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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DONNA M. MILLS Justice

PART 58

Index Number : 100846/2011
SURI, RACHANA
vs
GREY GLOBAL GROUP, INC.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 100846/11
MOTION DATE
MOTION SEQ. NO. 003

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):

Dated: 3/29/16

, J.S.C.
DONNA M. MILLS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 58

RACHANA SURI,
Plaintiff,

- against -

GREY GLOBAL GROUP, INC. and PASQUALE CIRULLO,
Defendants.

Index No.: 100846/2011

DECISION/ORDER

MILLS, DONNA, J.:

In this action, plaintiff Rachana Suri (Suri) sues her former employer and supervisor to recover damages for employment discrimination, alleging sexual harassment, disparate treatment and termination based on her gender, ethnicity and race, and retaliation, in violation of the New York State Human Rights Law (Executive Law § 296 [1]) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 [1])(NYCHRL). Defendants Grey Global Group, Inc. (Grey) and Pasquale Cirullo (Cirullo) move for summary judgment dismissing the complaint.

BACKGROUND

Defendant Grey, a wholly owned subsidiary of WPP Group plc, is a global advertising and marketing agency headquartered at 200 Fifth Avenue, New York, New York. Plaintiff, "a South Asian woman" (Complaint, ¶ 4), who also identifies herself as a "brown skinned woman of Indian descent" (Suri Affidavit in Opposition to Defendants' Motion [Suri Aff.], ¶ 2), was employed by defendant Grey for about six years, from June 2004 until her termination on April 27, 2010. *Id.*, ¶ 5; Plaintiff's Deposition (Pl. Dep.), Ex. A to O'Neill's Affirmation in Opposition (O'Neill Aff.), at 43. Defendant Cirullo, at most times relevant to the complaint, was employed by Grey as a Senior Vice President and was plaintiff's supervisor. Cirullo Dep., Ex. F to O'Neill

Aff., at 66, 180; Grudzina Dep., Ex. B to O'Neill Aff., at 36.

Plaintiff began working for Grey as a business analyst in its Financial Services department, and subsequently received several promotions and salary increases. Pl. Dep. at 43, 45; *see* Affidavit of Shadana Texidor in Support of Defendants' Motion (Texidor Aff.), ¶ 2; Personnel Action Forms, Ex. 1 to Texidor Aff. In September 2005, she was promoted to Financial Manager and, in January 2007, plaintiff was moved into Grey's IT department and promoted to Director. Suri Aff., ¶ 4. She was promoted again in April 2008 to Vice President, and held that position until her employment was terminated. Her starting salary was $70,000; as of September 2008, and at the time of her termination, her salary was $115,000. *See* Personnel Action Forms, Ex. 1 to Texidor Aff.

In March 2008, plaintiff applied for the position of project manager for Donovan Data Systems (DDS or Donovan) (Pl. Dep. at 264; Suri Aff., ¶ 5), a financial data management system to be implemented by Grey. *See* Grudzina Dep. at 49-50; Cirullo Dep. at 70-73. Although, plaintiff testified, she did not think she was qualified until she was asked to interview for it, (Pl. Dep. at 265), she believed the position would be "a good fit" because the position involved the rollout of a financial management system, and she had worked in the finance department. *Id.* at 264. She was interviewed by John Grudzina, Executive Vice President, General Counsel and Chief of Staff (Grudzina Dep. at 8-9), who at the time was responsible for Grey's IT department, but she did not get the position. Pl. Dep. at 266, 269; Grudzina Dep. at 41-42. Instead, in March 2008, Cirullo was hired as the DDS project manager, because, Grudzina testified, he was recommended by a WPP IT executive had DDS knowledge. *Id.* at 36, 41-42; Cirullo Dep. at 40, 66; Pl. Dep. at 273-274. As DDS project manager, Cirullo was responsible for overseeing the

implementation of the DDS financial management system, and reported to Grudzina. Grudzina Dep. at 37; Cirullo Dep. at 68.

Plaintiff testified that, when Cirullo was hired, she was unaware of his experience and assumed he was a better candidate, but subsequently, based on what he told her about his prior experience, she thought that he was less qualified for the position than she was. Pl. Dep. at 269, 271, 273, 274. Plaintiff believed that Grey discriminated against her, when it did not hire her for the DDS project management position, because Cirullo was referred and hired by white men, and "it became more and more obvious as more white males were promoted above me that it had something to do with me not being a white male." *Id.* at 270. In April 2008, plaintiff was promoted to Vice President, the same title then held by Cirullo. Suri Aff., ¶ 8.

In or around late September 2008, Cirullo was promoted to Senior Vice President and Director of Business Systems, and was given supervisory responsibility for plaintiff and Mike Yarcheski, then Vice President and Director of Business Solutions, and his team of system developers. Cirullo Dep. at 180.; Pl. Dep. at 46; Texidor Aff., ¶¶ 3-4; *see* Grudzina Email, dated August 28, 2008, Ex. 2 to Texidor Aff. Plaintiff was then managing Zoom, also known as Pelagon, and later was assigned to work on SharePoint, a document, workflow, and web content management system, which was her main focus at the time of her termination. Pl. Dep. at 38, 129-130, 275, 305, 406-407.

Plaintiff claims that, after Cirullo became her supervisor, he sexually harassed her and, beginning in November or December 2008, subjected her to hostile and discriminatory treatment based on her gender and/or national origin and/or skin color. Pl. Dep. at 281-282; 360-361. Plaintiff's sexual harassment claims arise from, as she testified, three alleged incidents, two

occurring shortly after Cirullo was promoted and one occurring some weeks later.

According to plaintiff, on the first day that Cirullo became her supervisor, he came into her office and, before having a five minute conversation about work, told her that she had beautiful hair. *Id.* at 239, 240. The next day, plaintiff claims, he came into her office and told her she had nice boots. *Id.* at 240-241. The third incident occurred in November 2008, when, plaintiff alleges, Cirullo touched and squeezed her leg, while sitting next to her at a conference table during a business meeting (the touching incident or the November incident). Complaint, ¶ 10; Pl. Dep. at 220-222.

Plaintiff testified that the November incident occurred at the beginning of a meeting with about six representatives of the vendor of DDS. *Id.* at 221-222. Plaintiff and Cirullo were sitting at a conference table, across from someone from Donovan; there were a few people in the room and others were entering it. *Id.* at 223, 227. Cirullo was sitting to plaintiff's right, and their chairs were about a foot or less apart, and, as plaintiff described what happened, Cirullo touched her thigh, near her knee, for "maybe a second or two," and "lightly" squeezed it. *Id.* at 227-228, 229, 231-232. He did not caress her leg or otherwise move his hand on her leg, and he did not look at her or say anything. *Id.* She immediately moved her chair farther away from him and made no eye contact with him during the two-hour meeting. *Id.* at 230, 233-234, 238-239. She said nothing to him at the time, and never discussed the incident with him at any other time. *Id.* at 239. Cirullo denies that he touched plaintiff at any meeting (Cirullo Dep. at 246), and does not recall giving her any compliments, although, he testified, he may have. *Id.* at 241.

