident with Moreno. The incident involved her attempt to access an office at RC that Matos had not yet mopped. With regard to her claimed incidents of harassment, physical harassment was limited to one occasion, namely, when Connor pushed plaintiff out of her office. Verbal harassment was limited to two occasions, namely, when she was cursed out by Gilman and then by Matos. Plaintiff testified that while she was unaware of how overtime was allocated, she did receive overtime, but only did so when she was already scheduled to work and said time extended her stay at work past her shift, and never by being called at home and being asked to come in. To the extent that a fellow employee, who started his employment with defendants at the same time as she, was allowed to work past his break in service period and thus accrued time and attendance, plaintiff testified that she was deprived of the benefit to similarly earn time and attendance. With regard to an incident occurring at RC when she intervened to stop other children from hitting Shaquile, a patron, she merely told the other children not to hit Shaquile. She was then called into Rodriguez' office

³To the extent that the description of all deposition testimony is disjointed, it merely reflects the failure of all parties to provide full and complete deposition transcripts.

who asked for plaintiff's version of the foregoing event. Rodriguez then sent plaintiff home. Plaintiff testified that she was only counseled once in relation to the altercation she had with Gilman.

Defendants submit portions of Connor's deposition transcript, wherein she testified, in pertinent part, as follows. During her tenure as an employee of the defendants, Connor had to speak to plaintiff several times about her rude behavior to both staff and patrons. To the extent that she observed plaintiff's behavior, she created incident reports and gave them to Rodriguez.

In opposition to defendants' motion, plaintiff submits a host of evidence, including and to the extent relevant, the following.

Plaintiff submits a letter dated January 20, 2006, authored by plaintiff and addressed to Rodriguez. Within the letter, plaintiff asserts that after failed attempts to discuss "numerous difficult situations," with Connor, plaintiff requested that Rodriguez schedule a meeting to resolve the differences between herself and Connor. Plaintiff further indicated that Connor had been verbally abusive, unprofessional, and had physically pushed plaintiff from her office. Plaintiff also submits two incident reports dated October 24, 2005 and October 1, 2006, wherein she memorializes two incidents where Matos cursed her out.

Plaintiff also submits a document titled "Handbook for Seasonal Employees," given by defendants to the plaintiff during her tenure at RC. To the extent relevant, it states

[y]ou [the employee] should understand, however, that your employment relationship with the Office of Parks, Recreation and Historic Preservation is temporary. It may be terminated at any time, either by you or by the agency, for any reason and without prior notice.

Applicable Law

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer

an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Under Executive Law § 297(9),

[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision

four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division

(emphasis added).

Thus, the filing of a discrimination complaint with the New York State Division of Human Rights (Division) generally bars a subsequent plenary action premised on the same violations and claims alleged before the Division (Executive Law § 297[9]; *Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd.*, 61 NY2d 542, 548 [1984] ["Generally, the remedies of administrative review through the Human Rights Division or judicial review are mutually exclusive"]); *Emil v Dewey*, 49 NY2d 968, 969 [1980] [Court held that plaintiff who filed discrimination complaint with the State Division of Human Rights and subsequently withdrew it, could not prosecute a plenary action for the same discrimination alleged before the State Division of Human Rights]); *Matter of James v Coughlin*, 124 AD2d 728, 729-730 [2d Dept 1986] ["The filing of a complaint with the Division precludes the commencement of an action in court based on the same incident or based on the same

discriminatory grievance"] [internal citations omitted]); *Low v Gibbs & Hill*, 92 AD2d 467, 468 [1st Dept 1983]; *Moodie v Federal Reserve Bank of New York*, 58 F3d 879, 882 [2d Cir 1995]). A review of *Low*, makes it abundantly clear that the election of remedies promulgated by the Executive Law serves to bar not only the discrimination claims expressly brought before the commission, but also those claims whose thrust is also implicitly, if not expressly, discrimination (*Low* at 468; see *Moodie* at 882 [Circuit Court affirmed dismissal of plaintiff's state and federal discrimination claims on grounds that his election to bring the same before the New York State Division of Human Rights, which dismissed his claims, barred a plenary action on all discrimination claims arising from the same incident])). In *Low*, the court dismissed plaintiff's cause for conspiracy because it was obvious "that its essential thrust is the same as that contained in the complaint filed by the plaintiff with the State Division of Human Rights" (*id.*).

