SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JENNIFER PETRISKO,

Plaintiff,

- v -

ANIMAL MEDICAL CENTER and KATHRYN COYNE,

Defendants.

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INDEX NO. 151573/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21

were read on this motion to dismiss.

Defendants move, pursuant to CPLR 3211(a)(5) and (7), for an order dismissing the complaint. Plaintiff opposes.

I. AMENDED COMPLAINT (NYSCEF 10)

Although defendant Animal Medical Center's (AMC) compensation committee had mandated that all calls to AMC's "hotline" be routed to AMC's outside counsel, the policy never took effect and all hotline calls continued to be routed to the human resources department, in the person of defendant Kathryn Coyne, AMC's CEO. Then, in June 2015, notwithstanding the directive of AMC's Board that an external hotline be established, the calls continued to be routed to Coyne.

On July 6, 2015, AMC hired plaintiff as its Executive Director of Marketing and Communications. Plaintiff reported directly to Coyne.

Throughout plaintiff's employment with AMC, Coyne made offensive, racist, and

anti-semitic remarks, including about plaintiff. She joked about Jewish people, referring to "Nazi humor," and she regularly referred to plaintiff as a "Super Jew." Sometime during 2015, Coyne took no "meaningful action" upon hearing from plaintiff and Coyne's administrative assistant that an AMC manager had referred to a subordinate as a "nigger." She made offensive remarks about Asian employees and imitated their accents, homophobically referred to AMC's Director of General Services as a "carpet muncher," and complained of her inability to fire AMC's former Director of Marketing due to her disability from the effects of leukemia. Coyne also told "everyone" that a staff doctor had suffered a miscarriage, and that other staff and board members had breast cancer and suffered from other medical conditions. She referred to each doctor she disliked as "Dr. Mengele."

On February 8, 2016, AMC's payroll department informed plaintiff that she was being charged for two days of personal time off (PTO) for failing to punch in and out. In reply, plaintiff stated that she had worked from home on one day and traveled for business on the other, and that as an executive employee, under the fair labor standards act (FLSA), she should receive full salary for any week during which she performs any work, regardless of the days and hours. Thus, she denied any legal requirement to punch in and out and maintained that the practice of monitoring her hours was illegal. Notwithstanding her objection, the practice continued.

On April 14, 2016, AMC's CFO warned all personnel that the failure to punch in and out from work would be charged as PTO and that employees who "consistently swiped in less than their scheduled hours will see a reduction in their PTO balance." Plaintiff responded to the CFO and AMC's Director of Human Resources, stating that the practice violated the FLSA. Again, despite plaintiff's objection, the practice continued.

In June 2016, Coyne and AMC's COO instructed plaintiff to remove all copies of AMC's

annual pre-2015 tax returns from AMC's website. Plaintiff protested, reasoning that doing so could compromise AMC's accountability and transparency ratings. That same month, Coyne sought plaintiff's time records, reprimanded her for inaccurately recording her time, and falsely claimed that pay was generated based on the inaccurate time records.

In or about July 2016, Coyne secretly surveilled all staff conversations, including those of AMC's Chief Medical Officer (CMO) and forced her administrative assistant to monitor email and calendar entries of the CMO and other staff members she considered to be not "on her side."

After September 2016, Coyne began listening to her administrative assistant's telephone conversations with plaintiff and taunted her administrative assistant by repeating their conversations word for word.

Coyne also abused AMC's PTO and Extended Illness bank by claiming that she was on administrative assignment when not working, getting reimbursed for air travel, and falsely claiming that she was conducting business when she had flown to her vacation home. On account of this conduct, Coyne has over $100,000 worth of PTO to be paid to her upon her departure from AMC.

In November 2016, Coyne had her administrative assistant charge to AMC a catering bill of approximately $500 and other bills for cookies and printed birthday invitations for her child's birthday party. She receives reimbursements for car services for personal trips for her and her family and was reimbursed for a dry-cleaning charge of $950 for drapery, even though there were no drapes were in her apartment. Coyne has told others, including her administrative assistant, to engage in the same conduct, stating that, "This is our retirement plan."

Coyne gave out bonuses to those she favored, with little regard for performance or merit, would artificially inflate revenue to justify such bonuses, and refused to comply with the

compensation committee's requirement that she send them quarterly updates of her salary and bonus allocations. These practices were scrutinized by AMC's former trustee and chairman of the finance committee.

