

**Woolcock v Mt. Sinai St. Lukes-Roosevelt And
Continuum Health Partners**

2019 NY Slip Op 30651(U)

March 4, 2019

Supreme Court, Kings County

Docket Number: 518301/2016

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 4th day of March 2019.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

CAROL WOOLCOCK,

Plaintiff,

Index No.: 518301/2016

DECISION & ORDER

Mtn Seq. 2

-against-

MT. SINAI ST. LUKES-ROOSEVELT
and CONTINUUM HEALTH PARTNERS,
Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>25, 27-36</u>
Opposing Affidavits (Affirmations) _____	<u>44-49</u>
Reply Affidavits (Affirmations) _____	<u>39-41</u>
Other Papers: <u>Memoranda of Law</u> _____	<u>26, 43</u>

Introduction

Defendants, Mt. Sinai St. Lukes-Roosevelt and Continuum Health Partners, move by notice of motion, sequence number two, pursuant to CPLR §3212 for an order granting summary judgment in favor of defendants and dismissing plaintiff's complaint alleging a

hostile work environment based on sexual harassment pursuant to New York State Executive Law §296[1]; and New York City Administrative Code §8-107[1]; for adverse employment action/retaliation pursuant to New York State Executive Law §296[7]; and New York City Administrative Code §8-107[7]; and on the basis that the defendants are not liable for alleged harassment of the third party vendor because they have a harassment policy.

Plaintiff opposes the application. Plaintiff withdrew her claims for “color and race” discrimination (*see* NYSCEF Doc. 55, November 14, 2018 Order).

Background

This is an action alleging sexual harassment and adverse employment action pursuant to the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Plaintiff is employed by defendants, Mt. Sinai St. Lukes-Roosevelt and Continuum Health Partners¹, in the environmental services department (“housekeeping”), since November 26, 2012 (*see* NYSCEF Doc. 28, Summons and Verified Complaint at ¶ 5; *see also* NYSCEF Doc. 33, Affidavit of Ann McNicholas at ¶ 8). Plaintiff testified at her examination before trial (EBT) that prior to starting her employment, she received an employee handbook from the hospital.² Plaintiff further testified that she understood the hospital’s anti-discrimination and harassment policy, and

¹ This Court notes that defendant represents that Continuum Health Partners and Mount Sinai Medical Center is now known as a combined entity called the Mount Sinai Health System. Counsel also states that the correct name of the hospital is St. Luke’s Roosevelt Hospital Center (collectively known as defendant).

² This Court also notes that both parties each annexed excerpts of depositions and records. There is no objection by either party.

she knew that if she had any concerns, she should report her concerns to her union delegate (see NYSCEF Doc. 32, EBT of Carol Woolcock, p 56-57).

The environmental services staff at the hospital is supervised by operation managers provided by Crothall Healthcare, a third-party vendor ("Crothall") (see NYSCEF Doc. 40, EBT of Ann McNicholas, p 28). Israel Lewis (Lewis) is a supervisor with Crothall. Crothall's managers can discipline the hospital employees, but they do not have the individual authority to terminate an environmental services staff worker (*id.* at 30).

Plaintiff alleges the following time line of events in her verified complaint and examination before trial:

Verified Complaint	12/28/14	Plaintiff began full time employment, 3:30 to 11:30 p.m. shift.
Verified Complaint	8/2015	Plaintiff transferred to 12:00 to 8:00 p.m. shift.
Verified Complaint	1/5/16	Lewis commented to plaintiff that he likes her hair and perfume.
Verified Complaint	1/18/16	Lewis grabbed plaintiff's breast.
Verified Complaint	Unknown date	Plaintiff expressed her dislike to Lewis about his comments and physical contact.
Plaintiff's Notes (Opposition Ex. C)	2/2016	Lewis told plaintiff that he likes to "[**]k Jamaican women".
Verified Complaint	2/16/16	Lewis complained about plaintiff's work and "wrote her up".
Plaintiff's EBT	2/19/16	Verbal warning from Lewis for failure to clean a bathroom.
Verified Complaint	2/22/16	Lewis assigned plaintiff to work the 10 th floor rooms where she was isolated, and Lewis made physical contact with plaintiff including grabbing plaintiff and stroking her buttocks.
Verified Complaint	3/1/16	Lewis assigned plaintiff to work the 10 th floor rooms where Lewis touched plaintiff's breast.