Plaintiff thought that the touching incident was a sexual overture based on Cirullo's previous comments about her hair and boots. Pl. Dep. at 239, 241. As plaintiff acknowledged,

he never touched her again, and he made no sexual comments to her at any time. *Id.* at 240. Rather, plaintiff claims, while he had been professional, cordial and "very nice and outgoing" to her prior to the November incident (Suri Aff., ¶ 12), he became distant and less communicative after it. Complaint, ¶ 17. Plaintiff alleges that Cirullo began a campaign of hostile and disparate treatment because she rejected his sexual advance. Complaint, ¶ 18.

Plaintiff claims that Cirullo discriminated against her by repeatedly moving her on and off projects (Suri Aff., ¶ 19); by inviting her to some meetings but not others, and leaving her off communication lists (Pl. Dep. at 282-283, 287, 288, 290-291); and by treating her like a secretary for the DDS project, asking her to set up meetings three or four times, even when she was not invited to the meetings and a "lower level software developer" could have done it. *Id.* at 279, 283-284, 285, 288, 290-291, 294, 379, 392; Suri Aff., ¶ 20. Plaintiff also claims that he gave her work to white males in the department, such as a lower level tech person (Pl. Dep. at 282-284, 313); took credit for her work on SharePoint (*id.* at 303); denied her resources to do work on SharePoint (*id.* at 331-332, 333); and belittled and dismissed her ideas at meetings. *Id.* at 23, 302. She thought, from the time she started reporting to Cirullo, that he was unprofessional and was not an effective manager. *Id.* at 279-280. She claims that Doug Livingston (Livingston), head of the special projects, or applications, group (Walsh Dep. at 35), who worked on the SharePoint project with plaintiff, but was not her supervisor (Pl. Dep. at 20-22; Cirullo Dep. at 139-140), also belittled her, and talked over and disagreed with her, at meetings. Pl. Dep. at 20-22.

In May 2009, plaintiff met for the first time with Natalia Schultz (Schultz) in Grey's human resources department, to complain that she was being mistreated and disrespected by

Cirullo and Livingston, was being asked to perform administrative tasks, such as sending out meeting invitations for Cirullo, and was denied resources to do her work. Pl. Dep. at 399-402. According to plaintiff, Schultz told her "that's how men are" and "this is a male dominated world and women "work twice as hard as they do with less pay." *Id.* at 401.

Schultz testified that, at their first meeting, plaintiff wanted to get clarity about her role and responsibilities under Cirullo, and felt that there were meetings she should be attending to which she was not invited. Schultz Dep., Ex. 9 to Cortes Aff., at 108-109. She told plaintiff that she would get Cirullo to write up a job description, so that her responsibilities would be clear. *Id.* at 112-113. She recalled meeting with plaintiff again in February 2010, when plaintiff told her that she was not happy working with Cirullo, that he was taking her off projects she thought she should be on, and directing her to work only on SharePoint. *Id.* at 118-121, 135, 136.

Cirullo recalled that he had two meetings with Schultz regarding plaintiff's complaints, and was told that plaintiff was not happy with her assigned projects and did not know what he expected from her. Cirullo Dep. at 251, 252-253. Schultz advised him to put together a job description for plaintiff (*id.* at 253-254), which, he testified, he provided to and reviewed with plaintiff, giving her an outline of her responsibilities for the Zoom and SharePoint projects. *Id.* at 255-256, 257-258, 260-261, 262-264. At about the same time, he said, he took plaintiff off the Donovan project to give her more time to work on her other projects. *Id.* at 267. Plaintiff then went back to talk to Schultz about being taken off the Donovan project, and, according to plaintiff, Schultz seemed surprised, but told her it was Cirullo's choice to do that. Pl. Dep. at 402-403.

Cirullo testified that he took plaintiff off the Donovan project at another point because he

thought that her financial knowledge was "redundant," as there were other people from the finance departments working on the Donovan team, who had more current knowledge about the operations of the financial systems. Cirullo Dep. at 103-104, 108, 113. He also testified that he put her back on for particular tasks, when her knowledge was useful (*id.* at 116-117), and he did the same thing with other IT staff, both men and women. *Id.* at 118-119.

Although not alleged in the complaint, plaintiff also testified that, on one occasion in October 2009, Cirullo called her "dark" and stereotyped her as a terrorist. Pl. Dep. at 24, 51, 318, 319. According to plaintiff, during a "terrorist alert day" she was pulled off the subway and searched, causing her to be late for a meeting at work, and, when she arrived, Cirullo commented that she should be expected to be searched because she was dark. *Id.* at 119-120. Plaintiff admitted that Cirullo never called her a terrorist, but, she testified, it was clear what he thought about her. *Id.* at 319, 322. Cirullo denies that he made any comment to plaintiff about being dark. Cirullo Dep. at 312.

In January 2010, Robert Walsh (Walsh), then working at Cohn & Wolfe (C&W), another WPP company, was hired as Grey's Chief Information Officer (CIO). Walsh Dep., Ex. C to O'Neill's Aff. at 21, 27; Grudzina Dep., Ex. B. to O'Neill's Aff., at 12. At about the same time, C&W and G2, another WPP company, moved into the building where Grey was located, and, at Walsh's recommendation, their IT teams were consolidated to create "a common shared service" (*id.* at 71-72), and eliminate overlap and duplication of resources and staff who were doing the same jobs at the different companies, which would have "an impact on the bottom line." Walsh Dep., at 33, 53, 62-63, 86; Grudzina Dep. at 18.

As Walsh testified, when he started at Grey, the IT department had different teams, or

"branches," which included infrastructure, business systems, applications, security, and production technologies. Walsh Dep. at 34, 39-40. He handled all the teams except infrastructure, which was handled by then CIO Alain Ngo-Mah. *Id.* at 33, 34-35, 39-40. The business systems group had 10-15 employees in January 2010. *Id.* at 229-230. Cirullo was director of the group, plaintiff was project manager, and the others, including Mike Yarcheski, were developers and help desk staff. *Id.*

It was Walsh's responsibility as CIO to figure out how to consolidate the various IT teams, and, in that process, to identify areas of overlap and duplication, and decide which employees would be let go. *Id.* at 89-90, 124-125. To do that, Walsh testified, he considered the "rank, role, [and] costs" of IT employees, observed people working, and reviewed staff salaries. *Id.* at 90, 92, 97. He also consulted with some team directors about the functions and performance of the employees on their teams, and asked them to consider which team members should be let go. *Id.* at 92, 100-101, 103, 106, 109, 111-112, 118-119, 148. With respect to the business systems group, Walsh stated that he spoke to Cirullo about the consolidation, but did not consult with him about who should be let go, because he also was being evaluated and considered for termination. *Id.* at 113, 116, 117-118.