Similarly, under section 8-502(a) of the New York City Human Rights Law (N.Y.C. Admin. Code § 8-502[a]),

[e]xcept as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for

damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence

(emphasis added). Accordingly, a person who files a discrimination claim with the New York City Human Rights Commission (Commission) is similarly precluded from instituting a plenary action against the same party who was the subject of the complaint filed with the Commission for the claims or violations alleged before the Commission (*Acosta v Loews Corp.*, 276 AD2d 214, 218 [1st Dept 2000]; *York v Association of the Bar of the City of New York*, 286 F.3d 122, 127 [2d Cir 2002]). Both section 297(9) of the Executive Law and section 8-502(a) of the Administrative Code have been construed as giving rise to the exclusive election of remedies - either a claim before the Division or Commission or a plenary action (*Acosta* at 218; *York* at 127). Section 297(9) of the Executive Law, however, doesn't bar the filing of a plenary action subsequent to the filing of a complaint with the Division when the complaint is dismissed for administrative convenience (*Matter of Pan Am. World Airways* at 548; *Emil* at 569; *Low* at 468). Similarly, if a complaint filed with the Commission is dismissed for administrative convenience, a plenary action can be brought thereafter (*Acosta* at 218-219).

It is well settled that to the extent that the liability imposed by a violation of the City Human Rights Law is statutory, the statute of limitations to commence a plenary action for a claim thereunder is three years from the date of the violations alleged (CPLR § 214[2]; *Acosta* at 217; *Alimo v Off-Track Betting Corp.*, 258 AD2d 306, 306-307 [1st Dept 1999]; *Teller v America West Airlines, Inc.*, 240 AD2d 727, 727 [2d Dept 1997]). Moreover, to the extent that the Executive Law § 297(5) states that "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice," such prescription "is in the nature of a statute of limitations," (*Murphy v Kirkland*, 88 AD3d 267, 273 [2d Dept 2011]), is mandatory (*id.*), and, therefore, any plenary action premised upon a violation of the State Human Rights Law must be commenced within one year of the discrimination alleged (*Board of Educ. of Farmingdale Union Free School Dist. v New York State Div. of Human Rights*, 56 NY2d 257, 261 [1982]).

42 USC § 1983 states, in pertinent, part that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress.

Thus, at minimum, the proponent of a cause of action under the statute must allege "conduct by a person acting under color of law which deprived the injured party of a right, privilege or immunity guaranteed by the Constitution or the laws of the United States" (*DiPalma v Phelan*, 81 NY2d 754, 756 [1992]). Because the Eleventh Amendment grants States sovereign immunity, generally shielding them from suits "which will be paid from public funds in the state treasury," (*Giaquinto v Commissioner of New York State Department of Health*, 11 NY3d 179, 187 [2008]), it is well settled that generally, neither States nor their officials acting in their official capacities are considered persons under 42 USC § 1983, and thus are generally not subject to suit thereunder (*id.*); (*Will v Michigan Department of State Police*, 991, US 58, 71 [1989]).

It is well settled that 42 USC § 1981, which states that

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other[,]

does not create an independent right action against a State (*Brown v State*, 89 NY2d 172, 185 [1986]; *Jett v Dallas Independent School*

Dist., 491 US 701, 735 [1989]; *Ortiz v City of New York*, 755 FSupp2d 399, 402 [EDNY 2010]). Instead,

the express action at law provided by §1983 for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor

(*Jett* at 735). Stated differently, absent a viable cause of action against a State actor under 42 USC § 1983, there can no be claim against the State pursuant to 42 USC § 1981.

Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) proscribes racial and gender discrimination in the workplace. Specifically,

[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens

(*McDonnell Douglas Corp. v Green*, 411 US 792, 800 [1973]). To be clear, however, it was not Congress' intent to guarantee a job to every person regardless of qualifications, but only to remove artificial, arbitrary, and unnecessary barriers to employment when they operate invidiously to discriminate on the basis of racial or other impermissible classification (*id.* at 800-801).

On a motion for summary judgment, in order to establish a prima facie case of racial discrimination, a plaintiff must establish that (1) he/she is a member of a protected class; (2) he/she was qualified to hold the employment position at issue; (3) he/she was terminated from employment or suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

An adverse employment action is an adverse material change in the terms and conditions of employment, meaning one "that is more disruptive than a mere inconvenience or an alteration of job responsibilities" (*Forrest* at 306). Thus, courts have held that acts such as termination, and demotions which result in a decreased wage, a less distinguished title, a material loss of benefits, or a significant reduction in material responsibilities constitute adverse employment actions (*id.* at 396; *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000]). Conversely, acts such as the snatching of a legal pad from a person's hand, the patting of a seat in a humiliating way, shouting at employee at a meeting, and the rolling of someone's eyes while an employee speaks, does not constitute a material adverse change in the terms and conditions of employment and thus, does not constitute adverse

employment action (*Forrest* at 307). Similarly, neither excessive work, denials of requests for leave with pay and a supervisor's general negative treatment of an employee (*Fridia v Henderson*, 2000 WL 177277, *7 [SDNY 2000]) nor being yelled at, receiving unfair criticism and receiving unfavorable assignments or schedules (*Katz v Beth Israel Med. Ctr.*, 2000 WL 11064, *14 [SDNY 2001]), are materially adverse changes in the terms, conditions or privileges of employment to constitute adverse employment action.

Once plaintiff establishes a prima facie case of discrimination the burden shifts to the defendant, who to prevail, must rebut the presumption of discrimination by clearly setting forth legitimate, independent and non discriminatory reasons to support its employment decision (*Forrest* at 305; *Ferrante* at 629). If defendant meets its burden, plaintiff can nevertheless avoid summary judgment in defendant's favor if he/she establishes that the reasons proffered by defendant for its employment action are pretext for discrimination, meaning that they are "false and that racially motivated discrimination was the real reason" (*Forrest* at 308; *Ferrante* at 629-630).

A defendant seeking summary judgment must establish "either plaintiff'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" (*Michno v New York Hosp. Medical Center of Queens*, 71 AD3d 746, 746-747 [2d Dept 2010]; see also *Mehra v Nayak*, 103 AD3d 857, 860-861 [2d Dept 2013] ["As to the cause of action asserted against the Woodhull defendants to recover damages for employment discrimination, they demonstrated that not every element necessary to a viable claim of intentional discrimination had occurred, that the decedent suffered no adverse employment consequences as a result of the alleged acts of discrimination, and that, in any event, nondiscriminatory reasons existed for the challenged actions"]).

Title VII of the Civil Rights Act of 1964 not only makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 USC § 2000e-2[a][1]), but it also proscribes the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment (*Meritor Savings Bank, FSB v Vinson*, 477 US 57, [1986]). Accordingly, a hostile work environment exists 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"

(*Harris v Forklift Systems, Inc.*, 510 US 17, 21 [1993][internal quotation marks and citations omitted]); *Forrest* at 310). In order to determine whether a hostile work environment exists the court should look at all the attendant circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance (*Forrest* at 310-311). Moreover, the conduct alleged must both have altered the conditions of the victim's employment by being both subjectively abusive and objectively hostile or abusive (*id.* at 311). Indeed, a hostile work environment requires much more than a few isolated incidents of racial enmity (*Snell v Suffolk County*, 782 F2d 1094, 1103 [2d Cir 1986]). Instead of sporadic racial slurs, what is required is a "steady barrage of opprobrious racial comments//(*Schwapp v Town of Avon*, 118 F3d 106, 110 [2d Cir 1997]; *Harris*, 510 US at 21 ["mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment"] [citation and internal quotation marks omitted]; *Brown v Coach Stores, Inc.*, 163 F3d 706, 713 [2d Cir 1998] [no hostile work environment where supervisor made, on occasion, racist remarks, including one directed at the plaintiff]).