At some time in 2016, Coyne told her administrative assistant and others that plaintiff was having an affair with an AMC staff doctor, and that she was working for the doctor part-time to run an illegal business from AMC's offices. Coyne made these statements without evidence, knowing that they were false. During the week of December 5, 2016, Coyne sent plaintiff a text message asking why an employee from plaintiff's department was walking the dog of the staff doctor with whom she had accused plaintiff of having an affair. Plaintiff responded that staff within her department took turns walking the dog and asked if it was an "issue." Coyne responded, "No issue…we'll discuss later."

On December 12, 2016, Coyne and others at AMC received a packet of documents from an anonymous source concerning illegal and unethical actions by AMC, including allegations that AMC's Nurse Manager lacks necessary training and education in veterinary medicine and that Coyne was reimbursed for the refurbishment of her penthouse, complaints that AMC docked exempt employees' wages, a letter dated April 14, 2016, from the CFO regarding the docking of wages for improper time-keeping, and AMC's recent annual tax returns reflecting that the salaies and bonuses of executive management had risen, while doctor's salaries were severely cut. In the presence of her administrative assistant, Coyne accused plaintiff and the staff doctor of creating and distributing the documents.

On December 17, 2016, Coyne accused plaintiff of having a "sexual and romantic affair" with the staff doctor, claiming to have seen closed-circuit television footage showing the doctor enter and leave plaintiff's apartment numerous times over three or four months. Coyne stated

that plaintiff's building manager had informed her of the affair and had shown her the guest registry and footage. She also claimed that the doctor had stayed at plaintiff's apartment on Fridays and Saturdays, whereas plaintiff had spent most weekends in New Jersey.

Coyne asserted to plaintiff that she was guilty of "poor judgment" and "bad optics," and said that "all of the interns and residents know about the affair. They're all talking about it." Coyne also said that the documents concerning AMC's practices must have come from plaintiff's computer and asked whether the staff doctor had had access to it. Coyne claimed that plaintiff undermined her authority and overspent on marketing initiatives.

In reality, plaintiff was on track to deliver all projects for 2016 and was underbudget. In response to Coyne's claims, she denied the affair and looked after the dog as a favor to the staff doctor and his partner, both of whom were her friends. Plaintiff denies having sent the documents and claims ignorance as to the identity of the person who had.

Due to Coyne's false accusations and invasion of privacy, plaintiff resigned, stating in an email dated December 17, 2016, "I'm left feeling that I have no choice but to find an amicable way to resign from my position. You have accused me of having an affair with a colleague - wholly inaccurate and offensive ... My privacy has been violated and my reputation has been tarnished."

After her resignation, plaintiff's building manager told her that Coyne had asked him "out of the blue" for access to the footage and guest registry, and he denied having raised the issue with her. He also told plaintiff that the cameras were not operational for at least the preceding three months.

On December 21, 2016, because plaintiff was "passionate about animal welfare and loved what she did in spite of the harassment," plaintiff sent Coyne an email retracting her resignation.

In response, Coyne stated that "my decision to accept your resignation from employment is in the best interests of the Animal Medical Center. That decision will stand."

On January 12, 2017, Coyne told two of the people who directly report to plaintiff that plaintiff had "broken some policies and procedures," and thus, it was best to accept her resignation. However, plaintiff violated no policies, and on January 30, 2017, just before plaintiff's last day of work, AMC's Director of Human Resources confirmed that plaintiff had "no write ups or any notices of discipline." Several weeks later, Coyne's former assistant saw her prepare a negative performance evaluation for plaintiff's personnel file.

Despite plaintiff's departure, Coyne continued to defame her by telling staff, including her administrative assistant, that plaintiff had an affair with a staff doctor, and she prohibited anyone from providing employment references for her. Coyne also told employees that plaintiff had illegally stockpiled prescription veterinary medication to sell. However, as Coyne was aware, plaintiff obtained only necessary medications for her four pets to last until March 1, 2017.

Coyne's behavior toward plaintiff continued throughout 2016 and into 2017, as she repeatedly told her administrative assistant and others that plaintiff was "diabolical," "evil," "unstable," a "pathological liar," and a "narcissist." Coyne also accused her of being a drug addict and claimed that she had found cocaine "all over" plaintiff's apartment. In response, her administrative assistant told Coyne repeatedly that she had been to plaintiff's apartment and that the accusations were false. Coyne nonetheless accused plaintiff of drugging her own horse and telling AMC's dispensary to inform her whenever a prescription for a particular drug was entered for plaintiff. Coyne had also asked her administrative assistant's brother for damaging information about plaintiff, and was heard defaming plaintiff to numerous persons, including AMC's CFO, COO, Coyne's sister, and AMC's Director of Human Resources.