As a result of consolidating the IT teams, 13 Grey employees, including plaintiff, were dismissed, over three rounds of layoffs, in February 2010, April 2010, and May 2010. *Id.* at 133-135, 145-177; *see* Texidor Aff., ¶¶ 5-8; Employee Lists, Ex. 3 to Texidor Aff. All the employees other than plaintiff who were let go were men, including white, Asian, and Latino men. Texidor Aff., ¶¶ 5-8 and Ex. 3; Texidor Suppl. Aff., ¶ 5. According to Walsh, some employees were let go because of performance, others due to overlap and for cost cutting reasons, and others because

the systems they worked on became obsolete or were no longer used, or their work was outsourced. Walsh Dep. at 145-160, 164-177. Plaintiff was the only employee in the business systems group whose employment was terminated as a result of the reduction in force. *Id.* at 141.

Walsh testified that he decided to terminate plaintiff's employment, without any input from Cirullo, because she was working on only one project, SharePoint, and he needed to cut costs. *Id.* at 280, 285, 287, 288, 298-299, 322; Cirullo Dep. at 298, 301. Walsh did not know much about her job performance, and recalled only that she was not working at full capacity. Walsh Dep. at 282. He thought that she was not assigned enough work and could be doing more, but also thought she was not asking for work and did not seem like a go-getter. *Id.* at 282, 283, 290. Walsh included her in his list of employees to be let go in the first round of layoffs in February 2010, but deferred her termination until the second round in April 2010, after Cirullo made an effort to keep her, and asked that she stay until she finished work on SharePoint. *Id.* at 307, 322; Cirullo Dep. at 297-298, 300-301.

Cirullo testified that plaintiff was not replaced and no one took over her assignments. *Id.* at 303. After she left, employees already working on SharePoint continued to work on it, and no new people were added. *Id.* at 310. SharePoint subsequently was rolled out and used by Grey. *Id.* at 304, 306-307. Walsh testified that he was not a "fan" of the SharePoint system, because it was too costly, and Grey eventually stopped using it and moved to different platforms. Walsh Dep. at 300-301.

After April 2010, Walsh testified, the structure of the business systems group changed, and the developers were moved to the applications group, because there was no longer a "homegrown finance system" to support. *Id.* at 230-231. Walsh also stated that the "central

function" of the business systems group remained the same, but it now uses more systems and has a bigger team with more responsibility. *Id.* at 224-225, 226. As Walsh explained, the number of employees in the group was reduced to about seven to eight people, but, because more work is outsourced, the group, when outsourcing personnel are counted, is larger. *Id.* at 254.

Walsh testified that the business systems group, after downsizing, did not have "the luxury of having dedicated project managers . . . . [s]o, people wear multiple hats." *Id.* at 239. Project management work was done, after April 2010, by Mark Van Westerlaak (Van Westerlaak) and John Ramsburg (Ramsburg), who were hired by Walsh. *Id.* at 231-232, 255. As part of the merger of the IT departments, Ramsburg, who was then working as business systems director at C&W, was hired, or transferred from C&W, by Walsh, on January 1, 2010,. *Id.* at 252, 256-257. Van Westerlaak, who had worked for G2 since March 2010, was hired by Walsh in May 2010 as Project Manager. Van Westerlaak Responses to Plaintiff's Interrogatories (Van Westerlaak Resp.), Ex. 2 to Cortes Aff., Nos. 2-6, 13; Walsh Dep. at 243. Both reported directly to Walsh, and performed project management work, for different systems, in addition to other work. *Id.* at 239-240.

Van Westerlaak was hired by Walsh to "fix" the DDS project, which was then Cirullo's responsibility, and, according to Walsh, he brought organization to the project that had been lacking. *Id.* at 235, 245, 258, 261. In 2010, he managed the implementation of the Donovan Data System, replacing Cirullo as project head; and implemented other outsourced systems, such as ADP payroll software. *Id.* at 244; Van Westerlaak Resp. No. 7. His project management responsibilities on DDS and ADP were completed in 2011, and in 2012, after his responsibilities expanded to global project management, he became the head of project management globally.

Id., Nos. 8-9. Van Westerlaak stated that he worked briefly in 2012 on a project management tool that would use the Sharepoint platform, but he recalled that Grey moved away from using Sharepoint about the same time. *Id.*, No. 29.

Ramsburg was hired as VP, Business Systems, and, in addition to project management responsibilities for systems, such as Maconomy, he supervised projects for which Van Westerlaak was project manager, and had responsibility for overseeing business systems at C&W and G2. Ramsburg Responses to Plaintiff's Interrogatories (Ramsburg Resp.), Ex. 3 to Cortes Aff., Nos. 6-7; Walsh Dep. at 239-241, 243, 246-247. According to Walsh, Ramsburg and Westerlaak were responsible for all systems used by Grey's departments. *Id.* at 249-251. Ramsburg replaced Cirullo as director of the business systems group after Walsh fired Cirullo in December 2010. *Id.* at 267.

Walsh decided to fire Cirullo, after consulting with Grudzina and others, because he was not able to properly manage the DDS project, or, Walsh thought, any project. *Id.* at 263, 264-265, 266, 267. Although Walsh thought about firing Cirullo when he started at Grey, he waited until December 2010, because he needed Cirullo's knowledge of the other systems being outsourced. *Id.* at 271-272. His decision to fire Cirullo was not, he testified, based on anything anyone told him about Cirullo. *Id.* at 274.

Plaintiff commenced this action in January 2011. The complaint alleges 15 causes of action for employment discrimination based on "gender and race/ethnicity or some combination of them," including failure to promote (1st & 2nd); hostile work environment (3rd); disparate terms and conditions of employment (5th & 6th); termination (9th & 10th); retaliation for rejecting Cirullo's sexual advance (4th, 7th, 8th, 11th, 12th); and unequal pay, in violation of the NYCHRL,

the NYSHRL, and Labor Law § 194 (13th, 14th, 15th). Defendants seek dismissal of all claims.

DISCUSSION

It is well settled that to prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If such showing is made, the opposing party must demonstrate, also by producing admissible evidence, that genuine material issues of fact exist which require a trial of the action. *See Jacobsen*, 22 NY3d at 833; *Alvarez*, 68 NY2d at 324.

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). However, "the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984); *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman,* 49 NY2d at 562.

In employment discrimination cases, courts urge caution in granting summary judgment, as direct evidence of an employer's discriminatory intent is rarely available. *See Ferrante v*

American Lung Assn., 90 NY2d 623, 631 (1997); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). Nonetheless, summary judgment remains available in discrimination cases (see *Ferrante*, 90 NY2d at 631; *Sibilla v Follett Corp.*, 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), 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 e.g. 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).

NYSHRL and NYCHRL

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 relevant here, an individual's sex/gender, race, or national origin. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). The statutes also prohibit an employer from retaliating against an employee who has opposed or complained about unlawful discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7); 42 USC § 2000e-3 (a).

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). The NYCHRL further requires that its provisions be construed more liberally than its state or federal counterparts, in order to accomplish the statute's

"uniquely broad and remedial purposes." *Id.* 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). To that end, courts must conduct an independent liberal construction analysis of claims under the NYCHRL. *See Hernandez v Kaisman*, 103 AD3d 106, 114 (1st Dept 2012); *Clark v Morelli Ratner PC*, 73 AD3d 591, 591 (1st Dept 2010); *Williams*, 61 AD3d at 66.