When plaintiff claims retaliation under Title VII, in order to establish a prima facie case of retaliation it must be shown that

(1) plaintiff participated in a protected activity known to the defendant; (2) defendant took employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action (*Forrest* at 321-313; *Van Zant v KLM Royal Dutch Airlines*, 80 F3d 708, 714 [2d Cir 1996]). Once plaintiff establishes a prima facie case of retaliation, the defendant must demonstrate legitimate reasons for its actions, whereupon the plaintiff bears the burden of showing that the defendant's explanations are pretext for the true discriminatory motive (*Tomka v Seiler Corp.*, 66 F3d 1295, 1308 [2d Cir 1995]).

Discussion

Defendants' motion for summary judgment is granted. With respect to all defendants, the evidence demonstrates that plaintiff's decision to file a discrimination claim against OPRHP based on the same incidents alleged in this action, serves to bar this plenary action. As discussed above, the filing of a discrimination complaint with the Division generally bars a subsequent plenary action premised on the same violations and claims alleged before the Division (Executive Law § 297[9]; *Matter of Pan Am. World Airways* at 548; *Emil* at 969; *Matter of James* at 729-730; *Low* at 468; *Moodie* at 882). Here, defendants' evidence in

support of the instant motion establishes that plaintiff filed a complaint and an amended complaint with the Division against OPRHP wherein she alleged that defendants discriminated against her because of her race and gender, was denied benefits, was subjected to a hostile work environment, and was terminated because she complained about the discrimination. Within her complaint before the division, plaintiff premises her claims of discrimination on the very same events which she alleges in her complaint filed in this action, namely, that (1) on October 24, 2005 and October 1, 2006, she was cursed at twice by Matos, a Hispanic male and coworker; (2) on January 20, 2006, she was physically pushed out of Connor's office and thereafter had the door slammed in her face; (3) on July 29, 2006 she was disrespected by Gilman; on October 7, 2006, she was sent home by Rodriguez and thereafter terminated by Rodriguez on October 12, 2006; (4) between 2002 and 2006 she observed Matos looking at female park patrons while putting his hand on his crotch; and (5) while employed by defendants she was denied permanent status, overtime, and other benefits. As borne out by defendants' evidence, on June 5, 2009, the Division dismissed her claims on the merits, finding no probable cause to believe that OPRHP discriminated against her. Accordingly, the instant action, premised on discrimination violating State and Federal law is barred not only against OPRHP and the Human Rights Law claims asserted therein, as urged by defendants, but against RC

and Rodriguez and with respect to all claims of discrimination, whether or not premised on the Human Rights Law. The law is clear in that "[t]he filing of a complaint with the Division precludes the commencement of an action in court based on the same incident or based on the same discriminatory grievance" (*Matter of James* at 729-730). This Court sees no legitimate reason to limit the foregoing holding so to bar a subsequent plenary action only against those defendants who were respondents in the action filed before the Division or only as to those claims premised on violations of the City Human Rights Law. Defendants thus establish prima facie entitlement to summary judgment and nothing submitted by plaintiff raises an issue of fact on the foregoing issues so as to bar summary judgment in defendants' favor.

Defendants also establish entitlement to summary judgment in favor of Rodriguez on grounds that the instant action, to the extent plaintiff claims discrimination based on violations of the City Human Rights Law, is time barred. It is well settled that to the extent that the liability imposed by a violation of the City Human Rights Law is statutory, the statute of limitations to commence a plenary action for a claim thereunder is three years from the date of the violations alleged (CPLR § 214[2]; *Acosta* at 217; *Alimo* at 306-307; *Teller* at 727). Here plaintiff's termination letter, provided by defendant in support of the instant motion, establishes that plaintiff was terminated on October 12,

2006. Therefore, plaintiff's causes of action, premised solely on events occurring while employed by the defendants, could not have accrued any later than her termination date. The complaint, also provided by defendants, evinces that it was filed on February 22, 2010. Accordingly, this action was commenced more than three years after the discrimination alleged and, therefore, defendants establish that plaintiff's City Human Rights Law claims are time barred. Nothing submitted by plaintiff raises an issue of fact on this issue as to preclude summary judgment in Rodriguez' favor.