On January 19, 2017, the chairman of AMC's board heard Coyne accuse plaintiff of being a "drug addict" and claim to have seen drugs "all over" plaintiff's apartment. Coyne told her administrative assistant to tell her if she did drugs with plaintiff. The assistant replied that they did not consume illegal drugs and that she does not drink.

At dinner in February 2017, Coyne forbade her administrative assistant from contacting plaintiff, calling plaintiff "dangerous" and stating that she manipulated her assistant. That night, Coyne looked through the assistant's texts and emails and told her that if plaintiff "continued to harass" her, she would get AMC's outside legal counsel involved.

Although the assistant told Coyne that her behavior was "endangering her wellbeing," Coyne continued to "harangue" her about plaintiff, such as attempting to get her to blame plaintiff for sending the packets of documents. Coyne told her, "I don't care if I find out that the sealed envelopes have your DNA on them, because we will find out! Just tell me anything you know about it and I promise you and your job and apartment will be safe."

In March 2017, Coyne told the assistant and others that she would ensure that plaintiff was "kicked out" of the stable where she and Coyne kept their horses, and would do so by telling the stable that plaintiff was illegally selling drugs and was a "drug addict." Coyne also claimed that "everyone" at the stable thought plaintiff was drugging her horse to make her sick. Plaintiff has kept three horses at the stable without incident for over seven years.

Coyne asked her assistant whether plaintiff had found another job and stated that plaintiff "will never get or keep another job if I have anything to with it."

On March 16, 2017, the assistant was placed on FMLA leave due to depression and anxiety caused by Coyne's behavior.

In April 2017, the stable forced plaintiff to remove her horse.

Plaintiff has been unable to find new employment despite "seemingly interested prospective employers and having attended several interviews."

On February 20, 2018, plaintiff filed her summons and complaint (NYSCEF 1 and 2), which she amended on April 8, 2018. She asserts causes of action of defamation, tortious interference with third party relations, and retaliation for opposing unlawful wage practices under the Labor Law. (NYSCEF 10).

II. CONTENTIONS

A. Defendants (NYSCEF 7-12)

Defendants assert that plaintiff fails to state a claim for retaliation under the Labor Law because she does not allege that she engaged in protected activity. Although she had complained that AMC violated the federal FLSA, she never complained of violations of the Labor Law, as a policy of reducing leave bank or reducing salary for partial-day absences does not constitute a Labor Law violation. Rather, under Labor Law § 198-c, it is permissible to reduce leave banks and salaries if consistent with the employer's policies, and plaintiff alleges that AMC was following its policies.

Even if plaintiff alleges a violation of the Labor Law, her failure to identify a provision violated demonstrates that she did not have a reasonable, good faith belief that the Labor Law was violated, and thus, warrants dismissal. In addition, having attempted to rescind her resignation and then continue to work for over a month after resigning, defendants assert, plaintiff is precluded from claiming constructive discharge. And even if she sufficiently alleges that she was engaged in a protected activity and had been constructively discharged, her claim fares no better as she fails to allege causation given the eight months elapsing after her last complaint and before her alleged constructive discharge.

Defendants also maintain that plaintiff fails to state a claim for tortious interference with a third-party relationship and that her claim that Coyne interfered with her employment has no factual basis, as she had voluntarily resigned and Coyne had disciplinary authority over her. Plaintiff's claim that Coyne interfered with her relationships with prospective employers is also legally insufficient absent the identities of the prospective employers, an allegation that Coyne knew of plaintiff's business relations with those employers, Coyne's specific statements, when and where they were made, that plaintiff would have received employment absent the statements, and that plaintiff suffered damages because of the statements. Plaintiff's claim that Coyne interfered with her ability to keep her horse at the stable fails absent an allegation of the existence of a contractual business relationship or that the stable breached a contract. She also fails to allege what statements Coyne had made to the stable or plead resulting damages.

As plaintiff filed her complaint on February 20, 2017, any defamatory statements alleged therein must have been made before February 20, 2016. Plaintiff's claim that Coyne's statements were continuous does not salvage the claim.