Generally, employment discrimination claims brought under the NYSHRL and the NYCHRL are analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII). *See Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 (2006); *Ferrante*, 90 NY2d at 629; *Melman*, 98 AD3d at 112-113. Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination (411 US at 802), that is, that she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination. *See Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003); *Ferrante*, 90 NY2d at 629; *Melman*, 98 AD3d at 113-114.

Once the plaintiff has made the required "minimal" prima facie showing (*see Bennett*, 92 AD3d at 35), the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and nondiscriminatory reason for its employment decision. If the employer makes such showing, the burden shifts back to the plaintiff "to prove

that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 (1981); *Melman*, 98 AD3d at 114.

Under the NYCHRL, claims must "be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework." *Melman*, 98 AD3d at 113; *see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 (1st Dept 2014); *Bennett*, 92 AD3d at 45. Thus, on a summary judgment motion, where a defendant has presented evidence of a nondiscriminatory reason for its actions, the plaintiff must produce evidence of pretext or show that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the employer's action. *Melman*, 98 AD3d at 127; *see Carryl v MacKay Shields, LLC*, 93 AD3d 589, 590 (1st Dept 2012); *Bennett*, 92 AD3d at 40.

Sexual Harassment/Hostile Work Environment

Sexual harassment which results in a hostile or abusive work environment is "one species of sex- or gender-based discrimination" prohibited by the NYSHRL and the NYCHRL. *Williams*, 61 AD3d at 75; *see Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 64-65 (1986) (same under Title VII). Hostile work environment claims generally "are different in kind from discrete acts . . . . [as] [t]heir very nature involves repeated conduct" (*Julius v Department of Human Resources Admin.*, 2010 WL 1253163, 2010 US Dist LEXIS 33259, *22 [SD NY 2010], quoting *National Railroad Passenger Corp. v Morgan*, 536 US 101, 115 [2002]), and usually involve such workplace conduct as comments, jokes or insults about a plaintiff's protected classification. *See Ben-Levy v Bloomberg, L.P.*, 2012 WL 2477685, *12, 2012 US Dist LEXIS 90292, *33-34 (SD NY 2012); *Faraci v New York State Off. of Mental Health*, 2013 WL 5717124, 2013 NY

Misc LEXIS 4853, *16-17, 2013 NY Slip Op 32613(U) (Sup Ct, NY County 2013).

Plaintiff's claim for sexual harassment/hostile work environment is brought under the NYCHRL. To establish liability under the NYCHRL for sexual harassment, or harassment based on other protected categories, a plaintiff need not establish that the harassing conduct was "severe or pervasive," the standard applied in cases brought under state or federal law, but only that the conduct was "more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" *Williams*, 61 AD3d at 80; *see Hernandez*, 103 AD3d at 114-115; *Nelson*, 87 AD3d at 999. The primary question in harassment cases brought under the NYCHRL, as it is in other terms and conditions cases, is whether plaintiff "has been treated less well than other employees because of her gender [or other protected class]." *Williams*, 61 AD3d at 78; *see Hernandez*, 103 AD3d at 113; *Nelson*, 87 AD3d at 999; *see generally Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 (2d Cir 2013). Under either city or state law, "a plaintiff must still establish that she suffered a hostile work environment *because of her gender*." *Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 451, 453-454 (ED NY 2013) (emphasis in original); *see Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 506 (1st Dept 2010); *Cortes v City of New York*, 700 F Supp 2d 474, 485 (SD NY 2010).

Retaliation

To prevail on a claim of unlawful retaliation under the NYSHRL and the NYCHRL, a plaintiff must show that (1) she engaged in a protected activity; (2) the employer was aware of the activity; (3) plaintiff was subjected to an adverse or "disadvantageous" employment action; and (4) a causal connection existed between the protected activity and the alleged retaliatory action. *See Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 312-313 (2004); *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 Calhoun v County of Herkimer*, 114 AD3d 1304, 1307 (4th Dept 2014); *Hicks v Baines*, 593 F3d 159, 170 (2d Cir 2010).

"Protected activity" refers to action taken to oppose or complain about unlawful discrimination. *See Forrest*, 3 NY3d at 313; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010); *Sharpe v MCI Communications Servs., Inc.*, 684 F Supp 2d 394, 406 (SD NY 2010). "[C]omplaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." *Pezhman v City of New York*, 47 AD3d 493, 494 (1st Dept 2008). "'The onus is on the speaker to clarify to the employer that [s]he is complaining of unfair treatment due to his membership in a protected class and that [s]he is not complaining merely of unfair treatment generally.'" *Sharpe*, 684 F Supp 2d at 406, quoting *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009).

Application of Law to Plaintiff's Case

The gravamen of plaintiff's complaint, as she now frames it, is that, based on her gender, she was denied a promotion, in March 2008, to the Donovan project manager position; was paid less than men in her department doing equivalent work; was subjected to a "campaign of disparate treatment" by Cirullo, after she rejected his sexual advance; and was fired by Walsh in April 2010 because of her gender and race. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion (Pl. Memo), at 24-25, 29-30, 42.

Sexual Harassment

Plaintiff's claim that she was sexually harassed by Cirullo rests on her testimony that Cirullo, shortly after becoming her supervisor, made two comments, complimenting her hair and boots; and once, some weeks after the comments, during a business meeting with others present, touched her thigh for a second or two. Defendants argue that the two comments and the brief touch, even if they occurred, were isolated incidents, and were no more than "petty slights and trivial inconveniences," and are not actionable under either the NYSHRL or the NYCHRL.[1]

As plaintiff herself described the November incident, Cirullo touched her thigh, near her knee, for "maybe a second or two," and "lightly" squeezed it. He did not move his hand on her leg, and the touch was unaccompanied by any comments, looks, or further touches. Pl. Dep. at 231-232. Plaintiff said nothing to Cirullo at the time of the incident or at any later time, and did not report the incident to anyone at Grey. Plaintiff also does not allege that there were any sexual or sex-based comments, actions or innuendos directed at her by Cirullo before October 2008, or at any time after the November incident.