Defendants also establish that they are entitled to summary judgment with respect to plaintiff's discrimination claims premised on violations of 42 USC §1981 and §1983. It is well settled that neither States nor their officials acting in their official capacities are considered persons under 42 USC § 1983 and are, thus, not generally subject to suit thereunder (*Giaquinto* at 187; *Will* at 71). Here, a review of the evidence submitted by defendants, particularly, plaintiff's own deposition testimony, establishes that she is suing for events related to her employment as an employee of the State and for actions or the failure to act by the same. Accordingly, neither OPRHP nor RC, both State agencies are persons under 42 USC § 1983. Rodriguez is similarly not a person under 42 USC § 1983 since it is clear by plaintiff's testimony and Rodriguez' affidavit, that Rodriguez was at all times acting in her official capacity as an agent of OPRHP. It is,

therefore, equally clear that plaintiff cannot maintain her claim pursuant to 42 USC § 1981 inasmuch as this statute does not create a private right of action against a State (*Brown* at 185; *Jett* at 735; *Ortiz* at 402), and absent a viable cause of action against a State actor under 42 USC § 1983, there can no be claim against the State pursuant to 42 USC § 1981. Nothing submitted by plaintiff raises an issue of fact on the foregoing issue and therefore the Court grants summary judgment in favor the defendants on the foregoing claims.

Lastly, and notwithstanding the foregoing, defendants independently establish entitlement to summary judgment on plaintiff's claims pursuant to Title VII. With regard to discrimination under Title VII, a defendant seeking summary judgment must establish "either plaintiff'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" (*Michno* at 746-747). Here, defendants establish that plaintiff cannot demonstrate the existence of an essential element, namely, adverse employment action because that with the exception of plaintiff's termination, none of the employment actions alleged by her were adverse as a matter of law. Additionally, defendants establish that the reason for her termination, clearly an adverse employment action under the

law, was precipitated by her well documented series of altercations with coworkers and patrons. First, defendants' evidence, namely plaintiff's own testimony evinces that the events upon which she premises discrimination are two to three occasions of verbal harassment, one occasion of physical harassment, defendants' failure to allot her more overtime and the inability to earn leave time. To the extent that an adverse employment action is an adverse material change in the terms and conditions of employment, meaning one "that is more disruptive than a mere inconvenience or an alteration of job responsibilities" (*Forrest* at 306), it is clear that none of acts alleged by plaintiff constitute an adverse employment action. While, termination, and demotions which result in a decreased wage, a less distinguished title, a material loss of benefits, or a significant reduction in material responsibilities constitute adverse employment actions (*id.* at 396; *Galabya* at 640), acts such as the snatching of a legal pad from a person's hand, the patting of a seat in a humiliating way, shouting at an employee at a meeting, and the rolling of someone's eyes while an employee speaks, does not constitute a material adverse change in the terms and conditions of employment and thus, does not constitute adverse employment action (*Forrest* at 307). Similarly, neither excessive work, denials of requests for leave with pay and a supervisor's general negative treatment of an employee (*Fridia* at 7) nor being yelled at, receiving unfair criticism and receiving unfavorable

assignments or schedules (Katz at 14), are materially adverse changes in the terms, conditions or privileges of employment to constitute adverse employment action. In this case, a few minor verbal altercations with coworkers and supervisors could not, and did not materially altered the conditions of plaintiff's employment as to have the Court conclude that plaintiff was the victim of adverse employment action sufficient to establish a Title VII claim. Moreover, plaintiff concedes that she did in fact receive overtime and had no idea how it was allotted, thereby making any assertion that she was discriminated against, nothing but sheer speculation. In fact, defendants' evidence establish that plaintiff did in fact work more overtime than many of her non-minority counterparts. Accordingly, defendants establish that plaintiff, with the exception of her termination, did not suffer any other adverse employment action as a matter of law.