Even if not time-barred, the alleged defamatory statements are not pleaded with sufficient specificity. Although plaintiff alleges that Coyne told her administrative assistant that she would ensure plaintiff's eviction from the stable where she kept her horse, plaintiff does not allege that she made such a statement to the stable, let alone the date, time, manner, or exact words. Statements about future intentions do not support a claim for defamation, they maintain, as they cannot be proven false. Moreover, plaintiff's claim that Coyne told everyone at the stable that she was drugging her horse to make him sick not only lacks specificity, but constitutes an opinion, and thus, does not support a claim for defamation. To the extent that any alleged defamatory statements are pleaded with the requisite specificity, they are non-actionable

statements of opinion.

Defendants also argue that plaintiff fails to allege special damages, as the *ad damnum* for $500,000 is too general to support a claim of slander, nor does she allege a claim of slander *per se*, as the alleged statements concern plaintiff's character or qualities which do not fall within the enumerated categories of slander *per se*.

B. Plaintiff (NYSCEF 16-18)

Plaintiff argues that she pleads her claims sufficiently, but to the extent that she does not, she attaches a proposed second amended complaint (NYSCEF 17). She denies any need to notify her employer as to which section of the Labor Law was violated as her complaints concerning AMC's unlawful wage practices are broad. She contends that internal complaints of a failure to pay wages in a timely manner or about uncompensated work constitute a protected activity, and her response to AMC's payroll department in February 2016, her complaint in April 2016, and her statements in June 2016 are examples of her internal complaints.

To the extent that defendants assert that they were following corporate policy, as required by Labor Law § 198-c, plaintiff notes that AMC had no preexisting policy of docking its employees PTO balances for partial day absences before she lodged her complaints. In addition, under the Labor Law, in contrast to vacation benefits, PTO is akin to wages and cannot be reduced absent a written agreement.

Plaintiff maintains that she sufficiently pleads that she was constructively discharged because Coyne's actions were objectively intolerable, and their seriousness, such as accusing her of illegally stockpiling prescription drugs in order to sell them, invading her privacy, accusing her of having an affair, and claiming that she had disseminated the packets of materials, led plaintiff to believe that her employment would be terminated, regardless of whether she resigned.

Coyne's racist, anti-semitic, and homophobic remarks, on their own, created an objectively intolerable work environment.

Plaintiff observes that some of Coyne's accusations were made the day she resigned, and that her resignation does not preclude her from claiming constructive discharge, because all she must plead is that the conditions she suffered forced her to quit involuntarily. According to her, an employee is constructively discharged when she resigns under the belief that her employment will be terminated. That plaintiff retracted her resignation is also not fatal, as the only legally significant question is whether her constructive discharge was motivated by protected activity, a question of fact that cannot be resolved on a motion to dismiss.

According to plaintiff, she sufficiently argues that she alleges causation, having pleaded that Coyne had accused her of creating and distributing the packets of documents about AMC's wage and other practices on the same day of her resignation, and that there is no minimum time within which a temporal relationship becomes attenuated.

While the amended complaint contains sufficient allegations of tortious interference, plaintiff's proposed second amended complaint cures the alleged deficiencies, as it contains allegations that plaintiff had attended interviews at another animal hospital, and that the company's CEO offered her a job contingent on obtaining employment references from AMC. As plaintiff was not offered a job with the company, and "[t]he circumstantial evidence pointing to Defendants thwarting this employment opportunity is strong," the cause of action is sufficiently stated.

Although a contract is not required to state a claim for tortious interference, plaintiff contends, the proposed second amended complaint contains allegations that for use of the stable, plaintiff paid a monthly minimum of $3,025 for seven years, that Coyne told the stable that she

was illegally selling drugs, and that the stable thus ended their contractual relationship. These allegations establish causation, as but for defendants' conduct, plaintiff would have been hired by the other animal hospital and would have been able to obtain board and other services from the stable.

To the extent that defendants argue that their conduct must constitute an independent tort or crime to be actionable, this is applicable only to plaintiff's claim of interference with her prospective employment opportunity.

Plaintiff argues that she states a claim for defamation, as she pleads with specificity the words used by Coyne, the persons who heard the statements, and the manner in which the statements were disseminated. She notes that any statements made after February 20, 2017 are within the statute of limitations and thus, are timely, and the earlier statements are actionable given their continuing and ongoing nature.

