

**Rivera v City of New York**

2020 NY Slip Op 34542(U)

April 28, 2020

Supreme Court, Bronx County

Docket Number: 23051/2019E

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
CRYSTAL RIVERA,

Index No.: 23051/2019E

**DECISION/ORDER**

**Present:**

**HON. MITCHELL J. DANZIGER**

-against-

THE CITY OF NEW YORK, et. al.,

-----X  
Recitation as Required by CPLR §2219(a): The following papers  
were read on this Motion to Dismiss the Summons  
and Complaint:

Papers Numbered

Notice of Motion Affirmation in Support with Exhibits.....	<u>1</u>
Memorandum of Law in Support of Motion.....	<u>2</u>
Memorandum of Law in Opposition to Motion.....	<u>3</u>
Reply Memorandum.....	<u>4</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Motion by defendants seeking to dismiss the complaint pursuant to CPLR §3211(a)(7) on the grounds that plaintiff's complaint fails to state a cause of action is granted in part.

Plaintiff's complaint purports to set forth causes of action for gender and race based employment discrimination, retaliation, and hostile work environment against the City of New York, Darcel D. Clark (Bronx District Attorney), Christina Scaccia (Chief of the Homicide Bureau of the BXDA), Carmen Facciolio III (Deputy Chief of the Strategic Enforcement and Intergovernmental Relations Bureau of the BXDA), Jeremy Sockett (Executive Assistant District Attorney at the BXDA), Terry Gensler (Deputy Chief of the Narcotics Bureau of the BXDA), Frank Chiara (Chief of Detective Investigators of the BXDA), Terrence Mulderrig (Deputy Chief Rackets Investigator at the BXDA), Wanda Perez-Maldonado (Chief of the Public Integrity Bureau at the BXDA), Omer Wiczuk (Deputy Chief of the Public Integrity Bureau at the BXDA), Arthur B. Simmons (Deputy Administrative Chief at the BXDA), Beth Ann Holzhay

(Director of the Crime Victims Assistance Unit at the BXDA), Priscilla Taveras (Supervising Coordinator of the Satellite Office for the Crime Victims Assistance Unit at the BXDA), and Brian Wareham (Advocate in the Crime Victims Assistance Unit at the BXDA), each sued individually and in their official capacities as employees of defendant, the City of New York (“hereinafter City”).

In her complaint, plaintiff alleges that she was discriminated against based on her gender and race (she is a woman of Puerto Rican descent). Plaintiff’s complaint sets forth a difficult and convoluted set of facts. Plaintiff was employed by the City in the Bronx District Attorney’s Office (hereinafter “BXDA”). Plaintiff does not set forth which position she holds at the BXDA in her underlying papers. She alleges all individually named defendants were also employed by the City in the BXDA. Plaintiff alleges that since August 6, 2007, the BXDA has conducted business in an incompetent, unethical way, engaging in misconduct and constitutional violations of African American and Hispanic criminal defendant’s rights.

Several year ago, plaintiff began a personal relationship with an NYPD detective named David Terrell. In the course of his employment, Detective Terrell was involved in the investigation of the alleged criminal activities of Pedro Hernandez and The Hill Top Crew. On August 9, 2017, plaintiff was asked to meet with various of the named defendants. At that time, she was asked about her personal relationship with Detective Terrell. She was also asked about the relationship between another colleague and a private investigator, Manny Gomez, who was working with Pedro Hernandez’s defense team. Plaintiff alleges that the individually named defendants were unaware of crucial evidence regarding Mr. Hernandez which led to his failed prosecution and that this was consistent with the earlier mentioned incompetence and misconduct of the BXDA. Thereafter, the focus of the BXDA became the alleged misconduct of Detective David Terrell regarding the investigation of Pedro Hernandez. Plaintiff alleges that on August 10, 2017, she complained to her supervisor, Stefany Paulino-Brown, that she was being discriminated against for failing to cooperate with the baseless racially charged criminal investigation of Detective David Terrell. Plaintiff alleges that Ms. Paulino-Brown did not file a complaint on her behalf.

On August 21, 2017, plaintiff met with defendants, Perez-Maldonado, Wiczky, Mulderrig, and Chiarra regarding the law enforcement practices of the 42<sup>nd</sup> precinct and her relationship with officers assigned to the 42<sup>nd</sup> precinct. Plaintiff was asked about Det. Terrell, however, ignored the questions asked about her personal life. Plaintiff was advised she was in trouble, that she lied, and that she needed a lawyer. She was then suspended with pay pending the outcome of the criminal investigation of Det. Terrell. Thereafter, on or about September 6, 2017, the BXDA dismissed the case against Pedro Hernandez.

On January 19, 2018, plaintiff was charged with professional misconduct by her employer for her personal relationship with Det. Terrell. On January 22, 2018, plaintiff was suspended without pay. On February 23, 2018, plaintiff was served with administrative charges related to her personal relationship with Det. Terrell. On February 26, 2018, plaintiff attended an informal conference regarding her charges of misconduct. Plaintiff alleges that during that conference she complained that she was being discriminated against due to her relationship with Det. Terrell and no complaint was filed on her behalf. Thereafter, on April 3, 2018, she attended an informal conference regarding her personal relationship with Det. Terrell and again she complained that the defendants were subjecting her to race discrimination based upon her personal relationship, yet no complaint was filed. On May 8, 2018, charges were sustained regarding her relationship with Det. Terrell and a recommendation was made that her time be credited, and she receive a demotion to duties with decreased access to sensitive information. On June 4, 2018, plaintiff declined the recommendation and elected to proceed to Step II of the process. Thereafter, plaintiff was reinstated with backpay. No Step II hearing was scheduled and on July 2, 2018, plaintiff was transferred to the Crime Victims Assistance Unit, Satellite Office.

While in the Crimes Victims Assistance Unit, plaintiff worked with defendant Brian Wareham. According to plaintiff, from the time she was transferred to the Unit until approximately October 1, 2018, plaintiff was subject to the unwanted sexual advances and sexual harassment by Wareham. Plaintiff alleges that she told defendant Taveras of defendant Wareham's behavior and she was blown off. No complaint was made on her behalf. Thereafter, plaintiff alleges that Taveras and defendant Holzhay claimed to have met with Wareham but did

not file a complaint on her behalf. Wareham continued to make advances and plaintiff complained again and no complaint was issued on her behalf. As a result of these complaints to her supervisors, no formal complaint was issued pursuant to those reports. Plaintiff then called defendant Simmons to report defendant Wareham. Plaintiff met with an Equal Employment Opportunity (hereinafter "EEO") officer on October 2, 2018 and complained of Wareham, Taveras, and Holzhay.

Plaintiff claims her First Amendment right to association was violated, that she was discriminated against on the basis of race and gender pursuant to the New York State Human Rights Law (hereinafter "SHRL") and the New York City Human Rights Law (hereinafter "CHRL"), that she was subjected to a hostile work environment, and that she was retaliated against.

The City moves to dismiss plaintiff's complaint arguing the following; 1) all allegations prior to January 19, 2016 are time barred; 2) plaintiff fails to state a cause of action for retaliation under the First Amendment; 3) plaintiff fails to allege personal involvement of any of the defendants except Wareham; 4) plaintiff fails to state a claim for race or gender discrimination pursuant to the SHRL and/or CHRL; 5) plaintiff fails to allege a retaliation claim pursuant to the SHRL and/or CHRL; and 6) plaintiff fails to state a claim for a hostile work environment pursuant to the SHRL and/or CHRL. Plaintiff opposes the City's motion and argues that the pleadings present a cognizable cause of action.

When a defendant seeks to dismiss a complaint pursuant to CPLR §3211(a)(7), the defendant must demonstrate that "based upon the four-corners of the complaint, liberally construed in favor of the plaintiff, that the pleading states no legally cognizable cause of action." (*Akhtab v. BCBG Max Azria Grp. Inc.*, 2012 N.Y. Misc. LEXIS 1865 [Sup. Ct. N.Y. Cty. 2012]; citing *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226 [1<sup>st</sup> Dep't 2002]). A motion to dismiss must be denied if the pleadings contain allegations that present a cognizable cause of action. (*511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). Mere conclusory allegations do not satisfy the notice pleading standard under SHRL or the CHRL. (*Askin v. Department of Educ. of the City of New York*, 110 A.D.3d 621 [1<sup>st</sup> Dep't 2013]).

#### **Statute of Limitations**

As an initial matter, the statute of limitations for claims pursuant to the First Amendment, the SHRL, and the CHRL is three (3) years. (*Mascola v. City Univ. of NY*, 14 A.D.3d 409 [1<sup>st</sup>

Dep't 2005]; *Herrington v. Metro-North Commuter R.R. Co.*, 118 A.D.3d 544 [1<sup>st</sup> Dep't 2014]; *Smith v. Campbell*, 782 F.3d 93 [2d Cir. 2015]). Plaintiff submits that the BXDA, since August 6, 2007, has conducted its business in an incompetent, unethical way, engaging in misconduct and constitutional violations of African American and Hispanic criminal defendant's rights. These allegations are in no way tied to plaintiff and do not allege a violation of her rights, in any way. The Court finds the statute of limitations has expired for any claim that took place prior to January 19, 2016.

### **First Amendment Claims**

The City argues that plaintiff has failed to state a claim for retaliation under the First Amendment. Plaintiff mentions in her complaint, that she was retaliated against for exercising her First Amendment right to association because she was in a relationship with Det. Terrell. She does not specifically articulate a cause of action for retaliation under the First Amendment. Plaintiff fails to address this argument at all in opposition to the City's motion. Therefore, the portion of the City's motion to dismiss seeking dismissal of any retaliation claim under the First Amendment is granted as unopposed.

### **Individually Named Defendants**

The City next moves to dismiss the individually named defendants, with the exception of defendant, Wareham, as plaintiff fails to allege any personal involvement in the conduct that gave rise to the alleged discrimination. Plaintiff argues that defendants Clark, Scaccia, Facciolo, Sockett, Gensler, Chiara, Mulderrig, Perez-Maldonado, Wiczuk, Simmons, Holzhay, Taveras, and Wareham, subjected her to associational discrimination for her personal relationship with NYPD Det. Terrell, and a hostile work environment for failing to cooperate with a 'race-based' false criminal investigation against she and Det. Terrell, defend against false disciplinary charges for failing to cooperate with a 'race-based' false criminal investigation against she and Det. Terrell. Additionally, Wareham subjected plaintiff to sexually offensive behaviors in the workplace. Plaintiff submits that the individual defendants failed to investigate, act, and to make the workplace free from race and gender discrimination. The City submits that the plaintiff did not allege that any of the individual defendants have an ownership interest in the BXDA, have the authority to carry out personnel decisions without approval from Human Resources or executive-level authority.

With the exception of defendant Brian Wareham, plaintiff fails to plead specific conduct on the part of each individually named defendant that gave rise to the alleged race or gender discrimination, retaliation, or hostile work environment. "A finding of participation in the alleged discriminatory conduct 'requires a showing of direct, purposeful participation.'" (*Harris v. N.Y.U. Medical Ctr.*, 2013 U.S. Dist. LEXIS 99328 [S.D.N.Y. July 9, 2013]). Further, plaintiff fails to address this argument in her opposition papers and therefore, all individually named defendants are dismissed from the action, with the exception of Brian Wareham.

**Plaintiff's Race and Gender Discrimination Claims (Counts I, II, V, VI of Pl. Complaint)**

In counts I, II, V, and VI of her complaint, plaintiff alleges she was discriminated against because of her race and gender by all defendants pursuant to the SHRL and the CHRL. She suffered the indignity of race and gender discrimination and great humiliation, which caused her to incur significant legal costs, emotional distress, and damage to her personal and professional reputation. The City argues that plaintiff did not properly plead her race and gender discrimination claims under the SHRL and CHRL.

To establish a prima facie case of discrimination under the SHRL, plaintiff must demonstrate: (1) she was a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated or suffered an adverse employment action; and (4) the discharge or adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*Appleton v. City of New York*, 2019 N.Y. Misc. LEXIS 1051 [Sup. Ct. N.Y. Cty. 2019]). CHRL claims must be analyzed separately and independently from state claims. (*Id.*). To state a claim for discrimination under the CHRL, a plaintiff must show a differential treatment of any degree based on a discriminatory motive. (*Id.*). Here, plaintiff fails to allege an adverse employment action that occurred under circumstances giving rise to an inference of discrimination and fails to show differential treatment based on a discriminatory motive. Plaintiff fails to set forth any discriminatory animus.

Plaintiff alleges she was questioned about her relationship, served with administrative charges, was suspended with pay, was placed on administrative leave without pay (but was later reinstated with back pay) and was transferred to another unit. However, neither disciplinary charges nor a transfer rise to the level of an adverse employment action for the purposes of the SHRL. (*Salerno v. Town of Bedford*, No. 05 Civ. 7293 [SCR], 208 U.S. Dist. LEXIS 99373 [S.D.N.Y. Dec. 3, 2008]; *Mejia v. Roosevelt Is. Med. Assoc.*, 95 A.D.3d 570 [1<sup>st</sup> Dep't 2012]).

Disciplinary charges that do not result in loss or are ultimately dismissed are not adverse actions. (*DuBois v. Brookdale Univ. Hosp. & Med. Ctr.*, 2004 NY Slip Op 51819[U] [Sup. Ct. Kings Cnty., 2004]; *aff'd*, 29 A.D.3d 731 [2d Dep't 2006]). Further, per plaintiff's own complaint, there was an ongoing investigation into the conduct of the officers of the 42<sup>nd</sup> precinct. Plaintiff had a personal relationship with Det. Terrell of the 42<sup>nd</sup> precinct. Plaintiff did not disclose the details of the relationship despite his involvement in the investigation of Pedro Hernandez. It's entirely reasonable that plaintiff would be questioned during this time. Plaintiff does not provide any facts that support that she was treated differently from other employees in light of her gender, and race and therefore, the cause of action is insufficiently plead. (*Buffolino v. Long Island Sav. Bank FSB.*, 126 A.D.2d 508 [2d Dep't., 1987]; *Whitfield-Ortiz v. Dept. of Educ. of the City of NY*, 116 A.D.3d 580 [1<sup>st</sup> Dept. 2014]). Under the Human Rights Law, a plaintiff must plead facts suggesting, "she has been treated less well than other employees because of her protected status [,] or that discrimination was one of the motivating factors of the defendant's conduct" (*Chin v. N.Y.C. Hous. Auth.*, 106 A.D.3d 443, 445 [1<sup>st</sup> Dept. 2013]; See, *Whitfield-Ortiz*).

In plaintiff's opposition papers, plaintiff for the first time mentions that this is a case regarding associational discrimination because she (a Puerto Rican woman) has a personal relationship with Det. Terrell (an African American male) pursuant to Title VII. This is not alleged in plaintiff's complaint and plaintiff is not seeking leave to amend her pleadings. Further, plaintiff has not alleged that she filed a charge with the EEOC, or obtained a right to sue letter, which is a prerequisite to suit pursuant to Title VII and therefore, the Court will not consider said claims. (*Harris v. NYU Langone Med. Ctr.*, 2013 U.S. Dist. LEXIS 99328, 2013 WL 3487032 [S.D.N.Y. July 9, 2013]). As a result of the foregoing, the portion of the City's motion seeking dismissal of plaintiff's gender and race discrimination claims (Counts I, II, V, and VI of her complaint) is granted.

**Plaintiff's Retaliation Claims (Counts III and VII of Pl. Complaint)**

For the same reasons as above, plaintiff's claims for retaliation fail. Pursuant to the SHRL, plaintiff must demonstrate that: 1) she engaged in a protected activity; 2) her employer was aware of the protected activity; 3) the employer took an adverse employment action against plaintiff; and 4) there is a causal connection between the protected activity and the adverse employment action. (*Vega v. Hempstead Union Free Sch.*, 801 F.3d 72 [2d Cir. 2015]). To

assert a claim for retaliation pursuant to the CHRL, a “plaintiff must show that she took an action opposing her employer’s discrimination, and that, as a result, the employer engaged in conduct that was reasonably unlikely to deter a person from engaging in such action.” (*Mihalik v. Credit Agricole Cheuvreuz N. Am., Inc.*, 715 F.3d 102 [2d Cir. 2013]). Plaintiff has failed to adequately plead an adverse employment action and a causal connection to any protected activity, which is fatal to her retaliation claim. (See, *Whitfield-Ortiz*; citing, *Askin v. Dept. of Educ. of City of NY*, 110 A.D.3d 621 [1<sup>st</sup> Dep’t. 2013]). As a result of the foregoing, no inference of discrimination or retaliation based on plaintiff’s race and gender can be made. Plaintiff’s claims for retaliation pursuant to SHRL and CHRL are dismissed for failure to state a claim for which relief can be granted.

**Plaintiff’s Hostile Work Environment Claims (Counts IV and VIII of Pl. Complaint)**

In order to properly plead a claim for a hostile work environment under the SHRL, a plaintiff must show that her place of work was “permeated with discriminatory intimidation, ridicule and insult” that was “sufficiently severe or pervasive to alter the terms or conditions of her employment.” (*Ferrer v. New York State Div. of Human Rights*, 82 A.D.3d 431 [1<sup>st</sup> Dep’t 2011]). Under the CHRL, plaintiff must show that “she was treated less well than other employees because of the relevant characteristic.” (*Nelson v. HSBC Bank*, 87 A.D.3d 995 [2d Dep’t 2011]). In assessing a hostile work environment claim, Courts evaluate “the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim’s job performance.” (*Rivera v. Rochester Genesee Reg’l Transp. Auth.*, 743 F.3d 11 [2d Cir 2014]). “As a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.” (*Alfano v. Costello*, 294 F.3d 365 [2d Cir. 2002]).

As the standard on a motion to dismiss is whether the plaintiff states a legally cognizable cause of action, the Court finds that plaintiff has sufficiently plead a hostile work environment claim pertaining to her allegations of sexual harassment against defendant Brian Wareham. Plaintiff details, per the City’s motion, thirteen (13) incidents over a three (3) month period, wherein defendant Wareham allegedly harassed plaintiff.

Plaintiff fails to state a hostile work environment claim with regard to the allegations stemming from plaintiff's relationship with Det. Terrell for the same reasons plaintiff's discrimination and retaliation claims fail.

Based on the foregoing, plaintiff's complaint fails to state a cause of action for discrimination based on race and gender, retaliation, and a hostile work environment as to the claims related to her personal relationship with Det. Terrell, and the same is dismissed pursuant to CPLR §3211(a)(7). Plaintiff's claim for a hostile work environment with regard to her claim stemming from the alleged sexual harassment by defendant Brian Wareham and as against the City, remains.

Defendants shall serve a copy of this order with notice of entry upon plaintiff within 30 days of the entry date hereof. This constitutes the decision and judgment of the Court.

Dated: 9/28/20  
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.