Plaintiff's EBT	3/29/16	Plaintiff received her second write-up, categorized as a first warning, from Lewis for her failure to communicate with management on duty to receive her daily assignment.
Plaintiff's EBT	4/4/16	Plaintiff hand delivered a letter to her union representative (Nadira) requesting the February verbal warning be removed from her file. Plaintiff stated she was assigned the work when her shift was over. And that, Lewis spoke to her in a nasty and rude tone to her. There is no mention of Lewis' physical contact. Nadira said she was going to throw the complaint in the garbage.
Plaintiff's EBT	unknown	Plaintiff hand delivered a second letter to her union delegate disputing the March disciplinary warning. Again, she described Lewis' behavior as "rude and nasty". The March warning was removed from plaintiff's file.
Verified Complaint	4/10/16	Lewis assigned plaintiff to work in the 6 th floor bathroom where Lewis approached plaintiff from behind and rubbed his body against her buttocks.
Plaintiff's EBT	5/3/16	Plaintiff was assigned to work in a room and Lewis jumped out of the closet and scared plaintiff.
Verified Complaint	5/4/16	Plaintiff wrote a letter to the human resources department complaining about Lewis' sexually harassing behavior. Plaintiff disagreed with Lewis' disciplinary action against her because of his harassment and unwelcome advances.
Verified Complaint	8/1/16	Plaintiff transferred back to 3:30 to 11:30 p.m. shift in retaliation for her complaints about sexual harassment by Lewis, exposing her to dangerous conditions on the streets, which caused her to request a shift change in the first instance.
Verified Complaint	8/2/16	Lewis confronted plaintiff at the elevator, faced her and grabbed his penis and smiled at her before entering the elevator.
Plaintiff's Notes (Opposition Ex. C)	7/10/17	Lewis said to plaintiff in the lobby "this is the boom boom room which he said is the sex room".

Plaintiff's Notes	7/17/17	Lewis went up to the unit where plaintiff was working approached plaintiff and grabbed her breast. Plaintiff pushed him away and said I'm going to report you.
Plaintiff's EBT Plaintiff's Notes	7/20/17	Lewis said to plaintiff at the elevator I want to eat your p[***]y and stuck his tongue out.
Plaintiff's EBT	8/2017	Plaintiff transferred to 7:30 a.m. shift at her request due to medical issues. Plaintiff does not recall her diagnosis that warranted this request.
Plaintiff's Notes	8/3/17	Lewis said to plaintiff, in the lobby, this office is the sex room.

Plaintiff and defendant have differing versions of the circumstances of plaintiff's shift transfer in August 2015. David Diaz (Diaz), the resident regional manager for Crothall, testified that plaintiff needed temporary accommodations to her schedule for medical needs and "train issues". He stated that plaintiff asked to temporarily change her shift from 3:30 to 11:30 p.m. to a daytime shift (*see* NYSCEF Doc 34, EBT of David Diaz, p 49). In August 2015, plaintiff's request was granted, temporarily; her new shift was 12:00 to 8:00 p.m. (*see* NYSEC Doc 28, Complaint, ¶ 9). Diaz further testified that he made it clear to plaintiff that this accommodation was temporary, and she would return to the 3:30 p.m. shift (*see* EBT of David Diaz, p 50, ll 9-12). Plaintiff testified that she needed the shift change because she had problems with her back and the train (*see* NYSCEF Doc 32, Woolcock EBT, p 60). However, she also testified that "dangerous conditions on the street caused her to request a shift change" (*supra*, Complaint ¶ 28). She discussed her back and train issues with her supervisor at that time, Albert, and he changed her shift to 12:00 to 8:00 p.m. Albert at some point stopped working at the defendant

hospital. Lewis became plaintiff's supervisor (*see supra Woolcock EBT*, p 66; *see also supra* Complaint, ¶¶ 9-10).

The parties also have differing versions regarding the basis for Lewis' disciplinary actions against plaintiff. Plaintiff avers that the disciplinary actions were taken against her by Lewis because she complained to Lewis about his behavior. Lewis testified that he gave plaintiff two write-ups, explaining that they are "disciplinary actions based on poor work performance" (NYSCEF Doc 36, EBT of Israel Lewis, p 12). On February 19, 2016, plaintiff received her first write-up, categorized as a verbal warning, from Lewis for failure to clean a bathroom (*see* NYSCEF Doc 32, EBT of Carol Woolcock, Exhibit H). Diaz testified that he witnessed plaintiff's behavior that led to the verbal warning. Specifically, he witnessed plaintiff "not being found in the area of assignment, not directly displaying insubordinate behavior but always questioning direction, turning away from a manager disrespectfully, sucking her teeth in disagreement, things like that." (NYSCEF Doc 34, EBT of David Diaz, p 34). On March 29, 2016, plaintiff received her second write-up from Lewis, categorized as a first warning, for her failure to communicate with management on duty to receive her daily assignment.

Ann McNicholas (McNicholas), director of labor relations at the hospital, met with plaintiff on three occasions regarding her complaints about Lewis. Although the dates of the second and third meetings are not provided, Ann McNicholas testified that at least one of the meetings occurred after she met with Lewis. McNicholas testified that at the first meeting

my intention was we met with her to discuss what happened, or her concerns, and she did not speak. I mean, there was very little communication from Ms. Woolcock. She looked down at the floor a lot, mumbled under her breath. So the communication was very minimal, but I did review the initial letter with her when we met in June 2016 and I went through this - - the letter with her regarding claims that Mr. Israel jumped out of a closet, touched her shoulder and made a comment on her perfume.

(NYSCEF Doc 35, EBT of Ann McNicholas, p 40).

McNicholas then met with Lewis. McNicholas testified that Lewis denied the allegations about commenting on plaintiff's perfume and any touching. McNicholas addressed with Lewis his demeanor and tone when speaking to employees. McNicholas testified that she met with plaintiff again stating "we spoke about it again. There was very -- we spoke about places, times specifically, there was none provided to me, because there's no date, there's no specific floor." (*id.* at p 57). McNicholas then followed up with plaintiff in writing on July 7, 2016, explaining that she could not corroborate plaintiff's allegations because no witnesses were provided for her to substantiate the claims, and therefore, she was closing the investigation into Lewis. On August 1, 2016, plaintiff was transferred back to the 3:30 p.m. shift, and Lewis was no longer her supervisor.

This Court notes that since the commencement of this action, plaintiff requested another shift transfer, to 7:30 a.m. to 3:30 p.m., due to medical issues. This shift is supervised by Israel Lewis. Plaintiff's request was granted in August 2017 (*see supra* Woolcock EBT, p 176).

In plaintiff's summons and complaint, dated October 5, 2016, plaintiff alleges, for the first time, that Lewis grabbed her breasts and buttocks on three occasions and grabbed his penis. Plaintiff concedes that that she did not report this to the union or the hospital:

Q. On January 18th your first time you claimed, at least from what I've seen, that he touched you on the breast and on the butt, did you report it to anyone?

Mr. Barkan: That day?

Q. That day or about that incident.

A. I report - - I told my husband about it.

Q. You told your husband?

A. Yes. I did tell him about the workplace.

Q. Anyone at the hospital that you notified?

A. No.

Q. Anyone at the union?

A. No.

Q. No?

Mr. Barkan: At that time.

Ms. Kokodis: Yes.

A. Nothing. I was so embarrassed, and I don't say.

* * *

Q. ...In neither of those two letters do you bring up anything to do with Mr. Lewis touching you, right?

A. No.

Q. In fact, the only thing you wrote in them that he's rude and he talks to you like a child and that basically he talks to you in an angry way, right?

A. Yeah.

* * *

Q. Okay. Miss Woolcock, did you ever tell anyone that Mr. Lewis touched your breasts and your butt, meaning anyone at the hospital at any time before you got an attorney?

A. No.

Q. You never did?

A. No.

(NYSCEF Doc. 32, EBT of Carol Woolcock, at pp 95-96; 136; 150).

Plaintiff further alleges that she sought medical treatment as a result of Lewis' actions. Plaintiff annexes medical records which indicate that she sought psychiatric treatment on March 30, 2017, approximately six months after the commencement of this action (*see* NYSCEF Doc. 49, Exhibit E, Excerpts of Plaintiff's Medical Records). In plaintiff's medical records, Dr. Akinola Adebisi notes on April 14, 2017, that there is an impression of major depressive disorder, late onset schizophrenia and schizoid personality type.³

Discussion

Summary Judgment

On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party' (*Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339, 937 N.Y.S.2d 157, 960 N.E.2d 948 [2011])." (*Vega v. Restani Const. Corp*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). "[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 demonstrate absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept.,

³ From the excerpts of plaintiff's deposition that were provided, plaintiff only testified to having depression. In opposition to this motion, plaintiff only asserts diagnosis of depression and anxiety due to her employment. Defendant did not address schizophrenia and schizoid personality type.

2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; see also *Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Fairlane Fin. Corp v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; see also *Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” (*Ruiz v. Griffin*, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2 Dept., 2010] [internal quotation marks and citation omitted]).

This action was brought under the New York State Human Rights Law (NYSHRL), New York State Executive Laws § 296 and the New York City Human Rights Law (NYCHRL), New York City Administrative Code § 8-107.

Adverse Employment Action - New York State Executive Law §296[7]

The New York State Executive Law § 296[7] states that “[it] shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article”. To establish a prima facie case of retaliation for opposing discriminatory practices under NYSHRL, a plaintiff has the burden of showing that “(1) [he or] she has engaged in protected activity, (2) [his or] her employer was aware that

[he or] she participated in such activity, (3) [he or] she suffered an adverse employment action based upon [his or] her activity, and (4) there is a causal connection between the protected activity and the adverse action” (*Ananiadis v. Mediterranean Gyros Prods., Inc.*, 151 A.D.3d 915, 54 N.Y.S.3d 155 [2 Dept., 2017], quoting *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 [2004]).

An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.

(*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, *supra*).

Here, the essence of the plaintiff's retaliation claim is that she complained to the defendant of alleged sexual harassment by Lewis, her supervisor. She alleges that the hospital, thereafter, transferred her shift from “the day shift” beginning at 12:00 p.m. to the later shift, which begins at 3:30 p.m. Defendant disputes the causal connection between the plaintiff's engaging in a protected activity and her shift transfer. Here, plaintiff was originally on the later shift and requested to change shifts. Diaz testified that in August 2015 plaintiff was advised that her shift change was temporary. He contends the change back in August 2016 was in accordance with that understanding. Viewing the facts in the light most favorable to the plaintiff, even if the shift transfer was in response to her complaints about Lewis, such an action does not constitute a materially adverse change

under the NYSHRL. There is no evidence that plaintiff suffered a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities (*see id.*). Defendant made a prima facie showing of entitlement to judgment as a matter of law. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, defendant is award judgment as a matter of law as to retaliation under the NYSHRL.

Retaliation- Administrative Code of the City of New York §8-107[7]

“The Court of Appeals has recognized that the New York City Human Rights Law must be construed “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible” (*Singh v. Covenant Aviation Sec., LLC*, 131 A.D.3d 1158, 16 N.Y.S.3d 611 [2 Dept., 2015]), quoting *Albunio v. City of New York*, 16 N.Y.3d 472, 922 N.Y.S.2d 244 [2011]; *see Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 936 N.Y.S.2d 112 [1 Dept., 2011]). “Thus, the New York City Human Rights Law is to be more broadly interpreted than similarly worded federal or State antidiscrimination provisions” (*Singh v. Covenant Aviation Sec., LLC*, 131 A.D.3d 1158, *supra*, citing *Zakrzewska v. New School*, 14 N.Y.3d 469, 902 N.Y.S.2d 838 [2010]). The Administrative Code of the City of New York § 8-107[7] provides that it is “an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has...opposed any practice forbidden under this chapter”. “Under the NYCHRL, the retaliatory act or acts complained of ‘must be reasonably likely to deter a person from engaging in protected activity’” (*Kassapian v. City of N.Y.*, 155 A.D.3d 851, 65 N.Y.S.3d

562 2 Dept., 2017], quoting Administrative Code of City of N.Y. § 8–107[7]; *see also* *Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 970 N.Y.S.2d 789 [2 Dept., 2013]). “Pursuant to the NYCHRL, ‘as amended by the Restoration Act (*see* 2005 N.Y. City Legis. Ann. at 528–535), a plaintiff need not establish that the alleged retaliation or discrimination ‘result[ed] in an ultimate action with respect to employment ... or in a materially adverse change in the terms and conditions of employment’ so long as ‘the retaliatory or discriminatory act ... [was] reasonably likely to deter a person from engaging in protected activity’” (*Ananiadis v. Mediterranean Gyros Prod., Inc.*, 151 A.D.3d 915, 54 N.Y.S.3d 155 [2 Dept., 2017], quoting *Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, *supra*; *see also* *Kassapian v. City of New York*, 155 A.D.3d 851, *supra*).

Plaintiff avers that her disciplinary actions resulted from her complaining to Lewis that she did not welcome his behavior. Defendant avers that the plaintiff’s disciplinary actions were the result of her poor work performance and this discipline was prior to plaintiff complaining to the union or defendant’s human resources department about the alleged harassment suffered from Lewis. Plaintiff further avers that the shift transfer was due to her complaints to the hospital. Defendant, through Diaz, contends that the shift change in August 2015 was intended to be temporary. So, the return to her shift in August 2016 was not in retaliation to plaintiff complaints. Here, the proximity between plaintiff’s protected activity, her complaints letter dated May 4, 2016, and the transfer in her shift in August 2016 raises a question of fact – was the transfer reasonably likely to deter the plaintiff from engaging in protected activity. Accordingly, defendant fails to meet its

burden establishing its entitlement to judgment as a matter of law as to retaliation under the NYCHRL.

Vicarious Liability and the Faragher-Ellerth Affirmative Defense

Defendant asserts that liability cannot be imputed to it for Lewis' conduct because it did not know about the harassment, it took appropriate remedial measures to the behavior that was brought to its attention and Lewis is not an employee of the hospital. Plaintiff avers that, pursuant to NYCHRL, liability can be imputed to defendant because Lewis is an agent of the defendant.

The NYCHRL provides that

- b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:
- (1) The employee or agent exercised managerial or supervisory responsibility; or
 - (2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
 - (3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

(New York City Administrative Code § 8-107 [13]).

The NYCHRL expressly provides that an employer can be held liable for the unlawful discriminatory conduct of an employee or agent.

Agency is a legal relationship between a principal and an agent and is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act

on his or her behalf and subject to his or her control, and consent by the other so to act; the agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority.

(*Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47, 961 N.Y.S.2d 542 [2 Dept., 2013]).

Defendant fails to establish as a matter of law that no agency relationship existed between Lewis and the defendant. McNicholas testified that Lewis is an employee of Crothall, which is a third-party vendor for the hospital. McNicholas further testified that the supervisors provided by Crothall have the authority to discipline hospital employees but do not have the individual authority to terminate hospital employees. Defendant neither provides any evidence that Lewis was not acting on behalf of the defendant during the alleged incidents, nor does it point to any evidence that demonstrates that it did not retain control over Lewis while he supervised hospital employees. To the contrary, McNicholas testified that in her capacity as the hospital's director of labor relations, she spoke with Lewis regarding the allegations, specifically about his demeanor towards employees. There is no evidence that an agency relationship did not exist between Lewis and defendant.

Plaintiff is silent on the issue of defendant's vicarious liability for the discriminatory conduct of Lewis, under NYSHRL. Pursuant to state law, an employer vicariously liable for the discriminatory conduct of a managerial or supervisory employee may avoid liability by asserting the Faragher-Elterth defense. Defendant states the Faragher-Elterth defense precludes a plaintiff from recovering for sexual harassment if the employer has an effective and well-disseminated harassment policy and the harassed

employee fails to use it. To establish this defense, the employer must show that “(1) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment, (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (*Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 928 N.E.2d 1035 [2010], citing *Zakrzewska v. New Sch.*, 598 F.Supp.2d 426, 105 Fair Empl.Prac.Cas. (BNA) 647 [U.S.D.C., 2009]; see *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 [1998]).

Here, defendant established the applicability of the Faragher–Ellerth defense. It is undisputed that the defendant had a sexual harassment policy, and plaintiff testified that she was aware of the policy. In the case at bar, as previously discussed, no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment. At most, plaintiff alleges a time change in her shift. Next, defendant established that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Plaintiff’s May 4, 2016, letter indicated Lewis’ unwelcomed physical contact, hand and shoulder touching, and commenting on plaintiff’s good looks and smell. On receipt of this letter, McNicholas met with plaintiff. McNicholas testified that plaintiff did not speak much at the initial meeting. Plaintiff looked down at the floor a lot, mumbled under her breath; the communication was very minimal. Based on the information that plaintiff provided in the letter and McNicholas’ meetings with plaintiff, McNicholas met with Lewis. Lewis denied the allegations. McNicholas discussed with

Lewis his demeanor and tone. McNicholas met with plaintiff a third time and stated that the lack of detail in plaintiff's allegations, such as dates times and locations, and in conjunction with McNicholas's inability to corroborate plaintiff's allegations, the investigation was closed. Accordingly, in consideration of what plaintiff disclosed to the hospital, the hospital exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

As to the allegations disclosed for the very first time in plaintiff's pleadings, McNicholas testified that plaintiff made no mention of the January 18, 2016, incident alleging Lewis grabbed her breast, the February 2016 incident alleging that he likes to "[**]k Jamaican women", the February 22, 2016, allegation that Lewis grabbed and stroked plaintiff's buttocks, the March 1, 2016, allegation that Lewis touched plaintiff's breast, and the April 10, 2016, allegation that Lewis rubbed up against her from behind. Simply put, plaintiff did not tell her employer of the pertinent acts plaintiff now alleges were committed by Lewis, therefore, thwarting the hospital's ability to provide any further preventive or corrective measures. Lastly, plaintiff failed to avoid harm by not disclosing these complaints. Accordingly, defendant is awarded judgment as a matter of law on the issue of vicarious liability for the discriminatory conduct of Lewis, under NYSHRL.

However, defendant's contention is without merit as it relates to the NYCHRL, since it is established that "the plain language of the NYCHRL precludes the Faragher-Ellerth defense" (*Zakrzewska v. New Sch.*, 14 N.Y.3d 469, *supra*).

Hostile Work Environment - New York City Administrative Code § 8-107

The NYCHRL broadens state law on unlawful discriminatory practices and states

1. It shall be an unlawful discriminatory practice:
 - (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status of any person:
 - (1) To represent that any employment or position is not available when in fact it is available;
 - (2) To refuse to hire or employ or to bar or to discharge from employment such person; or
 - (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

(New York City Administrative Code § 8-107[1]).

“Indeed, it is now beyond dispute that the provisions of the New York City Human Rights Law must be construed ‘broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible’” (*Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 929 N.Y.S.2d 259, [2 Dept., 2011], quoting *Albunio v. City of New York*, 16 N.Y.3d 472, *supra*). The Appellate Division, Second Department, adopted the standard set forth in *Williams v. New York City Hous. Auth.* (61 A.D.3d 62, 872 N.Y.S.2d 27 [1 Dept., 2009]) for liability for causes of action alleging hostile work environment pursuant to the New York City Human Rights Law. The Appellate Division, First Department, *Williams* Court held that

under the City Human Rights Law, liability for a harassment/hostile work environment claim is proven where a plaintiff proves that he or she was treated less well than other employees because of the relevant characteristic. Recognizing, however, that the broader purposes of the City's law “do not connote an intention that the law operate as a ‘general civility code,’ ”, the Court recognized “an

affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences”.

(*Nelson v. HSBC Bank USA*, 87 A.D.3d 995, *supra*, citing *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, *supra* [internal citations omitted]).

As an initial matter, defendant contends that plaintiff’s allegations amount to nothing more than petty slights and trivial inconveniences and that it cannot be held vicariously liable for condoning a third-party vendor/their agent for acts which plaintiff did not report and had no reason to suspect (*see Priore v. New York Yankees*, 307 A.D.2d 67, 72, 761 N.Y.S.2d 608, [1 Dept., 2003]). Plaintiff asserts that she was a victim of conduct that amounted to more than petty slights and trivial inconveniences, and defendant can be held vicariously liable for Lewis’s discriminatory conduct because he was their agent and plaintiff’s supervisor, even in the absence of plaintiff having failed to report the conduct (*Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 902 N.Y.S.2d 838 [2010] [“By the plain language of NYCHRL § 8-107 (13) (b), these are not factors to be considered so long as the offending employee exercised managerial or supervisory control”]).

In this case, defendant fails to set forth that a reasonable victim of discrimination would consider plaintiff’s allegations as nothing more than petty slights and trivial inconveniences. Summary judgment must be granted only where the movant can demonstrate “that the alleged discriminatory conduct in question does not represent a ‘borderline’ situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences” (*Williams v. New York*

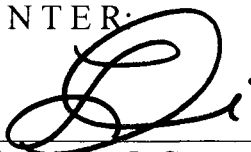
City Hous. Auth., 61 A.D.3d 62, *supra*). Here, plaintiff alleges that Lewis made physical contact with her, including groping her breasts and buttocks, rubbing his body against hers and making offensive and explicit comments. A jury could reasonably find that this behavior allegedly experienced by the plaintiff constitutes more than “petty slights and trivial inconveniences”. Accordingly, defendant’s motion for judgment as a matter of law dismissing plaintiff’s NYCHRL claim for hostile work environment based on sexual harassment is denied. There are issues of fact as to whether the incidents alleged by plaintiff are more than petty slights and trivial inconveniences.

This Court need not address defendant’s contention that it cannot be held vicariously liable for the conduct of its third-party vendor, of which it was unaware of since there is a question of fact regarding the agency relationship, as discussed above.

Conclusion

Accordingly, the branches of defendant’s motion for summary judgment dismissing plaintiff’s hostile work environment and retaliation claims pursuant to NYSHRL are granted. Defendant’s branch of the motion seeking dismissal of plaintiff’s hostile work environment and retaliation claims pursuant to NYCHRL are denied. The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
J.S.C.

2019 MAR 11 AM 9:18

KINGS COUNTY CLERK
FILED

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