Fruchtman v City of New York
2014 NY Slip Op 30703(U)
March 20, 2014
Supreme Court, New York County
Docket Number: 113520/2008
Judge: Kathryn E. Freed
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT, Justice

PART 5

Index Number : 113520/2008
FRUCHTMAN, SUNITA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT CAL: #20

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAR 21 2014

COUNTY CLERKS OFFICE NEW YORK

Dated: 3-20-14

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5
---X
SUNITA FRUCHTMAN,

Plaintiff,

-against-

DECISION/ORDER

Index No. 113520/2008

Seq. No. 006

THE CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GEROULD McCOY, KEVIN GOYETTE, ANTHONY BELLATONI,

Defendants.
---X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..................	..1,2(Ex A-P)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
AFFIRMATIONS IN OPPOSITION..	..3,(Ex 1-49)..
REPLYING AFFIRMATION..	....
OTHER(Memos of Law)...	.........4,5.........

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This action arises out of plaintiff Sunita Fruchtman's claims that she was subject to gender discrimination and retaliation for opposing discriminatory practices in violation of the New York City Human Rights Law (NYCHRL). Defendants The City of New York, Department of Environmental Protection (DEP),[1] Gerould McCoy (McCoy), Kevin Goyette (Goyette) and

FILED

MAR 21 2014

COUNTY CLERK'S OFFICE
NEW YORK

[1] Plaintiff incorrectly proceeds against the DEP, which is not a proper party in this proceeding.

Anthony Bellantoni (Bellantoni)[2] move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to her termination in August 2008, plaintiff had been working as an environmental auditor with the DEP in its Office of Environmental Health & Safety Compliance (OEHSC). Plaintiff was still a probationary employee, having been hired in November 2007 with the title "Industrial Hygienist II." Her job responsibilities included performing environmental audits at water treatment facilities and "noting regulatory compliance and deficiencies." Defendants' Exhibit A, Complaint, ¶ 15. Plaintiff conducted these audits with other employees, specifically team members. She was required to travel to the water treatment facilities, and would sometimes use a department vehicle for this purpose.

During the course of plaintiff's employment, McCoy was the assistant commissioner of OEHSC and had supervisory responsibility for all of the employees. When plaintiff started her employment, Goyette was also an auditor. During the course of plaintiff's employment, Goyette was promoted and became plaintiff's supervisor. He replaced nonparty David Nadler (Nadler), who had previously been plaintiff's supervisor. Bellantoni was a fellow team member, who was promoted to a team leader in May 2008. Bellantoni and Goyette have known each other since 1985, having worked together in private industry.

Through counsel, plaintiff alleges that Bellantoni and Goyette shared an efficiency

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[2] While plaintiff identified defendant as Anthony Bellatoni, the proper spelling of defendant's surname is Bellantoni.

apartment together in Queens to meet residency requirements, while still traveling back and forth to their homes in Connecticut. McCoy was Goyette's supervisor and condoned Bellantoni and Goyette's living situation.

Plaintiff's Allegations of Disparate Treatment/Gender Discrimination:

Owl's Head Audit

For three months starting in March 2008, plaintiff was assigned to perform an audit at the Owl's Head Wastewater Treatment Plant (Owl's Head). Bellantoni was appointed to plaintiff's team as the lead auditor. He did not have any supervisory responsibilities at that time. Plaintiff testified that she did not experience any discriminatory treatment prior to the Owl's Head audit, and that she did not have any issues with Bellantoni. Nonparty Leroy Knight (Knight) was the other member of the environmental team for this audit.

Plaintiff alleges that she was subject to disparate treatment by Bellantoni while they were working together on the Owl's Head audit. For example, plaintiff claims that Bellantoni would ignore violations at the facility that plaintiff would bring to his attention. After walking around the facility, Bellantoni would advise her not to document her findings, as that would be "too much work." Plaintiff's Exhibit 5, Fruchtman tr at 45. Plaintiff testified that she did not report any of her concerns to Goyette, who was her direct supervisor at the time.