Plaintiff, admittedly, does not claim that the comments alone would be actionable, but asserts that the cumulative effect of the comments and the touch must be considered. Pl. Memo

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[1]Plaintiff's argument that defendants cannot raise "petty slights and inconveniences" as a defense on their summary judgment motion (Pl. Memo at 27-28) is without merit. Plaintiff submits no legal authority that there is any requirement to plead such a defense (*see* CPLR 3108 [b]), and her reliance on *Williams* to support her argument is, at best, misplaced. *See Ferres v New Rochelle*, 68 NY2d 446, 450 (1986) (statute limiting liability of landowners for injuries on property establishes substantive law defining the extent of duty owed and is not required to be pled as affirmative defense); *Telfer v Gunnison Lakeshore Orchards*, 245 AD2d 620, 621 (3d Dept 1997) (in Labor Law action, "no express or implied requirement" to plead homeowner exemption as affirmative defense); *Cassidy v Gray*, 234 AD2d 6, 6 (1st Dept 1996) (defendants not required to plead intoxication as affirmative defense in personal injury case). Plaintiff also does not claim that this is a defense which "would be likely to take . . . [her] by surprise." CPLR 3108 (b). "Moreover, inasmuch as the plaintiff was given ample opportunity in opposition to the defendants' summary judgment motion to challenge the application of the [defense]," it is properly considered. *Bello v Transit Auth. of N.Y.*, 234 AD3d 58, 61 (2d Dept 2004).

at 29. Plaintiff's counsel thus surmises, even while allowing that the touch could have been accidental and remains unexplained, that a "reasonable interpretation" of the incident is that Cirullo was saying, "I want to have sex with you." *Id.* This base speculative leap, however, has no support in the record, and plaintiff otherwise submits no evidence sufficient to raise a triable issue of fact as to whether the alleged conduct could reasonably be interpreted as more than a petty slight. Plaintiff appears to recognize this, submitting that "[n]either the Court nor the jury will ever have to decide whether Cirullo's hair and boots comments, followed by his squeeze of plaintiff's thigh, was a mere slight or inconvenience," because her lawsuit is not based solely on that conduct, but on subsequent disparate treatment. *Id.* at 29-30.

Retaliation

Plaintiff asserts five causes of action for retaliation, alleging that, in retaliation for rejecting Cirullo's alleged sexual advance, in November 2008, she was subjected to a hostile work environment (4th cause of action), subjected to disparate terms and conditions of employment (7th and 8th causes of action), and wrongfully terminated (11th and 12th causes of action). She offers no opposition, however, to the branch of defendants' motion seeking dismissal of those claims, and does not otherwise address them. In any event, even if plaintiff subjectively perceived Cirullo's conduct as a sexual overture, there is no evidence that she ever complained about it, or even acknowledged that it happened. As she testified, she said nothing to Cirullo at the time of the incident, or later, and did not report his conduct to anyone at Grey.

To the extent that plaintiff claims that Cirullo retaliated against her after she complained to Schultz, in May or June 2009, that he was treating her like an administrative assistant, the alleged retaliatory conduct – moving her on and off projects, leaving her out of meetings, etc. (Pl.

Dep. at 292, 293-294) - was a continuation of the same conduct that caused her to complain, which "does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct." *Melman*, 98 AD3d at 129; *see also Gaffney v City of New York*, 101 AD3d 410, 411 (1st Dept 2012). Plaintiff, further, does not argue, or allege, that Walsh had knowledge of any complaints or that there was any causal connection between the November 2008 incident or any complaints she later made, and the termination of her employment in April 2010.

Disparate Treatment

Plaintiff's causes of action for gender/race/ethnicity-based disparate treatment are based on allegations that, from about November or December 2008 to February 2010, Cirullo treated her less well than white, male employees in her department, by, generally, treating her with disrespect and diminishing her role and denying her opportunities to work on projects. She claims that he criticized her ideas and made demeaning comments in front of other people at meetings, arbitrarily moved her on and off projects, left her out of meetings and asked her to schedule meetings to which she was not invited, denied her resources for her projects, and took credit for her work. Pl. Dep. at 281-285, 303; Complaint, ¶ 17.

Plaintiff asserts that Cirullo, together with Livingston, made a "team sport" of belittling her at meetings (Pl. Dep. at 21-23); consistently dismissed her ideas at meetings, or agreed with them only after someone else did (*id.* at 302); made derogatory comments about the finance department, where she previously worked, to "push [her] buttons" (*id.* at 294-295, 296); and took credit for her work on SharePoint, by taking her files while she was on vacation and making a presentation to employees who would be using it. *Id.* at 303, 305-306. She also claims that

Cirullo once told her not to talk to Livingston, although it is unclear about what, and threatened her by saying that it would be "harmful" if she did not tell him the next time Livingston asked her for something. *Id.* at 299, 300.

Many of plaintiff's complaints about Cirullo's discriminatory treatment of her were in connection with the Donovan project, which Cirullo had been hired to manage. She complained that Cirullo treated her like a secretary on the Donovan project, which he did not do in connection with the other projects she worked on. *Id.* at 294. Plaintiff testified that she was put on and taken off the Donovan project, and, after she complained about it, was briefly put back on but then taken off again. *Id.* at 287, 288. Cirullo testified that he also did this with other employees, male and female, on an as needed basis, which plaintiff does not refute. Although she complained that she was asked to set up meetings, she acknowledged that other people, including Cirullo, also set up meetings, and invited her to them. *Id.* at 368. Thus, evidence is insufficient to show that, even if Cirullo moved her on and off projects, and invited her to some but not all meetings, plaintiff's gender, or race or ethnicity, played any part in his decisions.

As to plaintiff's claim that Cirullo brought white men into the department to work on her projects (*id.* at 282-283) and seemed to giving all of her work to white males, "even lower level white males" (*id.* at 313), plaintiff identified only one "lower level tech guy," a software developer, who was brought in to work on implementation of the Donovan system, and sat in on meetings with her and Cirullo. *Id.* at 283-285. She did not testify that he was doing her work, but, rather, that she was asked to assist him by setting up meetings for him even though he was a lower level employee. *Id.* at 284-285. She also testified that Cirullo did not determine who was assigned to work with him, and she did not know what assignments he gave to other people who

reported to him, or what kinds of communications he had with them (*id.* at 370-371); and she does not claim that Cirullo gave away her work on her other projects.

Disparate treatment, in the context of a discrimination claim, occurs when an employer "treat[s] [the plaintiff] less favorably than a similarly situated employee outside [her] protected group." *Graham v Long Is. R.R.*, 230 F3d 34, 39 (2d Cir 2000), citing *International Brotherhood of Teamsters v United States*, 431 US 324, 335 n 15 (1977). However, "mere conclusory assertions that the employees outside of the plaintiff's class were treated more favorably will not suffice to create a triable issue of fact." *Lee v Winthrop Univ. Hosp.*, 2015 WL 7161955, *13, 2015 US Dist LEXIS 153939, *30-31 (ED NY 2015), citing *Watson v Arts & Entertainment Television Network*, 2008 WL 793596, *16, 2008 US Dist LEXIS 24059 (SD NY 2008), *affd* 352 Fed Appx 475 (2d Cir 2009) ("Vague references that plaintiff's treatment was inferior to that afforded to unidentified comparators are insufficient to withstand a motion for summary judgment."). "To benefit from a disparate treatment analysis, . . . the plaintiff needs someone to whom she can reasonably compare herself" (*Varughese v Mount Sinai Med. Ctr.*, 2015 WL 1499618, *48, 2015 US Dist LEXIS 43758, *128 [SD NY 2015]), that is, someone who is "similarly situated in 'all material respects.'" *Id.* (citation omitted); *see Shah v Wilco Sys., Inc.*, 27 AD3d 169, 169 (1st Dept 2005) (same standard under NYCHRL); *LeBlanc v United Parcel Service*, 2014 WL 1407706, *15, 2014 US Dist LEXIS 50760, *45-46 (SD NY 2014).