Plaintiff denies any need to allege special damages as Coyne's defamatory statements constitute slander *per se*, and she accused plaintiff of criminality, injured her career, and imputed her chastity.

C. Reply (NYSCEF 7-12)

Defendants assert that plaintiff's second amended complaint should not be considered given her failure to seek leave to amend before filing it and even if her opposition is construed as a motion to amend, it should be denied absent an affidavit of merit.

Defendants reiterate their arguments and maintain that plaintiff's second amended complaint suffers the same pleading deficiencies as the first amended complaint. They observe that plaintiff now claims that before she resigned, she feared termination of her employment, and argue that a fear of a discharge, absent a direct threat by an employer, is insufficient to establish

constructive discharge. Her allegations about prospective employment do not salvage her claim, as she fails to allege that the prospective employer ever contacted AMC for a reference, that AMC ever responded, or that AMC or Coyne told the prospective employer anything slanderous.

According to defendants, plaintiff's second amended complaint does not bolster her claims pertaining to the stable, absent a contract, and even if a contract exists, it is terminable at-will and does not support a claim for tortious interference. To the extent that plaintiff seeks to circumvent the contract requirement by stating that Coyne acted with malice, she fails because she must plead with particularity the manner in which Coyne defamed her to the stable, whereas plaintiff speculates as to Coyne's statements and fails to allege the manner, date, and words used. In addition, plaintiff's alleged damages are unspecified.

III. ANALYSIS

A. CPLR 3211(a)(5)

Pursuant to CPLR 3211(a)(5), a party may move to dismiss a cause of action as time-barred and bears the initial burden of establishing that the statute has run on the plaintiff's cause of action, including the date on which the cause of action accrued. (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]).

An action for defamation must be commenced within one year (CPLR 215[3]; *Bridgers v Wagner*, 80 AD3d 528 [1st Dept 2011], *lv denied* 17 NY3d 717), measured from the time the allegedly slanderous statement was uttered. (*Rand v New York Times Co.*, 75 AD2d 417, 424 [1st Dept 1980]). Although tort claims may be extended beyond the one-year limitation if the underlying conduct is continuous and the "final actionable event" occurred within the statute of limitations period (*Shannon v MTA Metro-N. R.R.*, 269 AD2d 218, 219 [1st Dept 2000]), defamation claims are not subject to such an extension (*Cheves v Trustees of Columbia Univ.*, 89

AD3d 463, 464 [1st Dept 2011]; *Arvanitakis v Lester*, 2014 WL 3952274, *2 [Sup Ct, Queens County 2014], *affd* 145 AD3d 650 [2d Dept 2016]). Thus, to the extent that plaintiff bases her defamation claim on statements made before February 20, 2017, it is time barred.

B. CPLR 3211(a)(7)

A pleading may also be dismissed for a failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

1. Defamation

To sustain a cause of action for defamation, the plaintiff must plead 1) a false statement, 2) publication of it to a third party, 3) absent privilege or authorization, which 4) causes harm, unless the statement is defamatory *per se,* in which case harm is presumed. (*Stepanov v Dow Jones & Co., Inc.,* 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman,* 115 AD3d 102, 104 [1st Dept 2014], citing *Dillon v City of New York,* 261 AD2d 34, 38 [1st Dept 1999]).

Statements of opinion, regardless of their derisiveness, are not actionable. (*See Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). Whether a statement constitutes an opinion turns on whether it may be objectively characterized as true. (*Id.* at 292). Thus, even if not time barred, Coyne's alleged statements calling plaintiff "diabolical," "evil," "unstable," and a

"narcissist" are not actionable as they constitute statements of opinion. (*See Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 537–538 [1st Dept 2013] [defamatory statements labeling the plaintiff as bothersome, a narc, and someone who would create issues were non-actionable statements of opinion]; *Scialdone v Derosa*, 148 AD3d 741, 742 [2d Dept 2017] [statements describing the plaintiff as quixotic, self-absorbed, narcissistic, ungrateful, delusional, and a "paranoid pompous ass" were non-actionable statements of opinion]). The term "pathological liar" is also a statement of opinion, as plaintiff alleges that the term was used along with the other aforementioned hyperbolic terms (s*ee Sandals Resorts Int'l Ltd. v Google, Inc.*, 86 AD3d 32, 41 [1st Dept 2011] [apparent statements of fact may constitute opinion when used in dispute or debate where "use of epithets, fiery rhetoric or hyperbole" is anticipated]), and she does not allege that she had been accused of lying about any particular matter.

