SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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VIOLET IDEHEN,

Plaintiff,

Index No.:
652469/2013

-against-

TEACHERS COLLEGE COLUMBIA UNIVERSITY, JOHN DEANGELIS, YEREMY CHAVEZ,

Defendants.

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JOAN A. MADDEN, J.:

This action arises out of plaintiff Violet Idehen's claims that she was subject to discrimination, retaliation and an alleged hostile work environment, based on her gender, in violation of the New York City Human Rights Law (NYCHRL). Defendants Teachers College, Columbia University (Teachers College), John DeAngelis (DeAngelis) and Yeremy Chavez (Chavez) (collectively, defendants) move, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing plaintiff's complaint. Plaintiff cross-moves, pursuant to CPLR 3025 (b), to file an amended complaint to include additional causes of action for discrimination based on race, age and national origin. Defendants also oppose plaintiff's cross motion to amend the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff identifies herself as a Nigerian-born African American female. Plaintiff is a former administrative assistant at the Teachers College and had been working there since 1988. Chavez was plaintiff's first-level supervisor and DeAngelis was plaintiff's second-level supervisor.

Plaintiff alleges that she started experiencing sexual harassment in April 2009, when her superiors, DeAngelis, Chavez, nonparties Chris Diodato (Diodato) and Frank Seguinot (Seguinot), took her out to lunch for staff appreciation day. She contends that DeAngelis "made suggestive comments" and that she could tell that DeAngelis was interested in her. Complaint, ¶ 11. Evidently, after this lunch in April 2009, DeAngelis "relentlessly harassed" plaintiff to go out to lunch.

In September 2009, plaintiff spoke to Chavez about DeAngelis's behavior. DeAngelis told Chavez that he only wanted to discuss work-related matters over lunch with plaintiff. Plaintiff maintains that, after Chavez's discussion with DeAngelis, DeAngelis became "increasingly hostile" with her and allegedly told coworkers to be careful and not let plaintiff hear their conversations. Plaintiff claims to have heard DeAngelis make a sarcastic remark about deleting his spam emails because plaintiff had written him a love letter. Nonetheless, despite the alleged hostility, DeAngelis continued to ask plaintiff out

to lunch, would compliment plaintiff's dressing, occasionally blew kisses at her and "even inquired about what kind of cereal [she] was having for breakfast." Complaint, ¶ 26.

Among other things, around 2009, plaintiff alleges that she experienced a mysterious loss of data from her computer. When plaintiff reported this problem to defendants, she was informed that someone had hacked her computer and was accessing it remotely. According to plaintiff, neither Chavez nor DeAngelis did anything to investigate the source of the problem. Plaintiff believed that her superiors knew the source of the problem. In addition, when Chavez was asked if he was accessing the computer due to the fact that he was plaintiff's supervisor, "appeared upset and vehemently denied doing so." *Id.*, ¶ 33.

In 2011, plaintiff's locker was broken into. She alleges that, despite her requests, DeAngelis would not file a formal complaint. Plaintiff also states that when her electric heater broke down, Diodato claimed he was too busy to meet with the electrician. Plaintiff further alleges that the new hires were not friendly towards her. She blames this on their not wanting to offend DeAngelis.

In February 2013, plaintiff's office reception area allegedly developed a strong noxious odor. Although plaintiff complained about it to her superiors, no one was asked to investigate the odor nor was she moved to another office area.

Plaintiff's doctor diagnosed her with broncho construction and suggested that her work area be free of respiratory irritants. Plaintiff states that she became ultimately "disabled" as a result of this strong odor. Eventually, plaintiff took a leave pursuant to the Family Medical Leave Act (FMLA), due to her disability.

Plaintiff's complaint contains three causes of action. In her first cause of action, plaintiff claims that she was sexually harassed and discriminated against by DeAngelis, by his constant lunch invitations and unwelcome comments which had "sexual undertones." *Id.*, ¶ 53.

The second cause of action is one for a general hostile work environment. Because her superiors did not sufficiently investigate the security of her locker and computer, or speak to the electrician about the heater, plaintiff claims that she was exposed to a hostile work environment. Plaintiff further alleges that the new hires were not friendly to her since they did not want to offend DeAngelis.

