SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

----------X

DIAZ, CAMILLE FRANCESCA

Plaintiff,

- v -

CHAMPION PARKING CORP.

Defendant.

----------X

INDEX NO. 151477/2021

MOTION DATE 07/12/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

Plaintiff Camille Diaz brings this action against her former employer, Champion Parking Corp. Management ("Champion"), her former supervisor Edwin Martinez, and Champion's President, Kenny Rosenblatt, alleging that she was wrongfully terminated after being sexually harassed at work and discriminated against due to a disability. In motion sequence 001, Defendants move to dismiss six of the eight causes of action set forth in the complaint, arguing that they are barred by the statute of limitations and fail to state a claim. Plaintiff opposes the motion and cross-moves for leave to amend the complaint. The motion and cross-motion are fully submitted.

Background

Plaintiff alleges that she was hired by Champion on January 6, 2014 to work in Accounts Receivable, but that she was demoted to being a Receptionist in June 2015 and worked in that role until her wrongful termination on April 23, 2019. (NYSCEF Doc No. 1, Complaint, at ¶¶ 10, 13.)

Champion hired Defendant Martinez as a Controller in 2016 and he became Plaintiff's direct supervisor. Plaintiff alleges that soon after his hiring, he began sexually harassing her by

inappropriately staring at her, approaching her desk and leaning over her shoulder, standing in the threshold of his doorway staring at her chest for 30 seconds to one minute at a time, and following her to the restroom. (*Id.* at ¶¶ 14-16.)

Plaintiff alleges that after a work party in June 2016, Defendants Rosenblatt and Martinez hid Plaintiff's shoes after she had taken them off. (*Id.* at ¶ 17.)

On September 27, 2016, Plaintiff alleges that she politely announced to her coworkers that she was leaving at 4:20 pm, when her shift ended, and that Martinez loudly reprimanded her and told her to not be "a smartass." (*Id.* at ¶ 18.) On the same date, Plaintiff sent an email to Defendant Rosenblatt stating that she felt harassed by Martinez (the "email"), although nothing came of her complaint. (*Id.* at ¶ 19.)

On October 11, 2016, Plaintiff alleges that she declined Martinez's offer to take her out to lunch for her birthday, but Martinez kept insisting and grew annoyed. This conversation took place while Plaintiff was on the phone with a customer and Martinez asked if she was speaking with her husband. Plaintiff stated that she was not, and Martinez responded "thank goodness, I did not want to get you in trouble." (*Id.* at ¶ 20.) Plaintiff alleges that shortly after this interaction, Martinez ordered that she report to him every time she left her desk, took lunch, went to the restroom, or left for the day, and that she was the only employee who had to adhere to this policy. (*Id.* at ¶ 21.)

On December 6, 2016, Plaintiff received a write-up for habitual absences, even though each absence had already been approved by Rosenblatt. (*Id.* at ¶ 22.) Plaintiff alleges that this write-up was in retaliation of her email and turning down Martinez for lunch. Plaintiff states that she is the only employee to have ever received a write-up at Champion. (*Id.*)

On March 3, 2018, Plaintiff alleges that she was given another wrongful write-up for taking time off that had already been expressly approved by both Martinez and Rosenblatt. (*Id.* at ¶ 24.)

Plaintiff then complained to her Union representative about the continuing harassment and showed him/her the email she had sent to Rosenblatt in 2016. (*Id.*) Rosenblatt allegedly stated at the meeting "I thought I told you to get rid of that email." (*Id.*)

In August 2018, after Plaintiff suffered a torn meniscus and ligament and received approved medical leave for surgery, she alleges that Martinez called her the night before and asked her to cancel her surgery because she was needed at work. (*Id.* at ¶ 25.) She had the surgery and returned to work the following week with a doctor's note stating that she could not walk long distances. (*Id.* at ¶ 26.) Plaintiff alleges that despite her note, Martinez repeatedly asked her to walk to the bank to deposit money. (*Id.*)

On October 12, 2018, Plaintiff alleges that she was unable to clock into work due to a system error, but that Martinez stated "I guess you won't get paid." (*Id.* at ¶ 27.)

On November 17, 2018, after Plaintiff's grandmother passed away and she asked Martinez for bereavement leave, he allegedly asked if it was her maternal or paternal grandmother, if she had really died, and requested proof of death. (*Id.* at ¶ 29.) Plaintiff provided a letter from the funeral home upon returning to work, which Martinez rejected, asking for a death certificate instead. (*Id.* at ¶ 30.)