Here, plaintiff's repeated assertions that Cirullo treated her differently because she is a woman, or a brown-skinned woman of Indian descent, are unsupported by evidence. By her own testimony, she can identify no similarly situated male employees who received favorable treatment. Despite her testimony that alleged discriminatory incidents occurred twice a week for

about eighteen months, plaintiff identifies no specific incidents of disparate treatment, no specific meeting or other instance when she was subjected to demeaning comments or treatment, and no criticisms that reflect a discriminatory intent. "Although a plaintiff may demonstrate an inference of discrimination by showing that 'the employer criticized the plaintiff's performance in ethnically degrading terms' or 'made invidious comments about others in the employee's protected group,' '[a] plaintiff's speculations, generalities, and gut feelings, however genuine, when they are not supported by specific facts, do not allow for an inference of discrimination to be drawn.'" *Brown v Northrup Grumman Corp.*, 2014 WL 4175795, *7, 2014 US Dist LEXIS 116188, *17 (ED NY 2014), quoting *Smalls v Allstate Ins. Co.*, 396 F Supp 2d 364, 371 (SD NY 2005). Plaintiff here offers no evidence linking Cirullo's alleged criticisms of her to gender-based discriminatory animus, and "a reasonable juror could not find an inference of discrimination based on this alleged conduct." *Brown*, 2014 WL 4175795, at *7, 2014 US Dist LEXIS 118188, at *17 (citations omitted).

Further, while plaintiff asserts that a colleague, Michael Yarcheski, witnessed Cirullo's mistreatment of her, he testified that he attended "quite a few" meetings with Cirullo and plaintiff, and Cirullo was always cordial to plaintiff. Yarcheski Dep., Ex. 8 to Cortes Aff., at 77-78. Mandy Wellington, a former Grey employee to whom plaintiff claims she complained, also testified that plaintiff never told her that she felt she was being treated differently. Wellington Dep., Ex. 10 to Cortes Aff., at 113-114. A sample of emails submitted by defendants also indicates that a cordial relationship existed between plaintiff and Cirullo. *See* Emails, Ex. 1 to Texidor Aff. Although plaintiff discounts the emails and contends that they are not representative of their relationship, she submits no evidence that contradicts them. Plaintiff also

does not dispute evidence that, in or around February 2010, when Walsh originally planned to terminate her employment, Cirullo urged him to retain her.

Plaintiff's claim that she was discriminated against based on her race or ethnicity is similarly unsupported by any evidence other than one disputed remark by Cirullo referring to her as "dark." Even assuming such a remark was made, it would be, as plaintiff essentially acknowledges, conjecture to consider that this one comment reflected discrimination. Pl. Dep. at 360. Moreover, the one stray remark is not enough, absent any other evidence, under either the NYSHRL or the NYCHRL, to show that race or ethnicity played any part in defendants' treatment of plaintiff. *See Godbolt*, 115 AD3d at 494 (stray remarks doctrine is not inconsistent with NYCHRL intentions, and applies under both NYSHRL and NYCHRL).

Failure to Promote

Plaintiff alleges that Grey discriminated against her based on her gender and/or race and/or ethnicity when it denied her a promotion in March 2010, and instead hired Cirullo to fill the position of Vice President and project manager for the Donovan system. Defendants contend that Cirullo was hired because he was highly recommended by a senior IT executive at WPP, and Grudzina believed he had directly relevant experience.

Plaintiff offers no evidence that undermines Grudzina's testimony that he hired Cirullo because he was highly recommended by someone at WPP and he had, Grudzina believed, the experience and qualifications to do the job. To the contrary, plaintiff testified that, at the time Cirullo was hired, she similarly had no reason to believe he was not better qualified for the job; and she believed that Cirullo got the job because of his connection with someone at WPP. It further is undisputed that she received regular promotions and salary increases before and after

applying for the DDS project manager position in March 2008, and was promoted to Vice President in April 2008. She also, admittedly, has made no factual allegations of discrimination against Grudzina. Pl. Dep. at 347.

She argues, however, that Cirullo's alleged statements to her about his experience, and his later dismissal by Walsh for poor performance show that he was not as qualified as she was for the position, and his referral by a white man at WPP to Grudzina, a white man, gives rise to an inference of gender bias. However, her conclusory assertion that the referral by a white man to a white man reflects discrimination, her hearsay testimony that Cirullo informed her that he was not qualified for the position, and his subsequent termination by Walsh because he was not a good manager, are insufficient to raise a triable issue of fact as to whether the March 2008 denial of a promotion was discriminatory.

Termination

Defendants contend that plaintiff's employment was terminated as part of a reduction in force, following Grey's decision to consolidate the IT departments of Grey, C&W, and G2. Generally, a reduction in work force as a result of restructuring of business operations or cost cutting is a legitimate and nondiscriminatory reason for termination of employment. *See Matter of Laverack & Haines, Inc. v New York State Div. of Human Rights*, 88 NY2d 734, 739 (1996); *Mirza v HSBC Bank USA, Inc.*, 79 AD3d 434, 435 (1st Dept 2010); *Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398, 398 (1st Dept 2007); *DeMarco v CooperVision, Inc.*, 369 Fed Appx 254, 255-256 (2d Cir 2010).

Evidence submitted by defendants, including deposition testimony, affidavits, and documents, establishes that there was a reduction in force in Grey's IT department, and that 13

employees from the IT department, including plaintiff, were let go during three rounds of lay-offs, in February, April, and May 2010. Other than plaintiff, all of the employees let go were men. Of those 12 men, eight were white, including a white, male vice president, three were Latino, and two were Asian. Texidor Aff., ¶¶ 5-8, Ex 3. Walsh testified that, after he was hired as Grey's CIO, in January 2010, he was charged with improving the company's IT operations, and, finding problems with inefficiencies and duplication of work in the consolidated IT department, he determined that the size of the staff should be reduced. Walsh decided to let plaintiff go, he testified, because he had to cut costs and she was only working on one project at the time.

Defendants' evidence is sufficient to demonstrate a legitimate, nondiscriminatory basis for plaintiff's termination. *See Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123-124 (1st Dept 2007). In response, plaintiff does not dispute that a reduction in force is a legitimate, nondiscriminatory reason for termination of an individual's employment, and she does not dispute that 12 other people, all men, were laid off from Grey's IT department following consolidation of the IT departments. Plaintiff argues, however, that the addition of two white men to the business systems group raises issues of fact as to whether there was a reduction in force in her particular group, and whether defendants' asserted reason for terminating her was a pretext for gender discrimination.

Plaintiff contends that Walsh hired Ramsburg and Van Westerlaak to replace her. Cirullo testified, however, and plaintiff offers no evidence to dispute, that plaintiff was not replaced and no one took on her responsibilities. Cirullo Dep. at 303. Cirullo explained that the Pelagon project, on which plaintiff worked, was stopped before her employment was terminated, and her

work on SharePoint was absorbed by existing employees already working on the project. *Id.* at 302, 310.

Ramsburg was hired by Walsh in January 2010 as a vice president, the same title plaintiff then had. Ramsburg Resp., Ex. 3 to Cortes Aff., Nos. 2-6. At the time, he was working for Walsh at C&W, and was transferred to Grey when C&W's IT department merged with Grey's. *Id.*, No. 4. His responsibilities during 2010 were equivalent to Cirullo's, and he, in addition to project management, oversaw business systems at G2 and C&W. *Id.*, Nos. 7, 23. He reported directly to Walsh, and had one employee reporting to him. *Id.*, Nos. 12, 17. Plaintiff does not dispute this, and although she questions why Ramsburg had the same title and comparable salary as plaintiff, if he had greater responsibilities, she offers no evidence to show, and does not even argue, that he did not have greater responsibilities than she did. Pl. Memo at 13. Rather, in her opposition papers, she focuses on arguing that Van Westerlaak replaced her. *Id.* at 40-42.

Walsh hired Van Westerlaak as Project Manager in or around May 1, 2010, after Van Westerlaak had been working on implementation of an electronic finance system at G2 for a couple months. Van Westerlaak Resp., Ex. 2 to Cortes Aff., Nos. 2-6. At Grey, during 2010, he was primarily responsible for implementation of the Donovan and ADP software projects, and replaced Cirullo in running those projects. *Id.*, No. 7. There is no evidence that Van Westerlaak performed, or was hired to perform, any of plaintiff's work. Even if Van Westerlaak performed some duties similar to plaintiff's, in addition to his other work, "a discharged employee 'is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work.' Rather, 'a person is replaced only when another employee is hired or reassigned to

perform the plaintiff's duties.'" *Morris v Northrop Grumman Corp.*, 37 F Supp 2d 556, 573 (ED NY 1999) (citation omitted); *accord Brown*, 2014 WL 4175795, at *8, 2014 US Dist LEXIS 116188, at *22.

Plaintiff also argues that the addition of two men to the business systems group raises a question as to whether any reduction in force occurred (Pl. Memo at 39-40), because, she attests, the other Grey employees laid off in early 2010 were in the IT help desk department, which was unrelated to the business systems group; and that she was the only woman in the business systems group, and the only one in that group who was terminated. Pl. Aff., ¶¶ 21, 22. While this may be true, the facts that she was the only woman in her group and the only one of the group selected for termination, are insufficient, without more, to create an issue of fact as to whether the decision was discriminatory. *See Brown*, 2014 WL 4175795, *9, 2014 US Dist LEXIS 116188, *22-23 (ED NY 2014); *Pearson v Lynch*, 2012 WL 983546, *9, 2012 US Dist LEXIS 39456, *26-27 (SD NY 2012). Similarly, there is no evidence that downsizing did not occur, even if the other employees terminated were from other groups, and notwithstanding the hiring of Ramsburg and Van Westerlaak. Such "'[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 . . . discrimination.'" *See Melman*, 98 AD3d at 121, quoting *Kelderhouse v St. Cabrini Home*, 259 AD2d 938, 939 (3d Dept 1999) (emphasis in original).

Thus, considering the totality of the evidence, and viewing it in a light most favorable to plaintiff, evidence does raise an issue of fact as to whether Grey's reason for terminating plaintiff's employment was a pretext or "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for its action. *Melman*, 98 AD3d at 127;

see Bennett, 92 AD3d at 39; *see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 741 (1st Dept 2013); *Carryl*, 93 AD3d at 590; *Williams*, 61 AD3d at 78 n 27. On this record, defendants have sustained their burden, under both the NYSHRL and the NYCHRL, of demonstrating their entitlement to summary judgment on plaintiff's unlawful termination claims.

Disparate/Unequal Pay

To establish a prima facie case of discrimination based on disparate pay under the NYSHRL and the NYCHRL, a plaintiff must demonstrate that she is "a member of a protected class and . . . was paid less than similarly situated nonmembers of the class." *Shah*, 27 AD3d at 176; *see Melman*, 98 AD3d at 115 n 2; *Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1483 (4th Dept 2013); *Yanai v Columbia Univ.*, 2006 WL 6849491, 2006 NY Misc LEXIS 9354, *20-21, 2006 NY Slip Op 30640(U) (Sup Ct, NY County 2006); *see also Rosario v Hilton Worldwide, Inc.*, 2011 WL 336394, *6, 2011 US Dist LEXIS 8719, *17 (ED NY 2012), *affd* 476 Fed Appx 900, 2012 US App LEXIS 7623 (2d Cir 2012). "The individuals being compared 'must be similarly situated in all material respects.' 'While their circumstances do not have to be identical, there should be a reasonably close resemblance of facts and circumstances.'" *Shah*, 27 AD3d at 177 (citations omitted); *see Wilberding v Center Cap. Group, LLC*, 2013 WL 5912140, 2013 NY Misc LEXIS 5150, *17-18, 2013 NY Slip Op 32830(U) (Sup Ct, NY County 2013). "[E]mployees must share a sufficient amount of significant employment characteristics to be considered similarly situated . . . [which] include the employees' education, work experience, and specific work duties." *McPherson v NYP Holdings, Inc.*, 2005 WL 2129172, *4, 2005 US Dist LEXIS 43348, *12 (ED NY 2005); *see Simpson v Metro-North Commuter R.R.*, 2006 WL 2056366, *7, 2006 US Dist LEXIS 50331, *24 (SD NY 2006); *DeJesus v Starr Tech. Risks*

Agency, Inc., 2004 WL 2181403, *9, 2004 US Dist LEXIS 19213, *29 (SD NY 2004).

Similarly, to sustain a claim for unequal wages under Labor Law § 194, a plaintiff must allege and establish "that 'the employer pays different wages to employees of the opposite sex, that the employees perform equal work on jobs requiring equal skill, effort, and responsibility and that the jobs are performed under similar working conditions.' (§ 194 [1])." *Kent v Papert Cos.*, 309 AD2d 234, 246 (1st Dept 2003); *see Torres v Vittoria Corp.*, 2008 WL 2937180, 2008 NY Misc LEXIS 8800, *21, 2008 NY Slip Op 32072(U) (Sup Ct, NY County 2008). "'[E]qual work' has been interpreted to mean that the jobs must be substantially equal." *Id.* (citations omitted). "'While the equal work inquiry does not demand evidence that a plaintiff's job is "identical" to a higher-paid position, the standard is nonetheless demanding, . . . [and to] satisfy this standard, a plaintiff must establish that the jobs compared entail common duties or content, and do not simply overlap in titles or classifications.'" *Chiaramonte v Animal Med. Ctr.*, 2016 WL 299026, *8, 2016 US Dist LEXIS 8024, *24-25 (SD NY 2016), quoting *EEOC v Port Auth. of N.Y. & N.J.*, 768 F3d 247, 255-56 (2d Cir 2014); *see Drury v Waterfront Media, Inc.*, 2007 WL 737486, *3, 2007 US Dist LEXIS 18435 (SD NY 2007) (rejecting argument that by virtue of their vice president titles, comparators performed the same work as plaintiff).