Plaintiff's third cause of action is one for retaliation. She alleges that, as a result of DeAngelis's "boorish behavior" she was retaliated against by not being moved after she complained about the odor in her office, ultimately "forcing" her to take a FMLA leave. *Id.*, ¶ 63. Although not expanded upon in the complaint, plaintiff maintains in this cause of action that

she was also retaliated against when she received a poor performance evaluation and was allegedly "discontinued" from employment while still out on leave. *Id.*, ¶ 64.

Defendants move to dismiss the complaint. They maintain that any sex discrimination or harassment claims are time-barred as these claims are subject to a three-year statute of limitations under the NYCHRL. Plaintiff filed her complaint on July 15, 2013. The lunch invitations, unwelcome comments and conversation with Chavez occurred prior to July 15, 2010. As a result, defendants maintain that plaintiff's claims are time-barred.

Defendants further contend that, even if the sex discrimination and harassment claims are not time-barred, they would fail. According to defendants, plaintiff cannot allege that she suffered an adverse employment action due to disparate treatment on the basis of her sex. In addition, she cannot claim that she was treated less well due to her gender. Any comments allegedly made by DeAngelis, were, according to defendants, too trivial to rise to an actionable level.

With respect to retaliation, defendants maintain that this claim must fail as plaintiff's conversation about DeAngelis does not constitute a protected activity. Even if construed as a protected activity, there is no causal connection between the protected activity and the adverse actions.

Plaintiff cross-moves to file an amended complaint. Plaintiff's proposed amended complaint contains two new causes of action. The first new cause of action alleges that plaintiff was discriminated against on the basis of national origin and race because she became aware, despite her requests for a raise, that an allegedly similarly situated employee, who was non-Nigerian and non-African American, received a higher salary.

In addition, plaintiff seeks to include a cause of action alleging that she was discriminated against on the basis of age. Evidently, her superiors would make comments to plaintiff such as "you are one day closer to your retirement, your big retirement" and state that she should be home "baking cookies and knitting for your grandchildren." Amended complaint, ¶ 104. Plaintiff claims that she took these comments as her superiors implying that she was too old to be employed.

The amended complaint contains additional allegations to bolster the other causes of action. Although not well articulated, evidently plaintiff believes she was further retaliated against for not responding to DeAngelis's requests for lunch and/or afternoon tea. For example, when a new employee was hired, that employee took over plaintiff's job functions. When plaintiff complained, she was accused of not cooperating with the new hire.

Plaintiff further adds details about DeAngelis's alleged

harassment towards her. She advises that, during the appreciation lunch in April 2009, DeAngelis "sat across the table facing Idehen so that his legs were rubbing against Idehen's which caused Idehen to pull back her chair to avoid DeAngelis's leg rubbing against hers." *Id.*, ¶ 12.

On another occasion, plaintiff states that she told DeAngelis that his wife should not go to lunch with other men. After this discussion, DeAngelis and Diodato went into Diodato's office and remained there for a while. Plaintiff continues that sometimes Diodato would jokingly say to DeAngelis that he should leave Violet alone. Plaintiff further summarizes as follows:

> "On one of the occasions after Idehen was not getting anywhere with her complaints to DeAngelis about work place problems, Diodato came over to Idehen and said to her, 'Violet, why don't you do what they want,' without indicating who he meant by 'they' or *what* it was 'they' wanted. Idehen perceived this statement as suggesting a sexual 'quid pro quo' for DeAngelis, but chose not to make an issue out of it [emphasis in original]."

Id., ¶ 83.

DISCUSSION

I. Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37

AD3d 670, 671 (2d Dept 2007); *see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds [internal citation omitted]." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009).

Under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]." *Leon v Martinez*, 84 NY2d 83, 88 (1994). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration [internal quotation marks and citation omitted]." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013).

At the outset, the court notes that plaintiff's complaint sets forth all of the allegations, yet fails to correctly describe them in their appropriate causes of action. For instance, in her cause of action for hostile work environment, plaintiff maintains that she was subject to a hostile work

environment due to general hostility in the office. Plaintiff neglects to add her allegations that she was subject to a sex-based hostile work environment. In addition, although not well articulated, it is evident that plaintiff alleges that she was subject to disparate treatment based on her gender. Because, at this stage, the court must assess whether "from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the court will address plaintiff's potential causes of action. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks and citations omitted).

II. Discrimination Claims

Pursuant to the NYCHRL, as stated in Administrative Code of the City of New York § 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, age, race or national origin. 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." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009). The court must evaluate claims with regard for the NYCHRL's "*'uniquely broad and remedial' purposes.*" *Id.* at 66.

In the realm of discrimination allegations brought pursuant to the NYCHRL, 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). Plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.,* 65 AD3d 961, 965 (1st Dept 2009).

Applying these standards to plaintiff's allegations, plaintiff cannot sustain a claim for disparate treatment based on her gender. Among other things, plaintiff maintains that she was subject to an odor in her workplace, that her computer's security was breached and that her locker was broken into. However, plaintiff fails to demonstrate how the alleged disturbances were motivated by gender discrimination, in violation of the NYCHRL. As plaintiff herself acknowledged, she does not even know who was responsible for the alleged acts. As these conclusory allegations do not establish that plaintiff was treated less well than other employees based on her gender, she cannot sufficiently set forth a cause of action for gender discrimination.

In addition, plaintiff claims that the incidents listed above, such as a noxious odor, generated a hostile work

environment. However, as defendants note, plaintiff is precluded from sustaining a claim for a non-sex-based hostile work environment. As set forth in *Adeniran v State of New York* 106 AD3d 844, 845 (2d Dept 2013), "New York does not recognize a common-law cause of action to recover damages for harassment [internal quotation marks and citations omitted]."

III. Claims of Sexual Harassment

A hostile or abusive work environment resulting from sexual harassment constitutes a violation of the human rights laws. *Williams v New York City Housing Auth.*, 61 AD3d at 75. "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." *Id.* at 78. *See e.g. Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 (1st Dept 2013) (Court held that plaintiff's testimony regarding disability based discrimination raised issues of fact as to whether she was treated differently under the NYCHRL).

Under *Williams*, the test for dismissing a NYCHRL hostile work environment claim is whether the alleged discriminatory conduct represents a "'borderline' situation, [or] one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." 61 AD3d

at 80. However, 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.

Actions to recover damages for alleged discrimination under the NYCHRL are subject to a three-year statute of limitations. Administrative Code § 8-502 (d). Defendants state that plaintiff's claims for sexual discrimination and harassment are time-barred since both the lunch date requests and the conversation with Chavez occurred over three years before the action was commenced.

Plaintiff concedes, in her cross motion, that the allegations which occurred more than three years prior to the commencement of this action are not a part of the causes of action in her complaint. Nonetheless, she still advises that she was subject, within the statute of limitations, to unwelcome comments and the blowing of kisses at her. Plaintiff does not provide dates for these or other alleged acts of sexual harassment.

As plaintiff concedes, the events such as the initial asking for lunch in April 2009 and the conversation with Chavez, are clearly time-barred. However, setting the statute of limitations aside, applying the standard set forth in *Williams* to the present case, plaintiff's allegations with respect to the gender-based

conduct cannot sustain a hostile work environment claim. None of the actions complained of, which include DeAngelis complimenting her attire, asking her what cereal she was eating and asking her out to lunch, states a claim for sexual harassment. Although plaintiff complains that she was treated less well by DeAngelis than male co-workers, and, although DeAngelis's conduct may have been offensive to plaintiff, a reasonable juror would find that it did not rise to an actionable level. *See e.g. Magnoni v Smith & Laquercia, LLP,* 701 F Supp 2d 497, 506 (SD NY 2010), *affd Magnoni v Smith & Laquercia, LLP* (2d Cir 2012) (Court held no viable claim under the NYCHRL for hostile work environment when plaintiff's boss told her a "crude anecdote from his sex life with another woman, and occasionally [referred] to [plaintiff] as voluptuous and knocking her knee . . . .").

Accordingly, plaintiff cannot state a viable claim under the NYCHRL for a hostile work environment.

IV. Plaintiff's Claims for Retaliation

Plaintiff alleges that she was retaliated against when she protested DeAngelis's behavior. She states that defendants failed to relocate her away from a noxious odor at work. This failure evidently led to her subsequent disability, which was followed by a poor performance evaluation and eventual termination while she was out on leave.