In December 2018, during a company Christmas party, Plaintiff ordered a non-alcoholic beverage. (*Id.* at ¶ 33.) Martinez asked why she was not drinking, insisted that she have a drink, and then allegedly surreptitiously asked the waiter to bring her an alcoholic mojito instead of the non-alcoholic one that she had ordered. (*Id.* at ¶¶ 33-34.)

In January 2019, Plaintiff alleges that her hours were reduced from 8:30 AM to 3:00 PM, instead of 8:30 AM to 4:20 PM. Plaintiff alleges that she complained to Rosenblatt, who stated that it was not his problem and that he did not need her to work that long. (*Id.* at ¶ 35.)

That same month, Plaintiff injured her other knee, scheduled surgery for March 29, 2019, and applied for disability leave. (*Id.* at ¶¶ 36-37.) Defendants stated that she would be replaced by a temporary hire until Plaintiff returned from disability leave. (*Id.*) However, Plaintiff alleges that her replacement was given her shift but with longer hours, working from 8:30 AM to 5 PM.

On April 23, 2019, Plaintiff alleges that as soon as she entered the office to return from disability leave, Rosenblatt told her that her position was eliminated. (*Id.* at ¶ 39.) Plaintiff alleges that her "temporary" replacement continued to work for Champion after her termination.

Plaintiff commenced this action on February 11, 2021, setting forth causes of action for: 1 and 2) quid pro quo sexual harassment and discrimination, in violation of the New York State Human Rights Law ("NYS HRL") and the New York City Human Rights Law ("NYC HRL"), respectively; 3 and 4) creating a hostile work environment through sexual harassment, in violation of the NYS HRL and NYC HRL; 5 and 6) disability discrimination, in violation of the NYS HRL and NYC HRL; and 7 and 8) retaliation from opposing sexual harassment, in violation of the NYS HRL and NYC HRL. (*Id.* at ¶¶ 47-109.)

Defendants move to dismiss causes of action 1 and 2 for quid pro quo sexual harassment on the grounds that they are time-barred and the allegations fail to state a claim. (NYSCEF Doc No. 21, Defs.' Memo, at 15-19.) Additionally, Defendants move to dismiss causes of action 3, 4, 7, and 8 for hostile work environment/sexual harassment and retaliation for failing to state a claim. (*Id.* at 19-31.)

Statute of limitations

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011].) "Actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations." (*Toos v Leggiadro Intern., Inc.*, 2016 WL 8193183, at *4 [Sup Ct, NY County 2016].)

Defendants argue that Plaintiff's quid pro quo sexual harassment claims must be dismissed because they are based solely on conduct which occurred in 2016, when Plaintiff denied Martinez's offer to take her for lunch on her birthday. (Complaint at ¶ 20; Defs.' Memo at 15.) As the complaint was filed on February 11, 2021, Defendants argue that Plaintiff's claims must be based solely on acts occurring on or after February 11, 2018.

However, the court finds that Plaintiff's allegations, taken as true, regarding Martinez's conduct in 2016 fall within the "continuing violation exception," and thus the motion to dismiss causes of action 1 and 2 as time-barred is denied. In the complaint, Plaintiff alleges that Martinez began to treat her differently after she rebuffed his invitation to lunch in 2016, resulting in closer scrutiny and other discriminatory acts towards her in the years following, and culminating in her termination in April 2019. (*Toos v Leggiadro Intern., Inc.*, 2016 WL 8193183, at *7 [Sup Ct, NY County 2016] [denying motion to dismiss quid pro quo sexual harassment claims as time-barred where plaintiff alleged that his termination was predicated on conduct occurring more than three-years prior to the filing of the complaint]; *see also Sier v Jacobs Persinger & Parker*, 236 AD2d 309, 309 [1st Dept 1997] ["dismissal of the sexual harassment claim on Statute of Limitations grounds was precluded by factual issues as to the timing of at least one of the alleged harasser's

discriminatory acts and whether any act within the period of limitations constituted a continuing violation"].)

Failure to state a claim

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

a. Quid Pro Quo Sexual Harassment

"The issue in a quid pro quo sexual harassment case brought under the State Human Rights Law is whether one or more employment decisions are linked to unwelcome sexual conduct. Sexual harassment occurs when such unwelcome sexual conduct is the basis, either explicitly or implicitly, for employment decisions affecting compensation or the terms, condition or privileges of employment." (*Franco v Hyatt Corp.*, 189 AD3d 569, 569 [1st Dept 2020].) "The 'focus is on the prohibited conduct - the unwelcome sexual overtures - and not on the victim's reaction to it ...' The pertinent inquiry is whether 'tangible job benefits' were expressly or implicitly linked 'to the acceptance or rejection of the sexual advances.'" (*Toos v Leggiadro Intern., Inc.*, 2016 WL 8193183, at *7 [Sup Ct, NY County 2016], *quoting Matter of Father Belle Community Ctr v New York State Div. of Human Rights*, 221 AD2d 44, 50 [4th Dept 1996].)

On the other hand, in interpreting a sexual harassment claim brought under the broader City Human Rights Law, the First Department has "dispensed with the need for much of the nomenclature … in gender discrimination jurisprudence, such as 'sexual harassment' and 'quid pro quo,' and instead focused on 'the existence of differential treatment' in connection with 'unwanted gender-based conduct.'" (*Suri v Grey Glob. Grp., Inc.*, 164 AD3d 108, 114 [1st Dept 2018]; *see also Williams v New York City Housing Authority*, 61 AD3d 62, 78 [1st Dept 2009].)

Here, taking the allegations in the complaint as true, Plaintiff has set forth causes of action for sexual harassment under both the NYS HRL and NYC HRL. Notably, almost "[a]ll of the cases cited by defendants are inapposite as they involve summary judgment, not motions to dismiss, an important distinction given that on a motion to dismiss, the facts alleged in the verified [] complaint are accepted as true." (*Polidori v Societe Generale Group*, 2006 WL 6349209 [Sup Ct, NY County 2006].)

b. Hostile Work Environment

"A hostile work environment is present when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Toos*, 2016 WL 8193183, at *13.) "Whether a workplace may be viewed as hostile or abusive -- from both a reasonable person's standpoint as well as from the victim's subjective perspective -- can be determined only by considering the totality of the circumstances." (*Matter of Father Belle Community Ctr*, 221 AD2d at 50.)

The facts alleged by Plaintiff in the complaint, set forth causes of action for hostile work environment under both the State and City HRL. Defendants erroneously contend that the complained-of incidents are merely "petty slights or trivial inconveniences," insufficient to amount

to a hostile work environment. However, "[t]he plaintiff does not have this burden. Rather, a contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense, which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss. A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action." (*Kaplan v NYC Dept. of Health and Mental Hygiene*, 142 AD3d 1050, 1051 [2d Dept 2016].) "[W]hether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss." (*Lieberman v Green*, 139 AD3d 815, 816 [2d Dept 2016].)

c. Retaliation

"In order to state a prima facie case for retaliation under the New York State Human Rights Law, plaintiff must allege (1) engagement in a protected activity; (2) the employer's awareness of such participation; (3) an adverse employment action against the plaintiff; and (4) a causal connection between the protected activity and the adverse action taken by the employer." (*Polidori v Societe Generale Group*, 2006 WL 6349209 [Sup Ct, NY County 2006] [citations omitted].) "To state a claim of retaliation under the New York City Human Rights Law, plaintiff must allege the same factors." (*Id.*)

Here, the "protected activities" set forth in the complaint include Plaintiff's September 27, 2016 email to Defendant Rosenblatt complaining about Defendant Martinez's behavior and her contacting her Union representative and having a meeting. Plaintiff specifically alleges that she was then wrongfully written up "in retaliation for Plaintiff's complaint[.]" (Complaint at ¶ 22.) Accepting this allegation as true, and providing Plaintiff the benefit of every possible inference, the complaint adequately sets forth causes of action for retaliation.

Cross-motion to amend

CPLR 3025[b] provides that "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of … Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBIA Ins. Corp. v. Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010].)

The cross-motion to amend is granted, as Defendants fail to demonstrate prejudice or surprise from the six additional sentences added in the proposed amended complaint, which are not devoid of merit or palpably insufficient. (NYSCEF Doc No. 31, Proposed Am. Cmplt., at ¶¶ 15, 16, 19, 21, 23, 39.)

Conclusion

Accordingly, based on the foregoing, it is hereby

ORDERED that Defendants' motion sequence 001 to dismiss is denied in its entirety; and it is further

ORDERED that Plaintiff's cross-motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

3/2/22
DATE

WILLIAM PERRY, J.S.C.

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