"An equal pay claim under New York Labor Law § 194 'is analyzed under the same standards applicable to the federal Equal Pay Act.'" *Talwar v Staten Is. Univ. Hosp.*, 610 Fed Appx 28, 31 n 2 (2d Cir 2015), quoting *Pfeiffer v Lewis County*, 308 F Supp 2d 88, 98 n 2 [ND NY 2004), citing *Kent*, 309 AD2d at 246 & *Mize v State Div. of Human Rights*, 33 NY2d 53, 56 (1973); *see also Moccio v Cornell Univ.*, 889 F Supp 2d 539, 570 (SD NY 2012) *affd* 526 Fed Appx 124 (2d Cir 2013). "Allegations that merely mirror the statutory language are insufficient

to allege an unequal pay claim" (*Torres,* 2008 NY Misc LEXIS 8800, at *21), and "if unequal pay is based on any factor other than gender, there is no statutory violation." *Wheeler v Citizens Telcoms. Co. of N.Y., Inc.*, 18 AD3d 1002, 1005 (3d Dept 2005) (citation omitted); *see also Suzuki v State Univ. of New York Coll. at Old Westbury*, 2013 WL 2898135, *4, 2013 US Dist LEXIS 83555, *9 (ED NY 2013) ("[b]ald allegations that male employees were paid more than female employees . . . will not survive a motion to dismiss").

In her complaint, plaintiff alleges, in general terms, that she "was paid less than the males in her Department for performing the same or equivalent work." Complaint, ¶ 39. She further alleges that, "[d]uring the approximate eighteen months that she reported to Cirullo, she received no raises and no bonuses," when she previously had received them on a regular basis, and "[d]uring the same period, other White males on the same projects were given promotions and pay raises and bonuses." *Id.*, ¶¶ 36-38. Plaintiff, notably, in her pleadings, offers no supporting facts for the allegation that she was paid less than her male counterparts; she does not identify any similarly situated male employees in her department who were paid more for doing substantially equal work, or any similarly situated "White males on the same projects" who were given promotions, pay raises, and bonuses during the relevant time period.

Even assuming that plaintiff's allegations were sufficient to withstand a CPLR 3211 motion to dismiss, on a motion for summary judgment, plaintiff must make a prima facie showing of disparate pay by submitting some evidence that she was paid less than similarly situated male employees. *See Shah*, 27 AD3d at 176; *Carryl*, 93 AD3d at 589-590; *Tu v Loan Pricing Corp.*, 21 Misc 3d 1104(A), 873 NYS2d 238 (Sup Ct, NY County 2008) (prima facie case of disparate pay must have proof that the plaintiff was paid less than similarly situated

nonmembers of the class); *cf Melman*, 98 AD3d at 115 (prima facie case of age discrimination in compensation may be established by showing a substantially younger subordinate was paid more than plaintiff); *see also Herrington v Metro-North Commuter R.R. Co.*, 2013 WL 3477128, *6, 2013 NY Misc LEXIS 2913, *13-14, 2013 NY Slip Op 31472(U), *affd* 118 AD3d 544 (1st Dept 2014) (complaint dismissed where allegations, that employee in more senior position and employee promoted above plaintiff were paid more, did not allege similarly situated employees).

Plaintiff offers no evidence to show which male employees were similarly situated in all material respects, or which were paid more for performing substantially equal work. Rather, asserting that she "has no burden to show anything on this motion" (Pl. Memo at 31), plaintiff argues that defendants have not eliminated issues of fact as to whether Ramsburg and Van Westerlaak were similarly situated, whether gender was a factor in the discrepancies between her salary and the salaries of male vice presidents in the IT department, and whether the discrepancy between her salary as a vice president and Cirullo's salary as a vice president was based on gender. *Id.* at 32-33.

Defendants, however, have submitted evidence, largely undisputed by plaintiff, that Ramsburg was transferred to Grey in January 2010 from another WPP subsidiary, and, from his start at Grey, had responsibilities on a par with Cirullo, including oversight of business systems, which plaintiff did not have. *See* Ramsburg Resp. No. 7, Ex 3 to Cortes Aff. Moreover, by her own argument, Ramsburg's salary was "virtually identical" to hers. Pl. Memo at 13. With respect to Van Westerlaak, it is undisputed that he was hired by Walsh after plaintiff was terminated and is not, therefore, a relevant comparator. As plaintiff also acknowledges, Van Westerlaak was paid less than she was. Pl. Memo at 15; *see* Personnel Action Form, Ex. G to

O'Neill Aff.

Plaintiff's reliance on a list of the salaries of vice presidents in the IT department (*see* Pl. Memo at 32-33; *see also* Defendants' Responses to Interrogatories, Ex. E to O'Neill Aff., No. 11), to argue that issues of fact exist as to whether there was unequal pay based on gender, is unavailing. Although the list demonstrates that male vice presidents were paid more than plaintiff, it does not indicate, and plaintiff offers no evidence to show, which male vice presidents on the list were similarly situated, and thus "fails to support an inference of discrimination." *Weit v Flaum*, 258 AD2d 286, 286 (1st Dept 1999); *see Yanai*, 2006 NY Misc LEXIS 9354, *22-23; *see also Quarles v Bronx-Lebanon Hosp. Ctr.*, 75 Fed Appx 846, 848 (2d Cir 2003) ("unanalyzed statistical evidence . . . show[ing] that black managers were, on average, paid less than white managers . . . is of little probative value because it wholly fails to account for any number of nondiscriminatory explanations for the disparities").

To the extent that plaintiff claims that white males received promotions and bonuses when she did not, she also fails to offer any evidence, and does not argue, that the two men she identified as receiving a bonus or a raise (Pl. Dep. at 410-411) were similarly situated or did substantially equal work. She similarly offers no evidence, other than her testimony, that Cirullo's work as a vice president, during the six months that they had the same title, was substantially equal, or that they had the same responsibilities. As she stated at her deposition, when asked whether anyone else had her job or the same job responsibilities, she was the only one who had her job. Pl. Dep. at 413-414. Accordingly, plaintiff has failed to make out a prima facie case of discrimination based on disparate pay or unequal pay under Labor Law § 194, and defendant is entitled to summary judgment dismissing those claims. *See Mejia v Roosevelt Is.*

Med. Assoc., 95 AD3d 570, 572-573 (1st Dept 2012).

Race/Ethnicity

In opposition to defendants' motion, plaintiff makes no argument that any discriminatory actions were taken against her because of her Indian ancestry or skin color. Absent opposition, or any evidence in the record demonstrating that Cirullo or anyone else took any adverse actions, or made any derisive remarks against, or otherwise treated differently, any employees, including women, based on skin color or Indian ancestry, plaintiff's discrimination claims based on race and/or ethnicity cannot be sustained.

Accordingly, it is

ORDERED that the defendants' motion is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 4/18/16

ENTER:

HON. DONNA MILLS, J.S.C.