To state a claim for defamation, the plaintiff must specify the time, place, and manner of the false statement. (*Knopf v Sanford*, 123 AD3d 521, 522 [1st Dept 2014]). Plaintiff's allegations that defamatory statements were made "[t]hroughout the period late December 2016 until March 16, 2017," "[d]uring dinner in February 2017," and "[i]n March 2017" are too vague to meet the temporal specificity requirement. (*See Arvanitakis*, 145 AD3d at 652 [allegations that defamatory statements made "in June, July, August, and September 2012, and 'through the present'" too vague]). Likewise, Coyne's alleged statements to the stable and others that plaintiff is a "drug addict" and is drugging her horse are not actionable as plaintiff does not specify dates or times.

2. Retaliation

Labor Law § 215 prohibits an employer from retaliating against an employee for engaging in protected activity. (*Wigdor v SoulCycle, LLC*, 139 AD3d 613, 613 [1st Dept 2016]).

To state a claim for unlawful retaliation, the plaintiff must allege that she made a good faith complaint concerning a Labor Law violation and was subject to an adverse employment action as a result. (*Day v Summit Sec. Servs. Inc.*, 53 Misc 3d 1057, 1061 [Sup Ct, NY County 2016], *affd* 159 AD3d 549 [1st Dept 2018], quoting *Higueros v New York State Catholic Health Plan, Inc.*, 526 F Supp 2d 342, 347 [ED NY 2007]).

a. Protected activity

Although a plaintiff must allege that she had complained about a "specific violation of the Labor Law" to state a claim of retaliation (*Epifani v Johnson*, 65 AD3d 224, 236 [2d Dept 2009]), she need not have explicitly referenced a particular section or provision (Labor Law § 215[1][a]; *Quintanilla v Suffolk Paving Corp.*, 2019 WL 885933, *22 [ED NY, Feb. 22, 2019, No. CV 09-5331]). Thus, plaintiff's reference to the FLSA and her failure to cite a specific section of the Labor Law is not fatal to her claim. There is also no need to reference a specific section of the Labor Law when lodging a complaint with an employer in the course of engaging in protected activity. Rather, the complaint lodged must reflect a "colorable violation" of the Labor Law. (*Esmilla v Cosmopolitan Club*, 936 F Supp 2d 229, 240 [SD NY 2013]; *Weiss v Kaufman*, 2010 WL 4858896, *2 [Sup Ct, NY County 2010]). The colorable violation, however, must come within a provision of the Labor Law. (*Grella v St. Francis Hosp.*, 45 Misc 3d 1222[A] [Sup Ct, Nassau County 2014], *affd* 149 AD3d 1046 [2d Dept 2017]), which includes a "reasonable and good faith belief that a violation occurred" (*Zutrau v ICE Sys., Inc.*, 128 AD3d 1058, 1060 [2d Dept 2015]), notwithstanding the employer's claim to the contrary.

While plaintiff does not specify a section of the Labor Law relating to her wage complaint, the parties argue about whether AMC's wage practices violated Labor Law § 190, *et seq*. Thus, accepting the facts alleged in the complaint as true, plaintiff's allegation that AMC

unlawfully reduced PTO benefits in February and April 2016 is sufficiently colorable to be deemed protected activity. (*See e.g., Weiss v Kaufman*, 2010 WL 4858896, *2 [Sup Ct, NY County Nov. 18, 2010 No. 103473/2010 [complaint that she was owed several pay-checks sufficiently colorable to state claim]; *cf Robledo v No. 9 Parfume Leasehold*, 2013 WL 1718917, *10 [SD NY, Apr. 9, 2013, No. 12-CIV-3579] [conveying "questions and concerns" about wage calculations too vague].

However, plaintiff's allegation that in June 2016, she "opposed AMC's unlawful wage practices" lacks the requisite specificity to serve as a predicate wage complaint for her retaliation claim. (*See Higueros*, 526 F Supp 2d at 348 [complaint must contain "more than bare allegations of violations of 'state law' or even 'Labor Law'"]).