Plaintiff further testified that, on one occasion in April 2008, she and Bellantoni got into a verbal argument. Evidently plaintiff and Bellantoni were reviewing whether or not Owl's Head was in compliance with a hazardous waste policy. When plaintiff became concerned that Bellantoni was not answering the questions accurately, Bellantoni got "upset" with her and then

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said "oh, if you think you're capable of doing it, you do it better." *Id.* at 52. Plaintiff continued that he then "threw down his computer right there and he left the room." *Id.*

On one occasion, plaintiff wrote an email to Bellantoni from her computer documenting some "findings." Ex. A, Complaint, ¶ 26. According to plaintiff, Bellantoni never addressed these findings with her and actually would "repeatedly" ignore her findings. *Id.* Plaintiff then had a male employee, Knight, send the same email from his computer. Bellantoni apparently addressed Knight's email and did not admonish him. As a result, plaintiff believes that Bellantoni "treated plaintiff differently than similarly situated male team members in that Bellantoni imposed different standards and requirements upon the plaintiff because of her gender." *Id.*, ¶ 25. Plaintiff further alleges that Bellantoni ignored her in that he would not send her work related to the audit, and she would have to obtain the information from her male coworkers.

Plaintiff claims that she was excluded from the Owl's Head audit closing meeting, which took place in June 2008. Goyette decided who would attend the meeting. Plaintiff contends that she was the only member of the team who was excluded from this meeting. She was also the only female member of this auditing team. Bellantoni testified that only the two senior auditors from the environmental auditing team attended the exit meeting. Thus, plaintiff did not attend the exit meeting because only Bellantoni and Knight were the senior members.

Plaintiff's Request to Change Her Schedule

Plaintiff alleges that she was subject to disparate treatment in that, while others were able to alter their work schedules, she was denied the opportunity. She contends that she went to

McCoy and requested a temporary work schedule in order to attend a summer class. McCoy advised plaintiff that she would need to apply for a "variance." Plaintiff emailed McCoy's assistant, Shamalina Khan (Khan), asking "[c]an you tell me how do I get a varience [sic] form." Plaintiff's Exhibit 41. Khan replied, "What is this?" *Id.* After receiving Kahn's response, plaintiff did not pursue her request any further.

Plaintiff alleges that Bellantoni was allowed to come into work early without a variance, and that he was also earning overtime for arriving early. She states, "McCoy treated plaintiff differently in that he permitted Bellantoni to begin his tour of duty at 6:45 a.m. without a special variance." Ex. A, Complaint, ¶ 32.

An email dated November 11, 2007 from Bellantoni to nonparty Nadler states the following: "Dave and Lois, I talked to Mr. McCoy about the starting time. He will allow me a variance to start at 7:30 a.m. due to family/home situation." Plaintiff's Exhibit 39. Nadler was the director of the environmental unit at the time. Bellantoni's email was in response to Nadler's email to the department regarding working hours and variances.

Team Leader Selection

In 2007, DEP hired a consulting group to provide recommendations to improve DEP's operations. The consulting group interviewed DEP employees, including plaintiff, in connection with its assignment. In April 2008, the consulting group suggested that team leader roles be created. Plaintiff testified that she, as well as the other employees, was aware of the team leader roles being created. During a meeting, plaintiff questioned why the positions would be filled from within and would not be posted to the public. This, according to plaintiff, would have

ensured that everyone had an "equal opportunity" to apply for this position. Plaintiff tr at 160.

In May 2008, Goyette appointed Bellantoni to be a team leader, as well as Carice Craffy, a female employee. Apparently three other males were also appointed as team leaders. Plaintiff alleges evidence of gender bias in that mostly males were appointed to the team leader position and that the promotion process was discretionary. She claims that while they were "out to lunch," two other females stated that they had wanted to become team leaders. *Id.* at 159.

Defendants maintain that the team leaders were chosen from within existing employees on the basis of the consulting group's recommendations, and that they were selected by a number of variables. Everyone within OEHSC had the opportunity to be selected as a team leader. Plaintiff testified that she never sought to become a team leader. *Id.* at 158.

In support of her contentions that other women were treated less favorably in the workplace with respect to advancements, plaintiff provides the testimony of nonparty Ann Marie Byrnes. Byrnes neither worked with nor knew plaintiff. Prior to leaving the DEP, Byrnes was Goyette's supervisor but they both reported to McCoy. Byrnes testified that McCoy would sometimes give preferential treatment to Goyette, despite the fact that she was Goyette's supervisor. She provides an example of when she asked for a vacation and Goyette was given vacation at the same time which, she alleges, was giving him preferential treatment. Byrnes also thought that McCoy did not respect her and had "women issues." Plaintiff's Exhibit 10, Byrnes tr at 64.

Use of DEP Vehicle and Plaintiff's Termination

On July 14, 2008, plaintiff requested the use of a DEP vehicle so that she could

participate in an audit scheduled for July 15, 2008. Plaintiff was granted permission to keep the vehicle overnight from July 14-15, 2008. Plaintiff did not participate in the audit on July 14, 15, 16, 17, 21 and 22. She called in sick on July 18, 2008, and then kept the vehicle over the weekend. The only date she participated in the audit was on July 23, 2008. McCoy testified that plaintiff did not have permission to keep the vehicle overnight except for July 14-15, and that she was supposed to turn the vehicle in after the allotted time.

On August 11, 2008, McCoy wrote a memo to human resources requesting that plaintiff be terminated for unauthorized use of a DEP vehicle since her actions constituted a violation of City personnel rules or policies. He wrote the following, in pertinent part:

> "Of the 6 days [plaintiff] purportedly used the car to participate in the audits, no staff was required to visit the facility for 5 out of these 6 days; OEHSC Jamaica audit records also indicate that [plaintiff] only traveled 1 day within this period to the Jamaica plant. During the other days, [plaintiff] appears to have used the vehicle to commute from her home to Lefrak . . . It should also be noted that [plaintiff] kept the car during the weekend of July 19, 2008 to July 20, 2008 having called in sick on Friday July 18, 2008, but did not contact her supervisor to advise him that she had the car and when she would return it."

Defendants' Exhibit O, at 2.

Plaintiff was informed on August 14, 2008 that she was being terminated. Other people at DEP, including nonparty Herb Roth, the deputy director of human resources, ratified the decision. Roth wrote a memorandum stating that he concurred with the bureau's request to terminate plaintiff, who was a probationary employee, due to improper use of the vehicle. Plaintiff's Exhibit 31. McCoy testified that, in hindsight, "I supposed I could have been less severe. I could have counseled her." McCoy tr at 182.

Plaintiff claims that she did not realize that there were any issues with her use of the DEP vehicle. She maintains that she did not find out until after she was terminated that her

termination was due to the alleged misuse of a company vehicle. According to plaintiff, she did not know in advance if she would be visiting the site during the other dates in July, and testified that she assumed that she was able to have the vehicle for the "life of the audit." *Id.* at 125. Plaintiff alleges that other employees were allowed to keep their vehicles for the entire audit. She further testified that another male employee was able to keep the vehicle over the weekend.

<u>Plaintiff's Allegations of Retaliation</u>:

April 17, 2008 Conversation with EEO Liaison

On April 17, 2008, plaintiff met with DEP employee/EEO liaison Doreen Johann. Plaintiff claims that Knight spoke to plaintiff about a conversation he had with Bellantoni during which Bellantoni told Knight that plaintiff "gets under his skin," and that Bellantoni did not want to work with her anymore. Plaintiff's tr at 43. As a result, plaintiff told Johann that she "felt uncomfortable working with [Bellantoni] because he, his treatment of me, because he stated that he does not want to work with me and his actions are showing it, that something should be done because I have to work with this individual." *Id.* at 60. Plaintiff testified that Johann did not follow up with plaintiff about her concerns.

According to plaintiff, she inferred that Johann had relayed her complaint to Goyette and McCoy by the way she was treated by them afterwards. She testified that Goyette informed her that was he aware of plaintiff's conversation with Johann and that he would speak to Bellantoni about plaintiff's complaint. Plaintiff alleges that Bellantoni's treatment of her worsened after Goyette spoke to him about plaintiff's complaint.

Goyette does not recall speaking to plaintiff or Bellantoni about any alleged complaint

regarding Bellantoni. Johann testified that she did not speak to Goyette or McCoy about plaintiff's conversation.

However, Johann did testify that Bellantoni complained to her about plaintiff's behavior. Specifically Bellantoni felt that plaintiff was harassing him and "stalking him" about his residency. Plaintiff's Exhibit 15, Johann tr at 90.

The record contains a memo to Zoe Ann Campbell, Deputy Commissioner for Human Resources and Administration, memorializing a conversation Bellantoni had with Johann, Deputy EEO Officer Edie Kantrowitz (Kantrowitz) and EEO Investigator Tanika Thomas. The memo states that Bellantoni felt he was being stalked by plaintiff and that he received two anonymous emails containing links to an Internet blog about DEP residency requirements. He indicated that McCoy received an anonymous letter criticizing his work. In addition, Bellantoni stated that he wanted a computer investigation into the emails, and if that could confirm who he thought was responsible, he could then provide more information in regards to plaintiff's "anger." The memo was summarized with the following, in pertinent part:

> "Mr. Bellantoni also filed a formal written complaint of discrimination with this office on June 12, 2008, identifying Age and "Victim of Stalking" as the EEO bases. He explained that while there had been a need in the past for both himself and Mr. Goyette to deal with residency issues, this matter had been resolved appropriately and approved by Human Resources in both instances. He indicated that he believed the "stalker" was a younger employee who was focusing on the residency issue in an attempt to remove both himself and Mr. Goyette, whom Mr. Bellantoni characterized as 'older employees,' so that their positions would become available."

Plaintiff's Exhibit 8, at 2.

There is also a similar memorandum in the record, pertaining to a meeting with Goyette, Johann and Kantrowitz, in July 2008, regarding Goyette's residency. In addition to discussing

the logistics about Goyette's residency, Goyette noted that he believed plaintiff was behind the "harassment" about his residency and that she was an angry person. He said that, following an email by plaintiff, two of Bellantoni's files disappeared. He stated that, due to the harassing anonymous emails, he was concerned about the security of their IT network, and believed that plaintiff might "attack" the network. Plaintiff's Exhibit 29, at 1.

Plaintiff's June 4, 2008 Letter

Plaintiff testified that, on June 4, 2008, she mailed an anonymous letter to various city agencies, including DEP's EEO office, Human Resources, plaintiff's union and the Department of Investigation. The letter was mailed from the post office without a return address. She never told anyone she mailed the letter. Her letter was written to address the "unfairness" occurring in her department. Specifically, plaintiff was angry that Goyette's friend, Bellantoni, was able to live in Connecticut and arrive to work early and also received overtime. Plaintiff wrote "[h]ow is it possible to live in another state and work for a city agency where DC 37 and city rules outline stringent procedures on residency requirements? . . . Did Human Resources perform the necessary follow up on that individual to ensure his NYC residency?" Defendants' Exhibit K at 1.

The letter also accuses Goyette of promoting Bellantoni based on the fact that they were friends and shared an apartment. She wrote "Isn't it a conflict of interest to promote individuals who share the same apartment whether it is for one day/one night/or a week?" *Id.* Plaintiff concluded the letter by once again addressing Bellantoni's alleged unfair receipt of overtime and included copies of time sheets from everyone in her department.

Plaintiff's July 14, 2008 Letter

When plaintiff's first letter was not investigated, she mailed another letter dated July 14, 2008. This letter was also anonymous and she did not tell anyone that she wrote it. The letter was almost identical to her June 4, 2008 letter, except the second letter also included an allegation that Goyette was having sexual conversations with a female in plaintiff's department and was promising to promote her to team leader. The letter concluded that the auditors "have come to the conclusion that [McCoy] is not aware of all the favoritism and sexually [sic] favor that this Director is offering people." Defendants' Exhibit L at 1.

Plaintiff testified that McCoy, Goyette and Bellantoni knew that she had made the complaints. She based this assumption on the way that they treated her after June 4, 2008. Plaintiff alleges that Bellantoni ignored her, and that Goyette withheld certain documentation from her regarding her audits.

Plaintiff heard from other coworkers that they were being interviewed with respect to an EEO complaint. She testified that no one asked her if this was her complaint, and that no one told her the substance of the interviews. Johann testified that some of the people interviewed thought that the letter may have been sent by plaintiff. Plaintiff herself was notified by the EEO that she would be interviewed with regards to this complaint, however she was terminated prior to the date of the interview.

Alleged Pretextual Basis for Termination

Since plaintiff allegedly had never been advised that her work performance was inadequate, and believes that she did not violate the policy with respect to DEP vehicles, she

concludes that her termination was pretextual. Plaintiff claims that it was well known in her department that she was the one who submitted the EEO complaints, and that she was ultimately terminated due to her complaint activity.

Plaintiff's complaint alleges that her EEO complaints were "advising in sum and substance that Bellantoni was receiving different treatment and requesting an investigation." Ex. A, Complaint, ¶ 33. As such, she concludes that the "termination was motivated in whole or part by plaintiff's exercise of her right to engage in protect[ed] activity by complaining about gender based disparate treatment and harassment and opposing same by the filing of a complaint." *Id.*, ¶ 40.

After she was terminated, plaintiff commenced this action alleging violations of the New York State and New York City Human Rights Laws (NYCHRL) and the New York State Constitution. She believes that the defendants discriminated against her "by disparately treating her, harassing her and abusing her because of her gender." Ex. A, Complaint, ¶ 52. Plaintiff further alleges that defendants retaliated against her, and that the individual defendants aided and abetted the discrimination. Plaintiff is seeking punitive and compensatory damages due to the loss of her job and the resulting emotional distress. On May 7, 2013, plaintiff withdrew all of her claims in the complaint except the ones for gender discrimination and retaliation pursuant to the NYCHRL.

LEGAL CONCLUSIONS

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Grasso,* 50 AD3d at 544, citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

II. New York City Human Rights Law:

Pursuant to the 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. "Under the NYCHRL there are not separate standards for 'discrimination' and 'harassment' claims [*internal quotation marks and citation omitted*]." *Johnson v Strive East Harlem Empl. Group*, 2014 US Dist Lexis 228, *15 (SDNY Jan. 2, 2014,

No. 12 Civ. 4460 [HB]). The court must evaluate the claims with regard for the NYCHRL's "*uniquely broad and remedial purposes.*" *Williams v New York City Housing Auth.*, 61 AD3d 62, 66 (1st Dept 2009). To establish a gender discrimination claim under the NYCHRL plaintiff has to prove by a "preponderance of the evidence that she has been treated less well than other employees because of her gender." *Id.* at 78.

Despite the broader application of the NYCHRL, *Williams* also recognized that the law does not "operate as a general civility code [*internal quotation marks and citation omitted*]." *Id.* at 79. Defendants can still avoid liability if they can demonstrate that "the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'." *Id.* at 80. However it is the employer's burden to prove the conduct's triviality. *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 111 (2d Cir 2013).

In addition, the Appellate Division, First Department, has reaffirmed the applicability of the burden shifting analysis to discrimination cases as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) in addition to the mixed motive analysis. *See Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012) ("an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed under both the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases").

In the burden shifting analysis developed in *McDonnell Douglas Corp.*, a plaintiff has the initial burden to establish a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 (2004). This analysis requires plaintiff to set forth that she is a member of a protected class, was qualified for the position, was actively or constructively discharged, and

that the discharge occurred under circumstances giving rise to an inference of discrimination. *Ferrante v American Lung Assn.*, 90 NY2d *supra* at 629.

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for a nondiscriminatory reason. *Id.* If the employer meets this burden, the plaintiff "is still entitled to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Id.* at 629-630.

Further, on a motion for summary judgment under the NYCHRL, when a defendant has put forth its nondiscriminatory reason for its actions, the court should then refrain from then going back to the question of whether a prima facie case has been made, but proceed to see whether "no jury could find defendant liable under any of the evidentiary routes - - *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 (1st Dept 2011).

At this stage, plaintiff must show that there is an issue of material fact as to whether the employer's stated reasons are false and pretextual (*Melman*, 98 AD3d *supra* at 114), or "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the employer's action. *Id.* at 127; *see also Carryl v MacKay Shields, LLC* , 93 AD3d 589, 590 (1st Dept 2012); *Bennett*, 92 AD3d *supra* at 39. Where the plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false . . . such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied." *Bennett,* 92 AD3d *supra* at 45.

Applying these principles to the case at hand, as set forth below, defendants are entitled to

summary judgment. Plaintiff alleges that defendants discriminated against her on the basis of her gender in that she was treated less favorably than males, which culminated in her termination on the basis of her gender and her complaints. However, plaintiff's papers are devoid of any evidence that she was either terminated or treated differently from anyone else under the circumstances due to her gender. Additionally, even meeting the minimal requirements of a prima facie case, there are no triable issues of fact that defendants have legitimate, nondiscriminatory reasons for their actions.

At the outset, while plaintiff fixates on the alleged notion that McCoy was "lax" with respect to the enforcement of the NYC residency requirements for Bellantoni and Goyette, this is irrelevant to her gender discrimination claims. The record indicates that, in connection with one of plaintiff's prior applications for discovery, Honorable Judge Jaffe determined that plaintiff and Bellantoni and Goyette were not similarly situated as required for her claim of disparate treatment. In an order dated January 30, 2012, the court concluded that plaintiff was a probationary employee while the others were not, and that her claims of their noncompliance with the residency rules is irrelevant to her claims of disparate treatment. Defendants' reply memorandum of law, appendix A. The issue will not be revisited here.

Team Leader Position:

Although plaintiff testified that she never sought or was denied a promotion herself, she still believes that her supervisor chose predominantly male employees for supervisory positions instead of choosing females. Plaintiff bases her allegations on conversations with two females in

her department, who advised her over lunch that they were upset at not being chosen for the position. Plaintiff also alleges that other females were being overlooked for the position since it was not publicly posted. As such, according to plaintiff, there exists an inference of discrimination in the employment selection process.

It is unclear how plaintiff is alleging discrimination based on other parties' alleged disappointment in not being chosen for a position. Plaintiff's testimony that these other nonparty females were qualified, yet not chosen, for the position is conclusory.

Regardless, as shown below, plaintiff cannot prove an inference of discrimination in the way that defendants chose the future team leaders. The record indicates that a consulting group advised defendants to hire team leaders from existing employees. Qualified employees were chosen for the position, including one female. As such, defendants have articulated a legitimate reason for the way they conducted their hiring process.

Allegations of Disparate Treatment:

Plaintiff contends that she was not treated as well as her coworkers insofar as her input was routinely ignored by Bellantoni and Goyette. She cites one example where Bellantoni responded to a male coworker's email while he did not respond to hers. She and Bellantoni also had an argument when she questioned if he was doing his work properly and, in response, he threw down his computer and said "oh, if you think you're capable of doing it, you do it better."

As defendants argue, plaintiff summarily states that she was routinely ignored by coworkers, yet provides but one example. In any event, even if plaintiff could allege that she was

not treated as well due to her gender, Bellantoni's conduct was nothing more than what a reasonable person would consider a "petty slight." *Williams*, 61 AD3d *supra* at 80.

Plaintiff contends that she was subject to gender discrimination by the fact that Bellantoni was given permission to change his work schedule and she was not. The record indicates that plaintiff emailed McCoy's assistant, Khan, to ask for a variance and Khan replied that she did not know what that was. After this interaction, plaintiff did not pursue her request any further.

Since plaintiff abandoned her request, she cannot reasonably claim that she was treated less favorably in that she could not change her work schedule while a male employee was able to. Additionally, the record indicates that Bellantoni did have a variance to arrive at work early. Moreover, this court has already determined that plaintiff cannot compare herself to Bellantoni in that they were not similarly situated employees. As such, her claim that she was treated less favorably in connection with the variance issue has no merit.

***Owl's Head Meeting*:**

Plaintiff summarily concludes that she was excluded from the final Owl's Head meeting on the basis of her gender. She alleges that, looking at the "totality of the circumstances," in addition to other unfavorable treatment, her exclusion from the meeting was motivated by gender discrimination. However, defendants indicate that only the two senior members of the team attended the meeting. Plaintiff is not a senior member. Thus, defendants have met their burden of showing that discrimination played no role in their actions.

Plaintiff's Use of DEP Vehicle and Termination:

Plaintiff claims that she experienced unfavorable treatment when she was terminated for allegedly violating a department policy regarding her use of the DEP vehicle. In support of her contention, plaintiff claims that male employees were allowed to keep vehicles overnight without any disciplinary action. Plaintiff reiterates McCoy's testimony that, in hindsight, he may have just counseled plaintiff rather than terminating her. This testimony, according to plaintiff, can establish that her termination was pretextual. However, as set forth below, none of plaintiff's allegations can establish that her termination was motivated, even in part, by discrimination. *See e.g. Carryl v MacKay Shields, LLC* , 93 AD3d at 590 ("In opposition to the motion, plaintiff failed to show that defendants' stated reasons for the disparity were false or pretextual or that, regardless of any legitimate motivations the defendant[s] may have had, the defendants [were] motivated at least in part by discrimination [*internal quotation marks and citations omitted*]").

It is well settled that a probationary employee can be fired, "for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law [*internal quotation marks and citation omitted*]." *Matter of Kolmel v City of New York,* 88 AD3d 527, 528 (1st Dept 2011). The record indicates that plaintiff only received permission to use the DEP vehicle for one night, yet kept the vehicle for almost two weeks. In addition, she was only required to participate in the audit for one day, yet drove the car on other days. As such, plaintiff cannot contest that she did not misuse the vehicle and that the DEP had the right to terminate her based on that violation.

Plaintiff provides no evidence that male employees were given preferential treatment with

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respect to the use of the DEP vehicles, or that they were even similarly situated employees. Plaintiff alleges that McCoy's testimony, in hindsight, regarding alternative forms of discipline instead of termination, demonstrates gender based discrimination. However, plaintiff has failed to demonstrate how McCoy's decision, at the time, to terminate her, was pretextual. *See e.g. Melman,* 98 AD3d *supra* at 121 ("[A] challenge . . . to the *correctness* of an employer's decision, does not, without more, give rise to the inference that the [adverse action] was due to [gender] discrimination [*internal quotation marks and citations omitted*]"); *see also Taylor v Polygram Records*, 1999 WL 124456,*_ 1999 US Dist LEXIS 2583, *29 (SDNY Mar. 8, 1999 No. Civ. 7689 [CSH]) (cautioning against the intrusion of third party hindsight in evaluation of employer's decisions).

Plaintiff argues that a former coworker's testimony about issues she had at work with McCoy and Goyette is relevant to determining whether plaintiff was treated less favorably due to her gender. Plaintiff claims, "[s]o the fact that decision makers Goyette and McCoy treated other women less favorably with respect to advancements and other work place issues is relevant to a jury's determination as to whether [plaintiff] was also treated less favorably by these individuals based upon her gender." Plaintiff's memorandum of law, at 8.

In support of this contention, plaintiff cites to *Hasan v Foley & Lardener, LLP* (552 F3d 520, 529 [7th Cir 2008]), for the proposition that Byrnes's "me too" evidence allegedly demonstrating "behavior towards or comments directed at other employees in the protected group," establishes an inference of discrimination. However, Byrne's testimony is not related to plaintiff's circumstances. Plaintiff's memorandum of law, at 8. As *Hasan, supra,* also states, "[t]he Court made clear that the relevance of 'me too' evidence cannot be resolved by application

of a per se rule. Instead, whether such evidence is relevant depends on a variety of factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case [*internal quotation marks and citation omitted*]." *Id.*

In the present situation, Byrne's comments are irrelevant. Byrne was a supervisor, who had been working with DEP much longer than plaintiff had. She neither knew plaintiff nor worked with her. Moreover, plaintiff does not provide any substantial evidence that she was treated less favorably due to her gender.

In conclusion, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to demonstrate how gender discrimination was a motivating factor in the way defendants treated her.

<u>III. Plaintiff's Claims for Retaliation</u>:

Administrative Code § 8-107 (7) provides, in pertinent part, that "[i]t shall be an unlawful discriminatory practice . . . to retaliate or discriminate in any manner against any person because such person has . . . opposed any practice forbidden under this chapter." Like the other provisions of the NYCHRL, this provision is to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011). "The retaliation . . . need not result in an ultimate action. . . or in a materially adverse change. . .[but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

For a plaintiff to establish a claim for retaliation under the NYCHRL, he or she must

demonstrate that: "(1) [he or she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [him or her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012).

"Protected activity" refers to "actions taken to protest or oppose statutorily prohibited discrimination." *Aspilaire v Wyeth Pharmaceuticals, Inc.*, 612 F Supp 2d 289, 308 (SDNY 2009); *see also Fattoruso v Hilton Grand Vacations, LLC,* 525 Fed Appx 26, 27 (2d Cir 2013) ("a plaintiff who makes a complaint to his employer need only have had a good faith, reasonable belief that he was opposing an [unlawful] employment practice [*internal quotation marks and citation omitted*]").

In the present case, there is no indication that plaintiff's conversation, or her two EEO letters, constituted protected activity, or that defendants knew about this activity. With respect to the April 2008 conversation with Johann, plaintiff testified that she told Johann that she uncomfortable with Bellantoni because he did not want to work with her. Plaintiff never stated to Johann that Bellantoni's behavior towards her was the result of a gender bias against her. Moreover, Johann testified that she never spoke to defendants about her conversation with plaintiff.

Despite this, plaintiff, citing *Albunio v City of New York* (16 NY3d 472 [2011]), argues that she did not need to make it known to Johann that she believed Bellantoni did not want to work with her due to any protected category. Under the NYCHRL, a jury may conclude that a plaintiff's activity opposed discrimination without saying so "in so many words." *Albunio v City*

of New York 16 NY3d *supra* at 479.

However, applying the tenets of *Albunio* to the present situation, even using the broadest interpretation of plaintiff's language, defendants would not know that plaintiff was opposing statutory discrimination. *See e.g. Fletcher v Dakota, Inc.* (99 AD3d *supra* at 54) ("[E]ven under the City HRL, a complaint . . . that contains 269 numbered paragraphs without alleging even on information and belief that defendants knew or should have known that [plaintiff] was opposing discrimination when he spoke to them about the African-American shareholder who intended to renovate her bathroom fails to state a cause of action for retaliation")."

Although plaintiff uses the word discrimination in her letters, the substance of her first letter is a complaint that Bellantoni was afforded certain privileges while other auditors were not and that she wanted an investigation. Her second letter is the same except that it also alleges that her supervisor was having sexual conversations with a coworker and was promising to promote that coworker. Similar to her April 2008 complaint, plaintiff's letters could not have been reasonably understood as protesting statutorily prohibited discrimination. Her belief that she was being treated "unfairly" does not "transform" into a complaint about gender discrimination. *Fattoruso*, 525 Fed Appx *supra* at 28.

Moreover, plaintiff wrote her letters anonymously, and testified that she told no one that she was the author. *See Fattoruso*, 525 Fed Appx *supra*, at 27-28 ("[plaintiff] failed to show that he participated in a protected activity *known to* [*defendant*])." As such, her letters cannot form the basis of a retaliation claim. And, with respect to her allegations of her supervisor's sexual conversations, "a 'paramour preference' does not constitute unlawful discrimination based on

gender [internal quotation marks and citation omitted]." *Id.* at 28. Plaintiff testified that she overheard "a couple" of conversations from her cubicle and that she never confirmed with this coworker whether the conversations were one-sided or not. Plaintiff tr at 93, 94.

Based on the harassing anonymous emails plaintiff allegedly sent to defendants, it is likely that they surmised she was the one who wrote the complaints. That being said, as plaintiff's "complaints were limited to expressing [her] dismay over 'favoritism with one of the employees,' [defendants] cannot be expected to have understood [plaintiff] to have been complaining about disparate treatment *based on [gender]* and therefore engaging in protected activity." *Id.*

Plaintiff claims that, as a result of her complaints, she was shunned, ignored and denied information. However, even assuming, arguendo, that plaintiff was opposing discriminatory practices, as previously mentioned, defendants have provided legitimate reasons for their actions and no causal connection exists between plaintiff's complaints and those actions, including her termination. She was a probationary employee who was terminated for the legitimate purpose of violating a company policy. As such, her retaliation claim fails as a matter of law.

IV. Plaintiff's Remaining Claims:

Since plaintiff has failed to raise a triable issue of fact with respect to discrimination or retaliation, she cannot sustain a claim as against the City of New York as an employer under the NYCHRL. Plaintiff is also prevented from having any individual claims against employees. *See Priore v New York Yankees*, 307 AD2d 67, 74 n 2 (1st Dept 2003), ("[a] separate cause of action

against an employee for actively 'aiding and abetting' discriminatory practices . . . would still require proof initially as to the liability of the employer [*internal citations omitted*]").

The court has considered plaintiff's other contentions and finds them without merit.

CONCLUSION

It accordance with the foregoing, it is hereby:

ORDERED that the motion of defendants The City of New York, Department of Environmental Protection, Gerould McCoy, Kevin Goyette and Anthony Bellantoni for summary judgment dismissing the complaint herein is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: March 20, 2014

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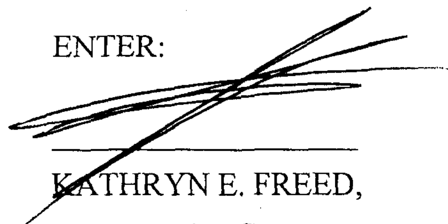

KATHRYN E. FREED,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

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