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 an 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 (SD NY 2009).

In the present case, there is no indication that plaintiff's conversation with Chavez in September 2009, where she complained about DeAngelis's lunch requests, constituted protected activity.

However, even assuming, arguendo, that plaintiff was opposing discriminatory practices, she has failed to show a causal connection between the conversation with Chavez in 2009 and the resulting alleged adverse employment actions, which occurred years later.[1] Accordingly, her retaliation claim fails as a matter of law.

V. Plaintiff's Cross Motion to Amend

Plaintiff seeks to file an amended complaint to include two other causes of action. She also seeks to include additional details about the alleged harassment and hostile work environment, which, for some reason, were not part of the original complaint. In general, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay [internal quotation marks and citations omitted]." *Murray v City of New York*, 51 AD3d 502, 503 (1st Dept 2008). However, "leave should be denied where the proposed claim is palpably insufficient." *Pasalic v O'Sullivan*, 294 AD2d 103, 104 (1st Dept 2002).

In this situation, for the reasons discussed below, the amended complaint is palpably insufficient, and plaintiff's request is denied.

Plaintiff accuses the defendants of discriminating against

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[1] Plaintiff's complaint states that the odor began in February 2013, yet the amended complaint states that the odor occurred in 2011 and that she took FMLA in 2012.

her based on one instance where a non-Nigerian, non-African American, allegedly similarly situated employee received a higher salary than plaintiff. Plaintiff provides the court with no relevant information about this claim except to assert that she "believes that her unaddressed lower salary scale for these years was discrimination . . . ." Amended complaint, ¶ 82. As set forth in *DuBois v Brookdale Univ. Hosp. & Med. Ctr.* (29 AD3d 731, 732 [2d Dept 2006]), "even accepting the allegations of the complaint as true, and giving her every favorable inference to be drawn therefrom, the plaintiff failed to state a prima facie case of illegal discrimination. Rather, her allegations were merely conclusory [internal citations omitted]." Therefore, as plaintiff cannot establish a prima facie case of discrimination based on national origin or race, her proposed cause of action is without merit.

Similarly, plaintiff's proposed age discrimination claim is without merit. Plaintiff alleges that she was discriminated against on the basis of age when two people other than the defendants allegedly made comments to her about her eventual retirement. For instance, one coworker purportedly would exclaim to plaintiff that she was one day closer to her big retirement. Although plaintiff may have been offended by these comments, the comments, standing alone, do not rise to an actionable level. Accordingly, as plaintiff cannot set forth a cause of action for

age discrimination, her request to amend her complaint to add such a cause of action, is denied.

Plaintiff includes more allegations in her amended complaint in relation to her sexual harassment claims. For example, plaintiff discusses a conversation she had with DeAngelis about his wife and how his wife goes out to lunch with male colleagues. However, plaintiff fails to allege any additional facts that would rise to the level of an actionable hostile work environment. As these, among plaintiff's additional allegations, are "vague, conclusory and unsubstantiated," any gender discrimination or retaliation claims would be dismissed. *All the Way E. Fourth St. Block Assn. v Ryan-NENA Community Health Ctr.*, 30 AD3d 182, 182 (1st Dept 2006). Accordingly, plaintiff's request to amend her complaint is denied.

VI. Additional Claims

Plaintiff's complaint states that she is seeking damages not only as a result of violations of Administrative Code § 8-107 (1) (a) and (7), but also as a result of violations of Administrative Code § 8-107 (6) and (13). Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. Administrative Code § 8-107 (13) states that an employer is liable for the discriminatory conduct of its employees. Plaintiff seems to abandon her claims under Administrative Code § 8-107 (6) and (13). Regardless, as plaintiff has failed to adequately plead

claims for retaliation or claims for discrimination under the NYCHRL, she cannot sustain these claims against any of the individual defendants as employers/supervisors. Plaintiff is also prevented from having any of these claims against the individual defendants as 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]").

Accordingly, it is

ORDERED that the motion of defendants Teachers College, Columbia University, John DeAngelis and Yeremy Chavez to dismiss the complaint is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion of plaintiff Violet Idehen to amend the complaint is denied.

DATED: October 28, 2014

HON. JOAN A. MADDEN
J.S.C.