To the extent that plaintiff complains about having been ordered to remove the annual tax returns from AMC's website, she fails to explain how it relates to the Labor Law or how it constitutes protected activity. (*See Nicholls v Brookdale Univ. Hosp. Med. Ctr.*, 2004 WL 1533831, *5 [ED NY, July 9, 2004, No. 03-CV-6233] [dismissing retaliation claim where court could not determine alleged violation]).

b. Adverse employment action

Labor Law § 215(1)(a) provides that a discharge constitutes an adverse employment action. A constructive discharge also constitutes an adverse employment action. (*Santana v Rent A Throne, Inc.*, 2018 WL 1027667, *8 [ED NY, Feb. 21, 2018, No. 215-CV-2563]; *Teran v JetBlue Airways Corp.*, 132 AD3d 493, 494 [1st Dept 2015]). To state a claim for an adverse employment action based on a constructive discharge the plaintiff must allege facts tending to show that the employer "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." (*Polidori v Societe*

Generale Groupe, 39 AD3d 404, 405 [1st Dept 2007], quoting *Mascola v City Univ. of New York*, 14 AD3d 409, 410 [1st Dept 2005]).

An employee's rescission of her resignation demonstrates that conditions were not so intolerable to compel resignation. (*See e.g.*, *Cadet v Deutsche Bank Sec. Inc.*, 2013 WL 3090690, *12 [SD NY, June 18, 2013, No. 11-CIV-7964] [plaintiff's attempt to rescind resignation severely undermined hostile work environment claim; "this fact alone is probably sufficient" to dismiss constructive discharge claim]; *Trinidad v New York City Dep't of Correction*, 423 F Supp 2d 151, 168 [SD NY 2006] [attempt to rescind resignation established that working conditions were not so intolerable]). Here, it is undisputed that plaintiff attempted to rescind her resignation, thereby negating her assertion of a constructive discharge, and thus failing to state a cause of action for an adverse employment action. In addition, an employer's rejection of a retraction of an employee's resignation does not constitute an adverse employment action. (*Cadet*, 2013 WL 3090690, *11).

3. Tortious interference

a. Interference with contract

To state a claim for tortious interference with contract, the plaintiff must allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

Plaintiff admits that AMC did not terminate her employment, as she had resigned. Thus, to the extent that her claim is premised on her employment relationship with AMC, it must be dismissed absent an allegation that AMC breached the contract. (*See Downtown Women's Ctr.,*

Inc. v Carron, 237 AD2d 209, 210 [1st Dept 1997] [affirming dismissal of claim where third-party did not actually breach contract]).

b. Interference with prospective business relations

To state a claim for tortious interference with prospective business relations, the plaintiff must allege that the defendant's interreference was accomplished by wrongful means or for the sole purpose of harming the plaintiff. (*GS Plasticos Limitada v. Bureau Veritas*, 88 AD3d 510 [1st Dept 2011]). Wrongful means includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions, and economic pressure. (*Arnon Ltd v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015], quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). Moreover, the wrongful means employed must amount to a crime or independent tort, such as defamation. (*Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]).

Plaintiff alleges that Coyne's defamatory comments about her impacted other employment opportunities, but does not allege what Coyne said to interfere with her ability to obtain another job. (*See Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [to state cause of action for defamation, plaintiff must allege particular words]). An inability to find new employment, despite being interviewed several times, does not state a claim for tortious interference.

Likewise, that Coyne told her administrative assistant that she intended to interfere with plaintiff's use of the stable, absent any allegation as to if and when Coyne did so, fails to state a claim relating to tortious interference with plaintiff's relationship with the stable.

IV. SECOND AMENDED COMPLAINT (NYSCEF 17)

In June 2016, when Coyne falsely claimed that pay was generated based on inaccurate time records, plaintiff responded that one of those to whom she directly reported also failed to

record her time accurately. Coyne responded that she would look at that employee's records as well.

In November 2016, in front of plaintiff, defendant gave her assistant, as "an early Christmas gift," a book called "Auschwitz." Coyne was aware that her assistant is Jewish and that "the Holocaust is a very sensitive subject for her."

On December 8, 2016, several female employees told plaintiff that they had been sexually harassed by their manager, and that they had reported it to Coyne. In response, Coyne threatened them on multiple occasions, and consequently, two of them resigned.

On December 10, 2016, Coyne accessed plaintiff's computer and printed out documents she had drafted. Coyne compared them with those in the packets, and when confronting plaintiff, implied that because the fonts were similar, plaintiff was responsible for creating and disseminating the packet.

