SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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YVONNE TAYLOR

Plaintiff,

- v -

HEALTH RESEARCH, INC.,

Defendant.

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INDEX NO. 151848/2019

MOTION DATE 09/26/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20

were read on this motion to/for DISMISS.

Plaintiff Yvonne Taylor commenced this action for employment discrimination after she was terminated from her employment by defendant Health Research Inc. on August 31, 2018. Defendant Health Research now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. In response, plaintiff filed opposition and a cross-motion seeking to amend her complaint. However, plaintiff can amend her complaint as of right under CPLR 3025(a) as a responsive pleading has not yet been served. This does not automatically abate defendant Health Research's motion to dismiss as it has the option to either withdraw the motion or press it forward against the amended complaint. *See Sobel v. Ansanelli*, 98 A.D.3d 1020, 1022 (2d Dep't 2012). Here, in its reply in further support of the motion to dismiss and in opposition to the cross-motion to amend, it is apparent that defendant Health Research seeks to assert its motion to dismiss as against the amended complaint. Accordingly, defendant's motion will be evaluated as against the amended complaint. Affirmation of Hendrick Vandamme dated June 11, 2019, Exh. A (Amended Complaint).

In the amended complaint, plaintiff alleges that she is a 60-year old African-American female. Amended Complaint, ¶ 10. She was hired by defendant Health Research in 1992 as a secretary, and, pursuant to defendant's contract with the Department of Health ("DOH"), plaintiff was assigned to work at the DOH. Amended Complaint, ¶¶ 11, 12. In October 2017, Michael O'Donnell became plaintiff's supervisor at the DOH. Amended Complaint, ¶ 13. According to plaintiff, Mr. O'Donnell never communicated with plaintiff to provide any supervisory feedback regarding her work, even though he did so for other similarly situated white employees. Amended Complaint, ¶ 14. Mr. O'Donnell did not approve plaintiff's requests for vacation or time-off, whereas he did so for other employees. Amended Complaint, ¶ 14. In July 2018, Mr. O'Donnell requested that plaintiff cover personnel at the Department of Health when the DOH employees were out, and that he could transfer plaintiff to the personnel department, in violation of the contract between defendant Health Research and DOH. Amended Complaint, ¶ 15. However, defendant Health Research told plaintiff that she could not transfer to DOH's personnel department, even though defendant gave such permission to other non-African American employees. Amended Complaint, ¶ 15. Then, on August 31, 2018, instead of responding to plaintiff's complaint regarding her treatment at DOH and her request to transfer to the DOH's personnel department, defendant Health Research terminated plaintiff. Amended Complaint, ¶ 15, 21.

In her amended complaint, plaintiff alleges (1) discrimination, hostile work environment and adverse employment action by defendant in violation of the New York City Human Rights Law; (2) retaliation under the New York City Human Rights Law; (3) discrimination and hostile work environment under the New York State Human Rights Law; and (4) intentional and negligent infliction of emotional distress. In her unauthorized sur-reply, plaintiff withdrew her

cause of action for intentional and negligent infliction of emotional distress so this claim will not be considered.

On a motion to dismiss under CPLR 3211(a)(7), the court is limited to examining the complaint to determine whether the complaint states a cause of action. *Greystone Funding Corp. v. Kutner*, 121 A.D.3d 581, 583 (1st Dep't 2014). It is well settled that "in assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts as alleged in the complaint to be true and afford the plaintiff the benefit of every possible inference." *Id.* Further, "[w]hether the plaintiff will ultimately be successful in establishing its allegations is not part of the calculus." *Id.*

With respect to the discrimination claims, a plaintiff states a claim for discrimination under the state and city human rights laws by alleging (1) that she is a member of a protected class; (2) that she was qualified for the position; (3) that she was subjected to an adverse employment action under the state human rights law, or that she was treated differently or worse than other similarly situated employees under the city human rights law; and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination. *Harrington v. City of New York*, 157 A.D.3d 582, 584 (1st Dep't 2018).

Plaintiff's discrimination claims are based on the following allegations: (1) Mr. O'Donnell's alleged mistreatment of plaintiff by failing to communicate with her and denying her requests for leave; (2) defendant's denial of her request to transfer to DOH's personnel department; and (3) defendant's termination of plaintiff. Construing these allegations in plaintiff's favor, her discrimination claims must be dismissed because she has failed to adequately plead the elements required for these claims under for the City and State Human Rights Laws.

With respect to the allegations concerning Mr. O'Donnell's alleged mistreatment of plaintiff, plaintiff has failed to plead anywhere in the complaint that Mr. O'Donnell's actions, as an employee of the DOH, can be imputed to defendant Health Research, a separate entity. In any event, Mr. O'Donnell's actions, which consisted of failing to communicate with plaintiff regarding her job performance and denying her requests for leave, are insufficient to constitute an adverse employment action or to be considered creating a hostile work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 307-313 (2004) (snatching pad, patting seat in humiliating way, shouting at plaintiff at meeting are insufficient to constitute adverse employment action; isolated use of racial epithets insufficient to create hostile work environment) (citing cases). With respect to plaintiff's allegations regarding the denial of the transfer to the DOH's personnel department, plaintiff fails to plead the second element required for these claims, namely that she was qualified for the position. Further, like the allegations related to Mr. O'Donnell's actions, plaintiff has also failed to plead that the denial of her transfer to the DOH was an adverse employment action as required under the State Human Rights Law. *Id.* at 307.

Finally, plaintiff has failed to adequately plead that any of the alleged acts were made under circumstances giving rise to an inference of discrimination. Indeed, with respect to defendant's refusal to transfer plaintiff, plaintiff undermines any discriminatory intent related to this claim by alleging that such a transfer was prohibited by defendant Health Research's contract with the DOH. Amended Complaint, ¶ 15. Plaintiff's conclusory and vague allegation that "similarly situated white employees" were not treated in the same manner is simply insufficient to demonstrate discriminatory intent, even under the generous pleading standard of a motion to dismiss. *McCabe v. Consulate Gen. of Can.*, 170 A.D.3d 449, 450 (1st Dep't 2019)

(plaintiff's allegation that he was terminated while another younger man and woman were retained was insufficient to support either age or sex discrimination); *Askin v. Dep't of Educ. of City of New York*, 110 A.D.3d 621, 622 (1st Dep't 2013) (plaintiff's allegation that she was treated differently than other employees deemed too conclusory to support discrimination claim).

With respect to the retaliation claim, in order to make out a claim for retaliation under the State or City Human Rights Law, the complaint must allege that (1) the plaintiff participated in a protected activity known to defendant; (2) defendant took an action that disadvantaged plaintiff; and (3) a causal connection exists between the protected activity and the adverse action. *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 51-52 (1st Dep't 2012). Here, plaintiff has failed to satisfy the second element, namely that she participated in a protected activity known to defendant. Although she generally alleges that she complained to defendant regarding Mr. O'Donnell's alleged mistreatment and her request to transfer to the DOH (Amended Complaint, ¶ 21), such grievances do not constitute protected activity as she does not allege that her complaints referred to alleged discriminatory conduct or that she told defendant that she was being treated differently on account of her race. *See Forrest*, 3 N.Y.3d at 313 (filing grievances of generalized "harassment" is insufficient to constitute a protected activity); *Fletcher*, 99 A.D.3d at 53 (plaintiff's complaint which did not make any reference to race was not protected activity). Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed, with costs and disbursements to defendant, and the Clerk shall enter judgment accordingly.

10/16/19
DATE

PAUL A. GOETZ, 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