With respect to her termination, defendants' evidence, namely Rodriguez and Connor's assertion that plaintiff had a long history of misbehavior while at work coupled with evidence - Rodriguez' assertion and Morris' incident report - that plaintiff stated that Shaquile was both on medication and mentally challenged, establish that she was terminated for legitimate, lawful, and nondiscriminatory reasons. As such defendants establish that the reasons for plaintiff's termination were anything but pretextual. Nothing submitted by plaintiff raises an issue of fact on this

issue as to preclude summary judgment. In fact, much of what plaintiff submits is the very same evidence submitted by plaintiff, which as just noted, fails to establish that the events about which she complains constitute adverse employment action. In fact, the employee manual submitted by plaintiff in opposition to the instant motion makes it exceedingly clear that she was an at-will employee, who could be terminated for any reason and without prior notice. This evidence supports that defendants had the right to terminate plaintiff for any reason, including, but not limited to the incident with Shaquile. Accordingly, with regard to plaintiff's termination, nothing submitted by her raises an issue of fact with regard to pretext as she fails to establish that the reason proffered for her termination is a pretext for discrimination, meaning that they were false and racially motivated (*Forrest* at 308; *Ferrante* at 629-630).

Defendants' motion seeking summary judgment with regard to plaintiff's hostile work environment claim is also granted as the incidents comprising plaintiff's claim are neither severe nor pervasive enough as a matter of law. A hostile work environment exists 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" (*Harris* at 17 [internal quotation marks and citations omitted]);

Forrest at 310). Moreover, a hostile work environment requires much more than a few isolated incidents of racial enmity (*Snell* at 1103). Instead of sporadic racial slurs, what is required is a "steady barrage of opprobrious racial comments (*Schwapp* at 110). Here, defendants' evidence establish, as noted above, that events upon which plaintiff premises her hostile work environment claim are merely at most three verbal altercations where she was cursed out by Matos and Gilman and one physical altercation where she was pushed out of Connor's office. These events are neither legally severe nor pervasive to warrant the conclusion that plaintiff worked in a hostile work environment. Accordingly, as to this claim, defendants establish prima facie entitlement and nothing submitted by plaintiff raises a question of fact sufficient to preclude summary judgment.

To the extent that the letter upon which plaintiff premises her retaliation claim under Title VII was anonymous and did not contain any complaints regarding discrimination based on either race or gender, defendants establish entitlement to summary judgment with respect to plaintiff's retaliation claim. In order to establish a prima facie case of retaliation it must be shown that (1) plaintiff participated in a protected activity known to the defendant; (2) defendant took employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action (*Forrest* at 321-313; *Van*

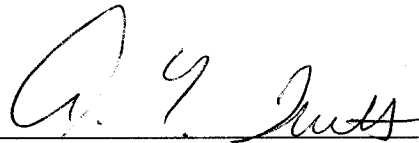
Zant at 714). Here, defendant's evidence establishes that the pre-termination letter sent to Castro, dated September 29, 2006 was anonymous and that neither Rodriguez nor Weinreb had knowledge of the letter when they terminated plaintiff. Moreover, the contents of the letter did not allege either racial or gender-based discrimination, and instead only raised "concerns about some unprofessional work practices at the Park.". Accordingly, defendants' evidence demonstrate that plaintiff did not engage in protected activity by writing and sending the letter to defendants or that, even if she had, the defendants were aware that it was she who wrote the letter, and that she was terminated because of it. Nothing submitted by plaintiff raises a material triable issue of fact as this claim and, therefore, defendants must be granted summary judgment on this claim. it is hereby

ORDERED that plaintiff's complaint be hereby dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Order with Notice of Entry upon defendant within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated: Feb 3, 2013
Bronx, New York



Alison Y. Tuitt, J.S.C.