SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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DEBRA CROOKENDALE,

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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DECISION & ORDER

Index No.: 154788/2015

Alexander M. Tisch, J.:

In this employment action, plaintiff, Debra Crookendale, a former supervisor of nurses at Queens Hospital Center (the Hospital), alleges that she was subjected to sexual harassment by her supervisor, and was retaliated against for rejecting the alleged advances and subsequently reporting the alleged harassment in violation of the New York City Human Rights Law, New York City Administrative Code §§ 8-101 et seq. (NYCHRL). Defendant, New York City Health and Hospitals Corporations, moves pursuant to CPLR 3212 for summary judgment dismissal of the complaint in its entirety. Plaintiff opposes. For the reasons set forth more fully below, the motion is denied in part and granted in part.

Background

Plaintiff, a former veteran and Captain of the United States Army, is a professional registered nurse (RN), who began her employment with defendant on September 9, 2013 in the subspecialty clinic at the Hospital. The subspecialty clinic consists of multiple clinics, including "Ear, Nose and Throat", orthopedics, surgery, dermatology and pulmonary. As supervisor of nurses, plaintiff's duties and responsibilities included supervising "Patient Care Associates", licensed practical nurses and RNs within the clinic. Plaintiff's employment was subject to a six-month probationary period.

During her tenure at the Hospital, plaintiff's direct supervisor was Marie Hyppolite, former associate director of nursing. Plaintiff claims that Hyppolite discriminated against her because of her

gender by sexually harassing plaintiff. In addition, plaintiff claims that Hyppolite retaliated against her after plaintiff allegedly complained of the alleged harassment to Joan Gabriele, deputy executive director at the Hospital. Plaintiff claims that on March 20, 2014, plaintiff was forced to resign.

Plaintiff's Allegations of Sexual Harassment

Plaintiff alleges that beginning in October 2013, Hyppolite repeatedly asked plaintiff out. Plaintiff responded that she was in a relationship with a man (defendant exhibit C, plaintiff tr at 155-156). There were no witnesses to Hyppolite's alleged requests for a date, and plaintiff did not report these requests to anyone at the Hospital (*id.* at 157).

In addition, plaintiff testified that on a near daily basis, Hyppolite would touch plaintiff's breasts and buttocks, under the guise of fixing plaintiff's clothing (*id.* at 131, 133-134, 159-160, 166). Plaintiff claims that Hyppolite would call plaintiff into her office two to three times each day, and more often than not, would simply "grope" plaintiff or ask plaintiff out (*id.* at 181-183). Hyppolite would also stroke plaintiff's hair (*id.* at 292).

On several occasions, while sitting across from Hyppolite, Hyppolite would pull up her own skirt, open her own legs in a sexually suggestive manner while also placing her hands on plaintiff's knees (*id.* at 132, 166-168). Plaintiff also claims that Hyppolite would tell plaintiff she was pretty, beautiful and smelled nice (*id.* at 169-170). At Christmas time, Hyppolite gave plaintiff a lotion and perfume set, and told plaintiff, "I am going to like the way it smells on you" (*id.* at 171-172). Hyppolite repeatedly asked plaintiff to go to lunch with her (*id.* at 174-176) and would repeatedly ask "when are we going to go out?" and "when are we going to the club?" (*id.* at 156). On three occasions, Hyppolite had "jealous fits" because plaintiff spoke with other Hospital employees. Plaintiff claims that she made it clear to Hyppolite that her advances were not welcome, and plaintiff would avoid Hyppolite whenever she could. Hyppolite reiterated to plaintiff that Hyppolite "could hire, fire or reassign anyone, including [plaintiff], whenever [she] want[ed] to" and "remember that you are here because of me" (*id.* at 44, 157-158). After a few months of refusing to engage with Hyppolite on a personal level, Hyppolite became

very hostile.

Plaintiff claims there were no witnesses to Hyppolite's alleged conduct (*id.* at 160, 168 -170, 183, 186-187). Plaintiff testifies that after rejecting Hyppolite's advances, Hyppolite manipulated staffing levels to make plaintiff appear to be an unsatisfactory manager (*id.* at 188-189). Plaintiff received a negative performance evaluation as a result (*id.* at 289).

Plaintiff's Allegations Regarding Retaliation

In January 2014, plaintiff allegedly complained to Gabriele concerning Hyppolite's purported harassment, and requests of plaintiff to "target employees", which plaintiff refused to do (plaintiff tr at 135-139). Specifically, plaintiff told Gabriele that Hyppolite was harassing plaintiff and asking plaintiff out (*id.* at 136-138). Plaintiff testifies that Gabriele told her she did not need to go any further and said, "Debra, don't let her do that to you. I am here for you and don't let her bully and harass you" (*id.* at 136-137). Plaintiff did not feel she needed to give any more specifics after that (*id.* at 137). Plaintiff admits that she did not provide any specifics to Gabriele about how she believed she was being harassed by Hyppolite (*id.* at 136-138). Gabriele testified that plaintiff did complain of a conflict she had with Hyppolite, but Gabriele claims plaintiff never mentioned that Hyppolite was harassing her sexually or otherwise (defendant exhibit D, Gabriele tr at 106-110, 175). Despite this, Gabriele admits she spoke with Hyppolite immediately after she spoke with plaintiff (Gabriele tr at 108).

On another occasion in January 2014, plaintiff completed an evaluation for a nurse in the clinic, Jennifer Henry. Plaintiff claimed that Hyppolite disapproved of plaintiff's evaluation of Henry and made her revise it until it read more favorably for Henry (plaintiff tr at 125-126). Plaintiff again met with Gabriele. Though plaintiff did not mention Hyppolite's alleged sexual harassment during this second meeting with Gabriele (*id.* at 142-143), she claims it was because the second meeting was soon after their first discussion and plaintiff did not feel the need to revisit the issue because Gabriele left off saying she was "there for [plaintiff]" (plaintiff aff, ¶ 21).

On February 6, 2014, a few weeks after complaining to Gabriele, plaintiff received a negative

performance evaluation from Hyppolite (plaintiff tr at 194-197, 222-223). On February 14, 2014, plaintiff made a formal internal EEO complaint to Julianne Yanez, the Hospital's Equal Employment Opportunity (EEO) officer (*id.* at 281-282; defendant exhibit H, EEO complaint). According to Yanez, however, plaintiff never complained of sexual harassment (Yanez affirmation, defendant exhibit I). Plaintiff claims that she did not want to write the words because she was "completely humiliated by Hyppolite's conduct" (plaintiff aff, ¶ 33). In the EEO complaint, plaintiff complained that she was discriminated against and harassed because of her veteran status, and was told she could not use her title when sending emails (EEO Complaint). According to Yanez, plaintiff struggled to connect any of her complaints to a protected class until Yanez described examples of protected classes, at which point plaintiff settled on her veteran status as a basis for Hyppolite's alleged mistreatment (Yannez affirmation). Plaintiff testified that she did not bring up her feeling discriminated against or being harassed based on her gender because she was going to tell the union representative when she "got inside" (plaintiff tr at 286).

Gary Bryan's Employment at the Hospital

In November 2013, defendant hired Gary Bryan, through an agency as a clerk for the Hospital's Cardiology clinic (Hyppolite tr at 71-73; plaintiff tr at 46-47; email dated 11/13/13 from Hyppolite to Jasmine Smallhorne, defendant exhibit V). According to plaintiff, Hyppolite asked plaintiff if she knew of anyone looking for a job. Plaintiff recommended Bryan because she knew he was looking for work. Plaintiff claims that she told Hyppolite that Bryan was a close family member and asked Hyppolite if she wanted to know the specifics of her connection to Bryan (plaintiff tr at 44-46). Hyppolite responded that she did not care since they urgently needed additional support staff (*id.*).

Hyppolite later learned that Bryan was the father of plaintiff's children. Hyppolite disclosed the relationship to Gabriele, as she felt it was inappropriate for plaintiff to supervise Bryan given their close relationship (Hyppolite tr 102; Gabriele tr 98-101, 178- 181). Plaintiff claims that she was not Bryan's supervisor as he was a clerk, who was supervised by Simone Burrow (plaintiff tr at 54). On January 6,

2014, the Hospital terminated Bryan's assignment with the facility (Hyppolite tr at 102-107; plaintiff tr at 66- 69). Specifically, plaintiff claims that Hyppolite called her into the office, and said "that because [plaintiff] had not gone out with her or done what she wanted, she wasn't playing around and Bryan had to go" (plaintiff aff, ¶ 15). While plaintiff was present, Hyppolite picked up the phone, called Bryan's extension and told him that he was fired (*id.*, ¶ 16; plaintiff tr at 31).

Plaintiff's Performance

Plaintiff received both a verbal and written evaluation of her performance in a meeting with Hyppolite and Gabriele (*id.* at 198-201). According to the evaluation, there were multiple areas requiring improvement (defendant exhibit F, plaintiff's performance evaluation). Plaintiff asserted that the evaluation was inaccurate and was written in retaliation for rejecting Hyppolite's alleged sexual advances (plaintiff tr at 240-241, 248- 249, 279, 289).

On February 18, 2014, plaintiff submitted a rebuttal to her February 6th performance evaluation (Rebuttal, defendant exhibit G; plaintiff tr at 274-76). Plaintiff also requested a transfer (Rebuttal). Plaintiff received no response (plaintiff aff, ¶ 30).

Plaintiff's Resignation

On March 20, 2014, Rose Mary Rogers, plaintiff's union representative employed by the New York State Nurses Association, informed plaintiff that the Hospital's human resources (HR) department had a meeting with Hyppolite and Gabriele wherein they decided plaintiff would be terminated, and that plaintiff would be escorted from the hospital on March 25, 2014 (plaintiff tr 300-301; 307-309; Rogers affidavit ¶¶ 1,4, defendant's exhibit J). According to Rogers, Hyppolite indicated that the reason for plaintiff's termination was due to plaintiff's improper hire of a relative, i.e., Gary Bryan, to work under plaintiff's direct supervision at the Hospital (Rogers aff, ¶ 4). Rogers explained that the Hospital would give plaintiff an opportunity to resign (*id.*). Rogers also told plaintiff that Gabriele declined plaintiff's request to be transferred (plaintiff tr at 303). Plaintiff preemptively resigned at the end of the day on March 20, 2014 (plaintiff tr at 309-310). Rogers avers that plaintiff never notified her of any complaints

of sex harassment or gender discrimination (Rogers aff, ¶ 6).

According to defendant, as of March 20, 2014, the Hospital had not decided to terminate plaintiff (Anna Colletti dep tr at 52-53, 61-62, defendant exhibit K). Rather, on March 12, 2014, Colletti, then associate director of HR of the Hospital, was asked by her supervisor, Jeannith Michelen, associate executive director of HR, to contact Hyppolite regarding concerns about plaintiff's performance (Colletti tr at 17-20). The human resources department wanted to determine what action, if any, should be taken regarding Hyppolite's complaints of plaintiff's performance issues (Colletti tr at 39-30, 46-47). Colletti and Hyppolite spoke about Hyppolite's concerns, and Hyppolite forwarded a series of emails (Colletti tr at 20-22). According to defendant, Colletti's next step in the review process would have been to meet with plaintiff but she was unable to complete her review as plaintiff resigned before HR took any action (Colletti tr at 37-38, 41-43). The decision to terminate plaintiff would have lied with Colletti (Colletti tr at 47-48, 62-63).

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003] [citation omitted]).

Sex Discrimination/Harassment

Under the NYCHRL, it is an unlawful discriminatory practice for an employer, because of an individual's gender, to refuse to hire or discharge such individual, or to otherwise discriminate against such individual in the terms, conditions and privileges of employment (Administrative Code § 8–107 [1] [a]). Sex-based discrimination in employment includes sexual harassment of employees (*Ananiandis v*

Mediterranean Gyro Prods. Inc., 151 AD3d 915 [2d Dept 2017]). "On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997], citing *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 252–253 [1981]; *McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]).

To establish a prima facie case of discrimination under the NYCHRL, plaintiff must show (1) that he/she is a member of a protected class (2) that he/she was qualified to hold the position (3) that he/she suffered an adverse employment action (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*see Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011]). Once a plaintiff meets his or her initial burden, the burden shifts to the defendant to demonstrate that the action(s) taken against the plaintiff were for legitimate, nondiscriminatory reasons (*Balsamo v Savin Corp.*, 61 AD3d 622, 623 [2d Dept 2009]). The plaintiff must then bear the burden "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination" (*Ferrante*, 90 NY2d at 629-630; *see also Casablanca v New York Times Co.*, 47 Misc 3d 1215[A], 2015 NY Slip Op 50629[U] [Sup Ct, NY County 2015]).

When analyzing cases under the NYCHRL, cases must be analyzed under both the burden shifting analysis, as well as a mixed-motive analysis (*see Hudson*, 138 AD3d 514-515; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). Under this more liberal standard, once a defendant has offered its nondiscriminatory reasons, the court should "proceed to see whether 'no jury could find defendant liable under any of the evidentiary routes - *McDonnell Douglas* [burden shifting], mixed motive, direct evidence, or some combination thereof'" (*Casablanca*, 2015 NY Slip Op 50629[U] *9, quoting *Bennett*, 92 AD3d at 45).

The court must evaluate the claims with regard for the NYCHRL's "uniquely broad and remedial purposes" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). To establish a

gender-discrimination claim under the NYCHRL plaintiff has to prove by a "preponderance of the evidence that she has been treated less well than other employees because of her gender" (*id.* at 78), i.e., whether the adverse employment "action was motivated at least in part by . . . discrimination" (*Melman*, 98 AD3d at 127).

Plaintiff satisfies the first and third prong of the prima facie case. As a woman, plaintiff is a member of a protected class. She was qualified for the position she held as she is an RN. Plaintiff cannot establish a prima facie case however, because she fails to demonstrate an adverse employment action.

An adverse employment action constitutes a change that is "materially adverse" to the terms and conditions of a person's employment, beyond a mere alteration of job responsibilities (*Matter of Block v Gattling*, 84 AD3d 445, 445 [1st Dept 2011]; *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]). Plaintiff alleges that she was subject to the following adverse employment actions: (1) adjusting staffing levels to plaintiff's detriment; (2) receipt of a negative performance evaluation; and (3) constructive discharge, by "forcing" plaintiff's resignation. The first two allegations fall short of the standard for adverse employment action (*see Gaffney v City of New York*, 101 AD3d 410, 410 [1st Dept 2012]; *Bayley v City of New York*, 2013 NY Slip Op 33473[U] [Sup Ct, NY County 2013] [placement in performance monitoring program, after multiple unsatisfactory performance evaluations, not an adverse action under [NYCHRL] where no impact on job responsibilities, pay or title]). Plaintiff has failed to show that the adjusting of the staffing levels and receipt of a negative performance even somewhat materially altered the terms and conditions of plaintiff's employment, or her responsibilities.

With the respect to Plaintiff's allegation of a constructive discharge, plaintiff's arguments are unpersuasive. "To establish a constructive discharge, plaintiff [is] required to produce evidence that her employer deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign" (*Short v Deutsche Bank Sec.*, Inc., 79 AD3d 503, 504 [1st Dept 2010] [internal quotation marks omitted]. Plaintiff must show more than a "lack of concern" or "mere negligence or ineffectiveness" (*Zimmer v Warner Bros. Pictures, Inc.*, 56 Misc 3d 1208[A], 2016

NY Slip Op 51889[U] *2, *6 [Sup Ct, NY County 2016], quoting *Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007]).

Here, viewing the facts in the light most favorable to plaintiff, plaintiff has failed to raise a question of fact concerning constructive discharge. Plaintiff contends that the knowledge of her termination, coupled with the potential humiliation of being escorted out of the building by security, forced her to resign. However, harm and humiliation from a firing fail to meet the stringent standard required for constructive discharge (*see Hanna v New York Hotel Trades Council & Hotel Assn. of NY City Health Ctr.*, Inc., 18 Misc 3d 436, 439 [Sup Ct NY Co 2007] [finding no constructive discharge where employee was threatened with harsh attendance requirements if he did not resign]; *see also Murphy v The Dept. of Educ. of the City of New York*, 155 AD3d 637, 640-641 [2d Dept 2017] [plaintiff's allegations of micro-management, negative evaluations, and enhanced scrutiny were insufficient to state a claim alleging constructive discharge]). No reasonable jury could find that the work environment was so intolerable or unpleasant, that an individual would feel forced to resign. Accordingly, defendant's motion seeking dismissal of the gender discrimination claim and the constructive discharge claim is granted.

Hostile Work Environment

The Court turns to whether plaintiff has established a hostile work environment claim under the NYCHRL (*see* Administrative Code of New York § 8-107). The NYCHRL hostile work environment claim "does not require either materially adverse employment actions or severe or pervasive conduct" (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 114 [2d Cir 2013], *relying on Williams*, 61 AD3d at 69). Rather, it does require a showing that any alleged unequal treatment was based on gender (*id.*; *see also Zimmer*, 56 Misc 3d 1208[A], at *6 ["(p)laintiff must show that [she] was treated less favorably than other employees because of" her protected status]). The New York Court of Appeals requires courts to broadly interpret the NYCHRL "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 conduct alleged must exceed "what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" (*Williams*, 61 AD3d at 80). Whether statements may have been isolated is irrelevant in analyzing the claim under the NYCHRL, as a single comment may be actionable under the statute (*Hernandez v Kaisman*, 103 AD3d 106, 115 [1st Dept 2012]; *Williams*, 61 AD3d at 84, n 30).

Here, plaintiff alleges that shortly after she started her employment with the Hospital, Hyppolite began groping plaintiff behind closed doors on a near daily basis, would stroke plaintiff's face and hair telling plaintiff how pretty she was, bought plaintiff gifts of lotion and perfume saying "I'm going to like the way it smells on you", touched plaintiff's breasts under the guise of adjusting plaintiff's clothes, among other things. Defendant denies these allegations. It is not, however, for the court to determine the veracity of these allegations. Based on these allegations and assessing the record in the light most favorable to plaintiff, the Court finds this branch of the summary judgment motion must be denied as a matter of law (*Rivera v United Parcel Serv. Inc.*, 148 AD3d 574, 574 [1st Dept 2017] [affirming a finding of sex harassment where supervisor made repeated "sexually-charged remarks to plaintiff" among other things]; *Hernandez*, 103 AD3d at 114-115 [plaintiffs' claims of 'mildly offensive emails' and 'isolated' comments 'objectifying women's bodies' sufficient to support a claim under the NYCHRL]; *Poolt v Brooks*, 38 Misc3d 1216[A] [Sup Ct, NY County 2013] [plaintiff established a claim of sexual harassment based on a few comments made within a week of the start of plaintiff's work]).

Retaliation

To make out a retaliation claim under the NYCHRL, plaintiff is required to show that

> "(1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he/she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity the alleged retaliatory conduct" (*Brightman v Prison Health Serv. Inc.*, 108 AD3d 739, 740 [2d Dept 2013]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

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] [internal quotation marks and citation omitted]; *see also Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18 [1st Dept 2014]; *McGuinness v Concentric Health Care LLC*, 116 AD3d 527, 529 [1st Dept 2014]). Plaintiff's claim alleging retaliation fails on every prong.

Plaintiff attributes any adverse employment actions with the complaints she made to Gabriele and Yanez concerning Hyppolite. Plaintiff contends that though the conversations were brief, even informal complaints of harassment are protected (*see Albunio*, 16 NY3d at 476; *McGuinness*, 116 AD3d at 529; *Giscombe v New York City Dept. of Educ.*, 39 F Supp 3d 396, 401 [SD NY 2014] [protected activity includes "[i]nformal complaints to supervisors, instituting litigation, or filing a formal complaint"] [internal quotation marks and citation omitted]). However, the law still requires that the plaintiff communicate an unlawful practice (*see Gonzalez v EVG, Inc.*, 123 AD3d 486, 487 [1st Dept 2014] [plaintiff's complaint about generalized harassment was too ambiguous to constitute protected activity]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004] [plaintiff complained of general harassment but failed to mention it was a result of her membership to a protected class]).

Here, the Court finds that plaintiff's complaints to Gabriele and the EEO do not constitute a protected activity under the CHRL *(see Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008] [a grievance complaining of conduct other than unlawful discrimination, is not a protected activity under the State and City Human Rights Law]). Plaintiff's conversations were not about sexual harassment, but rather general grievances. Plaintiff acknowledges that Gabriele and Yanez were the only Hospital employees that she spoke of the alleged harassment with. Plaintiff further admits that she did not provide any specific details of the alleged harassment by Hyppolite to Gabriele, but rather was vague and general.

With respect to the complaint made to Yanez, plaintiff admitted she did not include any language of sexual harassment in the written complaint. Nor did plaintiff verbally convey unlawful conduct to Yanez. In fact, plaintiff claimed that the harassment of Hyppolite was due to the former's veteran status. The record shows plaintiff only brought up the veteran status after Yanez informed plaintiff she must connect the alleged harassment to a protected class, and gave plaintiff examples of those. Because plaintiff did not engage in protected activity, defendant's motion seeking dismissal of the retaliation claim is granted.

Accordingly, it is ORDERED that the motion by New York City Health and Hospitals Corporation for summary judgment dismissing the complaint is granted in part, and denied with respect to the hostile work environment claim.

This constitutes the decision and order of the Court.

Dated: June 21, 2018

ENTER: _____

A.J.S.C.
HON. ALEXANDER M. TISCH