On December 17, 2016, plaintiff feared that, in light of Coyne's allegations, Coyne would terminate her employment, and thus, she resigned. Plaintiff later retracted her employment as she was "anxious that she had resigned without first securing alternative employment and therefore would suffer financially."

Plaintiff kept three horses at the stable for over seven years and monthly paid $3,025 for board, plus other expenses. After Coyne told the stable that plaintiff was illegally selling drugs and was a drug addict, plaintiff was "forced" to incur transportation costs and board her horse at a stable located an hour away.

On February 23, 2017, plaintiff was twice interviewed for a marketing position with another animal hospital, and again on February 24, 2017, when she was told "to expect a firm offer" of employment on February 27, 2017, contingent only on AMC work references. Plaintiff

was not hired and the prospective employer told her that they were "not in a position to move forward."

In May 2017, plaintiff was prevented from communicating with two AMC physicians who had removed a tumor from her dog.

A. CPLR 3025

A motion for leave to amend a pleading should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. (CPLR 3025; *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731 [2d Dept 2012]). No prejudice or surprise is shown when the proposed complaint sets forth new claims or theories based on the facts set forth in the original complaint. (*See e.g., Brewster v Baltimore & Ohio R. Co.*, 185 AD2d 653 [4th Dept 1992] [when proposed amendment sets forth no new facts but adds additional theory of recovery, leave should generally be granted]; *see also MBIA Ins. Corp. v J.P. Morgan Securities, LLC*, 144 AD3d 635 [2d Dept 2016] [defendants could not legitimately claim surprise or prejudice as proposed amendment premised on same facts, transactions, or occurrences as in original complaint]).

A request for leave to amend a complaint may be interposed in a memorandum of law. (*Mallory Factor Inc. v Schwartz*, 146 AD2d 465, 466–467 [1st Dept 1989]). Here, plaintiff's proposed second amended complaint supplements the first amended complaint with new factual allegations relating to her causes of action for retaliation and tortious interference; defendants substantively respond to them in their reply.

While it is unclear whether a motion for leave to amend must be accompanied by an affidavit of merit or other evidentiary proof (*see Boliak v Reilly*, 161 AD3d 625, 625 [1st Dept 2018] [affidavit of merit or other evidentiary showing in support of motion not required]; *Hickey*

v Kaufman, 156 AD3d 436, 436 [1st Dept 2017], *lv denied* 32 NY3d 905 [2018] [same]; *cf Velarde v City of New York*, 149 AD3d 457 [1st Dept 2017] ["plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment"]), leave must be denied if the proposed amended complaint is "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010]).

Although plaintiff alleges that another employee was not being penalized despite inaccurately recording her time, she does not state a colorable violation of the Labor Law absent her identification of any governing provision thereof.

That plaintiff feared being fired, absent allegations of any threats to fire her, neither establishes a constructive discharge nor negates her attempt to rescind her resignation. (*See Dall v St. Catherine of Siena Med. Ctr.*, 966 F Supp 2d 167, 177-178 [ED NY 2013] [plaintiff's fear of employment termination not enough, but threats of termination may suffice]).

Although plaintiff alleges that the prospective employer made her hiring contingent on AMC's references, she does not specify whom she listed as her AMC reference, whether her reference responded, or what her reference told the prospective employer. That Coyne had stated to another employee that she would ensure that plaintiff never got another job, absent any allegation that Coyne had communicated with the prospective employer or carried out her intention, is fatal to the claim. (*See GS Plasticos Limitada v Bureau Veritas*, 88 AD3d 510 [1st Dept 2011] [affirming dismissal where plaintiff failed to allege that defendant made misrepresentations to third party]).

Similarly, that Coyne had spoken with someone at plaintiff's stable "in or about March 2017" is insufficient. (*See Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 470 [1st Dept 2018] [although defamation supports a claim for tortious interference, plaintiff's allegations that

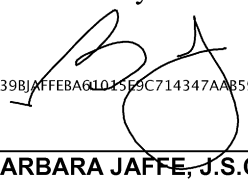
defamatory statements made "in or about Spring 2016" or "in April or May 2016" insufficiently specific]). As plaintiff admits ignorance as to the content of what Coyne told the individual at the stable, she fails to state a claim for tortious interference with prospective business relations.

For all of these reasons, plaintiff's proposed second amended complaint is palpably without merit.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted in its entirety.



3/22/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE