Mahoney v Metropolitan Tr. Auth.

2014 NY Slip Op 32774(U)

October 22, 2014

Supreme Court, New York County

Docket Number: 151518/12

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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ANN MARIE MAHONEY,,

Plaintiff,

Index No. 151518/12

- against -

THE METROPOLITAN TRANSIT AUTHORITY, and the METRO-NORTH COMMUTER RAILROAD,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Ann Marie Mahoney (Mahoney) sues to recover damages for alleged employment discrimination in violation of the New York State Human Rights Law (Executive Law § 296)(NYSHRL), and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107)(NYCHRL). In her complaint, plaintiff alleges that defendants discriminated against her based on her sexual orientation, by creating a hostile work environment, by retaliating against her for complaining about the hostile work environment, and by terminating her. Defendants the Metropolitan Transit Authority (MTA) and the Metro-North Commuter Railroad (Metro-North or defendant) now move, pursuant

to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment in her favor.

BACKGROUND

Plaintiff was employed by Metro-North for about 24 years, from February 1988 until her termination in November 2011. Metro-North, a commuter railroad providing passenger train service between New York City and communities in New York State and Connecticut, is a wholly owned subsidiary of the MTA. Affidavit of James McGovern in Support of Defendants' Motion (McGovern Aff.), ¶ 2. Plaintiff was hired by Metro-North as an assistant conductor, and was promoted to locomotive engineer in or around 1990. Deposition of Ann Marie Mahoney (Pl. Dep.), Ex. C to Plaintiff's Notice of Cross Motion (Cross Motion), at 33-34.[1] As a locomotive engineer, plaintiff was first assigned to a number of different locations, but for about the last 15 years of her employment, she was assigned to work as an emergency room engineer at Track 19 in Grand Central Station (Grand Central or the station). *Id.* at 34-37.

Emergency room engineers are responsible for, among other things,

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[1]All subsequent citations herein to plaintiff's deposition are to the transcript annexed to plaintiff's cross motion as exhibit C. As the parties have submitted different portions of the deposition testimony of Craig Davis and Steven Jimenez, citations to their testimony requires citation to multiple exhibits.

moving trains from the station platforms to the rail yards during the morning and evening rush hours; at other times, they remain on call and wait for their next assignment in the emergency room, which is actually two rooms located on the north and south sides of Track 19, and also is used as the engineers' lounge area. *Id.* at 48-49, 51-53, 71, 77-78; Deposition of Steven Jimenez (Jimenez Dep.), Ex. J to Affirmation of Joshua Fay in Support of Defendants' Motion (Fay Aff.), at 24-26. The engineers reported to the yardmasters, located in another part of the station, who gave assignments to the engineers. Pl. Dep. at 66-67, 70, 72, 79. Trainmasters, located at a nearby track, were responsible for overseeing the yardmasters and the emergency room engineers, and also gave assignments to the engineers. *Id.* at 65, 68, 69-70, 75-76.

Plaintiff worked the day shift with, generally, six other engineers, most of whom had worked at Grand Central for years. *Id.* at 49-50, 63-64, 72-73, 74. Plaintiff testified that she got along well with the other engineers working with her, that they "worked well together," and were "very close," socializing together outside of work and visiting each others' homes. *Id.* at 83, 89, 97. She and her coworkers at Track 19 were "like a mini family" and her workplace had "a very, very nice atmosphere," until July 12, 2011

(July 12). *Id.* at 97.

On July 12, plaintiff and coworker Craig Davis (Davis) had an argument, which escalated into a physical altercation, about allegedly pornographic images on a television screen in the north emergency room at Track 19. Although there is no dispute that this altercation occurred, plaintiff and Davis provide different versions of the events that led up to and occurred during the fight.

Plaintiff, who is openly lesbian, testified that, around midday on July 12, she entered the emergency room, and found several coworkers, including Davis, already there, and she noticed pornographic images on the television screen in the room. *Id.* at 119. According to plaintiff, the image on the television showed a heterosexual couple and lesbians engaged in sex, described by plaintiff as "the most derogatory sexual scenes . . . [she] ever witnessed" (*id.* at 119, 124, 125), and Davis was lying on the couch, in shorts, grabbing his crotch and moaning. *Id.* at 120, 124. Plaintiff told him to turn it off and in response, she testified, he told her to "go fuck yourself, you fucking dyke." *Id.* at 120. After telling Davis she would turn it off if he did not, she moved toward the television, and Davis shoved her backwards over a table and onto a couch, started

punching her in the face, put her in a headlock, and kept punching her, until another coworker came into the room and intervened. *Id.* at 121-122. Plaintiff sustained injuries, including lacerations to her head, and was taken by ambulance to a hospital emergency room for treatment. *Id.* at 129.

Davis testified that, on the day of the fight, he was in the north emergency room playing a video game when plaintiff entered the room. Deposition of Craig Davis (Davis Dep.), Ex. D to Cross Motion, at 64-65. According to Davis, at some point when plaintiff was in the room, the scene from the game visible on the television screen showed three "cartoonish" topless women, two of them kissing, and a male character in the game then appeared on the screen and had sex with one of the women, which was not shown, but moans and groans were heard. *Id.* at 69-70. Davis also testified that he did not know the scene was coming up and had not previously reached the level of the game where that scene appeared. Davis Dep., Ex. C to Fay Aff., at 70-71. He acknowledged that after plaintiff came into the room, at some point plaintiff told him he was watching pornography, asked him to turn it off, and he refused, and she told him she would if he did not. Davis Dep., Ex. D to Cross Motion, at 65-66, 68. When she moved toward the television, he stood in front of it and

they "had words." Davis Dep., Ex. C to Fay Aff., at 74. Plaintiff, he testified, shoved a coffee table against his leg, and he pushed her onto the couch; she then got up, yelling racial slurs at him and shoving the table, and he pushed her down on the couch again. *Id.* at 74-75, 82-84. He admitted that he punched her, and had her in a headlock, but claimed that she had provoked him by kicking and lunging at him. *Id.* at 82, 85, 88-89. Davis also admitted, at some point, that he called plaintiff a "dyke," and made the first contact, although, at his deposition, he claimed the admission was not true, and had been made solely to get his job back. Davis Dep., Ex. D to Cross Motion, at 98, 100-101, 107, 110-111.

As a result of the fight, police reports were filed and both plaintiff and Davis were arrested on assault charges. *See* MTA Police Incident Reports, Ex. D to Fay Aff. The district attorney declined to prosecute plaintiff, but Davis was prosecuted and, eventually, pled to a violation. *See id.*, Officer Aiken Report dated 07/13/2011; Davis Dep., Ex. D to Cross Motion, at 123-124. Both plaintiff and Davis received 61-day suspensions from work, and, before any formal investigation occurred, both signed waivers of the right to a hearing, in order to return to work. Pl. Dep. at 142-143, 146, 147-148; see Waivers, Exs. H, I to Fay Aff. Plaintiff testified that

she signed the waiver only because she felt she had no choice and needed to return to work to have an income. Pl. Dep. at 147-148, 150, 157. The waiver permitted plaintiff and Davis to return to work on a "last chance" basis, and provided that any future incidents involving "verbal/physical altercation" would result in immediate termination without a hearing. *See* Waiver, Ex. H to Fay Aff. In early September 2011, plaintiff returned to work at Grand Central, and Davis was assigned to work at the High Bridge yard in the Bronx. Pl. Dep. at 165; Davis Dep., Ex. C to Fay Aff., at 115.

Plaintiff claims that after she returned to work, she experienced hostility from her coworkers, who stopped talking to her, sneered at her, said they did not want to work with her, and slammed doors in her face. Pl. Dep. at 166-167, 171. She also claimed that someone was leaving empty coffee cups in front of her locker, and suspected it was coworker Steven Jimenez (Jimenez). *Id.* at 169-170. In addition, she testified, she overheard all of her coworkers saying derogatory things about her, such as "she's a rat," "a piece of shit," "violent," and that she should not have had kids because she was a man. *Id.* 113-114. She also heard people whispering the word "dyke" in little groups near her, and believed it was

said by coworker Keith Cadero. *Id.* at 175-177.

Plaintiff claims that she complained to Wendy Wark (Wark) in the Metro-North Office of Employee Relations and Diversity (ER&D) "several times" in September (*id.* at 115, 180, 196), and called Sherry Herrington, a vice president of Metro-North, and a lesbian, who, plaintiff claims, would not talk to her. *Id.* at 115-116, 185, 200. On October 10 or 11, 2011, plaintiff submitted a written harassment complaint to the ED&R against Jimenez. *Id.* at 195-196, 198-199, 204-205; *see* Complaint, Ex. K to Fay Aff.; Intake Form, Ex. L to Fay Aff. She subsequently spoke with Wark, who called Jimenez to her office, spoke to him, and then told plaintiff that Jimenez was put on "official notice," and that she would try to get management to do something. Pl. Dep. at 196-197, 205.

On October 13, 2011, Michael Doyle (Doyle), a union representative (*id.* at 41-42), called a meeting of the emergency room engineers (October 13 meeting), at which, plaintiff testified she was told, Wark would be present. *Id.* at 212-213, 214; Jimenez Dep., Ex. E to Cross Motion, at 62. In addition to plaintiff, about seven other engineers attended the meeting, including Doyle and coworker Jimenez. Pl. Dep. at 215. Wark did not attend the meeting, and Doyle led it, and, according to plaintiff, started the

meeting by telling her that she was the problem, and then telling those in attendance that they were "acting like babies" and "we're going to resolve this." *Id.* at 216-217. Although there are differing versions of who spoke at the meeting, and what was said, it is not disputed that it was an unruly meeting and that, not long after it started, everyone except plaintiff and Doyle left the room. *Id.* at 230.

Plaintiff testified that, during the meeting, the other people there were screaming at her, saying she belonged in a mental institution and needed to be on drugs (*id.* at 218-219, 220, 229); and saying that she was violent and had picked on Davis. *Id.* at 220-221, 229. She testified that Jimenez called her a "dyke" at the meeting (*id.* at 173, 229), and that coworker Joyce Cowan-Jennings (Cowan-Jennings) said she should not have a kid, although plaintiff did not know why that was said. *Id.* at 183-184. Other employees dispute plaintiff's version and contend that plaintiff did all the talking and was insulting her coworkers. *See generally* Hearing Transcript, dated November 18, 2011 (Hearing Transcript), Ex. Q to Fay Aff.

What happened after the October 13 meeting, during an incident that led to plaintiff's dismissal, also is in dispute. Plaintiff testified that, when the meeting ended, she was crying and upset with Doyle, and walked out

of the meeting room with him, intending to go home. Pl. Dep. at 230-231. She then dropped the bag she was carrying, and moved to look at the train monitor, then turned back to pick up her bag, and Jimenez grabbed her forearms until Doyle told him to let go. *Id.* at 231-232.

At his deposition, Jimenez testified that plaintiff came out of the meeting room, red-faced and maybe crying, and angrily walked toward him, stating something to the effect of "if I'm going to lose my job, I'm going to lose it for a reason." Jimenez Dep., Ex. J to Fay Aff., at 75-76. When she continued coming toward him, he testified, and she was within arms' length, he put his arms out and grabbed her forearms, and her anger dissipated. *Id.* at 77-79.

Immediately after the incident, plaintiff went to the ED&R office with Doyle to see Wark, who told Doyle that plaintiff could not work and should be "marked off" work for the rest of the day and the next day, and they would address what happened after the weekend, on Monday, October 17. Pl. Dep. at 232-233. The next day, however, plaintiff was told that she was marked "out of service," i.e. suspended, instead of marked off with pay. *Id.* at 234-235.

Jimenez, also right after the incident, filed a complaint against

plaintiff, and two employees who witnessed the events on October 13, Angela Manley (Manley) and Cowan-Jennings, submitted statements in support of Jimenez's complaint, asserting that plaintiff had been the aggressor. Jimenez Dep., Ex. J to Fay Aff., at 80-81; *see* Employee Statements of Occurrence, Exs. M, N to Fay Aff. Plaintiff testified that she then received a letter, dated October 18, from Wark's office, stating that the investigation of her October 11 complaint was being suspended in light of the complaint filed by Jimenez against her. Pl. Dep. at 238-239. She subsequently received a notice that an investigatory hearing would be held. *Id.* at 240. Both plaintiff and Jimenez were taken out of service pending the investigatory hearing. *Id.* at 240-241; Jimenez Dep., Ex. J to Fay Aff., at 81.

An investigatory hearing was held on November 18, 2011, concerning the October 13 incident. At the hearing, plaintiff and Jimenez were questioned, as were employees Cowan-Jennings and Manley, and an investigator, Emilio Perez (Perez). Jimenez, Cowan-Jennings and Manley testified, in sum, that the October 13 incident was provoked by plaintiff, when she "stormed" out of the meeting and angrily approached Jimenez, who had no option but to stop her with his hands. *See* Hearing Transcript,

Ex. Q to Fay Aff., at 54-57, 60-61, 85, 93-94. Perez, the investigator, testified that he concluded, after speaking to several witnesses, but without speaking to plaintiff, that she started the incident. *Id.* at 22-26. Following the hearing, plaintiff received a notice, dated November 23, 2011, that, as a result of her conduct on October 13, 2011, her employment with Metro-North was terminated. *See* Notice of Discipline, Ex. R to Fay Aff.

DISCUSSION

At the outset, the branch of defendants' motion seeking to dismiss the complaint as against the MTA is granted. There is no dispute that Metro-North is a subsidiary of the MTA, and that, pursuant to Public Authorities Law § 1266, "the MTA's subsidiary corporations are distinct entities and shall be individually subject to suit," and such subsidiary's employees shall not be deemed employees of the MTA. *Noonan v Long Is. R. R.*, 158 AD2d 392, 393 (1st Dept 1990); *accord Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910, 911 (2d Dept 2010); *Nussbaum v Metro-North Commuter R.R.*, 994 F Supp 2d 483, 490 n 1 (SD NY 2014). Plaintiff, in any event, does not argue, or even allege, that the MTA was her employer.

Further, "'[a] parent corporation will not be held liable for the torts or

obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary.'" *Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 708 (2d Dept 2006), quoting *Potash v Port Auth. of N.Y. & N.J.*, 279 AD2d 562, 562 (2d Dept 2001). Plaintiff offers nothing to demonstrate that MTA exercised such dominion and control over the daily operations of Metro-North. To the extent that plaintiff argues that the MTA is a proper party because the MTA police were involved in investigating the July 12 altercation, or because it holds her pension and issued her employee identification, that argument, unsupported by any legal authority, is unavailing.

It is well settled that to prevail on a motion for summary judgment, the movant must, by tender of evidentiary proof in admissible form, establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980); *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once such showing has been made, to defeat summary judgment, the party opposing the motion must establish, also by submitting evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez,* 68

NY2d at 324; *Zuckerman,* 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 (1957). Further, "[i]t is not the court's function on a motion for summary judgment to assess credibility." *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *accord Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013).

In employment discrimination cases, courts also urge caution in granting summary judgment, because direct evidence of an employer's discriminatory intent is rarely available. *See Ferrante*, 90 NY2d at 631; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). "'[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Sibilla v Follett Corp.*, 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), quoting *Gallo v Prudential Residential Servs., Ltd. Partnership*, 22 F3d 1219, 1223 (2d Cir 1994); *see Desir v City of New York*, 453 Fed Appx 30, 33 (2d Cir 2011). Nonetheless, summary judgment remains available in

discrimination cases (*see Ferrante*, 90 NY2d at 631; *Desir*, 453 Fed Appx at 33), and is appropriate when "the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Spencer v International Shoppes, Inc.*, 2010 WL 1270173, *5, 2010 US Dist LEXIS 30912, *15 (ED NY 2010) (internal quotation marks and citation omitted); *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127-128 (1st Dept 2012) (summary judgment granted where no evidence of pretext or discriminatory motive); *Bennett*, 92 AD3d at 46 (same).

Under the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in the terms, conditions and privileges of employment, because of, as pertinent here, an individual's sexual orientation. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). It also is unlawful under the statutes for an employer to retaliate against an employee who has opposed or complained about discrimination prohibited by the statute. Executive Law § 296 (7); Administrative Code § 8-107 (7).

Both the NYSHRL and the NYCHRL require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see*

Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights, 77 NY2d 12, 18 (1990); *Williams v New York City Hous. Auth.*, 61 AD3d 62, 65 (1st Dept 2009). Further, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]), the NYCHRL "explicitly requires an independent liberal construction analysis [of its provisions] . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights law." *Williams*, 61 AD3d at 66; *see* Administrative Code §§ 8-130, 8-101; *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Bennett*, 92 AD3d at 34; *Nelson v HSBC Bank USA*, 87 AD3d 995, 996-997 (2d Dept 2011).

HOSTILE WORK ENVIRONMENT

Under the NYSHRL, as under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2 [a] [1]) (Title VII]), to prevail on a claim of hostile work environment, a plaintiff must show that 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 Sys., Inc.*, 510 US 17, 21 (1993), quoting *Meritor Sav. Bank v Vinson*, 477 US 57, 65, 67 (1986);

see Forrest v Jewish Guild for the Blind, 3 NY2d 295, 310 (2004). To be actionable, the incidents of harassment "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992); *see Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 (1st Dept 2011); *Thompson v Lamprecht Transp.*, 39 AD3d 846, 847 (2d Dept 2007); *Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 (4th Dept 1996). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Forrest*, 3 NY3d at 310-311, quoting *Harris*, 510 US at 23.

Under the more protective NYCHRL, to establish liability for a hostile work environment, a plaintiff need not prove that the conduct was severe or pervasive, only that "she has been treated less well than other employees because of her [protected status]." *Williams*, 61 AD3d at 78; *see Hernandez v Kaisman*, 103 AD3d 106, 113 (1st Dept 2012); *Nelson*, 87 AD3d at 999; *see generally Mihalik v Credit Agricole Cheuvreux N. Am.*,

Inc., 715 F3d 102, 110 (2d Cir 2013). Courts nonetheless continue to recognize that the law does not operate as a "'general civility code'" (*Williams*, 61 AD3d at 79 [citation omitted]), and conduct which is "nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" is not actionable. *Id.* at 80. Moreover, a plaintiff must establish that the hostile conduct was directed at her because of her membership in a protected class. *See Lennert-Gonzalez v Delta Airlines, Inc.*, 2013 WL 754710, *8, 2013 US Dist LEXIS 27832, *23 (SD NY 2013); *Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 451, 453-454 (ED NY 2013); *Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 506 (1st Dept 2010). "An environment that would be equally harsh for all workers, or that arises from personal animosity, is not actionable under the civil rights statutes." *Bermudez v City of New York*, 783 F Supp. 2d 560, 578-579 (SD NY 2011) (internal quotation marks and citation omitted); *see Jeune v City of New York*, 2014 WL 83851, *8, 2014 US Dist LEXIS 2574, *25-26 (SD NY 2014).

In addition, under the NYSHRL, an "'employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.'" *Matter of State Div. of*

Human Rights v St. Elizabeth's Hosp., 66 NY2d 684, 687 (1985) (citation omitted); *see Forrest*, 3 NY3d at 311; *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 737-738 (2d Dept 2009); *Beharry v Guzman*, 33 AD3d 742, 743 (2d Dept 2006). Similarly, pursuant to the NYCHRL, an employer may be liable for the discriminatory conduct of a non-managerial employee only "where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take 'immediate and appropriate corrective action'; and . . . where the employer 'should have known' of the offending employee's unlawful discriminatory conduct yet 'failed to exercise reasonable diligence to prevent [it].'" *Zakrzewska v New School*, 14 NY3d 469, 479 (2010), quoting Administrative Code § 8-107 (13) (b) (1)-(3).

In this case, plaintiff testified that she, and other lesbian and gay people and other minorities, endured "a lot of insults" during her career at Metro-North (Pl. Dep. at 94), and she identifies two instances in the 1990s about which she complained to the ER&D. *Id.* at 90, 92-93, 95-96. She does not claim, however, that she experienced a hostile work environment during her years working at Track 19 prior to July 12, 2011. To the contrary, she described her workplace as "a very, very nice atmosphere"

until July 12, 2011 (*id.* at 83, 97, 108), and testified that, prior to July 12, her relationship with her coworkers was good, and they were very close and enjoyed working together. *Id.* at 83, 89, 97.

The gravamen of plaintiff's hostile work environment claim is that she was harassed by two particular coworkers, Davis and Jimenez, and other coworkers generally, because of her sexual orientation, over a period of about three months, from July to October 2011. Specifically, her claim arises out of Davis' conduct on July 12, 2011; Jimenez's conduct between September 4, 2011, when she returned to work, through October 13, 2011, the last day she worked as an emergency room locomotive; and the conduct of other coworkers after she returned to work in September 2011.

Plaintiff contends that Davis created a hostile work environment on July 12, 2011, when he physically attacked her, after she complained about an offensive video game portraying lesbians in a sexual manner, called her a dyke, and stated to her that "your mother is a whore who should have given birth to a man and not you." *Id.* at 107-108, 110, 120. Evidence shows that, during their altercation, both Davis and plaintiff called each other derogatory names - plaintiff does not deny that she called Davis a "nigger" (*id.* at 137) – and, although plaintiff sustained more serious injuries

as a result of the fight, both engaged in fighting, as plaintiff reported to the police. *See* Police Report, Ex. I to Cross Motion, at 6-7. Both plaintiff and Davis were suspended for 61 days, and, as a condition of returning to work, both were required to meet with the ER&D to review defendant's workplace harassment and discrimination prevention policy, and agreed to attend an anger management course. *See* Waiver, Ex. H to Fay Aff. After plaintiff and Davis returned to service in early September 2011, they were assigned to different locations, and plaintiff has not spoken with Davis since July 12, 2011. Pl. Dep. at 165, 179.

The rapid escalation of their argument into a physical fight, and the admissions of both plaintiff and Davis that they hurled derogatory slurs at each other, clearly point to an unacceptable lack of civility on the part of both employees, and notwithstanding plaintiff's argument that she was the victim and should not have been disciplined in the same manner as Davis, Metro-North's actions following the July 12 altercation, including the suspension of both employees, were not improper or evidence of discrimination. There is, moreover, no evidence that defendant acquiesced in Davis' conduct, failed to take immediate and appropriate action in response, or should have known the fight would occur.

Plaintiff's hostile work environment claim also rests on allegations that she was subjected to her coworkers' animosity, and again called a dyke, following her return to work at Grand Central on September 4, 2011. According to plaintiff, Jimenez harassed her from the time she returned to work, was likely the employee who left empty coffee cups in front of her locker, called her a dyke at the October 13 meeting, and referred to her partner as her "lesbo" girlfriend. *Id.* at 169-170, 173-174. Jimenez also insulted her work ethic and character and made comments about her mental health. *Id.* at 179-180, 181. Plaintiff claims that she also once heard another coworker use the word "dyke" while talking and whispering in a "little group" near her. *Id.* at 175-177.

As to other coworkers, plaintiff claims that, after she returned to work in September 2011, people stopped talking to her, sneered at her, did not want to work with her, and slammed doors in her face (*id.* at 166-167, 171); they also called her names, such as "crazy," "rat," "violent," and "piece of shit." *Id.* at 112-114. She testified, however, that, prior to the October 13 meeting, most of her coworkers were not responsible for creating a hostile work environment based on her sexual orientation; only Davis and Jimenez were. *Id.* at 223. She also testified that people were angry with her

because she would not drop the criminal charges against Davis, who was their friend. *Id.* at 171-172, 193-194, 211-212. Further, plaintiff herself acknowledged and testified that she had no problems with her coworkers prior to September 2011, although she now argues that "just because the coworkers were at one time not hostile, it does not mean that at some later time they could become hostile based upon her sexual orientation" Pl. Memo of Law, at 15-16.

In view of all the evidence, including plaintiff's testimony that she had no problems with her coworkers until after the incident with Davis, and her acknowledgment that most of her coworkers were not responsible for creating a hostile environment until the October 13 meeting, and even if questions remain as to the basis for the alleged hostilities in September and October 2011, there is no evidence that defendant became a party to any discriminatory conduct by encouraging, condoning or approving it. The incidents involving Davis and Jimenez were addressed; and the October 13 meeting, by all accounts, was unruly and chaotic, with many people, including plaintiff, yelling, and provides no basis for finding that plaintiff was treated differently because of her sexual orientation. The hostile work environment claims, therefore, under either the NYSHRL or the NYCHRL,

cannot survive.

Retaliation

To establish a claim of unlawful retaliation under the NYSHRL (Executive Law § 296 [1] [e]) and the NYCHRL (Administrative Code § 8-107 [7]), a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the plaintiff, or, under the NYCHRL, the employer's actions were reasonably likely to deter a person from engaging in protected activity; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest,* 3 NY3d at 312-313; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 (2d Dept 2013); *Asabor*, 102 AD3d at 528; *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). A causal connection can be established directly, through evidence of retaliatory animus, such as verbal or written remarks, or indirectly, by showing that the adverse action closely followed in time the protected activity. *See Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 (2d Cir 2001); *Pace Univ. v New York State Commn. on Human Rights*, 85 NY2d 125, 129 (1995).

Metro-North does not dispute that plaintiff engaged in a protected activity, of which her employer was aware, when she filed a complaint on October 10 or 11, and that she suffered an adverse action when her employment was terminated. *See* Defendants' Memo of Law, at 23. Further, "[t]o prevail on a retaliation claim, 'the plaintiff need not prove that her underlying complaint of discrimination had merit,' but only that it was motivated by a 'good faith, reasonable belief that the underlying employment practice was unlawful.'" *Kwan v Andalex Group, LLC*, 737 F3d 834, 843 (2d Cir 2013), quoting *Lore v City of Syracuse*, 670 F3d 127, 157 (2d Cir 2012) and *Reed v A.W. Lawrence & Co.*, 95 F3d 1170, 1178 (2d Cir 1996); *see Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18 (1st Dept 2014) (dismissing hostile work environment claim but upholding retaliation); *Beharry*, 33 AD3d at 744 (same); *Pronin v Raffi Custom Photo Lab, Inc.*, 383 F Supp 2d 628 (SD NY 2005) (same). Here, the good faith and reasonableness of plaintiff's belief that she was subjected to discrimination are not contested.

Defendant argues, however, that plaintiff cannot show a causal connection between the protected activity and the adverse action, and that even if the temporal proximity between plaintiff's complaint and the adverse

action was enough for a prima facie showing, it has demonstrated a legitimate, nondiscriminatory reason for terminating plaintiff's employment. That is, according to defendant, plaintiff was terminated after she "aggressively charged one of her coworkers . . . in violation of the last chance" provision of the waiver she signed in September 2011. Defendants' Memo of Law, at 25.

In support of its argument, defendant submits a portion of a transcript of an investigatory hearing held, on November 18, 2011, in response to Jimenez's complaint against plaintiff, and deposition testimony of Jimenez and plaintiff. Defendant also submits documents, including the complaint filed by Jimenez, dated October 13, 2011 (Ex. M to Fay Aff.), and statements from coworkers Cowan-Jennings and Manley in support of his complaint (Ex. N to Fay Aff.); the complaint filed by plaintiff, dated October 10, 2011 (Ex. L to Fay Aff.); and a Notice of Discipline, dated November 23, 2011, stating that plaintiff was dismissed for "[w]ilful disregard of the Company's interests and hostility," namely, yelling at Jimenez and moving toward him "in a hostile fashion to physically attack him." Ex. R to Fay Aff.

Defendant sets forth a facially nondiscriminatory reason to support the decision to terminate plaintiff's employment, specifically, misconduct.

However, evidence submitted on this motion, including defendant's own evidence, raises triable issues as to whether the proffered reason for firing plaintiff was pretextual and whether retaliation played any part in the decision to terminate plaintiff's employment after nearly 24 years of satisfactory work.

Although the Notice of Dismissal, which followed the investigatory hearing, indicates the reasons for plaintiff's dismissal, the transcript of the hearing offers no conclusions of the hearing officer with respect to those reasons, and no other admissible evidence is presented as to who determined that plaintiff was in violation of the waiver. There also is no testimony, or affidavit, from anyone with personal knowledge, articulating or explaining the reasons for firing plaintiff.

The investigative hearing was not, as the hearing officer made clear, a legal proceeding (*see* Hearing Transcript, Ex. J to Cross Motion, at 12), and the hearing officer restricted testimony to the October 13 meeting, and permitted no questions about plaintiff's claims. *Id.* at 67-68, 70-71, 81; Pl. Dep. at 243-244. Assuming that the hearing testimony is admissible evidence,[2] it raises classic credibility issues, not clearly resolved on this

[2]The record does not indicate whether witnesses were sworn.

record, as to whether plaintiff engaged in conduct requiring application of the "last chance" provision, and, therefore, whether the last chance provision was the real or only reason for terminating plaintiff's employment. Even if the testimony of the witnesses at the hearing serves to undercut plaintiff's credibility, it does not resolve the issues, which are not properly decided on this motion. *See Ferrante*, 90 NY2d at 631; *Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974).

In addition, questions as to the reasons for firing plaintiff are raised by the lack of any evidence as to what, if any, disciplinary action was taken against Jimenez, who admittedly grabbed plaintiff's arms; and by defendant's failure to investigate plaintiff's harassment complaint against Jimenez in favor of investigating Jimenez's complaint against her. While defendants argue that plaintiff has submitted no evidence that she was treated differently than any similarly situated employee, their argument "ignores the rule that 'a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof.'" *Fields v Village of Sag Harbor*, 92 AD3d 718, 720 (2d Dept 2013) (citation omitted). As movants, they must "affirmatively demonstrate the merit of its claim or defense." *Peskin v New York City Tr. Auth.*, 304 AD2d 634, 635 (2d Dept

2003); *see Furment v Ziad Food Corp.*, 104 AD3d 562, 563 (1st Dept 2013).

Absent clearly articulated findings resulting from the hearing, or any evidence based on personal knowledge as to the decision to terminate plaintiff, and given the issues of credibility which remain concerning the incident that led to plaintiff's dismissal, defendant has not established as a matter of law that its stated reason for dismissing plaintiff was not pretextual or motivated at least in part by retaliation, and dismissal of the retaliation claims is denied.

Punitive Damages

Turning to plaintiff's punitive damages claim, defendants correctly argue that Metro-North, as a public benefit corporation under Public Authorities Law § 1263, is immune from such claim. The Court of Appeals has made clear, in closely analogous circumstances, "in light of the essential public function served by defendant in providing commuter transportation and the public source of much of its funding, that defendant should receive the same immunity from punitive damages as do the State and its political subdivisions." *See Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 387 (1987); *see DeFrancesco v Metro-North R.R.*, 2012

NY Misc LEXIS 2934, *29, 2012 NY Slip Op 31626(U) (Sup Ct, NY County 2012), *affd* 112 AD3d 445 (1st Dept 2013); *Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 (1st Dept 1997). Although plaintiff contends that a further "particularized inquiry is necessary" (*Clark*, 70 NY2d at 387), plaintiff fails to refute defendant's evidence of its public funding and otherwise fails to raise any factual issues warranting further inquiry.

Accordingly, it is

ORDERED that the motion of defendants is granted to the extent that all claims as against the MTA are dismissed; and it is further

ORDERED that defendants' motion is granted to the extent that the first, third, fourth, fifth, seventh and eighth causes of action are dismissed; and it is further

ORDERED that plaintiff's claim for punitive damages is dismissed; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the remaining claims (second and sixth causes of action) are severed and shall continue.

Dated: October 22, 2014
New York, New York

ENTER:

MICHAEL STALLMAN, J.S.C.

HON. MICHAEL D. STALLMAN